CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

DHAMEER BRADLEY ET AL. *v.* NIKKI YOVINO ET AL.
(AC 45040)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff B sought damages from the defendant university, claiming that the university had breached its contractual obligations under the student handbook when it suspended B, then a student, after the university was informed by the police that he was under investigation for an alleged sexual assault of a fellow student, Y, without having first determined the veracity of the allegations against him. Although B was cleared of any wrongdoing and eventually was allowed to resume his academic studies and graduate, B claimed that he suffered monetary damages as a result of losing his football scholarship and academic credit while on suspension. During discovery, the university disclosed information regarding a prior unsubstantiated rumor of sexual misconduct by B involving someone other than Y, after the depositions of two university employees, W and C, had already been conducted. B filed a motion to compel a second round of depositions of W and C, arguing that the information was disclosed late, was responsive to his discovery requests, and highly relevant to the prosecution of his case. The university responded by filing a motion for a protective order and an objection to the motion to compel, as well as a motion for summary judgment. B thereafter filed a motion for an extension of time to respond to the motion for summary judgment, arguing that the resolution of the discovery dispute regarding the second round of depositions would assist his opposition to the motion for summary judgment. Subsequently, the trial court denied B's motion for an extension of time, sustained the university's objection to his motion to compel the second round of depositions

and granted the university's motion for a protective order. Thereafter, the trial court granted the university's motion for summary judgment, which was unopposed by B, and rendered judgment in favor of the university. The trial court thereafter denied the plaintiff's motion to reargue. On B's appeal to this court, *held*:

1. B could not prevail on his claim that the trial court abused its discretion in denying his motion to compel a second round of depositions of W and C and his related motion for an extension of time: B failed to provide this court with an adequate record from which it could conclude that the documents regarding a rumor of prior sexual misconduct were responsive to an outstanding discovery request such that the university failed to timely disclose them, the discovery requests with which B asserts the university failed to comply were not contained in either the trial court record or the appellate record, despite B having had numerous opportunities to make or supplement those records, and B did not provide any support for his claim during oral argument before this court that the rumor documents were responsive to any particular discovery request; moreover, B could not prevail on his claim that he was harmed by his inability to further depose W and C, as he failed to establish that an opportunity to conduct a second round of depositions was reasonably likely to have affected the court's decision to render summary judgment against him, B's theory of liability rested on the alleged contract between the university and himself as provided by the student handbook and the university's purported obligation to investigate the truthfulness of Y's accusation of sexual assault before making a determination as to whether to suspend B from the university, and B never alleged in his complaint or amended his complaint to include claims that the university's awareness of facts related to an unsubstantiated rumor of prior sexual misconduct played any role in the university's decision to suspend him immediately and without investigation, and, therefore, facts relating to the rumor of prior sexual misconduct had little to no bearing on B's breach of contract claim as pleaded and would not have raised a genuine issue of material fact that would have defeated summary judgment in favor of the university.
2. This court concluded that the trial court's procedural error in granting the university's motion for summary judgment without hearing oral argument on that motion pursuant to the applicable rule of practice (§ 11-18) was harmless: although B's right to oral argument was improperly denied because the court adjudicated the motion for summary judgment without providing the parties with an opportunity to mark the motion according to the schedule set forth in the short calendar on which the motion appeared, B could not demonstrate that such error likely affected the court's decision rendering summary judgment as to his breach of contract claim against the university; moreover, the university met its initial burden in establishing that there was no genuine issue of material fact that the university had breached its contract by

suspending B without investigating the allegations of sexual misconduct against him, the university's dean of students, in relying on the clear contractual language in the student handbook, was authorized to suspend students immediately to preserve the benefit and welfare of the university community and to suspend students facing allegations of serious criminal activity without first investigating the allegations against them, and, accordingly, the burden then shifted to B to show, on the basis of the timely submission of evidentiary materials, that a genuine issue of material fact existed in order to defeat the university's motion, which B failed to do during the six month period the motion was pending and, thus, in light of the procedural posture and this court's independent review of the record, oral argument on the university's motion for summary judgment likely would not have resulted in a decision other than the one granting the motion in favor of the university.

3. B could not prevail on his claim that the trial court abused its discretion in denying his motion to reargue his motion to compel and the summary judgment rendered against him on the ground that the court subsequently granted the motion to reargue filed by a second plaintiff, H, despite both motions to reargue having the same legal arguments and the court's failure to provide an explanation for this alleged disparate treatment: because this court determined that the trial court did not err in denying B's motion to compel and rendering summary judgment against him, there was no abuse of its discretion in denying the motion to reargue; moreover, although the trial court denied B's motion without articulating the basis for its decision, B, having the burden to establish that the trial court abused its discretion, failed to file a motion for articulation pursuant to the relevant rule of practice (§ 66-5); furthermore, the record sufficiently demonstrated that B's and H's cases were in different procedural positions, specifically, the trial court denied B's motion for an extension of time prior to rendering summary judgment against him, but the court had not denied H's motion for an extension of time prior to rendering summary judgment against H, and, accordingly, the trial court's dissimilar treatment of B's and H's motions for reargument was insufficient for this court to conclude that the trial court's denial of B's motion was a miscarriage of justice.

Argued November 10, 2022—officially released March 7, 2023

Procedural History

Action to recover damages for, inter alia, an alleged breach of contract, brought to the Superior Court in the judicial district of Fairfield, where the trial court, *Jacobs*, *J.*, denied the named plaintiff's motion for extension of time to respond to the motion for summary

judgment filed by the defendant Sacred Heart University, Inc.; thereafter, the court granted the motion for protective order filed by the defendant Sacred Heart University, Inc., and sustained its objection to the named plaintiff's motion to compel a second round of depositions; subsequently, the court, *Jacobs*, *J.*, granted the motion for summary judgment filed by the defendant Sacred Heart University, Inc., as to the named plaintiff's revised complaint and rendered judgment thereon; thereafter, the court, *Jacobs*, *J.*, denied the named plaintiff's motion for reargument, and the named plaintiff appealed to this court. *Affirmed.*

Jeffrey M. Cooper, for the appellant (named plaintiff).

James M. Sconzo, with whom was *Brendan N. Gooley*, for the appellee (defendant Sacred Heart University, Inc.).

Opinion

PRESCOTT, J. This appeal arises out of an action brought by the plaintiffs, Dhameer Bradley and Malik St. Hilaire, two former students of the defendant Sacred Heart University, Inc. (university), against the university and the defendant Nikki Yovino. Yovino, a fellow student at the university, accused the plaintiffs of sexually assaulting her but later recanted her allegations and pleaded guilty to the charges of falsely reporting an incident in the second degree in violation of General Statutes § 53a-180c and interfering with an officer in violation of General Statutes § 53a-167a. In this action, the plaintiffs allege that Yovino committed various torts against them by falsely accusing them of sexual assault and that the university breached its contract with them in the manner in which it conducted an investigation into Yovino's accusations and by suspending them from the university.[1]

[1] For purposes of clarity, we refer to the parties hereafter by name rather than their party status.

Bradley appeals from the summary judgment of the trial court rendered in favor of the university as to the count of the complaint brought by him against the university.[2] On appeal, he claims that the court improperly (1) denied his motion to compel a round of second depositions of certain university employees and his related motion for an extension of time to respond to the university's motion for summary judgment,[3] (2) rendered summary judgment against him without permitting oral argument on the university's motion in violation of Practice Book § 11-18, and (3) denied his motion for reargument of his motion to compel and the summary judgment rendered against him. We conclude that the court did not abuse its discretion by denying Bradley's motion to compel a second round of depositions or his motion for an extension of time. We also conclude that, although the court improperly deprived the plaintiff of oral argument pursuant to Practice Book

[2] Bradley and St. Hilaire each alleged separate breach of contract claims against the university, which filed separate motions for summary judgment with respect to those counts. The court granted both motions in separate decisions. Because the court also granted the university's separate motion for summary judgment directed at St. Hilaire's breach of contract claim, the two decisions of the court disposed of all counts of the operative complaint brought against the university. As a result, Bradley has appealed from a final judgment, pursuant to Practice Book § 61-3, because all causes of action against the university had been finally adjudicated by the court's decisions rendering summary judgment. This appeal involves only the court's decision granting the university's motion for summary judgment as to Bradley's breach of contract claim.

After the present appeal was filed, the court granted St. Hilaire's motion for reargument as it pertained to the summary judgment rendered against him. The court's decision to reconsider the summary judgment rendered against St. Hilaire, however, does not vitiate the finality of the judgment from which Bradley has appealed. See *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 716 n.11, 284 A.3d 341 (2022) ("a court's decision to allow reargument does not affect the finality of the judgment").

[3] We address Bradley's claim concerning the court's denials of his motions to compel and for an extension of time together because Bradley briefed these issues together in his principal appellate brief and relies on the same legal arguments regarding why the court abused its discretion in denying both motions.

§ 11-18, that error was harmless because, in light of the procedural posture of this case, there is not a reasonable probability that oral argument would have resulted in the trial court denying the motion for summary judgment. Finally, we conclude that the court did not abuse its discretion by denying Bradley's motion for reargument.[4] Accordingly, we affirm the summary judgment rendered against Bradley and in favor of the university.

The record reveals the following relevant facts and procedural history. On Saturday, October 15, 2016,

[4] After the present appeal was filed, the university filed a motion to dismiss St. Hilaire's breach of contract count against the university for lack of subject matter jurisdiction. The trial court subsequently stayed any further proceedings in the action underlying this appeal, including reargument on the university's motion for summary judgment against St. Hilaire on his breach of contract count, until our Supreme Court decides *Khan* v. *Yale University*, Docket No. SC 20705.

That case is currently pending before our Supreme Court upon its acceptance of certified questions of law from the United States Court of Appeals for the Second Circuit pertaining to whether Title IX proceedings are quasi-judicial in nature such that statements made or actions taken within those proceedings are subject to absolute or qualified immunity. The university's motion to dismiss St. Hilaire's breach of contract count relied on the United States District Court's decision in *Khan* v. *Yale University*, 511 F. Supp. 3d 213 (D. Conn. 2021), which dismissed the claims of the plaintiff in that case against one of the defendants because the claims relied on defamatory statements made during Title IX proceedings conducted by that university. The District Court concluded that Title IX proceedings are quasi-judicial proceedings and, therefore, the defendant was entitled to "absolute immunity as to any allegedly defamatory statements made therein." Id., 226.

In the underlying action, St. Hilaire alleged that the university breached its contract when it suspended him and alleged that the university also breached its contract in the manner in which it conducted the Title IX proceeding. In this appeal, the university has not challenged the trial court's subject matter jurisdiction over Bradley's breach of contract count against the university, which alleged only that the university breached its contract when it suspended Bradley.

We recognize that the doctrine of absolute immunity implicates a court's subject matter jurisdiction. *Carter* v. *Bowler*, 211 Conn. App. 119, 121–22, 271 A.3d 1080 (2022). We also are mindful that subject matter jurisdiction cannot be waived, and it may be raised by this court sua sponte. See *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 532–33, 911 A.2d 712 (2006). We are not convinced, however, that the doctrine of absolute immunity is implicated by Bradley's breach of contract count, which challenged only the university's decision to suspend Bradley. Notably, the university's decision to suspend Bradley occurred prior to the scheduling of a Title IX hearing regarding his alleged misconduct. Consequently, we conclude that the trial

Bradley, St. Hilaire, and Yovino attended an off campus party in Bridgeport. During the party, Bradley and St. Hilaire engaged in sexual intercourse with Yovino in a bathroom.[5] After leaving the bathroom, Yovino told her friends who were with her at the party that Bradley and St. Hilaire had sexually assaulted her. Early Sunday morning, Yovino and her friends went to St. Vincent's Medical Center in Bridgeport, and Yovino reported the sexual assault to hospital staff. Hospital staff performed a sexual assault examination and contacted the police. At the hospital, Yovino gave a statement to a police officer alleging that she was sexually assaulted by Bradley and St. Hilaire.

On October 17, 2016, the following Monday, a detective from the Bridgeport Police Department, Walberto Cotto, Jr., informed the university's dean of students, Larry Wielk, that, over the weekend, Yovino had reported that she was sexually assaulted by Bradley and St. Hilaire. Cotto also informed Wielk that an investigation into the alleged sexual assault was underway.[6]

The next day, Wielk approached Bradley on campus and informed him that, on the basis of allegations of

court had subject matter jurisdiction over Bradley's breach of contract count.

[5] Despite her guilty pleas, Yovino continues to maintain that the sexual conduct was not consensual. That factual issue, however, is not before us on appeal. Yovino first reported to the Bridgeport Police Department that she did not consent to the sexual acts. Yovino later admitted to the Bridgeport police that her initial statements pertaining to the sexual encounter were inaccurate. The Bridgeport Police Department subsequently obtained an arrest warrant for Yovino on two counts of falsely reporting an incident in the second degree and one count of interfering with an officer. Yovino pleaded guilty to those charges and was sentenced to a term of incarceration. Nevertheless, she maintains that she did not consent to the sexual acts that occurred on October 15, 2016.

[6] Prior to Cotto informing Wielk of the sexual assault allegations, Leonora P. Campbell, the university's Title IX coordinator, had learned of the incident from a resident hall director who, in turn, had received a report from a third party on Sunday, October 16, 2016. No disciplinary action was taken against Bradley until Wielk had been informed that Yovino had made allegations of sexual assault to the Bridgeport Police Department.

sexual assault that had been made to the Bridgeport Police Department, he was suspended from the university. The suspension barred Bradley from participating in any university classes or sponsored events, and from playing on the football team of which Bradley was a member. He was permitted, however, to maintain contact with his professors through email.[7]

On the advice of counsel, Bradley withdrew from the university on November 4, 2016, which caused him to lose his football scholarship. The university later reinstated Bradley as a student, and he returned to complete his studies, graduating in December, 2018. His scholarship to play football, however, was not restored.

Bradley and St. Hilaire subsequently commenced the underlying action. In addition to Bradley's claims against Yovino, his operative complaint contains a single count by Bradley against the university sounding in breach of contract.[8] Bradley pleaded that the student

[7] At that time, Wielk also hand delivered a letter to Bradley informing him of his suspension. The letter stated in relevant part: "I am writing to inform you that based on an allegation of sexual assault that has been filed with both [the university] and the Bridgeport Police Department stemming from an off campus incident this past Sunday morning (Oct. 16, 2016) you are hereby Suspended effective immediately, from [the university]. As such, pending an investigation, and, if necessary, a disciplinary hearing, you are not allowed on the [university's] premises . . . including attendance in any scheduled classes as well as participating in any [university] sponsored activities including intercollegiate athletics until further notice. At this time, you may remain in contact with your professors via electronic means. . . ." St. Hilaire was also suspended on October 19, 2016.

[8] The pleadings are not a model of clarity. The initial complaint was filed jointly by Bradley and St. Hilaire. Subsequent amended complaints often only included counts brought by one of the two plaintiffs or did not include all of the counts contained in prior versions of the complaint. In a request for leave to file a second amended complaint, St. Hilaire asserted that he had removed the counts pertaining to Bradley as per a request of the university. Accordingly, the operative complaint pertaining to St. Hilaire is a second amended complaint dated August 19, 2019, while Bradley filed a third amended complaint, dated January 11, 2021. We treat Bradley's third amended complaint as the operative complaint with respect to his breach of contract count because the university did not object to Bradley's request to file the amended pleading; see Practice Book § 10-60; it filed an answer

handbook obligates the university and its officials to treat Bradley with "respect, dignity, and compassion" and mandates that "a presumption of guilt should not be made as a result of any allegations." Bradley alleged that the university's student handbook, which includes a policy on sexual misconduct, created a contract between the university and its students. Bradley further alleged that the university breached that contract by immediately suspending Bradley on the basis of an uncorroborated accusation of sexual assault by a fellow student and without any prior investigation by the university into the allegation. By way of relief, Bradley requested monetary damages to compensate him for the loss of his football scholarship and academic credits that Bradley forfeited due to his withdrawal from the university.

According to the court's scheduling orders, all disclosures pertaining to written discovery requests were due on March 30, 2020, and all depositions of fact witnesses and parties were to be completed by January 31, 2021. On November 17, 2020, the university disclosed additional documents that purportedly came to the university's attention in late October, 2020. The email sent to Bradley disclosing the documents stated: "We recently obtained the attached documents, which may be responsive to the discovery requests and/or may be relevant evidence." The newly disclosed documents included notes taken by Leonora P. Campbell, the university's Title IX coordinator, regarding a rumored sexual assault that purportedly was committed by Bradley prior to the incident involving Yovino (prior rumor documents). The rumored sexual assault had been brought

to that complaint, along with its motion for summary judgment; and the trial court referred to the third amended complaint as the operative complaint in its memorandum of decision rendering summary judgment against Bradley on his claim against the university. In Bradley's third amended complaint, count four is the operative breach of contract count alleged against the university.

to the attention of the university's football coach, Mark Nofri, by students who had heard of the alleged sexual assault from a third party. Neither the name of an alleged victim nor the name of any third party that informed the students of a possible sexual assault were ever disclosed to, or identified by, university employees.

Following the disclosure of the prior rumor documents, on January 8, 2021, Bradley filed a motion to compel a second round of depositions of Wielk and Campbell, who previously had been deposed on March 3, 2020, and March 5, 2020, respectively. Bradley argued that a second round of depositions was warranted because of the university's late disclosure of the prior rumor documents, which he asserted were responsive to his discovery requests and highly relevant to the case. In support of his motion, Bradley attached excerpts from Campbell's previous deposition, the email sent by the university disclosing the prior rumor documents, and the prior rumor documents. Bradley did not attach any of his prior discovery requests to demonstrate that the prior rumor documents were in fact responsive to any discovery requests he had served on the university. On January 18, 2021, the court marked off Bradley's motion to compel without prejudice to reclaiming it and instructed Bradley and the university to confer in good faith to resolve or narrow the disputes.

On January 21, 2021, the university filed a motion for a protective order and an objection to Bradley's motion to compel a second round of depositions. In its motion for a protective order and objection, the university argued that the principles of equity and fairness should preclude a second round of depositions.

On February 1, 2021, the university filed a motion for summary judgment with respect to Bradley's breach of contract claim, accompanied by a memorandum of law

in support of the motion. On March 4, 2021, Bradley filed a motion for an extension of time to respond to the motion, in which he adopted the arguments set forth in St. Hilaire's motion for extension of time, namely, that there remained an unresolved discovery dispute over Bradley's motion to compel a second round of depositions and that this evidence would help him oppose the university's motion for summary judgment.[9] The university filed an objection to Bradley's motion for an extension of time and filed a renewed motion for a protective order and objection to Bradley's motion to compel additional depositions.

Bradley subsequently filed case flow requests asking the court to clarify a schedule for resolving the university's motion for summary judgment in light of his pending motion for an extension of time. On May 3, 2021, a status conference was held, off the record, to address Bradley's case flow requests and set deadlines for the parties to submit all motions and memoranda relating to the discovery dispute, prior to the court ruling on the university's motion for summary judgment. The university and Bradley agreed that, on the basis of the discussions at the status conference, any motions and memoranda in favor of a second round of depositions were to be filed by May 11, 2021, and any opposition to a second round of depositions was to be filed by May 18, 2021.

According to this agreed upon schedule, Bradley filed a memorandum of law in support of his motion to compel a second round of depositions of Campbell and

[9] The motion stated: "Pursuant to Practice Book §17-45, [Bradley], in the above-captioned matter hereby requests the same sixty (60) day extension of time requested by [St. Hilaire], on March 2, 2021." St. Hilaire's motion for an extension of time stated that, "[w]hile the parties have engaged in extensive discovery to date, there remains certain issues unresolved including, it appears, the need for further depositions . . . . [Bradley has] . . . moved to compel further depositions in light or a recent disclosure by [the university] . . . [and the] anticipated evidence . . . would prove useful in opposing [the university's] motion for summary judgment."

Wielk on May 7, 2021. Bradley primarily incorporated his arguments from his previous motions to compel and argued that additional depositions were necessary to inquire into their knowledge of the prior rumor. On May 18, 2021, the university filed a motion for a protective order and objection to Bradley's motion to compel a second round of depositions of Wielk and Campbell. The university's motion primarily incorporated its arguments from its previous motions for protective orders and objections on the matter but also argued that the prior rumor documents were not responsive to Bradley's discovery requests and, therefore, their disclosure did not justify additional depositions.

Two days after all motions, objections, and memorandum were due, the court, on May 20, 2021, denied Bradley's motion for an extension of time.[10] On July 15, 2021, the court sustained the university's renewed objection to Bradley's motion to compel a second round of depositions of Wielk and Campbell and granted the university's motion for a protective order, effectively denying Bradley's motion to compel.[11]

Bradley did not file an objection to the motion for summary judgment by March 15, 2021, the date he was required to do so by the court's scheduling order, and he never received any additional extensions of time. On July 26, 2021, the court granted the university's

[10] The court did not provide an explanation regarding why it was denying the motion for a continuance, and Bradley never asked the court to articulate its reasons.

[11] In sustaining the university's renewed objection to Bradley's motion to compel, the court stated: "This court adopts the reasoning set forth by the court in *Wheelis* v. *Backus Hospital Corp.*, Superior Court, judicial district of New London, [Docket No. CV-14-6022485-S (January 20, 2017)], in denying a motion for a continued deposition despite the fact that there might have been new information potentially to be had after the depositions of the witnesses Campbell and [Wielk] were completed. [The] defendant's motion for [a] protective order is granted. [The] defendant's objection to [the] plaintiff's motion to compel is sustained."

unopposed motion for summary judgment directed at Bradley's breach of contract count. In granting the motion for summary judgment, the court concluded that the student handbook created an enforceable contract between the university and its students but that the handbook authorized the university's immediate suspension of students facing allegations of serious criminal activity without further investigation. The court also concluded that the affidavit from Wielk, which the university submitted in support of its motion for summary judgment, evidenced that Wielk had suspended Bradley only after learning that he was facing an allegation of serious criminal activity. For these reasons, and in light of the lack of contrary evidence, the court concluded that there was no genuine issue of material fact as to whether the university breached its contract with Bradley by suspending him. Accordingly, the court rendered summary judgment in favor of the university.

Bradley subsequently filed a motion for reargument, arguing that the court should reconsider its denial of his motion to compel because the court abused its discretion in declining to permit additional depositions in light of the fact that he did not have the prior rumor documents at the time the first depositions were conducted. Bradley also argued that the motion for summary judgment was granted in violation of Practice Book § 11-18 because Bradley had not been provided an opportunity for oral argument. The university filed an objection to Bradley's motion for reargument and, on October 12, 2021, the court denied Bradley's motion for reargument without further explanation.[12] This

[12] As previously discussed, the court also granted the university's separate motion for summary judgment directed at the breach of contract claim brought against it by St. Hilaire. St. Hilaire also filed a motion for reargument, which the court granted on December 21, 2021, as it pertained to the court's granting of the university's motion for summary judgment with respect to St. Hilaire's breach of contract claim. In granting reargument, the court concluded that counsel for St. Hilaire reasonably understood the court's consideration of the motion for summary judgment to be deferred until after the court rendered its decisions on the discovery dispute.

appeal followed. Additional facts will be set forth as necessary.

I

We first consider Bradley's argument that the court abused its discretion by effectively denying his motion to compel a second round of depositions of Wielk and Campbell and his related motion for an extension of time to respond to the university's motion for summary judgment. Bradley argues that the court should have granted the motions because of the university's purportedly late disclosure of the prior rumor documents. In response, the university argues that the court did not abuse its discretion because the prior rumor documents were not responsive to Bradley's discovery requests and, therefore, it did not disclose them "late." Alternatively, the university argues that, even if the court had granted Bradley's motion to compel and motion for an extension of time, further depositions would not have helped him establish that the university breached the student handbook and, in turn, would not have aided him in opposing the university's motion for summary judgment. We agree with the university and conclude that, because Bradley has failed to identify the discovery request, if any, to which the prior rumor documents were responsive, Bradley cannot establish that the court abused its discretion by denying his motions to compel and for an extension of time. Even if we were to conclude that the court abused its discretion, which it did not, Bradley was not harmed by his inability to conduct a second round of depositions of Wielk and Campbell regarding the prior rumor documents because it would not have likely affected the result.

The relevant standard of review is well established. "We have long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such

an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed. . . . Therefore, we must discern whether the court could [have] reasonably conclude[d] as it did." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 16–17, 905 A.2d 55 (2006). Similarly, a trial court's denial of a motion for an extension of time to respond to a motion for summary judgment is reviewed for an abuse of discretion. See *Goody* v. *Bedard*, 200 Conn. App. 621, 626–27, 241 A.3d 163 (2020).

"As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . Under an abuse of discretion standard, a court's decision must be legally sound and [the court] must [have] honest[ly] attempt[ed] . . . to do what is right and equitable under the circumstances of the law, without the dictates of whim or caprice." (Citations omitted; internal quotation marks omitted.) *Gianetti* v. *Neigher*, 214 Conn. App. 394, 437–38, 280 A.3d 555, cert. denied, 345 Conn. 963, 285 A.3d 390 (2022). The appellant has the burden to provide this court with a record from which we can review any alleged abuse of discretion. See *Misata* v. *Con-Way Transportation Services, Inc.*, 106 Conn. App. 736, 744–45, 943 A.2d 537 (2008) ("[i]t is incumbent upon the appellant to take the necessary steps to sustain its burden of providing an adequate record for appellate review" (internal quotations marks omitted)).

"[I]n order to establish reversible error in nonconstitutional claims, the [appellant] must prove both an abuse of discretion and harm . . . ." (Internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, 141 Conn. App. 227, 235, 60 A.3d 1051, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013). "The harmless error standard in a

civil case is whether [an] improper ruling would likely affect the result. . . . In the absence of a showing that the [claimed error] would have affected the final result, its [error] is harmless." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 249–50, 842 A.2d 1100 (2004).

A

We first address whether Bradley has demonstrated that the court abused its discretion in denying his motion to compel and motion for an extension of time. We conclude that he has failed to provide this court with an adequate record from which we can conclude that the prior rumor documents were responsive to an outstanding discovery request such that the university failed to timely disclose them. Therefore, Bradley cannot demonstrate that the court abused its discretion in denying Bradley's motions to compel and for an extension of time on the basis of the university's alleged delayed disclosure.

The discovery requests with which Bradley asserts the university failed to comply on a timely basis are not contained in the record before the trial court or in the record on appeal. Bradley had numerous opportunities to make or supplement the record by providing the trial court with his discovery requests that purportedly required the university to disclose the prior rumor documents. Bradley repeatedly has failed to provide this information. Bradley first argued, on January 8, 2021, in his motion to compel a second round of depositions, that the prior rumor documents were responsive to discovery requests that he served on the university, which he claimed improperly delayed in disclosing them to him. Bradley also asserted the same claim in his May 7, 2021 memorandum of law. In support of his motions to compel, Bradley attached a copy of the email sent by the university with the prior rumor documents, but

he did not provide the court with a copy of the particular discovery request that purportedly required their disclosure. In its email, the university stated only that the documents "may" be responsive to discovery.

In its May 18, 2021 motion for a protective order and objection to Bradley's motion to compel, the university argued that "[t]he documents that Bradley now claims justify second depositions of [Wielk and Campbell] are not responsive to any of Bradley's requests for production." Bradley never subsequently indicated to the trial court which discovery request, if any, required the university to disclose the prior rumor documents.

On appeal, Bradley continues to maintain that the prior rumor documents were responsive to discovery and disclosed late by the university. Bradley, however, again failed to include his discovery requests in the appendix to his brief and has not directed our attention to where they may be found in the record. In his principal brief on appeal, Bradley again does not specify which of his discovery requests required the disclosure of the prior rumor documents. Moreover, even though the university's brief on appeal discussed this lacuna in the record, Bradley entirely failed to respond to this argument in his reply brief. Finally, during oral argument before this court, Bradley's counsel was asked to address the university's argument that the prior rumor documents were not encompassed by Bradley's discovery requests. In response, Bradley's counsel failed to provide any support for his argument that the prior rumor documents were responsive to any particular discovery request. Instead, Bradley's counsel simply directed this court to the email sent by the university with the prior rumor documents, which stated that the documents "may" be responsive.

Because Bradley cannot establish that his discovery requests required the university to disclose the prior

rumor documents, he has failed to demonstrate that the university did not disclose responsive documents on a timely basis. Moreover, because Bradley's argument that the court abused its discretion by denying his motions to compel and for an extension of time is based solely on the university's purportedly late disclosure, his claim necessarily fails.

B

Even if we conclude, which we do not, that the court abused its discretion by denying Bradley's motions, we are not persuaded that he was harmed because he has failed to establish that an opportunity to conduct a second round of depositions of Wielk and Campbell was reasonably likely to have affected the court's decision to render summary judgment against him.

It is well established that "[t]he pleadings determine which facts are relevant and frame the issues for summary judgment proceedings or for trial." *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 621, 99 A.3d 1079 (2014). The gravamen of Bradley's claim, as pleaded in his complaint, is that the university breached its contract by immediately suspending Bradley as a result of Yovino's sexual assault allegations before it investigated those allegations. Specifically, Bradley pleaded in the operative complaint only that "[the university] breached its contract with Bradley as a [university] student when, on October 18, 2016, without any investigation, and based on the unilateral accusation of a Caucasian female student, it immediately suspended [Bradley] . . . and barred him from campus. . . ." In other words, Bradley's theory of liability in this case is that the student handbook constituted a contract between the university and himself and that, in order to avoid breaching that contract, the university was obligated to investigate the truthfulness of Yovino's accusation of sexual assault before making a determination as to

whether to suspend Bradley from the university. Bradley never alleged in any of the complaints he filed that the university's awareness of facts relating to unsubstantiated rumors that he previously sexually assaulted another student played any role in the university's decision to suspend him immediately and without investigation after it learned of the sexual assault allegations against Bradley reported by Yovino to the Bridgeport Police Department. In our view, facts relating to the prior rumors have little to no bearing on Bradley's breach of contract claim as pleaded and would not have raised a genuine issue of material fact that would have defeated summary judgment in favor of the university.

Importantly, Bradley had the opportunity to amend his complaint and plead new theories of liability or allege additional facts after learning of the university's knowledge of the prior rumor, but he failed to do so. Specifically, the university disclosed to Bradley the documents relating to the prior rumor on November 17, 2020. On January 11, 2021, Bradley filed an amended complaint that did not articulate any theory of liability different from the one he previously had pleaded. Nor did he allege that the university had acted improperly or in breach of its contractual obligations because of its knowledge of the unsubstantiated rumors of a prior sexual assault. As we discuss at greater length in part II of this opinion, the student handbook permits the university to suspend a student facing allegations of serious criminal conduct without first investigating the veracity of those allegations. The undisputed facts demonstrate that Yovino made such an allegation and that the university acted in a manner authorized by the student handbook. The existence of a prior rumor and the university's knowledge of it does not vitiate that fact. Accordingly, we are not persuaded that, even if the court should have permitted the additional discovery,

Bradley was harmed by his inability to depose further Wielk and Campbell.

II

Bradley next claims that, because a motion for summary judgment is arguable as a matter of right pursuant to Practice Book § 11-18, the court improperly failed to provide him with an opportunity for oral argument before rendering summary judgment.[13] The university argues, in part, that any procedural error was harmless because the court properly granted its motion for summary judgment and Bradley has failed to demonstrate that oral argument likely would have affected that result. We agree with the university that the court's procedural error was harmless because Bradley has failed to demonstrate, under the circumstances of this case, that oral argument likely would have resulted in the court denying the motion for summary judgment.

The following procedural history is relevant to Bradley's claim. On February 1, 2021, the university filed its motion for summary judgment with respect to Bradley's

[13] Bradley further contends that the court improperly rendered summary judgment because there was a "temporary stay" on the adjudication of the motion until the court resolved the discovery dispute regarding a second round of depositions. Bradley contends that, at the May 3, 2021 status conference, the court "unequivocally stayed the motion for summary judgment in order to resolve the ongoing discovery dispute . . . ." This claim fails for two reasons.

First, Bradley has not provided any citations to the record demonstrating that the court had implemented a "temporary stay" on the motion for summary judgment. Our independent review of the record has not revealed any evidence of a temporary stay. Second, even if Bradley was correct in assuming that a temporary stay was in place, that stay would have been in effect only until the discovery dispute was resolved. Bradley acknowledges that the court granted the university's motion for a protective order and sustained the objection to Bradley's motion to compel a second round of depositions on July 15, 2021. Therefore, even if any adjudication of the university's motion for summary judgment was stayed until the court resolved the discovery dispute, the temporary stay ended on July 15, 2021, when the court effectively denied Bradley's motion to compel.

breach of contract claim. According to the court's scheduling order, any opposition to the motion was due by March 15, 2021. On March 4, 2021, Bradley filed a motion for an extension of time, which was denied on May 20, 2021. The court did not provide an explanation for its order denying the motion, and Bradley did not request an articulation.

On July 20, 2021, after the court resolved the discovery dispute by declining to permit a second round of depositions, the university reclaimed its motion for summary judgment to the short calendar. The motion appeared on the short calendar for August 2, 2021. According to the marking rules found on the short calendar, the dates on which a party was permitted to mark a motion were from July 27, 2021, to July 29, 2021.

Bradley failed to file any opposition to the university's motion for summary judgment between May 20, 2021, the date Bradley's continuance request was denied, and July 20, 2021, when the university reclaimed its motion to the short calendar. Moreover, Bradley did not oppose the motion by filing an affidavit that additional discovery was needed pursuant to Practice Book § 17-47.[14]

On July 26, 2021, prior to the date short calendar markings were due, the court granted the university's unopposed motion for summary judgment on count four of Bradley's operative complaint. In rendering summary judgment, the court first determined that the student handbook created an enforceable contract between the university and its students. The court then reviewed the language of the student handbook and the other

[14] Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

evidence and affidavits the university submitted in support of its motion. "In his November 1, 2019 affidavit, [Wielk] stated that [o]n October 17, 2016, I met with [Cotto] [and Cotto] told me that [Yovino] . . . reported that two [of the university's] students had sexually assaulted her at an off campus party. [Cotto] . . . informed me that . . . the victim had identified the men as . . . Bradley and . . . St. Hilaire. . . . In [the university's] interim suspension letter, sent by [Wielk] to [Bradley] . . . Wielk wrote, in relevant part: I am writing to inform you that based on an allegation of sexual assault that has been filed with both [the university] and the Bridgeport Police Department . . . you are hereby [s]uspended effective immediately . . . . As such, pending an investigation and, if necessary, a disciplinary hearing, you are not allowed on the premises of [the university] . . . ." (Internal quotation marks omitted.)

On the basis of this evidence, the court concluded that "it is undisputed that [Wielk] became aware, upon meeting [Cotto] on October 17, 2016, that Yovino had reported to the Bridgeport Police Department that she was sexually assaulted by Bradley and St. Hilaire. . . . It is undisputed that [Wielk] subsequently suspended [Bradley] on October 18, 2016, and that he specifically cited Yovino's allegation of sexual assault as the basis for [Bradley's] immediate suspension. . . . The [student handbook] expressly and unambiguously authorized [Wielk], as the dean of students, to suspend students who were facing allegations of serious criminal activity . . . . [I]t was within [Wielk's] discretion and right to impose an immediate suspension from residency and/or partial or full academic suspension from [the university] until a student conduct hearing can be scheduled. . . . This court finds that there is no genuine issue of material fact that [Wielk] suspended [Bradley] upon learning that he was facing an allegation of

serious criminal activity." (Internal quotation marks omitted.)

We begin by setting forth the standard of review and legal principles relevant to Bradley's claim. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the [initial] burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . ." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 756–57, 905 A.2d 623 (2006). "Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 792–93, 218 A.3d 717 (2019). "[T]he party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . [T]he scope of our review of the trial court's decision to grant the . . . motion for summary judgment is plenary." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, supra, 757.

"The elements of a breach of contract claim are the formation of an agreement, performance by one party, breach of the agreement by the other party, and damages." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311

Conn. 282, 291, 87 A.3d 534 (2014). "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 319, 12 A.3d 995 (2011).

Practice Book § 11-18 (a) provides in relevant part: "Oral argument is at the discretion of the judicial authority except as to . . . motions for summary judgment . . . and/or hearing on any objections thereto. For those motions, oral argument shall be a matter of right, provided: (1) the motion has been marked ready in accordance with the procedure that appears on the short calendar on which the motion appears, or (2) a nonmoving party files and serves on all other parties . . . a written notice stating the party's intention to argue the motion . . . . Such a notice shall be filed on or before the third day before the date of the short calendar date . . . ." Finally, the legal principles pertaining to harmless error analysis set forth in part I of this opinion are also applicable to Bradley's claim of procedural error.

The court adjudicated the motion for summary judgment without providing the parties with an opportunity to mark the motion according to the schedule set forth in the short calendar on which the motion appeared. Bradley also had a right to oral argument on the motion pursuant to Practice Book § 11-18 (a) and this right was improperly denied.

To prevail on his claim of procedural error, however, Bradley must also demonstrate that the court's erroneous actions likely affected the result. See *Kraus* v. *Newton*, 211 Conn. 191, 195, 558 A.2d 240 (1989) (ruling must

be both erroneous and harmful to constitute reversible error); *Wasilewski* v. *Commissioner of Transportation*, 152 Conn. App. 560, 570, 99 A.3d 1181 (2014) (court applied harmless error analysis to Practice Book § 11-18 motion).[15] Bradley has not demonstrated that the court's failure to provide oral argument on the motion likely affected the court's decision rendering summary judgment as to his breach of contract claim against the university. Accordingly, we cannot conclude that the court committed reversible error.

It is clear from our plenary review of the record that the university met its initial burden in establishing that there was no genuine issue of material fact that the university breached its contract by suspending Bradley without investigating Yovino's allegations. Bradley alleges, and there is no dispute that, the student handbook formed an enforceable contract between Bradley and the university. Therefore, we must first look to the language of the student handbook to determine the parties' respective rights and obligations. The student handbook states: "In the event that the Dean of Students deems it necessary in order to preserve the benefit and welfare of the [the university] community and the individual student(s), he/she . . . reserves the right to impose *an immediate suspension* from residency and/or partial or full academic suspension from [the university] until a student conduct hearing can be scheduled. . . . [T]he Dean of Students or designee *may* impose restrictions and/or *separate a student* from the *community pending the scheduling of a campus hearing* on *alleged* violation(s) of the Code [of Student Conduct and Community Standards] when a student represents a threat of serious harm to others, [or] *is facing allegations of serious criminal activity* . . . . During an

[15] On appeal, Bradley does not argue that the court committed structural error by denying him oral argument on the motion for summary judgment. Nor does he argue that the court deprived him of his constitutional rights.

interim suspension, a student may be denied access to [the university's] housing and/or [the university's] campus/facilities/events. As determined appropriate by the Dean of Students or designee, this restriction may include classes and/or all other University activities or privileges for which the student might otherwise be eligible." (Emphasis added.) The policy on sexual misconduct included in the student handbook states: "The Title IX Coordinator in coordination with the Dean of Students will initiate an immediate response to separate the Complainant and Respondent from engaging each other in common areas, residence halls, campus buildings, and student activities . . . . Nothing herein shall preclude an immediate suspension in order to preserve the safety of the campus community . . . ."

The language of the student handbook, considered as a whole, clearly authorizes the dean of students to suspend *immediately* a student if the dean of students deems it necessary to preserve the benefit and welfare of the university's community. The student handbook further authorizes the dean of students to suspend a student "facing allegations of serious criminal activity." Such a suspension may include denying the student access to campus, events, and classes when the dean of students determines that such a restriction is appropriate. Read together, the language of the handbook prioritizes the welfare and safety of the university's community and gives the dean of students discretion to act as necessary to serve this purpose. This broad discretion explicitly includes imposing an immediate suspension, when such an action is deemed necessary by the dean.

The university further established that Wielk, in his position as the dean of students, suspended Bradley because he was facing an allegation of serious criminal activity—the purported sexual assault of Yovino. In Wielk's affidavit submitted in support of the university's

motion for summary judgment, Wielk stated that, on October 17, 2016, he met with Cotto who informed him that, over the previous weekend, Yovino had reported to Bridgeport police that she had been sexually assaulted by Bradley and St. Hilaire. Wielk further attested that, on the basis of the information he received from Cotto, he imposed an immediate suspension on Bradley pending an investigation and, if necessary, a disciplinary proceeding.

Given Wielk's affidavit and the clear contractual language that authorizes Wielk to suspend immediately a student to preserve the benefit and welfare of the university community and to suspend students facing allegations of serious criminal activity, it is apparent that Wielk was authorized to immediately suspend Bradley without first investigating Yovino's allegations.

Wielk suspended Bradley due to an allegation of sexual assault, made by another student, that was filed with the Bridgeport Police Department. This allegation of sexual assault established not only that Bradley was facing allegations of serious criminal activity, but that, if true, Bradley posed a risk to the welfare of the university community due to the possibility that he had inflicted serious harm on another student. Rather than requiring Wielk first to substantiate this allegation, during which time the university community's welfare could potentially be at risk, the student handbook provided Wielk with discretion to immediately suspend the alleged perpetrator. Finally, it is important to note that the student handbook does not contain any language obligating the university to investigate allegations of serious criminal activity before suspending the student.

Under these circumstances, Wielk clearly was authorized to immediately suspend Bradley because he was facing an allegation of sexually assaulting another student. Therefore, the university met its initial burden in

establishing that there was no genuine issue of material fact that the university had not breached its contract when Wielk immediately suspended Bradley prior to any investigation.

Because the university met its initial burden, the burden then shifted to Bradley to show, on the basis of a timely submission of evidentiary materials, that a genuine issue of material fact existed in order to defeat the university's motion. During the approximately six month period after the motion for summary judgment was filed and before it was granted, Bradley did not file any opposition to the motion and, therefore, failed to meet his burden to defeat the motion for summary judgment. See *Bayview Loan Servicing, LLC* v. *Frimel*, supra, 192 Conn. App. 794–95 (court must first consider whether summary judgment movant met initial burden before granting summary judgment on basis that opposing party failed to file any objection); see also *Chase Home Finance, LLC* v. *Scroggin*, 194 Conn. App. 843, 856 n.7, 222 A.3d 1025 (2019) ("it is only upon the satisfaction of a summary judgment movant's initial burden that the burden shifts to the nonmovant to demonstrate, on the basis of a timely submission of an evidentiary showing, that there exists a genuine issue of material fact to defeat summary judgment").[16] In light of this procedural posture and our independent review of the

[16] We note that in *Bayview Loan Servicing, LLC*, and *Chase Home Finance, LLC*, this court held that the trial court's failure to provide oral argument on a party's motion for summary judgment constituted reversible error. See *Chase Home Finance, LLC* v. *Scroggin*, supra, 194 Conn. App. 857; *Bayview Loan Servicing, LLC* v. *Frimel*, supra, 192 Conn. App. 796–97. The trial court's rulings on the moving party's motions for summary judgment in *Bayview Loan Servicing, LLC*, and *Chase Home Finance, LLC*, are distinguishable from the present case because, in those cases, the trial court failed to consider whether the moving party met its burden in establishing that there was no genuine issue of material fact and, instead, granted the motions solely on the ground that no timely opposition to the motions had been filed. *Chase Home Finance, LLC* v. *Scroggin*, supra, 850, 859; *Bayview Loan Servicing, LLC* v. *Frimel*, supra, 794–95.;

record, we are not persuaded that oral argument on the university's motion for summary judgment likely would have resulted in a decision other than the one granting the motion in favor of the university. Accordingly, the court's improper denial of oral argument was harmless and Bradley's claim fails.

III

Finally, Bradley claims that the court abused its discretion by denying his motion for reargument of his motion to compel and the summary judgment rendered against him because, after denying his motion, the court subsequently granted St. Hilaire's motion for reargument of the summary judgment rendered against St. Hilaire. Bradley argues that this disparate treatment was an abuse of discretion because St. Hilaire's and Bradley's reargument motions set forth the same legal arguments. We disagree.

The relevant legal principles and standard of review are well established. "[T]he purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address [alleged inconsistencies in the trial court's memorandum of decision as well as] claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple [or to present additional cases or briefs which could have been presented at the time of the original argument] . . . ." (Internal quotation marks omitted.) *Klass* v. *Liberty Mutual Ins. Co.*, 341 Conn. 735, 741, 267 A.3d 847 (2022).

"We review a trial court's decision to deny a litigant's motion for reargument and reconsideration for an abuse of discretion. . . . [A]s with any discretionary action

of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In addition, where a motion is addressed to the discretion of the court, the burden of proving an abuse of that discretion rests with the appellant." (Citations omitted; internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, 160 Conn. App. 226, 236, 124 A.3d 952 (2015). "We will find that such an abuse of discretion exists when the court's decision creates a miscarriage of justice." *Campbell* v. *Plymouth*, 74 Conn. App. 67, 85, 811 A.2d 243 (2002).

In his motion for reargument, Bradley raised the same challenges that we have rejected in resolving his prior claims pertaining to the court's effective denial of his motion to compel; see part I of this opinion; and the court's rendering of summary judgment. See part II of this opinion. Because we have concluded that the court's denial of Bradley's motion to compel and its rendering of summary judgment against him did not constitute reversible error, we further conclude that the court's denial of Bradley's motion for reargument was not an abuse of its discretion. See *LendingHome Marketplace, LLC* v. *Traditions Oil Group, LLC*, 209 Conn. App. 862, 873, 269 A.3d 195, cert. denied, 343 Conn. 927, 281 A.3d 1187 (2022) ("[b]ecause there was no error in the court's ruling, we also conclude that the court did not abuse its discretion in denying the defendant's motion to reargue/reconsider); see also *Campbell* v. *Plymouth*, supra, 74 Conn. App. 85–86 (court's denial of motion to reargue summary judgment motion not abuse of its discretion because court properly granted party's motion for summary judgment).

The sole new argument that Bradley raises in support of his claim that the court abused its discretion in denying his motion for reargument is that the court granted

St. Hilaire's motion for reargument, which relied on the same arguments that Bradley made in his motion, and the court has provided no explanation for this disparate treatment. Bradley, however, has the burden to establish that the court abused its discretion. The court denied Bradley's motion without articulating the basis for its decision and Bradley did not file a motion for articulation pursuant to Practice Book § 66-5. See, e.g., *Hartford* v. *Pan Pacific Development (Connecticut), Inc.*, 61 Conn. App. 481, 488–89, 764 A.2d 1273 (2001); see also Practice Book § 61-10. Furthermore, as the university argues, Bradley's and St. Hilaire's cases were in different procedural positions. In particular, the court had denied Bradley's motion for an extension of time prior to rendering summary judgment against him, but the court had not denied St. Hilaire's motion for an extension of time prior to rendering summary judgment against him. On the basis of this record, the court's dissimilar treatment of Bradley's and St. Hilaire's motions for reargument is not enough for us to conclude that the court's denial of Bradley's motion was a miscarriage of justice.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* TRAVIS WAYNE ARMSTRONG (AC 44561)

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

Syllabus

Pursuant to statute (§ 53a-134 (a) (4)), a person is guilty of robbery in the first degree when, inter alia, in the course of the commission of the crime of robbery, he threatens the use of what he represents by his words or conduct to be a firearm.

Convicted of the crime of attempt to commit robbery in the first degree, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of attempted robbery. The defendant walked to the front counter at a fast-food restaurant and demanded $20. While he spoke with the employee, W, at the counter, his right hand was located near his right hip, partially under a hoodie he was wearing, and he moved his hand up and down. The defendant repeated his demand for money, and threw a plastic bag across the counter, which landed on the floor beside W. After W did not make any move to open the cash register, the defendant walked out of the restaurant. During the incident, W observed a cell phone clip on the defendant's belt as well as an object with a black handle near his belt. At trial, the state's theory of the case was that the defendant had threatened what he represented to be a handgun during his encounter with W, which lasted for approximately thirty seconds. *Held* that the state did not satisfy its burden of proving beyond a reasonable doubt that the defendant took a substantial step in the commission of an attempted robbery because the evidence did not support a finding that the defendant threatened the use of what he represented by his words or conduct to be a firearm, one of the necessary elements of attempted robbery in the first degree: the evidence showed that the defendant demanded money to which he was not entitled, but he did not threaten explicitly to physically injure W and did not explicitly threaten to do so by means of the use of a handgun, nor did the defendant explicitly direct W's attention to any object in his possession or indicate that he possessed a handgun, and, considering the totality of the circumstances, the jury could have reasonably interpreted the defendant's statements as a threat to cause W physical harm, but, standing alone, the statements could not have reasonably been interpreted as a threat to use a specific object, namely, a handgun, to cause such harm; moreover, although there is no requirement that a threat to use a firearm be explicitly uttered, consideration of the defendant's accompanying conduct did not lead to a different conclusion, for the evidence of the defendant's conduct during his brief encounter with W did not permit a reasonable inference that his threat to do harm encompassed a threat to do harm with a handgun, as W did not describe an item in the defendant's possession that objectively resembled a handgun, nor did she testify that the defendant had made use of an object in his possession in the same way one would make use of a handgun, such as pointing an object at her in the way in which one would point a handgun at another person; furthermore, it would have been entirely speculative for the jury to premise a finding that the defendant specifically threatened to use a handgun solely on the fact that W observed an object with a black handle near the defendant's belt, as the jury reasonably could have inferred that the defendant engaged in the movements that W described in order to draw W's attention to that area of his body while

he was demanding money from her, but it could not have reasonably inferred from this evidence, viewed in isolation or in light of the evidence as a whole, that the defendant intended to convey that he was in possession of a handgun as opposed to any other object or weapon.

Argued November 2, 2022—officially released March 7, 2023

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of attempt to commit robbery in the first degree, and, in the second part, with being a persistent felony offender and having displayed, threatened the use of, or represented by his words or conduct that he possessed a firearm during the commission of a felony, brought to the Superior Court in the judicial district of Windham, geographical area number eleven, and tried to the jury before *Spellman, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Pamela S. Nagy, supervisory assistant public defender, with whom, on the brief, was *Mark Rademacher*, former assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, *Andrew Slitt*, assistant state's attorney, and *Thadius L. Bochain*, deputy assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Travis Wayne Armstrong, appeals from the judgment of conviction, rendered following a jury trial, of attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49

(a) (2)[1] and 53a-134 (a) (4).[2] The trial court, *Spellman*, *J.*, enhanced the defendant's sentence after the defendant was adjudicated a persistent felony offender in violation of General Statutes (Rev. to 2017) § 53a-40 (g),[3] and for his having "displayed, threatened the use of, or represented by his words or conduct that he possessed a firearm" during the commission of a class A, B, or C felony, in violation of General Statutes § 53-202k,[4] as he was charged in two part B informations.[5] The defendant claims that (1) the court violated his right to self-representation, (2) the court committed instructional error

[1] General Statutes § 53a-49 (a) provides in relevant part: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he . . . (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[2] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. . . ."

[3] General Statutes (Rev. to 2017) § 53a-40 (g) provides: "A persistent felony offender is a person who (1) stands convicted of a felony other than a class D felony, and (2) has been, at separate times prior to the commission of the present felony, twice convicted of a felony other than a class D felony."

All references in this opinion to § 53a-40 are to the 2017 revision of the statute.

[4] General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

[5] After returning its verdict with respect to the underlying charge, the jury found that the state had proven beyond a reasonable doubt the factual bases for the application of the sentence enhancement statutes. Thereafter, the court imposed a total effective sentence of seventeen years of imprisonment.

with respect to the essential elements of attempted robbery, (3) the court improperly enhanced his sentence pursuant to § 53a-40 (g), and (4) the state failed to prove beyond a reasonable doubt that he was guilty of attempted robbery. We agree with the defendant that the state did not satisfy its burden of proving beyond a reasonable doubt that he took a substantial step in the commission of the offense because the evidence did not support a finding that he displayed or threatened the use of what he represented by his words or conduct to be a firearm. Accordingly, we reverse the judgment of conviction and remand the case to the trial court with direction to render a judgment of acquittal.[6]

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. On May 17, 2018, the defendant arrived via automobile at a McDonald's fast-food restaurant in Willimantic. At that time, shift manager Marzetta Williams was working at the restaurant, as was Janel Burdzy, who was working as a cashier at the restaurant's drive-through window. The defendant walked into the restaurant and went into a restroom. He then walked to the front counter, where he encountered Williams. The defendant stated: "Oh, give me the money. I don't want any problems." The defendant was wearing a gray hoodie. While he spoke with Williams, his right hand was located near his right hip, partially under the hoodie, and he moved his hand up and down. Williams replied that she was unable to open the cash register. The defendant stated, "I don't want any problems. I just need $20. Give me the money." The defendant threw a plastic bag across the counter, which landed on the floor beside Williams. After Williams did not make any move to open the register, the defendant walked out of the restaurant. Williams

[6] In light of our conclusion that the state failed to present sufficient evidence to convict the defendant of attempted robbery, we need not address the defendant's other claims on appeal.

immediately shouted to Burdzy, who was serving a customer at the drive-through window, that "we just almost got robbed." Burdzy saw the defendant quickly enter the passenger side of an automobile in the restaurant's parking lot, and she recorded the license plate. Williams then called 911 to report the incident. During the incident, Williams observed a cell phone clip on the defendant's belt as well as an object with a black handle near his belt. Although Williams did not observe a handgun, and she did not inform the police that the defendant was armed, she believed that he possessed a handgun and that he would do "whatever" to get the money that he demanded.

Although the defendant raises four claims in this appeal, we first turn to the merits of his sufficiency of the evidence claim, for he is entitled to a judgment of acquittal if the evidence was insufficient to support his conviction.[7] See, e.g., *State* v. *Bereis*, 117 Conn. App. 360, 364, 978 A.2d 1122 (2009). "In [a defendant's] challenge to the sufficiency of the evidence . . . [w]hether we review the findings of a trial court or the verdict of a jury, our underlying task is the same. . . . We first review the evidence presented at trial, construing it in the light most favorable to sustaining the facts expressly found by the trial court or impliedly found by the jury. We then decide whether, [on] the facts thus established and the inferences reasonably drawn therefrom, the

[7] Sufficiency of the evidence claims are reviewable on appeal, even if they are unpreserved, because they implicate a defendant's federal constitutional right not to be convicted of a crime upon insufficient proof. See *State* v. *Ward*, 76 Conn. App. 779, 795 n.8, 821 A.2d 822, cert. denied, 264 Conn. 918, 826 A.2d 1160 (2003). Nonetheless, we observe that the defendant raised the present claim before the trial court in a motion for a judgment of acquittal at the close of the state's case-in-chief. Following the jury's verdict, the defendant filed a motion for a judgment of acquittal and a new trial. During argument on that motion, defense counsel indicated that the defendant wanted the court to "reconsider" the arguments made in support of the prior motion for a judgment of acquittal. The court denied both motions.

trial court or the jury could reasonably have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt. . . . [W]e give great deference to the [verdict] of the [jury] because of its function to weigh and interpret the evidence before it and to pass [on] the credibility of witnesses. . . .

"In evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . As we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the trier [of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Lori T.*, 345 Conn. 44, 72–73, 282 A.3d 1233 (2022).

Having set forth our standard of review, we turn to the elements of the offense of which the defendant was convicted. Section 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery . . . or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or

other firearm . . . .”[8] Because the defendant was charged with attempt to commit robbery pursuant to § 53a-49 (a) (2), the state bore the burden of proving, “first, that the accused acted with the intent to commit the crime . . . and, second, that the accused intentionally took action that constituted a ‘substantial step’ toward completion of the crime.” *Small* v. *Commissioner of Correction*, 286 Conn. 707, 727, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

In its long form information, the state charged the defendant with attempt to commit robbery in the first degree in that he “did, while in the course of . . . attempting commission of a robbery . . . display or threaten the use of what he represented to be a handgun . . . .” At trial, however, the state’s theory of the case was not that the defendant had displayed a handgun during the attempted commission of the crime, but that he had threatened the use of what he represented to be a handgun during his encounter with Williams, which lasted for approximately thirty seconds. The state also argued that the defendant’s conduct amounted to an attempted robbery because the defendant allegedly took a substantial step toward, but did not actually, obtain any money. Consistent with the evidence and its theory of the case at trial, in this appeal, the state does not argue that the evidence was sufficient to prove

[8] General Statutes § 53a-133 defines the crime of robbery as follows: “A person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.”

General Statutes § 53a-119 provides in relevant part: “A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . .”

beyond a reasonable doubt that the defendant displayed a handgun during the attempted commission of the crime or flight therefrom, but that he had threatened the use of what he represented to be a handgun during the attempted commission of the crime.

The defendant claims that the evidence was insufficient to prove that he threatened the use of what he represented to be a handgun during the attempted commission of the robbery. "In determining whether [a] defendant threatened to use what he represented by words or conduct to be a firearm, [t]he test is not whether the defendant actually had a firearm . . . but whether he displayed or threatened the use of what he represented by his conduct to be a firearm." (Citation omitted; internal quotation marks omitted.) *State* v. *St. Pierre*, 58 Conn. App. 284, 288, 752 A.2d 86, cert. denied, 254 Conn. 916, 759 A.2d 508 (2000). "[T]he essential element of subsection (a) (4) [of § 53a-134] . . . is the representation by a defendant that he has a firearm. Under this portion of § 53a-134, a defendant need not have an operable firearm; in fact, he need not even have a gun. He need only represent by his words or conduct that he is so armed." (Emphasis omitted.) *State* v. *Hawthorne*, 175 Conn. 569, 573, 402 A.2d 759 (1978).

The defendant argues that, "[i]n cases where there is sufficient evidence of this element, there is some action taken by the defendant that suggests he is holding or concealing a gun, such as pointing an object at the victim, or holding a concealed object that appears to be a gun by its shape and size. . . . There is also sufficient evidence when the defendant says something indicating that he has a gun. . . .

"In addition to evidence that the defendant represented that he had a gun, there must be evidence to prove that he threatened to use the gun. . . . There is no requirement that the threat be explicitly stated. . . .

However, evidence proving that the defendant represented that he had a firearm does not necessarily prove that he threatened to use it. . . .

"In the present case, the record is devoid of any evidence that the defendant represented that he had a gun, and that he threatened to use a gun." (Citations omitted; internal quotation marks omitted.)

The state focuses on the evidence that the defendant moved his right hand, which was concealed near his right hip, up and down during his encounter with Williams. The state also relies on the fact that Williams observed a "black handle" near the defendant's belt and that Williams believed that the defendant had a firearm. The state argues that, "[c]onsidering [the evidence of the defendant's] words and conduct, the jury reasonably could have concluded that the defendant wanted Williams to believe that he had a gun and that he threatened the use of it during his attempt to rob her." The state further argues that "[t]he defendant's claim boils down to an improper attempt to have this court substitute its judgment for that of the jury."

Next, we turn our attention to the relevant evidence. During the state's direct examination of Williams, the only eyewitness to the pertinent events at issue, the following colloquy between the prosecutor and Williams occurred:

"Q. [A]round 6:50 in the morning or so, just a little bit before 7 [a.m.], did anything unusual happen?

"A. Yeah.

"Q. What . . . was it?

"A. A car pulled up . . . in the parking lot, a guy came out, he went into the restroom, and then he came back out, he came to the front counter. He was jiggin' something on his right side.

"Q. You said he was doing what?

"A. Like, jiggin' around on his right side. He had somethin' on his side of his belt. And he was jiggin' around and he said, Oh, give me the money. I don't want any problems.

"Q. And he said that to who?

"A. He said it to me. I was at the register in the front. I thought he was gonna place an order.

"Q. And you said he was—I just want to make sure I use the right word that you used, you said he was jigging . . .

"A. I said jigging, yes."

At this point during the state's direct examination of Williams, the prosecutor, with the court's permission, asked Williams to demonstrate the movement she described in colloquial terms as "jiggin' " or "jigging." While demonstrating the movement, Williams explained that the perpetrator, who she subsequently identified as the defendant, had his hand "slightly under the hoodie" he was wearing, but "you could still kinda see his hand." Following Williams' demonstration, the prosecutor asked the court if the record could reflect "that the witness took her right hand and put it on the side of her hip and moved it up and down." The court agreed.

Williams then testified that she told the perpetrator that she was unable to open the cash register, and that he replied, "I don't want any problems. I just need $20. Give me the money." Williams testified that after she reiterated that she could not open the cash register, the perpetrator threw a plastic bag in her direction, which landed on the floor. She testified that the perpetrator then walked out of the restaurant and got into an automobile.

The following colloquy between the prosecutor and Williams then occurred:

"Q. What . . . were you thinking when he was doing that with his hand? . . .

"A. I . . . kinda figured it was a gun. That's what I thought, like, maybe he had a gun. Like—that's what it seemed like to me.

"Q. So . . . what did you think . . . was happening?

"A. That he was tryin' to rob me, that he wanted money, and he was gonna do whatever to get it.

"Q. And . . . you said at first you didn't open the register. . . . [W]ere you able to open the register at any point?

"A. I didn't open it at all.

"Q. Why not?

"A. I wasn't gonna make any sudden movements or anything in case it was a gun."

During defense counsel's cross-examination of Williams, Williams agreed that, when she called 911, she did not "mention anything about . . . a gun in that phone call . . . ." Later, during cross-examination, the following colloquy between defense counsel and Williams occurred:

"Q. And you said . . . [that the perpetrator] wiggled his waist, so at some point in time, you were looking down at his belt. Is that correct?

"A. Yes.

"Q. And it's safe to say you were trying to figure out if he actually had a gun or not?

"A. Yes.

"Q. And you did not actually see a gun?

"A. No, I did not.

"Q. Did you tell . . . in that 911 call, did you tell the police that somebody had a gun?

"A. No, I didn't."

During defense counsel's cross-examination of Williams, she was asked about the first of two written statements that she provided to the police in the immediate aftermath of the incident.[9] Williams testified that, in her first statement, she stated that the perpetrator had a clip on his belt, but she did not state that he had moved the clip. The following colloquy between defense counsel and Williams then occurred:

"Q. I'm jumping back to the clip again . . . you had mentioned that the person had a cell phone clip on his belt. . . .

"A. Yes. . . .

"Q. Is that what he was putting his hands on?

"A. I—not at the time, no. He was jigging. Like . . . his hand was, like, slightly under his hoodie when he was jiggin' the side.

"Q. And you couldn't see a gun there. Is that correct?

"A. Correct.

"Q. But you could . . . see a clip on the belt there?

"A. I couldn't see anything but his hand. . . .

"Q. Did the police ask you if . . . the person had a gun?

"A. Yes, they did.

"Q. Did they . . . ask you more than once?

[9] Neither statement was admitted as evidence.

"A. Yes, they did.

"Q. Did they ask you when they . . . first arrived at the McDonald's? Did they ask you if the person had a gun?

"A. Yes.

"Q. And when they first arrived at the McDonald's, what did you tell them?

"A. I told them I didn't know if it was a gun or not, but he was jigging the side of his belt.

"Q. You never told the police this was . . . an armed robbery. Is that correct?

"A. I did not."

During the state's redirect examination of Williams, the prosecutor asked her about the second statement that she had provided to the police concerning the incident. Williams testified that, in her second statement, she stated that the perpetrator "was grabbin' at his belt and it . . . could have been a gun, that I seen somethin' black and it could have been a gun." Williams agreed with the prosecutor that, in her statement, she used the term "black handle." Williams then identified the defendant, who was present in the courtroom, as the perpetrator.

Beyond Williams' testimony, the other evidence concerning the defendant's conduct inside of the restaurant was presented by the state in the form of a surveillance video as well as still photographs that were generated from the video. The video and photographs depict the defendant, who was wearing dark colored pants and a gray hoodie, entering the restaurant, going into a restroom, and interacting with Williams at the front counter. Consistent with Williams' testimony, the video and the photographs reflect that the defendant had his right hand positioned near the front, right side of his

waist. The defendant's right hand appears to be partially or completely concealed in either the right pocket of his pants or under his hoodie. The video also depicts the defendant throwing a plastic bag across the front counter with his left hand during his interaction with Williams.

Having carefully reviewed the evidence, we conclude that it did not support a finding beyond a reasonable doubt that the defendant had threatened by his words or conduct that he would use a handgun. We recognize that we must interpret the defendant's words and conduct in light of their circumstances, his conduct in the attempted commission of a larceny, and in the light most favorable to sustaining the jury's verdict. With respect to what the defendant explicitly stated to Williams, he demanded money to which he was not entitled, but he did not threaten explicitly to physically injure Williams, and certainly did not explicitly threaten to do so by means of the use of a handgun. Nor did the defendant explicitly direct Williams' attention to any object in his possession or indicate that he possessed a handgun. The jury, however, reasonably could have inferred that the defendant's words amounted to an implicit threat. The defendant twice told Williams that he did not "want any problems" while demanding that she give him money to which he was not legally entitled. Considering the totality of the circumstances, we conclude that the jury reasonably may have interpreted these statements as a threat to cause Williams physical harm, but, standing alone, they may not reasonably be interpreted as a threat to use a specific object, namely, a handgun, to cause such harm.

We recognize that there is no requirement that a threat to use a firearm "be explicitly uttered." *State* v. *Torrence*, 37 Conn. App. 482, 486, 657 A.2d 654 (1995). Our consideration of the defendant's accompanying

conduct, however, does not lead to a different conclusion, for the evidence of the defendant's conduct during his brief encounter with Williams did not suggest that his threat to do harm encompassed a threat to do harm with a handgun. Williams unambiguously testified that she did not observe a handgun in the defendant's possession. Williams, describing the defendant's hand movements, testified that she "kinda figured it was a gun" and that "maybe [the defendant] had a gun." Next, she testified that she did not make any sudden movements "in case it was a gun." She agreed with defense counsel that she was trying to figure out if the defendant had a handgun, but she did not actually see one. Ultimately, when she was questioned about her second statement, Williams testified that she saw a black object and "it . . . could have been a gun . . . ." Williams' testimony revealed that the basis for her opinion was the fact that the defendant was moving his right hand near his right hip, and that she had observed an item with a black handle near his belt.

What Williams thought or believed though is not the dispositive question. It was not sufficient for the state to prove beyond a reasonable doubt that Williams subjectively came to such a conclusion.[10] See, e.g., *State* v. *Torrence*, supra, 37 Conn. App. 487 (victim's opinion with respect to whether object in defendant's possession was handgun "had no relevance to the issue" of

[10] The state does not appear to dispute this principle. The state, responding to the defendant's claim of instructional error in this appeal, which we need not and do not consider on its merits, argued that the court did not improperly instruct the jury that it was sufficient for the jury to return a verdict of guilty solely upon a finding that Williams believed that the defendant possessed a handgun. In its brief to this court, the state further argued that "a robbery in the first degree conviction must be based on evidence objectively proving that the defendant, considering his words and conduct, displayed or threatened the use of a firearm. Put simply, the [jury] charge [in the present case] adequately focused the jury's attention on whether the defendant represented through words or conduct that he was armed with a firearm."

whether defendant threatened to use handgun). As this court observed in *State* v. *Aleksiewicz*, 20 Conn. App. 643, 648, 569 A.2d 567 (1990), the state's burden of proof under § 53a-134 (a) (4) is not to demonstrate that a perpetrator used an item in such a manner that a reasonable person believed that he possessed a handgun. Instead, "the Connecticut statute's objective requirement [is] that the perpetrator *represented* that he had or would use a gun." (Emphasis in original.) Id. Consequently, to satisfy its burden of proof, the state had to persuade the jury, beyond a reasonable doubt, that the defendant threatened, through his words or actions, the use of a handgun during the attempted robbery. Important in our analysis is the fact that Williams did not describe an item in the defendant's possession that objectively resembled a handgun, nor did she testify that the defendant had made use of an object in his possession in the same way one would make use of a handgun. For example, Williams did not testify that the defendant pointed an object at her in the way in which one would point a handgun at another person. Instead, at different points in her testimony, Williams testified that the defendant "had somethin' on the side of his belt," that she observed a "clip on his belt," and that she observed a "black handle." This evidence did not permit a reasonable inference that the defendant had represented to Williams, through his actions, that whatever object he might have possessed was a handgun.

We assume, as we must, that the jury found that the defendant possessed, near his belt, an object with a black handle. Life experience, however, teaches that an item with a black handle is not necessarily a handgun, for many objects, including other types of weapons, have a black handle. Certainly, in light of the overwhelming evidence of the defendant's intent to commit larceny, it was reasonable for both the jury, and Williams, to suspect that the defendant might be in possession of a weapon of some type. Yet, it would have been

entirely speculative for the jury to premise a finding that the defendant specifically threatened to use a handgun solely on the fact that Williams observed an object with a black handle near the defendant's belt. "In finding guilt beyond a reasonable doubt, a jury may not resort to speculation and conjecture but it is clearly within the province of the jury to draw reasonable, logical inferences from the facts proven." *State* v. *Morrill*, 193 Conn. 602, 608, 478 A.2d 994 (1984). Indeed, "[t]he line between permissible inference and impermissible speculation is not always easy to discern. . . . [P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis, but it must suffice to produce in the mind of the trier a reasonable belief in the probability of the existence of the material fact." (Citation omitted; internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 238, 249 A.3d 683 (2020). Here, the jury reasonably could have inferred that the defendant engaged in the movement described as "jigging" in order to draw Williams' attention to this area of his body while he was demanding money from her, perhaps to suggest that he was in possession of an item with which he could inflict physical injury, but the jury could not reasonably infer from this evidence, viewed in isolation or in light of the evidence as a whole, that the defendant intended to convey that he was in possession of a handgun as opposed to any other object or weapon.[11] As set forth previously in our discussion of the relevant

[11] For the reasons discussed in this opinion, we conclude that the movement described by Williams, when carefully examined in the light of all the evidence presented in this case, does not suggest the threatened use of a handgun. We do not, however, suggest that, under different factual circumstances, the movement described by Williams could not be consistent with the threatened use of a handgun. As stated previously in this opinion, we consider the totality of the circumstances, which necessarily encompasses all the evidence of a defendant's words and conduct, in our evaluation of whether the evidence permitted a finding beyond a reasonable doubt that a defendant threatened the use of a handgun.

evidence, Williams testified that she did not observe a handgun, but that she had observed an object with a black handle near the defendant's belt.[12]

The state urges us to conclude that the present case is factually similar to the events at issue in *State* v. *Arena*, 33 Conn. App. 468, 636 A.2d 398 (1994), aff'd, 235 Conn. 67, 663 A.2d 972 (1995), and that *Arena* undermines the defendant's claim. The defendant in *Arena* was convicted of robbery in the first degree in violation of § 53a-134 (a) (4), and, on appeal to this court, he claimed "that there was no evidence that he displayed or represented by his words or conduct that he had a firearm." Id., 470, 475. In *Arena*, the jury reasonably could have found that the defendant walked into a convenience store and ordered Dhanwantie Ramdayal, an employee, who was behind the counter, to " '[p]ut all the money in a bag.' " Id., 471. "As the defendant said that, he placed an opaque plastic shopping bag on the counter. His hand was at the top of the bag and he gripped an object inside the bag. He pointed the object in the bag at Ramdayal. Ramdayal testified that she thought it looked like a gun and that it was round and about fifteen or sixteen inches long.

[12] The state argues that "the jury reasonably could have concluded that video surveillance capturing the incident depicted the defendant, throughout his interaction with Williams, holding his right hand near the front, right side of his waistband and slightly under his hoodie, near a 'black' item with a 'black handle' that was in the same location, and kept his hand in that position while, from the other side of a counter, he threw a plastic bag at Williams with his opposite hand for her to fill with money from the register." Having reviewed the video and photographs, we are not persuaded that the quality of the images is such that they shed light on what, if anything, the defendant was carrying, let alone if he was in possession of a black object with a black handle, as the state argues. Moreover, the video does not appear to capture images continuously and, thus, the playback quality is not smooth enough to depict the hand movement described by Williams in her testimony. We note that, at trial, Michael Haggerty, a police officer who was the lead investigator for the incident, testified that, although he had viewed the video to determine whether the perpetrator had a gun, he did not observe any type of weapon in the video.

"As the defendant was asking for the money, [a second employee] [Alexander] Smolkin walked toward the phone. The defendant then said to Smolkin, 'Don't call the police' and 'Don't play cool.' Smolkin turned and saw the object in the bag in the defendant's hand. Smolkin could see the shape of the object and thought it looked like a long barrelled weapon. Smolkin further testified that, in trying to make light of the situation during the robbery, he joked, 'Is that a real gun?' and 'Is it a real robbery?'

"Ramdayal was nervous and had difficulty opening the cash register. The defendant told her to open the register fast and 'hurry up' and 'nothing will happen.' When she opened the register, she withdrew the cash from the drawer. . . . She extended her hand with the money in it and the defendant snatched the money out of her hand. The defendant turned and left the store quickly, and Ramdayal called the police." Id., 471.

In *Arena*, this court rejected the defendant's sufficiency of the evidence claim. Id., 477. The court explained that the state bore the burden of establishing beyond a reasonable doubt that the defendant had displayed or threatened the use of what he represented by his words or conduct to be a firearm. Id., 476. It then explained, "[a]t trial, the state presented evidence demonstrating that the defendant's conduct implied that he was carrying a firearm. Both witnesses testified that in his right hand he was holding a bag they thought concealed a gun. The defendant suggested that the bag's only purpose was to hold the money. . . . We acknowledge that this is not a situation where the defendant said he had a gun or represented that he would shoot if his demands were not met. The evidence presented at trial, however, did include the defendant's statement to one of the witnesses 'hurry up' and 'nothing will happen.' Implicit in that statement is a threat of harm. . . .

"Considering that statement by the defendant and the way the defendant held the object in the bag, the jury could have reasonably inferred that the defendant either carried a firearm or wanted the store clerks to think he had a firearm. . . . We conclude that the facts in this case do not require the jury to resort to speculation or conjecture to infer that the defendant acted as though he carried a firearm." (Citation omitted.) Id., 476–77.

Arena is consistent with our conclusion in the present case. Unlike in *Arena*, in the present case the record is devoid of evidence that the defendant possessed an object that was similar in appearance to a handgun or that he brandished a concealed object in the same way that one would use a handgun. Williams did not testify that she observed an object in the defendant's possession that shared distinctive physical characteristics with a handgun. Her reference to an object with a "black handle" is not an adequate evidentiary basis on which to find that the defendant, by his words and conduct, threatened the use of a handgun. Nor did Williams describe the defendant as having used a concealed object in the manner in which one would use a handgun, such as by grasping it or pointing it in the direction of a victim. Such testimony would have provided the basis for a reasonable inference that the defendant threatened the use of a handgun. In *Arena*, Ramdayal described an object that looked like a gun, which the defendant then gripped and pointed in Ramdayal's direction. Here, Williams, without linking her subjective belief to an object's appearance or the way in which the defendant made use of an object, expressed a subjective belief, namely, that she suspected that the defendant had a gun.

In another relevant decision of this court on which the defendant relies; *State* v. *St. Pierre*, supra, 58 Conn. App. 284; a defendant was convicted of robbery in the

first degree in violation of § 53a-134 (a) (4). Id., 285. In his direct appeal to this court, the defendant claimed that the trial court improperly had concluded that the evidence was sufficient to prove beyond a reasonable doubt that he had threatened the use of what he represented by words or conduct to be a firearm. Id. This court set forth the facts the jury reasonably could have found: "At approximately 1:30 a.m. on April 12, 1996, the defendant, wearing a hooded gray sweatshirt with the hood tied tightly around his face, dark pants, a dark jacket and black footwear, entered a convenience store in Watertown. The defendant approached the clerk behind the counter, Christopher Brown, and stated, 'This is a holdup.' Brown replied, 'Are you serious?' The defendant answered, 'Yes, I am,' and then gestured by raising his hand inside his jacket from beneath the counter to counter level while at all times keeping his hand and wrist covered by his jacket. On the basis of the comments and gestures of the defendant, Brown presumed that the defendant had a weapon. Brown opened the cash register and gave the defendant the money that was inside. The defendant took the money while keeping the one hand in his jacket and then left." Id., 286.

In analyzing the sufficiency of the evidence claim, this court in *St. Pierre* stated: "In the present case, Brown testified that after the defendant made the demand for money, the defendant raised his right arm, which was covered by a jacket, onto the counter while stating that he was serious. Brown then performed a demonstration for the jury as to what movements the defendant had made. When Brown was asked whether he knew what kind of weapon the defendant had, Brown replied, 'No, I have no idea what the weapon could have been,' but asserted that he thought that the defendant was armed. Officer Tim Gavallas of the Watertown

[P]olice [D]epartment, who had gone to the convenience store after Brown reported the robbery, testified that Brown told him that the defendant made movements suggesting he had a gun. Gavallas also discussed what he saw when he viewed the store surveillance videotape and testified that he saw the defendant put his hand under his shirt and 'motion like he had a gun.' " Id., 287–88.

This court concluded "that the defendant's words and upward motion of his arm in his jacket, under the circumstances as they existed, may properly have been considered factors consistent with the representation and threatened use of a firearm. . . . Accordingly, we conclude that the court properly denied the defendant's motion for judgment of acquittal as to the offense of robbery in the first degree because the jury reasonably could have concluded that the cumulative effect of the evidence established the defendant's guilt beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) Id., 289.

As in *Arena*, in *St. Pierre*, this court had before it evidence of words and conduct that were objectively consistent with the defendant's having threatened the use of a handgun. Specifically, there was evidence that the defendant raised his concealed right hand to counter level while stating that he was serious about holding up the convenience store. Id., 288–89. Both the eyewitness to the crime and an investigating police officer testified that the defendant's movements were consistent with his possession of a handgun. Id., 287–88. As we have stated previously, evidence of similar movements that are objectively distinctive to the possession of a handgun was lacking in the present case. Here, Williams described the fact that the defendant had his right hand near his right hip, and that he was moving his hand up and down. Assuming, as the state reasonably argues,

that handguns are commonly carried in one's waistband, we nevertheless observe that the type of motion described by Williams, viewed in light of the unique circumstances of the present case, lacks the distinctive characteristics that reflect a representation that the defendant possessed a handgun—such as pointing an object at a victim—and, thus, distinguishes the present case from *St. Pierre*.

The facts of *State* v. *Bell*, 93 Conn. App. 650, 891 A.2d 9, cert. denied, 277 Conn. 933, 896 A.2d 101 (2006), a case that is cited by both parties, are somewhat similar to the facts in *St. Pierre*. In *Bell*, a defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (4). Id., 652. On direct appeal to this court, the defendant argued that the evidence was not sufficient to support the conviction because it did not support a finding beyond a reasonable doubt that he displayed or represented by his words or conduct that he had a firearm. Id., 668.

In *Bell*, with respect to the incident giving rise to the conviction at issue, this court set forth the following facts that the jury reasonably could have found: "On April 14, 2001, Tricia Smith, the assistant manager of a Friendly's restaurant in Glastonbury, arrived at the store alone at about 6 a.m. to open the restaurant. As she unlocked the front door, the defendant, unmasked, came up behind her and forced his way into the restaurant. He told her that he would not hurt her if she did what he told her to do. Smith was fixated on something the defendant was holding in his hand under his jacket that 'looked like a gun.' The defendant ordered her to take him to the safe. By the time Smith had reached the safe, the defendant had put a bandana over the lower portion of his face. After Smith opened the safe, the defendant told her to get into the walk-in refrigerator. Smith waited a few minutes in the refrigerator until

she thought the defendant had left the restaurant. She then ran to a nearby gasoline station for help." Id., 653.

In *Bell*, this court rejected the claim of evidentiary insufficiency, reasoning as follows: "At trial, the state presented evidence demonstrating that the defendant acted in such a way as to imply that he was carrying a firearm. Smith . . . testified that when the defendant approached her inside the restaurant, he told her that she 'wouldn't get hurt' if she did what he told her to do. Smith testified further that the defendant was holding something under his jacket and was pointing it in her direction. She testified that the object 'looked like a gun.' Considering the defendant's statement implying that Smith could get hurt, along with the way the defendant held the object under his jacket, in the light most favorable to sustaining the verdict, the jury reasonably could have inferred that the defendant had wanted Smith to think that he had a firearm." Id., 670–71.

For the reasons previously discussed in this opinion, the evidence in the present case is distinguishable from the evidence in *Bell*. Absent in the present case was evidence that the defendant acted in such a way so as to imply that he was carrying a firearm, as opposed to any other type of object or weapon. Notably, unlike in *Bell*, in the present case, there was no evidence that the defendant pointed an object while making either an explicit or an implicit threat to physically harm another person. The defendant in the present case twice stated that he did not want "any problems," which, under the circumstances could be interpreted as a threat to physically harm Williams, but not necessarily with a handgun. Moreover, unlike the conduct at issue in *Bell*, when examined in light of the unique factual circumstances of the present case, the position of the defendant's right hand and the movement described by Williams were not necessarily consistent with the threatened use of a handgun. Furthermore, Williams did not testify

that she had observed an object in the defendant's possession that a reasonable person would infer to be a handgun as opposed to another type of weapon capable of causing physical harm. Thus, the analysis and outcome of *Bell* is consistent with our resolution of the present claim.

Finally, we turn to *State* v. *Aleksiewicz*, supra, 20 Conn. App. 643, a decision on which the defendant relies but which the state argues is too factually distinct from the present case to be instructive. In *Aleksiewicz*, a defendant was convicted of robbery in the first degree in violation of § 53a-134 (a) (4). Id., 645. On appeal to this court, the defendant claimed that the evidence was insufficient to support a conviction because, during the commission of the crime, he had not threatened the use of what he represented by his words or conduct to be a firearm. Id.

The court set forth the facts that the jury reasonably could have found, as follows: "On July 16, 1986, at approximately 9 p.m., Thomas Norton and his brother Donald Norton drove to the Connecticut National Bank on Main Street in New Britain. Thomas withdrew $400 from the bank's automatic teller machine. The defendant approached the window on the driver's side of the car and said, 'Give me that money or you're dead.' The defendant then grabbed some of the cash from Thomas' hands, and Thomas, frightened, handed the remaining cash in his lap to the defendant. The defendant then ran toward the front of the bank building. Donald initially pursued him on foot, but when the defendant jumped into a car and fled, the brothers pursued him in their car for twenty to thirty minutes, until they lost him in traffic.

"In reporting the details of the robbery at the police station shortly thereafter, Thomas stated that the defendant was holding his hand inside a 't-shirt' when he

demanded the money. At trial, Thomas testified that the defendant had held his hand flat against his abdomen in a 'coat like or jacket.' " Id., 645–46.

In *Aleksiewicz*, the defendant argued on appeal "that the state failed to prove that the defendant, during the commission of the crime, threatened the use of what he represented to be a firearm to the exclusion of any other type of weapon or no weapon at all." Id., 648. In accepting that claim, this court reasoned that "[t]he only evidence in the present case that the defendant threatened the use of what he represented by word or conduct to be a firearm was the testimony of one of the victims that the assailant held one hand flat against his body, inside his shirt, vest or jacket, and that he said, 'Give me that money or you're dead.' This testimony does not definitely establish the firearm element of this crime because no gun was shown and no specific indication was given, by either the defendant's words or actions, that he had in his possession or would use specifically a gun to accomplish his threat. The question is whether the jury could have found, logically and beyond a reasonable doubt, from the facts presented and inferences drawn from those facts, that the defendant represented by his conduct and words that he had or would use a gun." (Emphasis omitted.) Id., 647.

In *Aleksiewicz*, this court noted that the trial court had precluded Thomas Norton from testifying as to a belief that the defendant had a firearm during the robbery. Id., 649. The court based its evidentiary ruling on a lack of foundation in the evidence for such an opinion. Id., 650. This court then stated: "The [trial] court's assessment of the evidence was that even the victim could not have concluded reasonably that the assailant had a gun in his possession. It is difficult to see how the jury, on the same evidence, could have concluded beyond a reasonable doubt that the assailant either displayed or threatened the use of a gun. We conclude,

on the basis of our review of the evidence, in the light most favorable to upholding the conviction, that insufficient evidence was presented on a necessary element of the crime of robbery in the first degree." (Emphasis omitted.) Id.

The state argues that the defendant's reliance on *Aleksiewicz* is misplaced, for, in the present case, Williams testified that she believed that the defendant was in possession of a handgun during the attempted robbery. The state also argues that, in the present case, there was evidence to support that belief, in that Williams testified that the defendant was moving his right hand near his waistband, which is "a common place to conceal a gun," and that he was in possession of an object with a black handle. These factual differences are not significant in light of our conclusion, set forth previously in this opinion, that the defendant's words or conduct did not logically support Williams' belief that the defendant had a handgun as opposed to another object capable of causing physical harm. The rationale in *Aleksiewicz* applies with equal force to the present case. As in *Aleksiewicz*, the state did not present evidence to support a finding beyond a reasonable doubt that the defendant gave the impression, by his words or conduct, that he had in his possession or would use a specific weapon, namely, a *handgun*, during his commission of the offense.

Having concluded that the defendant is entitled to a judgment of acquittal with respect to the charge of attempted robbery in the first degree, we observe that, at trial, the state did not request that the court instruct the jury with respect to lesser included offenses, and such an instruction was not delivered to the jury. The defendant argues that, under the rationale in *State* v. *LaFleur*, 307 Conn. 115, 151–54, 51 A.3d 1048 (2012), it would be unfair to him to remand the case to the trial court with instruction to modify his conviction and

impose a conviction for attempted robbery in the third degree. The state has made it clear to this court that it does not advocate for such a course of action on remand if this court overturns the conviction for attempted robbery in the first degree. We agree that, under these circumstances, a remand to modify the judgment to reflect a conviction for a lesser included offense would not be appropriate.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion the other judges concurred.

VERNAL MITCHELL, JR. *v.* IANINA BOGONOS
(AC 44980)

Elgo, Moll and Suarez, Js.

Syllabus

The defendant, an immigrant from Ukraine, appealed to this court from the judgment of the trial court dissolving her marriage to the plaintiff and entering certain financial orders. Prior to trial, the plaintiff failed to timely provide the defendant with a financial affidavit pursuant to the automatic orders and court-ordered tax documents, and the defendant filed a motion for contempt and requested attorney's fees. The court did not directly address the defendant's motion for contempt in its memorandum of decision on its judgment dissolving the marriage but did not award attorney's fees to either party. *Held*:

1. The defendant could not prevail on her claim that the trial court abused its discretion in refusing to address her motion for contempt; although the court did not issue a ruling directly addressing the motion, it heard evidence as to the plaintiff's alleged violation of court orders and indicated that it would consider the merits of the motion and issue any appropriate orders in rendering its final decision, and this court construed the trial court's memorandum of decision as an adjudication on the merits of the defendant's motion.
2. The defendant could not prevail on her claim that the trial court erred in not finding the plaintiff in contempt and awarding her attorney's fees: this court declined to make factual findings as to whether the plaintiff was subject to clear and unambiguous directives from the trial court

and wilfully failed to comply with such directives, as fact bound issues are entrusted to the sound discretion of the trial court; moreover, it was not the role of this court to exercise discretion to determine what attorney's fees, if any, were just if contempt had been established but only to review the trial court's exercise of its discretion on that issue.

3. The trial court did not abuse its discretion in awarding the plaintiff his comic book collection without hearing evidence from an appraiser as to its value; the court found that the defendant introduced no evidence as to any contribution she made to the acquisition, preservation or appreciation in value of any of the plaintiff's assets, including the collection, which the plaintiff started as a child, and the decision to award the plaintiff the collection was not related to an assessment of its value.

4. Contrary to the defendant's claim, the trial court did not err in failing to impute an income of $150,000 to the plaintiff; the evidence showed that the plaintiff's reported annual income during the years of the marriage was between $30,000 and $56,000, and the court was not required to make a finding of the plaintiff's earning capacity but was entitled to rely on the plaintiff's actual income.

5. The defendant could not prevail on her claim that the trial court abused its discretion and exceeded its statutory authority in finding she had committed fraud in submitting an application for asylum on the basis of domestic abuse, as this court could not review a ruling that the trial court did not make.

Submitted on briefs September 21, 2022—officially released March 7, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendant filed a cross complaint; thereafter, the defendant filed a prejudgment motion for contempt and for attorney's fees; subsequently, the matter was tried to the court, *Truglia*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

Luis A. Medina filed a brief for the appellant (defendant).

Opinion

SUAREZ, J. The defendant, Ianina Bogonos, appeals from the judgment of the trial court dissolving her marriage to the plaintiff, Vernal Mitchell, Jr. The defendant claims that the court (1) improperly refused to decide her motion for contempt and other pretrial motions, (2) erred in not finding the plaintiff in contempt and not awarding her attorney's fees,[1] (3) improperly permitted the plaintiff to decide that his comic book collection was not subject to distribution, (4) failed to impute income of $150,000 to the plaintiff, and (5) abused its discretion and exceeded its statutory authority in finding that the defendant committed fraud.[2] We affirm the judgment of the trial court.

The following facts, which were either found by the court or are otherwise undisputed, and procedural history are relevant to the resolution of this appeal. The parties were married on March 12, 2015, in Danbury. On August 3, 2020, the plaintiff, through counsel, filed a complaint,[3] together with a notice of automatic court orders,[4] seeking a dissolution of marriage and an equita-

[1] We note that, in her brief, the defendant raised first her claim that the court erred in not finding the plaintiff in contempt and in denying her attorney's fees. In part II of this opinion, we elect to address this claim second and present it in this order accordingly.

[2] The plaintiff failed to file a brief in this court, and we have considered the appeal on the basis of the defendant's brief and the record. The defendant waived her right to oral argument on appeal.

[3] On July 28, 2020, the defendant executed a waiver of service pursuant to General Statutes § 46b-45 (b).

[4] Practice Book § 25-5 governs automatic orders in dissolution actions and requires that service of automatic orders "be made with service of process of a complaint for dissolution of marriage . . . ." The automatic orders provide in relevant part that "[t]he parties shall each complete and exchange sworn financial statements substantially in accordance with a form prescribed by the chief court administrator within thirty days of the return day. . . ." Practice Book § 25-5 (c) (1). Practice Book § 25-5 further provides: "Failure to obey these orders may be punishable by contempt of court."

ble distribution of assets. On August 31, 2020, the defendant filed a motion for alimony pendente lite in which she requested alimony and the return of an automobile.

On December 1, 2020, the court, *D'Andrea*, *J.*, held a remote hearing on the defendant's pendente lite motion. At the time of the hearing, the plaintiff appeared in a self-represented capacity and had not filed a financial affidavit. The plaintiff informed the court that he was looking for an attorney and that he was not prepared to proceed on the motion. The court informed the plaintiff that he was in violation of the automatic orders due to his failure to provide the defendant with a financial affidavit. The court continued the matter to December 15, 2020, to permit the plaintiff either to hire an attorney or to proceed as a self-represented party. On December 1, 2020, the court ordered the plaintiff to provide the defendant with his tax returns for the previous five years on or before December 3, 2020, and a sworn written statement of his income, expenses, assets, and liabilities on or before December 8, 2020. On December 11, 2020, the defendant filed a motion seeking to find the plaintiff in contempt for failure to comply with the automatic orders and for failure to comply with the December 1, 2020 court orders.

On December 15, 2020, the plaintiff appeared with counsel for the continued pendente lite hearing. At the hearing, the plaintiff's counsel represented to the court that she had recently been retained by the plaintiff and that she was not prepared to proceed on the defendant's motion as there was outstanding discovery. Counsel also informed the court that the plaintiff had not filed tax returns for the past five years but was able to produce two years of unfiled tax return drafts. At the December 15, 2020 hearing, the parties agreed, and the court ordered, that the plaintiff was to "provide" the defendant with one automobile and to pay the defen-

dant pendente lite alimony in the amount of $290 monthly. The matter was continued to January 15, 2021.

On January 15, 2021, both parties appeared with counsel, and the court held a hearing at which the parties presented evidence on the defendant's motion for contempt. At the conclusion of evidence, the court reserved decision "until the next time we come here with the understanding . . . counsel can work together and resolve some of these issues. This is not the most complicated dissolution. It should be able to be resolved on [an] amicable basis, and a little more cooperation would probably go a long way toward getting this resolved."

On July 13, 2021, the court, *Truglia*, *J.*, commenced a hearing on the underlying dissolution action, which continued for three nonconsecutive days. On August 23, 2021, the last day of evidence, the defendant filed a motion in limine seeking a ruling from the court to have the plaintiff's comic book collection, which had not been previously disclosed to the defendant, appraised. The motion in limine further sought an order from the court to take into account an increase in the net worth of the plaintiff in accordance with the value of the comic book collection and to grant the defendant a share of its value. The court reserved decision on the motion in limine. In addition, on August 23, 2021, as a preliminary matter, the defendant informed the court that her motion for contempt was still pending. At the hearing on August 23, 2021, the court allowed the defendant an opportunity to introduce evidence if she believed that the plaintiff was wilfully violating an outstanding court order and indicated that it would "issue appropriate orders in [its] final decision." The defendant then proceeded to put on evidence in support of her position that the plaintiff should be held in contempt.

On September 7, 2021, the court issued a memorandum of decision[5] in which it found that the parties married on March 12, 2015, and that their marriage had broken down irretrievably. The court further found that the plaintiff was fifty years old and was in good health, was self-employed as an information technology consultant and, in 2019, had an annual income of $30,000.[6] The court found that the defendant was born in Ukraine, first came to the United States in 2008 on a two year work visa, and worked as a babysitter. At the time of dissolution, the defendant was thirty-six years old and was in good health, had a bachelor's degree in hospitality, travel, and restaurant management, and was working as a housekeeper and a hostess at a restaurant, earning $17,400 in 2019. The court stated that "the defendant's claims . . . [were] based on three theories of recovery." First, that the plaintiff promised to assist her in obtaining legal residency in the United States or citizenship and that he failed to do so. Second, that he was abusive to her throughout their relationship, and third, that he earned more than $150,000 annually. The court did not find that the plaintiff "reneged on a 'promise' to assist her with her immigration application" but found "the plaintiff's explanation for the delay in filing the [application] credible." The court did not find the defendant's claims of abuse credible. Finally, the court found that the defendant did not present any compelling evidence from which it could conclude that the plaintiff had consistently earned more than $150,000 in each year of the marriage. The court ultimately found that the defendant was more responsible for the breakdown of the marriage.

[5] On February 7, 2022, the court issued a corrected memorandum of decision to address scrivener's errors.

[6] The court found that the plaintiff reported annual earnings of approximately $56,000 in 2015, $36,000 in 2016, $55,000 in 2017, and $56,000 in 2018.

After carefully considering every factor listed under General Statutes §§ 46b-81[7] and 46b-82,[8] the court ordered the marriage dissolved and issued its financial orders. The court ordered the plaintiff to pay alimony to the defendant in the amount of $500 monthly until March 1, 2023, either party's death, or the defendant's remarriage or cohabitation; ordered that each party retain his or her own personal property; awarded the plaintiff his comic book collection free and clear from any claim by the defendant; and ordered that each party was responsible for the debts listed in the respective financial affidavits. The court did not award attorney's fees to either party. In its decision, the court did not explicitly address the defendant's motion for contempt. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

First, the defendant claims that the court improperly refused to decide her motion for contempt and other pretrial motions.[9] We are not persuaded.

[7] General Statutes § 46b-81 governs the assignment of property in a dissolution action. It provides in relevant part: "[T]he court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." General Statutes § 46b-81 (c).

[8] General Statutes § 46b-82 governs the award of alimony in a dissolution action and provides in relevant part: "(a) . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . ."

[9] The defendant does not indicate in her brief to this court which other pretrial motions are the subject of this claim. Accordingly, we confine our analysis to the motion for contempt.

As stated previously in this opinion, on December 11, 2020, the defendant, pursuant to General Statutes § 46b-87, filed a motion asking the court to find the plaintiff in contempt for his failure to comply with certain aspects of the court's automatic orders (requiring the exchange of financial affidavits and requiring that neither party conceal any property) and for his failure to comply with the court's December 1, 2020 orders and to award attorney's fees to her. At a hearing on January 15, 2021, and at the August 23, 2021 hearing on the underlying dissolution action, the court permitted the defendant to present relevant evidence in support of her motion. At the January 15, 2021 hearing, the court stated that it would defer ruling on the motion. At the August 23, 2021 hearing, the court stated that, with respect to the contempt motion, it would issue any orders that it deemed to be appropriate in its final decision. In its final decision, the court neither expressly referred to the motion nor awarded the defendant attorney's fees.

The defendant argues that the court abused its discretion by *refusing* to address her motion for contempt. In support thereof, the defendant cites to our Supreme Court's decision in *Ramin* v. *Ramin*, 281 Conn. 324, 915 A.2d 790 (2007). In *Ramin*, the trial court *explicitly* refused to address a pendente lite motion for contempt. Id., 330. Our Supreme Court stated, "[i]n summary, the court's comments reveal the following reasons for not ruling on the plaintiff's motion: (1) because the motion was lengthy and detailed, it would consume too much of the court's time to consider it, particularly in light of the court's backlogged docket; (2) the discovery stage of the case already had been pending too long, three years, and, therefore, the case should go to trial without further delay; (3) the plaintiff had enough information to go forward and should take her 'best shot,' because 'there's no such thing as a [100] percent job';

and (4) the imposition of further sanctions on the defendant would not 'help,' that is, they probably would not result in the defendant's cooperation." Id., 341. Our Supreme Court concluded that "[n]one of these reasons proffered by the court in support of its refusal to consider the plaintiff's motion presents an extreme and compelling circumstance that would have justified the court's refusal to consider the plaintiff's motion, which was properly before it." Id. It further reasoned that, "in the absence of an extreme, compelling situation, a trial court that has jurisdiction over an action lacks authority to refuse to consider a litigant's motions." (Internal quotation marks omitted.) Id., 336.

Ramin is distinguishable from the present case. In the present case, the court did not explicitly refuse to consider the motion for contempt. To the contrary, the court stated that it was willing to hear evidence on the motion for contempt, and, in fact, the defendant introduced evidence as to the plaintiff's alleged violation of court orders. The court also indicated that it would consider the merits of the motion and issue any appropriate orders in rendering its final decision. "Until the contrary is shown, the law presumes that judges have acted in accordance with the law. We do not presume error." *A. Secondino & Son, Inc.* v. *LoRicco*, 19 Conn. App. 8, 14, 561 A.2d 142 (1989). Simply put, our review of the record reveals no instance in which the court refused or otherwise expressly declined to address the merits of the defendant's motion for contempt.

In light of the court's statements concerning the plaintiff's motion for contempt, and the fact that there is nothing in the record to suggest otherwise, we construe the trial court's memorandum of decision as implicitly denying the defendant's motion for contempt. The trial court, reminded on various occasions of the pendency of the motion for contempt, denied the defendant's

request for attorney's fees, which was the only relief sought in her motion for contempt. Accordingly, we construe the trial court's decision as an adjudication on the merits of the defendant's motion for contempt.

II

Next, the defendant claims that the court erred in not finding the plaintiff in contempt and awarding her attorney's fees. We are not persuaded.

The defendant's motion for contempt, brought pursuant to § 46b-87, was discussed generally in part I of this opinion. Before this court, the defendant, relying on the evidence that she presented in connection with her motion for contempt, argues that she proved that the plaintiff was in contempt of court and, therefore, that she was entitled to an award of damages and attorney's fees. The defendant argues that such a finding and award were warranted "in light of the plaintiff's year-long contemptuous behavior."

We begin by setting forth the following relevant legal principles. "Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . [C]ivil contempt is committed when a person violates an order of court which requires that person in specific and definite language to do or refrain from doing an act or series of acts. . . . In part because the contempt remedy is particularly harsh . . . such punishment should not rest upon implication or conjecture, [and] the language [of the court order] declaring . . . rights should be clear, or imposing burdens [should be] specific and unequivocal, so that the parties may not be misled thereby. . . . To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both

a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . The question of whether the underlying order is clear and unambiguous is a legal inquiry subject to de novo review. . . . If we answer that question affirmatively, we then review the trial court's determination that the violation was wilful under the abuse of discretion standard." (Internal quotation marks omitted.) *Scott* v. *Scott*, 215 Conn. App. 24, 38–39, 282 A.3d 470 (2022).

"Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court. . . . Without a finding of wilfulness, a trial court cannot find contempt and, it follows, cannot impose contempt penalties." (Citation omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 98–99, 161 A.3d 1236 (2017). Moreover, "[t]he award of attorney's fees in contempt proceedings is within the discretion of the court. . . . An abuse of discretion in granting the counsel fees will be found only if this court determines that the trial court could not reasonably have concluded as it did. . . . Importantly, where contempt is established, the concomitant award of attorney's fees properly is awarded pursuant to § 46b-87 and is restricted to efforts related to the contempt action." (Citation omitted; internal quotation marks omitted.) *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 184, 138 A.3d 1069 (2016).

In the present claim, the defendant essentially invites this court to conclude, as a matter of law and on the basis of the evidence presented during the trial proceedings, that she proved by clear and convincing evidence both that the plaintiff was subject to clear and unambiguous directives from the court and that he wilfully failed to comply with those directives. As the foregoing precedent makes clear, however, these are inherently fact bound issues that are entrusted to the sound discretion

of the trial court. This court's function is to review the trial court's findings with respect to whether contempt has been proven, not to make such findings in the first instance. Similarly, it is not the role of this court to exercise discretion to determine what attorney's fees, if any, are just if contumacious conduct has been proven, but to review the trial court's exercise of discretion in this regard.[10] Accordingly, on the basis of the record before us, we are not persuaded that the defendant has proven error.

III

Next, the defendant claims that the court improperly permitted the plaintiff to "decide for himself that his comic book collection was not subject to distribution." On the basis of the substance of the argument presented in the defendant's brief to this court, we interpret her claim to be that the court erred in awarding the plaintiff the comic book collection without having heard evidence from an appraiser with respect to its value. We are not persuaded.

As stated previously in this opinion, on August 23, 2021, the defendant filed a motion in limine in which she sought an opportunity to obtain an appraisal of the plaintiff's comic book collection. The court did not rule on the motion. The defendant argues that the court's indecision "directly affected its financial orders and prejudiced the outcome for the defendant." She argues that, even if the court was to determine that the comic book collection was not subject to equitable distribution, it nevertheless should have considered its appraised value in deciding the defendant's alimony award. She asserts that, because the court failed to rule on the August 23, 2021 motion, she did not have the

[10] We note that the record does not reflect that, before the trial court, the defendant presented evidence of attorney's fees incurred by her generally or attorney's fees restricted to her efforts related to the contempt motion.

information she needed regarding the plaintiff's income and assets to prepare and present her case, and, therefore, the court lacked the information it needed to "enter orders that were not based on speculation and conjecture."[11] (Internal quotation marks omitted.)

The following legal principles guide our analysis of this claim. Section 46b-81, which governs the distribution of the assets in a dissolution action, "authorizes the court to assign to either spouse all or any part of the estate of the other spouse" and "provides for the court's consideration of the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." (Internal quotation marks omitted.) *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 834–35, 263 A.3d 972, cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

"[A] fundamental principle in dissolution actions is that a trial court may exercise broad discretion in . . . dividing property as long as it considers all relevant statutory criteria. . . . While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others,

[11] The defendant does not separately brief her argument that the court should have considered the comic book collection in determining the financial positions of the parties and its award of alimony. To the extent this argument could be recognized as a separate claim, we conclude that it is inadequately briefed and do not address it further. See *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) ("[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)).

and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . . In dividing up property, the court must take many factors into account. . . . A trial court, however, need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor." (Internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

"[W]e do not review the evidence to determine whether a conclusion different from the one reached could have been reached. . . . Thus, [a] mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Langley* v. *Langley*, 137 Conn. App. 588, 591, 49 A.3d 272 (2012).

Bearing these principles in mind, we review the court's decision to award the plaintiff the comic book collection without granting the defendant's motion to have it appraised. At trial, the court stated that having the comic book collection appraised was "probably not . . . necessary," but it would hear evidence regarding its value. The court noted in its memorandum of decision that the only real asset of any value that either party had was the comic book collection that the plaintiff started as a child, and it further concluded that the defendant did not make any contributions to the collection. The court noted that there was evidence that the comic book collection may be worth $150,000. The court also stated that "[t]he record is clear that the defendant brought no significant assets into the marriage." The court also found that the "defendant introduced no evidence as to any contribution she may have made to the acquisition, preservation or appreciation

in value of any of the plaintiff's assets." Applying the factors set forth in § 46b-81, the court concluded that the parties' marriage was of a short duration and the defendant did not contribute to the acquisition, preservation, or appreciation in value of any of the plaintiff's assets. The court's decision to permit the plaintiff to retain the comic book collection was not related to the court's assessment of its value and, thus, the defendant is unable to establish that the absence of an appraisal somehow affected the court's ultimate disposition concerning the parties' assets. Considering the totality of the court's findings and orders, we cannot conclude that the court abused its discretion in awarding the plaintiff his comic book collection without hearing evidence from an appraiser as to its value.

IV

The defendant next claims that the court erred in failing to impute an income of $150,000 to the plaintiff. Specifically, the defendant argues that, on the basis of the evidence before it, it was clearly erroneous for the court not to impute an income of $150,000 to the plaintiff. We are not persuaded.

We begin by setting forth the relevant legal principles that govern the resolution of this claim. It is well settled that "[a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or

could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 467–68, 929 A.2d 351 (2007).

"[O]ur case law is clear that a party's earning capacity is the amount that he or she realistically can be expected to earn. . . . It is not the amount the party previously has earned or currently may be earning." (Citation omitted; emphasis omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 592, 187 A.3d 1184 (2018). "In marital dissolution proceedings, *under appropriate circumstances* the trial court *may* base financial awards on the earning capacity rather than the actual earned income of the parties . . . when . . . there is specific evidence of the [party's] previous earnings. . . . It is particularly appropriate to base a financial award on earning capacity where there is evidence that the [party] has voluntarily quit or avoided obtaining employment in [the party's] field." (Emphasis in original; internal quotation marks omitted.) *Brown* v. *Brown*, 148 Conn. App. 13, 21–22, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014). "Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health." (Internal quotation marks omitted.) *Elia* v. *Elia*, 99 Conn. App. 829, 833, 916 A.2d 845 (2007).

With respect to this claim, the court found that "the defendant presented no compelling evidence from

which [the] court could conclude that the plaintiff ha[d] consistently earned more than $150,000 in each year of the marriage." The court noted that, although the plaintiff "filed a loan application which listed his income as $150,000 . . . this is an insufficient ground for the court to find an earning capacity higher than his reported annual earnings, none of which have exceeded $60,000 since the date of the marriage. A careful review of the plaintiff's business checking account records submitted into evidence by the defendant shows no unusual activity that would support the defendant's claims of consistent annual income in excess of $150,000." The court concluded, based on the evidence before it, that the plaintiff's reported annual earning as a self-employed information technology consultant was "approximately $56,000 in 2015, $36,000 in 2016, $55,000 in 2017, $56,000 in 2018, and $30,000 in 2019." The court did not, nor was it required to, make a finding of the plaintiff's earning capacity. As it was entitled to do, the court relied on the plaintiff's actual income. See *Leonova* v. *Leonov*, 201 Conn. App. 285, 322–26, 242 A.3d 713 (2020) (court was entitled to rely on plaintiff's actual income instead of plaintiff's earning capacity when determining alimony and child support), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021).

After a careful review of the record, we conclude that the court's finding with respect to the plaintiff's income is consistent with the evidence before it, and we are not left with a definite and firm conviction that a mistake has occurred. Accordingly, we conclude that the court's findings in this regard are not clearly erroneous.

V

Finally, the defendant claims that the court abused its discretion and exceeded its statutory authority when it found that she committed fraud when she submitted

an application seeking asylum on the basis of domestic abuse. Specifically, she argues that the application she filed regarding her immigration status was not in evidence before the court, and, therefore, the court could not have properly found that it was fraudulently submitted. The defendant's claim depends on the court having made the factual finding at issue. Thus, we carefully examine the court's decision to determine, first, if the challenged finding is set forth therein. For the reasons that follow, we do not interpret the court's decision to include such a finding.

In the present case, the defendant filed an amended cross complaint in which she alleged intolerable cruelty as a ground for dissolution. With respect to this allegation, the court found "a complete failure of proof as to the . . . claim of intolerable cruelty." The court, citing *Bosworth* v. *Bosworth*, 131 Conn. 389, 40 A.2d 186 (1944), noted that "[i]ntolerable cruelty has a subjective as well as an objective significance. There must not only be proof of acts of cruelty on the part of the offending party but proof that in their cumulative effect upon the other party they are intolerable." (Internal quotation marks omitted.) Id., 390–91. The court then found that, "[e]ven allowing for the possibility of a subjective interpretation, the court finds no acts of extreme or intolerable cruelty visited upon the defendant in this case."

Moreover, the court noted that the defendant had recently submitted a petition with the Department of Homeland Security seeking immigrant status on the basis of her allegations of abuse. The court further noted that neither party had submitted as evidence a copy of the defendant's petition seeking asylum or a change in her immigration status based on her claims of abuse. In a footnote of its decision, the court noted that it suspected that the defendant had filed a petition

pursuant to 8 U.S.C. § 1154 (2018).[12] The court further noted that, "[*i*]*f so*, the defendant filed a materially false statement intending that the [United States] government would rely on it." (Emphasis added.) The court found the defendant's allegations of abuse not credible. We do not interpret the court's comments, which refer to the mere possibility that the defendant had filed an immigration petition, to be a finding that fraud was committed. Rather, we interpret the court's comments as an assessment of the defendant's credibility in general and, specifically, as it relates to her allegations of abuse and intolerable cruelty. See *State* v. *Montana*, 179 Conn. App. 261, 265–66, 178 A.3d 1119 ("[c]redibility determinations are the exclusive province of the . . . fact finder" (internal quotation marks omitted)), cert. denied, 328 Conn. 911, 178 A.3d 1042 (2018). The claim fails because we are unable to review a ruling that was not made. See *Lane* v. *Cashman*, 179 Conn. App. 394, 416, 180 A.3d 13 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.

WELLS FARGO BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* ELITA DOREUS
(AC 45502)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The plaintiff previously had commenced a

[12] In relevant part, 8 U.S.C. § 1154 (a) (1) (A) (iii) (I) provides that "[a]n alien . . . may file a petition with the Attorney General under this clause for classification of the alien . . . if the alien demonstrates to the Attorney General that—(aa) the marriage or the intent to marry the United States citizen was entered into in good faith by the alien; and (bb) during the marriage or relationship intended by the alien to be legally a marriage, the alien or a child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse."

foreclosure action against the defendant with respect to the same property. Although the trial court rendered judgment of strict foreclosure in that prior action, that judgment was opened and vacated, and the action subsequently was dismissed for failure to prosecute pursuant to the applicable rule of practice (§ 14-3 (a)). The trial court in the present action denied the defendant's motion to dismiss, in which she claimed that the plaintiff's action was barred by the doctrines of res judicata and collateral estoppel as a result of the dismissal of the prior action. The court thereafter granted the plaintiff's motion for summary judgment as to liability and, subsequently, rendered judgment of strict foreclosure, from which the defendant appealed to this court. *Held* that the defendant could not prevail on her claim that the trial court improperly rendered judgment of strict foreclosure because the doctrines of res judicata and collateral estoppel barred the plaintiff's action: the doctrine of res judicata was inapplicable because the dismissal of the prior action pursuant to Practice Book § 14-3 (a) was not a judgment on the merits, and the doctrine of collateral estoppel was inapplicable because no issues were ultimately determined in the prior action, the judgment in that action having been opened and vacated and the case dismissed for failure to prosecute.

Argued February 2—officially released March 7, 2023

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, denied the defendant's motion to dismiss; thereafter, the court, *Bruno, J.*, granted the plaintiff's motion for summary judgment as to liability and rendered judgment of strict foreclosure; subsequently, the court, *Spader, J.*, denied the defendant's motion to dismiss and granted the plaintiff's motion to open the judgment; thereafter, the court, *Spader, J.*, rendered judgment of strict foreclosure, from which the defendant appealed to this court. *Affirmed.*

Elita Doreus, self-represented, the appellant (defendant).

Geraldine A. Cheverko, for the appellee (plaintiff).

Opinion

ALVORD, J. The self-represented defendant, Elita Doreus, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Wells Fargo Bank, National Association, as Trustee for the Holders of the First Franklin Mortgage Loan Trust 2006-FF17 Mortgage Pass-Through Certificates, Series 2006-FF17. On appeal, the defendant claims that the court improperly rendered a judgment of strict foreclosure because the action is barred by the doctrines of res judicata and collateral estoppel.[1] We affirm the judgment of the trial court.

The following facts and procedural history are necessary for our resolution of this appeal. The defendant is the owner of real property in Stratford. In March, 2014, the plaintiff commenced a prior foreclosure action against the defendant with respect to the property (prior foreclosure action). See *Wells Fargo Bank, National Assn.* v. *Doreus*, Superior Court, judicial district of Fairfield, Docket No. CV-14-6041980-S. The defendant was

[1] The defendant asserts other claims in her statement of issues but does not brief them adequately. Thus, we decline to address them. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . .

"In addition, briefing is inadequate when it is not only short, but confusing, repetitive, and disorganized. . . . We are mindful that [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022).

defaulted for failure to plead and failure to disclose a defense. A judgment of strict foreclosure was rendered in June, 2015, and the court set a law day for December 1, 2015. The plaintiff filed a motion to open the judgment on the basis that "the parties [we]re negotiating a loan modification as a potential alternative resolution to [the] foreclosure action," and the court granted the motion. In May, 2016, the plaintiff filed a "request for exemption from docket management program . . . dismissal" under Practice Book § 14-3.[2] The court granted the request for "a period of one month to and including June 20, 2016." When that date passed, on June 21, 2016, the court dismissed the action. The plaintiff filed a motion to open the judgment of dismissal, which the court denied. The plaintiff did not file an appeal.

In October, 2017, the plaintiff commenced the present foreclosure action. The defendant filed a motion to dismiss the action for lack of subject matter jurisdiction, based on the dismissal entered in the prior foreclosure action, and a memorandum of law in support of her motion. Specifically, she argued that the present action was barred by the doctrines of res judicata and collateral estoppel.[3] The plaintiff objected to the motion to

[2] Practice Book § 14-3 (a) provides: "If a party shall fail to prosecute an action with reasonable diligence, the judicial authority may, after hearing, on motion by any party to the action pursuant to Section 11-1, or on its own motion, render a judgment dismissing the action with costs. At least two weeks' notice shall be required except in cases appearing on an assignment list for final adjudication. Judgment files shall not be drawn except where an appeal is taken or where any party so requests."

[3] We note that a motion to dismiss for lack of subject matter jurisdiction is not a proper vehicle for presentation of a claim that the doctrines of res judicata and collateral estoppel operate to bar an action, as those doctrines do not provide the basis for a judgment of dismissal. See *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 223, 982 A.2d 1053 (2009) ("[T]he doctrine of collateral estoppel does not implicate a court's subject matter jurisdiction. . . . Even when applicable, therefore, collateral estoppel does not mandate dismissal of a case." (Internal quotation marks omitted.)); *Geremia* v. *Geremia*, 159 Conn. App. 751, 772 n.15, 125 A.3d 549 (2015) ("[r]es judicata does not provide the basis for a judgment of dismissal; it is a special defense

dismiss, arguing that the court's dismissal of the prior foreclosure action, pursuant to Practice Book § 14-3, did not constitute an adjudication of the merits of the case. Thus, according to the plaintiff, res judicata and collateral estoppel were not applicable. On March 26, 2018, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, denied the motion to dismiss on the ground that the dormancy dismissal of the prior foreclosure action did not constitute an adjudication on the merits that could be treated as res judicata.

The complaint was amended in September, 2018, and the defendant filed an answer in October, 2018. In November, 2018, the plaintiff filed a motion for summary judgment as to liability, and the defendant filed an objection. The court, *Bruno, J.*, granted the motion in January, 2019. On March 28, 2019, the plaintiff filed a motion for a judgment of strict foreclosure. The defendant did not file an objection. On April 15, 2019, the court rendered a judgment of strict foreclosure, finding that the property had a fair market value of $192,000 and that the debt owed as of the judgment date was $307,571.63. The court set a law day for September 17, 2019.

On September 16, 2019, the plaintiff filed an affidavit with the court in which the plaintiff's counsel averred that the defendant had filed a bankruptcy petition. No filings were made with the court until April 6, 2021, when the plaintiff filed a notice indicating that the bankruptcy action was closed and that the plaintiff intended to proceed with the foreclosure action. Also on that date, the plaintiff filed a motion to open the judgment for the purpose of setting a new law day. On November 22, 2021, the plaintiff filed a "request for exemption from dormancy docket dismissal," in which the plaintiff

that is considered after any jurisdictional thresholds are passed" (internal quotation marks omitted)).

represented that its "servicer has placed [the] file on a FEMA hold." In March, 2022, the plaintiff filed a motion to open the judgment for the purpose of setting a new law day, in which it represented that its servicer had lifted all holds with respect to the loan.

On March 8, 2022, the defendant filed a motion to dismiss, which she captioned "motion to dismiss request for exemption from dormancy docket dismissal." She also filed a memorandum of law in support of that motion, again relying on the dormancy dismissal of the prior foreclosure action. The plaintiff filed a memorandum in opposition to the defendant's motion, in which it argued, inter alia, that the court's March 26, 2018 denial of the defendant's first motion to dismiss constituted the law of the case. The defendant filed a reply memorandum. On May 2, 2022, the court, *Spader*, *J.*, denied the defendant's motion to dismiss.

On April 5, 2022, the plaintiff filed a motion to make new findings and to reenter judgment. On May 2, 2022, the court, *Spader*, *J.*, opened the judgment of strict foreclosure and reentered it as follows. The court found that the property had a fair market value of $310,000 and that the debt owed as of the judgment date was $348,908.93. The court set a law day for September 20, 2022.[4] This appeal followed.

On appeal, the defendant claims that the trial court improperly concluded that the present action is not barred by the doctrines of res judicata and collateral estoppel.[5] We disagree.

[4] On September 12, 2022, the defendant filed a motion to open the judgment, which was denied. On September 19, 2022, the defendant filed a notice of bankruptcy. On October 28, 2022, the plaintiff filed a notice of termination of the bankruptcy stay.

[5] We note that the defendant did not assert a special defense of res judicata or collateral estoppel in her answer. Res judicata and collateral estoppel are affirmative defenses that may be waived if not properly pleaded. See *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 222, 982 A.2d 1053 (2009). The plaintiff, however, did not object, either before the trial court or in its appellate brief, to consideration of the defendant's res judicata or collateral

We first set forth our standard of review and general principles of law. "The issue of whether the doctrines of res judicata and collateral estoppel apply to the facts of this case presents a question of law. Our review, therefore, is plenary. . . .

"Claim preclusion (res judicata) and issue preclusion (collateral estoppel) have been described as related ideas on a continuum. [C]laim preclusion prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [I]ssue preclusion . . . prevents a party from relitigating an issue that has been determined in a prior suit. . . . The doctrines of res judicata and collateral estoppel protect the finality of judicial determinations, conserve the time of the court, and prevent wasteful relitigation." (Citation omitted; internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 625, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014).

We first address the defendant's argument that the doctrine of res judicata precluded the court from rendering a judgment of strict foreclosure in the present action. "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. . . . The doctrine of res judicata applies if the following elements are satisfied: the identity of the parties to the actions are the same; the same claim, demand or cause of action is at issue; the judgment in the first action was rendered on

estoppel arguments on the basis that the defendant failed to plead the applicability of those doctrines as a special defense. See *Carnese* v. *Middleton*, 27 Conn. App. 530, 537, 608 A.2d 700 (1992) (plaintiff may waive any objection to defendant's failure to plead special defense if plaintiff fails to challenge evidence and argument offered in support of affirmative defense that should have been pleaded). The trial court expressly considered and rejected the defendant's claim that res judicata and collateral estoppel were applicable. Accordingly, we consider the defendant's claim on appeal.

the merits; and the parties had an opportunity to litigate the issues fully. . . . Judgments based on the following reasons are not rendered on the merits: want of jurisdiction; pre-maturity; *failure to prosecute*; unavailable or inappropriate relief or remedy; lack of standing." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 626.

In the present case, there is no dispute that the prior foreclosure action was dismissed pursuant to Practice Book § 14-3 for failure to prosecute. That disposition plainly is not a judgment on the merits, and the doctrine of res judicata, therefore, does not apply. See, e.g., *Wilmington Trust, National Assn.* v. *N'Guessan*, 214 Conn. App. 229, 238, 279 A.3d 310 (2022) (res judicata not applicable where prior action was dismissed for failure to prosecute).

We now turn to the defendant's argument that the doctrine of collateral estoppel precluded the court from rendering a judgment of strict foreclosure in the present action. "Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit. . . . Issue preclusion arises when an issue is actually litigated and determined by a valid and final judgment, and that determination is essential to the judgment. . . . Collateral estoppel may be invoked against a party to a prior adverse proceeding or against those in privity with that party." (Citation omitted; internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, supra, 151 Conn. App. 628–29.

The defendant has not directed this court to any issue raised in the present action that was determined by a

valid and final judgment in the prior foreclosure action. Although the court rendered a judgment of strict foreclosure in the prior action, that judgment was opened and vacated, and the action subsequently was dismissed for failure to prosecute pursuant to Practice Book § 14-3. Thus, no issues were ultimately determined in the previous action. "Collateral estoppel can be applied only to bar relitigation of facts that were formally put in issue *and ultimately determined* by a valid, final judgment. . . . To conclude otherwise would improperly infringe on a party's right to seek a judicial determination of disputed issues of fact." (Emphasis in original; internal quotation marks omitted.) *Pollansky* v. *Pollansky*, 162 Conn. App. 635, 660, 133 A.3d 167 (2016).

On the basis of our plenary review of the defendant's claim, we conclude that neither the doctrine of res judicata nor the doctrine of collateral estoppel precluded the court from rendering a judgment of strict foreclosure.

The judgment is affirmed.

In this opinion the other judges concurred.