FRANK SACRAMONE, JR., ADMINISTRATOR (ESTATE OF JOSEPH F. LATELLA, SR.) *v.* HARLOW, ADAMS & FRIEDMAN, P.C., ET AL.

(AC 45034)

Prescott, Moll and Cradle, Js.

Syllabus

The plaintiff successor administrator of an estate appealed to the Superior Court from a decree of the Probate Court approving a request for attorney's fees filed by the defendant law firm in connection with the administration of the estate, for which the defendant M had been the initial administrator. The Probate Court had first issued a decree, in which it disallowed the attorney's fees claimed by M in the final accounting, finding, inter alia, that M failed to achieve results in representing the estate that warranted the amount of fees charged and failed to present any basis on which it could assess the reasonableness of the claimed fees "as presented." The Probate Court also removed M as administrator of the estate and appointed the plaintiff as the successor administrator. No appeal was taken from that decree. Thereafter, the law firm filed with the Probate Court a motion for approval of legal fees, to which the plaintiff objected, on the ground that no final appeal was filed after the first decree and that the Probate Court had no authority to reconsider, modify, or revoke its first decree pursuant to statute (§ 45a-128 (b)). After a hearing, the Probate Court issued a subsequent decree, approving the law firm's request for attorney's fees, from which the plaintiff appealed to the Superior Court. The Superior Court rejected the law firm's claim that the first decree was not a final determination of the attorney's fees claimed in the final accounting by M, and concluded that the Probate Court lacked subject matter jurisdiction to consider the law firm's motion for approval of legal fees because it did not meet any of the conditions of § 45a-128 (b) that would allow the Probate

Court to reconsider its prior decision. The Superior Court vacated the second decree and ordered the law firm to return the fees to the estate. On the defendants' appeal to this court, *held* that the Superior Court properly vacated the Probate Court's second decree approving the law firm's request for attorney's fees as the first decree disallowing the attorney's fees was a final decree pursuant to statute (§ 45a-24), and the Probate Court did not have subject matter jurisdiction to adjudicate the request for attorney's fees; moreover, this court's review of the first decree revealed no intention, express or implied, by the Probate Court to keep the issue of attorney's fees open to afford the defendants an opportunity to present additional evidence, and, if the Probate Court had the intention to provide the defendants an additional opportunity, it should have explicitly stated that intention by denying the fees without prejudice or by reserving judgment on the issue, and the defendants' argument that the Probate Court's use of the phrase "as presented" in its first decree indicated its intention to leave open the issue of attorney's fees was untenable, because, although the Probate Court acknowledged in its first decree that reasonable fees would have been appropriate, it found that M had presented no evidence in support of that request and, therefore, the use of the phrase "as presented" emphasized the fact that the claim for legal fees, as submitted to the Probate Court, failed as a substantive matter; furthermore, although the Probate Court indicated in its second decree that its use of the phrase "as presented" in the first decree was intentional, a fair reading of the Probate Court's language explaining its use of the phrase "as presented" suggested a reconsideration by the Probate Court of its earlier decree, which it was not entitled to do in the absence of the satisfaction of any of the conditions set forth in § 45a-128 (b).

Argued October 4, 2022—officially released March 28, 2023

Procedural History

Appeal from the decree of the Probate Court for the district of Milford-Orange granting the named defendant's motion for approval of attorney's fees, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Pierson*, *J.*; judgment sustaining the appeal and vacating the decree of the Probate Court and ordering the named defendant to return the fees to the estate of Joseph F. Latella, Sr., from which the defendants appealed to this court. *Affirmed.*

Andrew W. Skolnick, for the appellants (defendants).

Frank Sacramone, Jr., with whom was Houston Putnam Lowry, for the appellee (plaintiff).

Opinion

CRADLE, J. In this probate matter, the defendants, Harlow, Adams & Friedman, P.C. (law firm), and Ronald Milone, appeal from the judgment of the Superior Court vacating a decree of the Probate Court awarding attorney's fees in the amount of $97,979.60 in connection with the administration of the estate of Joseph F. Latella, Sr. (estate), and ordering the law firm to return these fees to the estate. The defendants claim that the Superior Court, in an appeal filed by the plaintiff, Frank Sacramone, Jr., the successor administrator of the estate, erred in concluding that the Probate Court lacked subject matter jurisdiction to award those fees after disallowing them in an earlier decree. We affirm the judgment of the Superior Court.

The following facts and procedural history are relevant to our resolution of the defendants' claim on appeal. On August 19, 2005, Joseph F. Latella, Sr., died in the town of Orange, and was survived by his wife, Antoinette Latella, and three children. The sole beneficiary of the estate was the Joseph F. Latella Revocable Trust, and Antoinette Latella was the sole beneficiary of that trust. On July 20, 2006, Milone was appointed administrator of the estate. The law firm was retained to provide legal services in connection with the administration of the estate, including claims pertaining to various potential estate assets.

On November 9, 2012, Milone filed a final accounting of the estate, which reflected, inter alia, that he had paid attorney's fees to the law firm, from estate funds, in the amount of $97,979.60. Antoinette Latella filed, inter alia, a written objection to those fees, alleging that "[t]he legal fees are disproportionately high considering the size of the estate . . . [t]he legal fees are excessive

when compared to the result achieved and the value conferred upon the estate and beneficiary; [and] [t]he legal fees are excessive considering the manner and promptness in which legal services were provided in the context of the administration of the estate."[1] The Probate Court held a hearing on, inter alia,[2] Antoinette Latella's objection to the attorney's fees listed in the final accounting filed by Milone. Both of the defendants were present at that hearing, at which testimony and documentary evidence were submitted.[3] The defendants acknowledged at oral argument before this court that they could have submitted evidence of the requested fees at that time.

On March 28, 2014, the Probate Court issued a decree, wherein, inter alia, it disallowed the attorney's fees claimed by Milone in the final accounting. In its decree, the Probate Court found, inter alia, that Milone failed to achieve results in representing the estate that warranted the amount of fees charged and failed to present any basis on which it could assess the reasonableness of the claimed fees.[4] The Probate Court further found that

[1] Although the written objection filed by Antoinette Latella is not in the record before us, the substance of her objections was set forth by the Probate Court and is not in dispute.

[2] The Probate Court noted: "The matters presently before the court are: 1. [Antoinette] Latella's Objection to Acceptance of Inventory filed April 10, 2012, which objection was thereafter supplemented by Supplement to Objection to Acceptance of Inventory filed August 15, 2012; 2. [Antoinette] Latella's Application for Removal of Fiduciary and Appointment of Successor filed September 5, 2012; 3. Milone's Motion to Withdraw as Administrator . . . filed November 9, 2012; 4. Milone's Corrected or Substitute Inventory filed November 9, 2012; 5. Milone's Estate Administration Account filed November 9, 2013; and 6. [Antoinette] Latella's Objection Motion to Withdraw filed November 16, 2012."

[3] Although the transcripts of the proceedings before the Probate Court are not in the record before us, the Probate Court referenced Milone's testimony in its decree.

[4] Specifically, the Probate Court reasoned: "No itemized time sheets were presented by the fiduciary as to the attorney's fees paid in this estate. The accounting sets forth in Schedule B-1 a series of payments to the law firm based upon billings received by the fiduciary but none of those billing

Milone failed to produce attorney billing invoices or invoices were produced at hearing. The payments total in the amount of $97,979.60. . . .

"It is clear to the court that a significant amount of time has been expended by the attorneys in this matter if only by virtue of the longevity of this estate. It is also clear that just ascertaining what in fact the decedent owned or operated at his death was a daunting task. Yet Milone, an accountant in practice for over 30 years, acknowledged that he failed to utilize typical accounting standards when determining the value of the decedent's business interests. He admitted that none of the values asserted reflect liabilities but rather, they merely set forth the gross value of the underlying real estate owned by the business entities in which the decedent owned an interest. He also failed to determine or present a reasonable explanation as to why he failed to determine what the entity (Latella Enterprises Corporation) even is—a corporation or a de facto partnership.

"By his own testimony, it is difficult for the court to determine that Milone and through him, his attorneys, obtained results in this estate to support the substantial fees sought. The only assets that the fiduciary testified warranted involvement of the attorneys was the litigation against the decedent's sons on the promissory notes. The value asserted by the fiduciary in settlement of those notes totals approximately $136,000. And yet that value is speculative as it does not account for the liabilities of the business interest involved. And at a cost of legal fees of $98,000, the result hardly seems warranted.

"The court is well aware of the reputation and skills of the law firm whose fees are at issue. It is certainly not a question of such reputation or skills. But there was absolutely no effort made by the firm, either through the fiduciary or the firm itself, to present any basis upon which this court might evaluate the reasonableness of its fees. No retainer agreement was presented nor testimony made as to the terms of the fees paid in exchange for what services. No billing invoices were presented although the fiduciary testified that he paid the fees pursuant to bills. The fiduciary was unable to recall even the nature of the services rendered by the firm or support the fees at issue.

"It simply comes down to leaving the court to speculate as to the 'time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances, whether the fee is fixed or contingent' (as set forth in rule 1.5 of the Professional Rules of Conduct). And speculate this court will not and cannot do.

"By his own testimony, the fiduciary recognized his failure to properly value the assets of the estate when he set forth in his inventory and his accounting the gross value of the business interests while failing to account for the liabilities of said interests. As an accountant, he has more expertise

any evidence of the contractual or other basis for charging for the legal services rendered, and that the absence of any such evidence required the court to speculate as to the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services required. The court concluded: "The fiduciary has failed to meet his burden of proof as to the reasonableness of the attorney's fees set forth in the [final] accounting. Furthermore, with no evidence whatsoever as to the time expended, the nature of services, or the rates charged, to the court's dismay, it cannot . . . be determined what fee may be reasonable . . . . The court would find that some fees are in fact reasonable, but the dearth of evidence leaves the court no choice but to disallow the fees as presented." The court disallowed the final accounting in

in abiding by this requirement than a lay person fiduciary and must be held to a higher standard in that regard. This estate has been open and unsettled since the decedent's death in 2005 with no apparent effort on the part of the fiduciary to close the estate until such time as [Antoinette] Latella began pursuing her claims in the probate court. No explanation for the delay in settlement has ever been presented to the court. . . .

"It is clear, as previously stated, that this decedent held interests in various business entitles and in fact it is a spider web of complexities. Unweaving the corporate shields and personal interests and the overlaps between conduct and documentation may have been nearly impossible. The court recognizes that it may have been a daunting task to accurately evaluate this estate and to bring it to settlement. The bottom line, however, is that this fiduciary had an obligation to the beneficiary of this estate and to any creditors. The fiduciary was obligated to duly appraise the assets of the decedent. . . . He had an obligation to present evidence in support of the accounting before the court. He has presented no appraisals and readily acknowledged that he did not have information as to the liabilities side of the estate assets. He failed to even present oral evidence of the terms of the legal fees paid such that this court has no knowledge whether fees were a flat retainer amount, an hourly rate and at what basis, a contingency fee agreement or some other basis for charging for the services rendered. . . .

"The fiduciary has failed to meet his burden of proof as to the reasonableness of the attorney's fees set forth in the accounting. Furthermore, with no evidence whatsoever as to the time expended, the nature of services, or the rates charged, to the court's dismay, it cannot even be determined what fee may be reasonable under a quantum meruit basis. The court would find

its entirety, removed Milone as administrator of the estate, and appointed the plaintiff as successor administrator. No appeal was taken from the March 28, 2014 decree pursuant to General Statutes § 45a-186.

On May 27, 2014, the law firm filed with the Probate Court a motion for approval of legal fees, to which the plaintiff objected on several grounds, including that the Probate Court lacked the authority to act on the motion.[5] The plaintiff argued, inter alia: "In essence, [the law firm] asks this court to rehear argument, accept new evidence, and to thereafter reconsider, modify or revoke its decree of March 28, 2014. The March 28, 2014 decree disallowing attorney's fees is conclusive as no timely appeal was filed. The decree is final and not subject to collateral attack in the form of reargument." The law firm argued that the Probate Court's disallowance of the requested fees "as presented" demonstrated that the court had intended to leave the issue of attorney's fees open for final determination at a later date.

On November 17, 2014, the Probate Court issued a decree dated November 17, 2014, wherein it approved legal fees in the amount of $97,979.60.[6] In so doing, the Probate Court reasoned, inter alia: "To be clear, the express wording of the court's finding in its March 28, 2014 [decree] was intentional, to wit: 'as presented.' Given the extensive legal services rendered in this complex and litigiously involved estate, it would be unreasonably burdensome for the court to have fully disallowed any legal fees to [the law firm]." The plaintiff

that some fees are in fact reasonable, but the dearth of evidence leaves the court no choice but to disallow the fees as presented."

[5] The record reflects that, at a hearing before the Probate Court on June 10, 2014, the court ordered the parties to file memoranda addressing the issue of whether the March 28, 2014 decree was final and whether the Probate Court had the authority to entertain, take evidence on, and adjudicate the law firm's motion.

[6] The Probate Court also ordered the law firm to disgorge $15,000 to the estate "for its failure to have timely presented said fees with the final accounting . . . ."

thereafter filed an appeal to the Superior Court from the November 17, 2014 decree.

On May 12, 2021, the Superior Court, sitting as the Probate Court, conducted a trial de novo on the plaintiff's appeal, and the parties filed posttrial briefs in support of their respective positions. By way of a memorandum of decision filed on September 23, 2021, the Superior Court rejected the defendants' claim that the March 28, 2014 decree was not a final determination on the attorney's fees claimed in the final accounting filed by Milone, and concluded that the Probate Court lacked subject matter jurisdiction to consider the law firm's May 27, 2014 motion for approval of legal fees because it did not meet any of the statutory requirements that would permit the Probate Court to reconsider, modify or revoke it pursuant to General Statutes § 45a-128 (b). The court further noted that all parties had the opportunity to be heard on the attorney's fees issue at the evidentiary hearing on Milone's final accounting and Antoinette Latella's objections to the attorney's fees set forth in that accounting. Accordingly, the court vacated the November 17, 2014 decree and ordered the law firm to return the fees to the estate within thirty days. This appeal followed.[7]

[7] Following oral argument in this case, we asked the parties to brief the issue of whether Milone, as the initial administrator of the estate, has standing to maintain this appeal. It is axiomatic that to have standing, one must be aggrieved. "The fundamental test for determining [classical] aggrievement encompasses a [well settled] twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a *possibility*, as distinguished from a *certainty*, that some legally protected interest . . . has been adversely affected." (Emphasis added; internal quotation marks omitted.) *Handsome, Inc.* v. *Planning & Zoning Commission*, 317 Conn. 515, 526, 119 A.3d 541 (2015). "[A]n economic interest that is injuriously affected may afford a basis for aggrievement . . . as long as the economic deprivation is not speculative." *Goldfisher* v.

"[A] court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power. . . . The Superior Court, in turn, in passing on an appeal, acts as a court of probate with the same powers and subject to the same limitations." (Internal quotation marks omitted.) *Rider* v. *Rider*, 210 Conn. App. 278, 285–86, 270 A.3d 206 (2022). Generally, the determination of whether a court has subject matter jurisdiction is a question of law, over which our review is plenary. Id., 285.

General Statutes § 45a-24 provides in relevant part that "[a]ll orders, judgments, decrees of courts of probate, rendered after notice and from which no appeal

Connecticut Siting Council, 95 Conn. App. 193, 198, 895 A.2d 286 (2006). "Aggrievement is not restricted to persons to whom [an] . . . order is directed. A person may legitimately claim to have been adversely affected by an administrative or judicial action without having been the person to whom the order is directed." *Kelly* v. *Freedom of Information Commission*, 221 Conn. 300, 311, 603 A.2d 1131 (1992). "Thus, persons . . . who are not the subjects of an order, may nevertheless be aggrieved. The test for aggrievement is whether personal rights are affected by an order, no matter who the addressee of that order may be." Id. Thus, Milone does not lack standing simply because the trial court ordered the law firm to return the subject funds to the estate but issued no order as to Milone.

It is well settled that whenever an executor or administrator enters into a contract by which he or she purports to bind the estate, the fiduciary may incur personal liability. *Taylor v. Mygatt*, 26 Conn. 184, 189 (1857); *Hewitt* v. *Beattie*, 106 Conn. 602, 613, 138 A. 795 (1927); see also D. Johnson & J. Gilbert, Settlement of Estates in Connecticut (3d Ed. 2022) §§ 7:148 through 7:155, pp. 262–65. Accordingly, by reversing the Probate Court's order that sanctioned the payment of the law firm's fees by the estate, and ordering the law firm to reimburse the estate, the judgment on appeal effectively placed Milone in legal jeopardy. In other words, as a direct consequence of the judgment, there is a possibility, albeit not a certainty, that the law firm will seek recovery of the fees at issue from Milone and that Milone

is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud." General Statutes § 45a-186 (b) provides in relevant part: "Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court." Accordingly, "[a] Probate Court decree is conclusive . . . until or unless the decree is disaffirmed on appeal. . . . [T]he decree of a court of probate, in a matter within its jurisdiction . . . is as conclusive upon the parties, as the judgment or decree of any other court; and the [S]uperior [C]ourt as a court of equity, has no more power to correct, alter, or vary it, than it has to alter or vary the judgments of any other court in the state." (Internal quotation marks omitted.) *Ferraiolo* v. *Ferraiolo*, 157 Conn. App. 350, 356, 116 A.3d 366 (2015).

General Statutes § 45a-128 permits a Probate Court, in its discretion, to reconsider, modify or revoke an order or decree. The legislature has, however, limited the Probate Court's ability to do so to only four circumstances. Section 45a-128 (b) provides that "[t]he court may reconsider and modify or revoke any such order or decree for any of the following reasons: (1) For any reason, if all parties in interest consent to reconsideration, modification or revocation, or (2) for failure to provide legal notice to a party entitled to notice under law, or (3) to correct a scrivener's or clerical error, or (4) upon discovery or identification of parties in interest unknown to the court at the time of the order or decree."

Here, the defendants do not contend that they met any of the conditions set forth in § 45a-128 that permit the Probate Court to reconsider, modify or revoke its March decree. Rather, their sole argument on appeal is that the Probate Court's March 28, 2014 disallowance

may be held personally liable for those fees. On the basis of that possibility, we conclude that Milone has standing in this appeal.

of attorney's fees was not a final decree and the court left the issue open for the defendants to revisit it and present additional evidence in support of their request at a later date.[8] The defendants argue that, to decide this issue, "[t]his court need look no further than the plain language of the March 28, 2014 memorandum of decision" issued by the Probate Court. In support of their argument, the defendants rely on the Probate Court's language when it disallowed the attorney's fees "as presented." The defendants assert that "[t]here is no other reasonable interpretation of the court's choice of words than that the court's intent was to leave open the issue of attorney's fees subject to the presentation of additional documentation in support of the fees paid and claimed." We disagree.

Like the consideration of a court's subject matter jurisdiction, "the construction of a judgment is a question of law for the court. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 516, 218 A.3d 83 (2019).

Our review of the March 28, 2014 decree reveals no intention, express or implied, by the Probate Court to keep the issue of attorney's fees open to afford the defendants an opportunity to present additional evidence in support of their request for those fees at a

[8] The defendants do not claim that the issue of attorney's fees was not before the Probate Court when it held the evidentiary hearing that gave rise to the March 28, 2014 memorandum of decision that disallowed those fees.

later date. The court specifically disallowed the attorney's fees and if it had the intention to provide the defendants an additional opportunity to present evidence regarding those fees, it should have explicitly stated so. Indeed, the court could have stated that the requested fees set forth in the final accounting were denied without prejudice to filing a new application or seeking approval of them as part of the approval of a new final accounting. Additionally, the Probate Court could have stated that it was not deciding the question of the propriety of the fees at that time and would await an additional evidentiary submission.

The defendants would have this court read into the March 28, 2014 decree an intention by the Probate Court to leave the request for legal fees open. In light of the remainder of the sentence in which the Probate Court used the phrase that the defendants contend served to demonstrate that intention—"as presented"—that argument is untenable. As noted, after carefully considering the request for fees and the objections thereto, the Probate Court acknowledged that reasonable fees would be appropriate, but that the defendants presented "no evidence whatsoever" in support of the amount requested, and, in light of the "dearth of evidence," the Probate Court disallowed the fees "as presented." As the Superior Court aptly reasoned, the use of the phrase "as presented" did not "defeat or otherwise qualify the conclusive character of the [March 28, 2014] decree," but, rather, "emphasize[d] the fact that the claim for legal fees, as submitted to the court during the hearing, failed as a substantive matter." It simply and unambiguously disallowed the fees.

Moreover, we agree with the Superior Court that the use of that phrase may be "compared to the rejection of a claim at trial in the Superior Court or other tribunal for failure to satisfy an applicable standard of proof."

Similarly, the use of the phrase "as presented" is analogous to "based upon the evidence submitted." Neither phrase, in itself, undermines the finality of a ruling or indicates an intention to leave an issue open for further consideration at a later date. We decline to read this language as granting the defendant a "second bite of the apple" in light of the fact that it had an adequate opportunity to demonstrate that the amount of the fees was reasonable and justified.

The defendants argue that the Probate Court's November 17, 2014 decree demonstrates that it had intended to revisit the attorney's fees claim.[9] We disagree. Although the Probate Court indicated that its use of the phrase "as presented" in the earlier decree had been intentional, it then stated: "Given the extensive legal services rendered in this complex and litigiously involved estate, it would be unreasonably burdensome for the court to have fully disallowed any legal fees to [the law firm]." The fact that the Probate Court's use of the phrase "as presented" was intentional, in itself, does not demonstrate that its intention at the time of the March 28, 2014 decree was to revisit the issue at a later date. Rather, a fair reading of the Probate Court's language explaining its use of the phrase "as presented" suggests a reconsideration by the Probate Court of its earlier decree, which it was not entitled to do absent satisfaction of one of the four circumstances set forth in § 45a-128 (b). If the Probate Court had intended, when it issued its March 28, 2014 decree, to afford the defendants an opportunity to revisit their claim for attorney's fees, it should have expressly stated that intention by denying the fees without prejudice or by reserving judgment on the issue.

As noted herein, the defendants were present at the evidentiary hearing on the final accounting but failed

[9] The same judge issued both decrees of the Probate Court.

to present any evidence to support their claim for attorney's fees. It is well settled that "[w]here an . . . administrator presents an account, the burden is upon him to prove the facts involved in it, and if he fails of proof as to any issue, it must be found against him; if he fails to justify the allowance of claimed credits they must be disallowed." *Reiley* v. *Healey*, 124 Conn. 216, 222, 198 A. 570 (1938). The Probate Court abided by that principle in its March 28, 2014 decree when it disallowed the requested fees after finding that the defendants had presented "no evidence whatsoever" in support of them. It did so without expressly stating that the issue would remain open or that the defendants would have an opportunity to relitigate the issue at a later date. Accordingly, pursuant to § 45a-24, the March 28, 2014 decree disallowing the requested fees was a final decree on that issue.[10] Because "[p]robate courts are strictly statutory tribunals and, as such, they have only such powers as are expressly or implicitly conferred upon them by statute"; (internal quotation marks omitted) *Gaynor* v. *Payne*, 261 Conn. 585, 596, 804 A.2d 170 (2002); the Probate Court did not have subject matter jurisdiction to adjudicate the May 27, 2014 motion for approval of legal fees filed by the law firm. We therefore conclude that the Superior Court properly vacated the November 17, 2014 decree.

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] We note that the March 28, 2014 decree contained several orders in addition to the disallowance of the requested attorney's fees. The finality of those orders has not been challenged.

STATE OF CONNECTICUT *v.* ERIC L.*
(AC 45113)

Prescott, Moll and Cradle, Js.

Syllabus

The defendant, who had been on probation in connection with his plea of guilty to the crime of violation of a protective order, appealed to this court from the judgment of the trial court revoking his probation. During the term of his probation, in May, 2020, the defendant was arrested and charged with the crime of threatening in the second degree in violation of statute (§ 53a-62) for statements he allegedly made regarding W, who was the boyfriend of the defendant's former girlfriend. In October, 2020, while still incarcerated awaiting trial, the defendant was served with an arrest warrant, charging him with violation of probation. Following a hearing, the court determined that the state had proven by a preponderance of the evidence each of the four grounds for violation of probation that it alleged in its long form information, including, inter alia, that the defendant failed to report to his probation officer, had multiple unexcused absences from an alcoholism treatment program, and engaged in harassing behavior toward W through voicemails and a Facebook message, and the defendant appealed to this court. *Held*:

1. The trial court did not err in finding that the defendant violated his probation: although the defendant claimed that three of the four violations were only "technical in nature" and, "standing alone," were insufficient to find that he violated his probation, this court concluded that they constituted independent grounds to find that he violated his probation and declined to address the merits of his principal claims relating to the fourth ground, involving various statements that he made to a social worker that resulted in his May, 2020 arrest, and the court's finding that he violated § 53a-62 on the basis of those statements; moreover, the defendant did not claim on appeal that, as an evidentiary matter, the state had not met its burden in proving the grounds it alleged in its long form information and on which the court determined that the defendant violated his probation, as a finding that the defendant violated

* In accordance with our policy of protecting the privacy interests of victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

any one condition of his probation was sufficient to conclude that he violated his probation.

2. The defendant could not prevail on his claim that the trial court abused its discretion when it revoked his probation and imposed a sentence that included a period of incarceration, that court having thoroughly considered whether the beneficial aspects of probation would be served by merely continuing the defendant on probation, considered both the defendant's rehabilitation and the safety of the public on the basis of the whole record, and concluded that the beneficial aspects of probation were no longer being served.

3. The trial court did not abuse its discretion in failing to award the defendant presentence confinement credit for the period between his arrest for threatening and when he was served with the violation of probation arrest warrant; in light of this court's recent decision in *State* v. *Hurdle* (217 Conn. App. 453), which held that, pursuant to the express language of the statute (§ 18-98d) applicable to presentence confinement credit, the Commissioner of Correction has the sole statutory authority to determine a defendant's eligibility for presentence confinement credit and to apply such credit against a defendant's sentence, the trial court properly declined to award the defendant presentence confinement credit due under § 18-98d.

Argued October 4, 2022—officially released March 28, 2023

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, where the matter was tried to the court, *Shaban*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, was *David Shannon*, state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Eric L., appeals from the judgment of the trial court finding him in violation of,

and revoking, his probation pursuant to General Statutes § 53a-32.[1] On appeal, the defendant claims that the court (1) erred in finding that he had violated his probation, (2) abused its discretion in revoking his probation and imposing a sentence that included a period of incarceration, and (3) abused its discretion in declining to award him presentence confinement credit. We disagree, and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. In 2018, the state charged the defendant with violation of a protective order in violation of General Statutes § 53a-223, based on text messages that he had sent to Rachael C., his former girlfriend and the mother of his child.[2] On January 17,

[1] General Statutes § 53a-32 provides in relevant part: "(a) At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . .

"(c) Upon . . . an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charges. At such hearing the defendant shall be informed of the manner in which such defendant is alleged to have violated the conditions of such defendant's probation . . . shall be advised by the court that such defendant has the right to retain counsel and, if indigent, shall be entitled to the services of the public defender, and shall have the right to cross-examine witnesses and to present evidence in such defendant's own behalf. . . .

"(d) If such violation is established, the court may . . . (4) revoke the sentence of probation . . . . If such sentence is revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence."

[2] The defendant also was charged with another count of violation of a protective order in violation of § 53a-223, harassment in the second degree in violation of General Statutes (Rev. to 2017) § 53a-183, and falsely reporting an incident in the second degree in violation of General Statutes (Rev. to 2017) § 53a-180c. The record also reflects that the defendant was charged

2019, the defendant pleaded guilty to one count of violation of a protective order in violation of § 53a-223. After accepting the defendant's plea, the trial court, *Matasavage, J.*, sentenced the defendant to five years of incarceration, execution suspended, followed by five years of probation.[3] The conditions of the defendant's probation included, inter alia, that he would (1) abide by a standing criminal protective order,[4] (2) "[e]ngage in [a] substance abuse and anger management evaluation and follow treatment recommendations," (3) "not violate any criminal law of the United States, this state or any other state or territory," and (4) "[r]eport as the [p]robation [o]fficer [required] . . . ." On February 8, 2019, the defendant signed the conditions of his probation, acknowledging that he understood and would follow the conditions.

On May 6, 2020, the defendant was arrested and charged with threatening in the second degree in violation of General Statutes § 53a-62,[5] for statements that he allegedly made regarding Walter L., who was, during the relevant period, Rachael C.'s boyfriend. On October 22, 2020, while still incarcerated pretrial on the threatening in the second degree charge, the defendant was

in a separate file with breach of the peace in the second degree in violation of General Statutes § 53a-181.

[3] The defendant also pleaded guilty to and was convicted of one count of breach of the peace in violation of General Statutes § 53a-181. For that conviction, the court sentenced the defendant to six months of incarceration, execution suspended, followed by one year of probation. That sentence ran concurrently with the sentence for violation of a protective order. That conviction is not germane to this appeal. See footnote 2 of this opinion.

[4] The record is unclear as to who the protected person was under the protective order.

[5] General Statutes § 53a-62 provides in relevant part: "(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror . . . ."

served with an arrest warrant, charging him with violation of probation in violation of § 53a-32. On that same day, the defendant was arraigned thereon, and the court, *Wu*, *J.*, set a cash or surety bond in the amount of $10,000. On December 28, 2020, the defendant posted bond and was released from pretrial incarceration.

On March 29, 2021, the defendant filed a motion for a bill of particulars, requesting that the state give, inter alia, "[s]pecific notice of the manner in which the defendant is alleged to have violated probation . . . ." On April 16, 2021, the state filed a long form information alleging four grounds for the violation of probation charge against the defendant. Specifically, the state alleged that the defendant violated his probation by (1) failing to report to his probation officer on September 6, 2019, (2) having multiple unexcused absences from Midwestern Connecticut Council of Alcoholism (MCCA), (3) engaging in harassing behavior toward Walter L. by leaving him voicemails and sending him one Facebook message, and (4) engaging in threatening behavior toward Walter L., resulting in the May 6, 2020 arrest for threatening in the second degree in violation of § 53a-62.

On June 18, 2021, the court, *Shaban*, *J.*, commenced a violation of probation hearing. On the basis of the evidence adduced during the evidentiary phase of the hearing, the court determined that the state had proven by a preponderance of the evidence each of the four grounds for violation of probation alleged in its long form information. On October 1, 2021, the court conducted the dispositional phase of the hearing, during which it (1) revoked the defendant's probation and sentenced him to five years of incarceration, execution suspended after six months, followed by three years and 250 days of probation, and (2) issued a ten year standing criminal protective order identifying Walter L.

as the protected party.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court erred in finding that he violated his probation. Specifically, the defendant contends that (1) the court improperly concluded that he committed threatening in the second degree in violation of § 53a-62, because his statements regarding Walter L. were made in the context of psychiatric treatment and his hospital discharge and, therefore, did not violate § 53a-62, (2) the court violated General Statutes § 52-146q and the rule set forth in *State* v. *Orr*, 291 Conn. 642, 969 A.2d 750 (2009), in admitting into evidence the statements that he made regarding Walter L., and (3) the other bases for the court's finding that the defendant violated his probation were technical in nature and, standing alone, were not sufficient to find that the defendant violated his probation. For the reasons that follow, we conclude that the defendant's third contention fails on the merits and, consequently, we need not address the merits of his other two claims.

We begin by setting forth the following applicable legal principles. "[R]evocation of probation hearings, pursuant to § 53a-32, are comprised of two distinct phases, [the evidentiary phase and the dispositional phase] each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no

[6] According to the parties' briefs, on October 7, 2021, a nolle prosequi was entered on the threatening in the second degree charge.

longer being served. . . . Since there are two distinct components of the revocation hearing, our standard of review differs depending on which part of the hearing we are reviewing." (Citation omitted; internal quotation marks omitted.) *State* v. *Gamer*, 215 Conn. App. 234, 241, 283 A.3d 16, cert. granted, 345 Conn. 920, 284 A.3d 984 (2022).

"The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation. . . . It is also well settled that a trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence when there is no evidence in the record to support [the court's finding of fact] . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) Id., 241–42.

The following additional facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our resolution of the defendant's

claims. On May 2, 2020, the defendant was admitted to Danbury Hospital for psychiatric treatment. When the defendant was admitted, he signed a "Verbal Release of Information Consent" form (consent form), in which he authorized Danbury Hospital to "verbally disclose pertinent clinical information regarding [his] medical and psychiatric care" to Elizabeth Atkins, his probation officer. (Emphasis omitted.) On May 4, 2020, the defendant told a licensed clinical social worker at Danbury Hospital, Nicole Knapp, that he intended to kill Walter L. after his discharge. On May 6, 2020, Knapp, in a sworn written statement to the Danbury police, reported the communications that the defendant made to her regarding his intent to kill Walter L. Knapp reported in the sworn written statement that the defendant told her that " '[w]hen I leave here, I'm a free man and I will kill Walter. I'm not going to shoot him, I want to take a knife [and] look him in [the] eyes while I twist and turn it in his body to kill him. I want to inflict bodily harm on him. I will kill him.' " In the sworn written statement, Knapp also reported that the "specific threats were very concerning to [her], made [her] feel very uncomfortable," and that she "believe[d] that he ha[d] full intention to carry out his plan." That same day, the defendant was arrested for threatening in the second degree in violation of § 53a-62 for the statements that he made to Knapp about Walter L. He was unable to post bond at that time. On October 22, 2020, while in custody on the threatening charge, the defendant was served with an arrest warrant, issued by the court on May 14, 2020, charging him with violating the condition of his probation that he " 'not violate any criminal law of the United States, this state or any other state or territory.' "

On May 28, 2021, prior to the violation of probation hearing, the defendant filed a motion in limine to exclude physical evidence of the voicemails that the

defendant allegedly left, and the Facebook message that the defendant allegedly sent, to Walter L. Relevant here, the defendant also sought to exclude the testimony of (1) Walter L., (2) Officer Vito Iacobellis, the Danbury police officer who took Knapp's sworn written statement, and (3) Rachael C. The defendant contended in the motion that the aforementioned evidence would be irrelevant, hearsay, impermissible character evidence, impossible to authenticate, and that its probative value would be outweighed by its prejudicial effect. The defendant filed a second motion in limine to exclude testimony from Knapp and Atkins regarding the statements that the defendant made to Knapp on May, 6, 2020, and regarding his subsequent arrest. The defendant's motion also sought to exclude his Danbury Hospital records. The defendant argued that his statements to Knapp on May 6, 2020, and any other evidence addressed in the motion, constituted privileged communications and were protected under, inter alia, § 52-146q.[7] On June 10, 2021, the state filed a response to the defendant's motions in limine. On June 14, 2021, the court, *Shaban*, *J.*, held a hearing on the defendant's motions in limine but reserved decision on both motions.

On June 18, 2021, the court held a violation of probation hearing. During the hearing, the court heard additional argument on the defendant's motions in limine. The defendant argued that Knapp was prohibited from testifying under § 52-146q and our Supreme Court's decision in *State* v. *Orr*, supra, 291 Conn. 642, which

[7] General Statutes § 52-146q provides in relevant part: "(b) All communications and records shall be confidential and, except as provided in subsection (c) of this section, a social worker shall not disclose any such communications and records unless the person or his authorized representative consents to such disclosure. Any consent given shall specify the individual or agency to which the communications and records are to be disclosed, the scope of the communications and records to be disclosed, the purpose of the disclosure and the expiration date of the consent. . . ."

held that testimony of social workers is not admissible under § 52-146q (c) (2), i.e., the dangerous client exception to the social worker-client confidentiality rule.[8] Id., 662. The court, citing *Orr*, permitted Knapp to testify only to the fact that she had a confidential relationship with the defendant and that she warned a third party of the defendant's statements under the dangerous client exception of § 52-146q (c) (2).[9] The court also permitted Atkins, Officer Iacobellis, Rachael C., and Walter L. to testify. Further, the court admitted as full exhibits (1) the consent form, under § 52-146q (b), (2) the sworn written statement that Knapp gave to Officer Iacobellis,[10] (3) the recordings of the voicemails that the

[8] General Statutes § 52-146q (c) provides in relevant part: "Consent of the person shall not be required for the disclosure or transmission of such person's communications and records in the following situations as specifically limited . . .

"(2) Communications and records may be disclosed when a social worker determines that there is a substantial risk of imminent physical injury by the person to himself or others, or when disclosure is otherwise mandated by any provision of the general statutes. . . ."

[9] In *Orr*, our Supreme Court held that, "[b]ecause all communications between social workers and their clients are confidential, those communications falling under the dangerous client exception are confidential as well. When a social worker determines, through communication with his or her client, that there is a substantial risk of imminent physical injury to either the client or another person, he or she is authorized by the statute to divulge this information at that point for the purpose of preventing injury. The communications, however, retain their confidential nature by virtue of the statutory mandate in § 52-146q (b)." *State* v. *Orr*, supra, 291 Conn. 655–56. In that regard, the defendant argued that, even though Knapp reported his statements to the police under an exception to the privilege pursuant to § 52-146q (c) (2), "in-court testimony by that social worker" is still prohibited. The state, however, argued that (1) because the defendant signed a consent form, and (2) in light of footnote 22 of the majority opinion of *Orr*, which suggests that social workers are permitted to testify as to "the existence of a confidential relationship" and that "the social worker warned the third party of possible injury as permitted under the statute," Knapp should be permitted to testify. *State* v. *Orr*, supra, 662 n.22.

[10] The defendant also argued that the sworn written statement should not be admitted into evidence as a full exhibit because the statements are privileged and because of the hearsay rule. Specifically, the defendant argued that admitting the sworn written statement through Officer Iacobellis would circumvent § 52-146q (b) and the rule set forth in *Orr*.

defendant allegedly left Walter L., and (4) a screenshot of the Facebook message that the defendant allegedly sent to Walter L. The court admitted the sworn written statement as a full exhibit through the testimony of Officer Iacobellis and noted that it admitted the statement "not for the truth of the statement, but rather with respect to [Knapp's] determination that she had an obligation to prevent physical injury to another." The defendant did not call any witnesses in his case-in-chief.

On the basis of the evidence adduced at the violation of probation hearing, the court found that "the state has sustained its burden of proving by a preponderance of the evidence . . . that the defendant has, in fact, violated his probation by missing appointment[s] with his probation officer, having multiple unexcused absences at MCCA, [and] engaging in harassing behavior directed at [Walter L.] telephonically and then later via Facebook, even after having been told by Atkins to have no contact with [Walter L.]." The court further found that "[b]y engaging in behavior deemed serious enough to Knapp to compel her to report the statements . . . the defendant threatened to commit a crime of violence with the intent to terrorize [Walter L.]. In addition, the defendant threatened to commit such crime of violence in reckless disregard of the risk of causing such terror. . . . As a result, the [c]ourt finds by a preponderance of the evidence that in doing so the defendant has violated the terms of probation with respect to that charge."

With respect to its determination that the defendant missed appointments with Atkins, the court found that it "heard credible testimony from . . . Atkins . . . that the defendant failed to report to probation as scheduled on August 26, 2019 and September 6, 2019. As to the August 26, 2019 appointment, he called Atkins indicating he had been in custody in Florida and had

been recently released. Atkins advised him to report on September 6, 2019. He failed to appear on that date, later claiming by email that he had been confused about the date. Atkins responded by telling him to report on September 9, 2019. The defendant did report on that date as directed, following his missed appointments."

As to its determination that the defendant had engaged in harassing behavior toward Walter L., the court found as follows. "[D]uring the [September 9, 2019] meeting . . . Atkins . . . discussed with [the defendant] that she had been contacted the day before by . . . [Walter L.], who complained that the defendant had been repeatedly contacting him by phone during the last week. In those contacts by phone, the defendant had made threatening remarks toward [Walter L.] and members of his family. At the time of the calls, [Walter L.] was dating [Rachael C.], who is the defendant's ex-girlfriend. [Walter L.] was concerned enough about the nature of the calls that he contacted both the Thomaston and Winsted Police Departments, which were the towns where his family members lived. More specifically, there had been a series of calls to [Walter L.] from the defendant beginning on September 4, 2019, and concluding on the evening of September 7, 2019 . . . ."[11] The court noted that "[t]he speaker's tone on the call[s] was unmistakably one of irritation and anger. Notably, the phone number from which the calls were made was the same number that the defendant gave to Atkins two days later on September 9, [2019], as his contact information. There was additional credible testimony from [Rachael C.] that she had been in a romantic relationship with the defendant from 2014 to 2018, and they had a child in common. Once out of that relationship, she began a relationship with [Walter L.], which made the defendant extremely jealous and led

[11] The court found that the defendant left a total of eight voicemails for Walter L., the contents of which are detailed in its decision.

him to being very threatening and angry that [Walter L.] was involved in his child's life. . . . [Rachael C.] heard the messages and recognized the defendant's voice as being the individual who left the messages on [Walter L.'s] phone. [Walter L.] also testified credibly as to the defendant's conduct and actions directed toward him. In addition to the phone calls in September, 2019, the defendant had previously called [Walter L.] at his place of employment at least four times and had spoken to him in a very aggressive manner. [Walter L.] directed the defendant not to call him anymore.

"At his September 9, 2019 meeting with Atkins, two days after the last phone calls, Atkins specifically told the defendant that he was to have no contact with [Walter L.] via telephone, social media, through a third party, and there should be no threats of violence or harassment toward him. The defendant stated that he understood . . . ." Nevertheless, on or about December 18, 2019, Walter L. reported to Atkins that he received a Facebook message from the defendant, in which the defendant wrote in relevant part that "[j]ust so you know, Rachael [C.] is playing you and me, she told me you're nothing and [is] done with you . . . ." The next day, "Atkins met with the defendant and expressly told him that any further contact with [Walter L.] would result in additional action being taken by her with regard to his probation. However, no action was taken at that time to seek a violation of probation warrant."

As to its determination that the defendant had multiple unexcused absences at MCCA, the court found that "Atkins . . . referred [the defendant] to MCCA for evaluation and treatment. After the referral, the defendant missed a series of appointments with MCCA on October 7, October 17, October 21 and November 5, 2019, all without being excused. The defendant made up some but not all of the missed appointments. One

of the missed appointments was due to a power outage from a storm, another due to issues with insurance coverage. There were other missed appointments for medical management on November 7, 2019 and December 10, 2019; the latter of which was made up by the defendant."

Regarding the statements that the defendant made to Knapp regarding Walter L., the court stated that "[t]he call to the police by Knapp was made following a call Knapp had made to Atkins regarding the defendant's statements. As a licensed clinical social worker, Knapp was bound by the confidentiality provisions of . . . [§] 52-146q as to any statements made to her by the defendant while at Danbury Hospital. . . . Now, while the statute generally prohibited the disclosure of any statements made by the defendant to Knapp, the exceptions embodied in the statute allowed for Knapp's disclosure of those statements to Atkins, who in turn asked Knapp to alert the police. In effect, there were two bases for the disclosure of the statements. First, pursuant to the subsection (b) of the statute, the defendant had signed a consent form upon his admission to the hospital on May 2, 2020 to the oral disclosure of information about his care and treatment. . . . The second basis for the release of the information is [§] 52-146q (c) (2) . . . . [A]lthough Knapp was statutorily prohibited from testifying in court about the statements made by the defendant in her presence, and the admission of Knapp's statement to the police was for a limited purpose, those limitations are negated by the release of information signed by the defendant on May 2, 2020, which waived any cloak of confidentiality relative to his mental health information. . . . Even if such statements were deemed to be hearsay as they were relayed by Knapp to both Atkins and the police, the [c]ourt considered

them as reliable hearsay, given Knapp's credible testimony that she reported the statements under her statutory obligation as a mandated reporter." (Citations omitted.)

We now turn to the defendant's claims. The defendant principally claims that the court (1) improperly concluded that he violated § 53a-62 because his statements regarding Walter L. were made in the context of psychiatric treatment and his hospital discharge and, therefore, do not violate § 53a-62,[12] and (2) violated § 52-146q and the rule set forth in *Orr* in admitting, through Officer Iacobellis, the defendant's statements made to Knapp regarding Walter L. The defendant also, albeit somewhat cursorily, challenges the three other violations that the court found—that he missed two meetings with Atkins, missed six meetings with MCCA, and left threatening voicemails and a Facebook message with Walter L. The defendant claims that those incidents were only "technical in nature" and, "standing alone," were insufficient to find that he violated his probation. For the reasons that follow, we conclude that the three other violations that the court found constitute independent grounds to find that the defendant violated his probation, and, accordingly, we decline to address the merits of the defendant's first two claims relating to the statements that he made to Knapp and the court's finding that he violated § 53a-62 on the basis of those statements.

"[T]o support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . Our law does not require the state to prove that all conditions alleged were violated; it is sufficient to prove that one was

[12] The defendant also claims that he did not know that the statements that he communicated to Knapp would be shared with Walter L., which is necessary for a violation of § 53a-62. For the reasons set forth in this opinion, we decline to address the merits of this claim.

violated." (Citation omitted; internal quotation marks omitted.) *State* v. *Widlak*, 74 Conn. App. 364, 370, 812 A.2d 134 (2002), cert. denied, 264 Conn. 902, 823 A.2d 1222 (2003); see also *State* v. *Theoferlius D.*, 93 Conn. App. 88, 93–94, 888 A.2d 118 (concluding that rejection of defendant's challenge to admission of evidence regarding violation of probation based on failure to register as sex offender "render[ed] unnecessary any consideration" of defendant's challenge to admission of evidence regarding violation of probation based on discharge from treatment program), cert. denied, 277 Conn. 916, 895 A.2d 792 (2006), aff'd sub nom. *State* v. *T.D.*, 286 Conn. 353, 944 A.2d 288 (2008).

In its long form information, the state alleged that the defendant violated four conditions of his probation, in that he (1) failed to report to his probation officer on September 6, 2019, (2) missed multiple MCCA meetings, (3) harassed Walter L. through phone calls and Facebook, and (4) engaged in threatening behavior toward Walter L., resulting in his May 6, 2020 arrest for threatening in the second degree. The court found that the defendant violated his probation on the basis of each of the four aforementioned grounds.

The defendant does not claim on appeal that, as an evidentiary matter, the state has not met its burden in proving the first three grounds that it alleged in its long form information and on which the court determined that the defendant violated his probation. Instead, the defendant contends that those incidents were merely technical and, standing alone, would not have resulted in a finding that he violated his probation. We are not persuaded.[13] As this court explained, "[a] critical element of probation is the supervisory role of the state.

[13] We do not mean to imply that a defendant, in order to obtain review of the merits of a claim that the trial court improperly found him to be in violation of his probation in a particular way, must always successfully challenge on appeal each and every ground on which the court found him to be in violation. If a defendant adequately briefs a claim that a court's

. . . That role cannot be diluted by a claim that one or more of the conditions were not substantial. All of the conditions at issue related to the state's interest in supervising the defendant, and were not, therefore, mere technical violations." (Citation omitted.) *State* v. *Navikaukas*, 12 Conn. App. 679, 683, 533 A.2d 1214 (1987), cert. denied, 207 Conn. 804, 540 A.2d 74 (1988).

In sum, because a finding that the defendant violated any one condition of his probation is sufficient to conclude that he violated his probation and the defendant does not claim that, as an evidentiary matter, the state failed to sustain its burden of proof as to all four alleged conditions of probation, we conclude that the trial court did not err in finding that the defendant violated his probation.

II

The defendant next claims that the court abused its discretion when it revoked his probation and imposed a sentence that included a period of incarceration, contending that neither the purpose of his rehabilitation nor the safety of the public is served thereby. This claim also fails.

"The standard of review of the trial court's decision at the sentencing phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness

alleged error in finding one particular ground during the adjudicatory phase materially affected the severity of the sentence it imposed during the dispositional phase, the court should review the claim because the alleged error may "have had some bearing on [the] disposition the court ordered and, if the court ordered the defendant to serve some portion of his suspended sentence as to that disposition, what that sentence would be." *State* v. *Benjamin*, 299 Conn. 223, 231–32, 9 A.3d 338 (2010). The defendant has not adequately briefed such a claim in this case.

of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion. . . . In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society. . . . The important interests in the probationer's liberty and rehabilitation must be balanced, however, against the need to protect the public." (Citation omitted; internal quotation marks omitted.) *State* v. *Rodriguez*, 130 Conn. App. 645, 649–50, 23 A.3d 826 (2011), aff'd, 320 Conn. 694, 132 A.3d 731 (2016).

The following additional procedural history is relevant to our resolution of the defendant's claim. On October 1, 2021, the court conducted the dispositional phase of the hearing during which it revoked the defendant's probation and sentenced him to five years of incarceration, execution suspended after six months, followed by three years and 250 days of probation. The court also issued a ten year standing criminal protective order identifying Walter L. as the protected person. In revoking the defendant's probation, the court concluded that he "would not be well served by . . . simply continuing on probation, as he's already been given that opportunity, and, yet . . . engaged in behavior that was harmful not only to his own rehabilitation, but to the safety of the public as well." The court further reasoned that "the beneficial aspects of probation are not likely to be served in the immediate future, and the conclusion is based on the defendant's conduct in this instance and

because he had already received the benefit of probation but nonetheless continued to engage in behavior that led to warnings from his probation officer and ultimately led to his arrest. This is evidenced by . . . new activity that was testified to by the witnesses in this case, including the phone calls . . . prior to the arrest as well."

The defendant claims that it would be an injustice to reincarcerate him because he is not a danger to public safety and because it would harm his rehabilitation. In support of his claim, the defendant highlights that (1) he has completed the MCCA program, has enrolled himself in a counseling program, has a job, and has not failed any drug tests, and (2) there has been no allegation that he has contacted Walter L. since the Facebook message in December, 2019. As we recited previously in this opinion, however, the court, in determining whether to revoke the defendant's probation, thoroughly considered whether the beneficial aspects of probation would be served by merely continuing the defendant on probation. Indeed, the court considered both the defendant's rehabilitation and the safety of the public on the basis of the whole record and concluded that the beneficial aspects of probation were no longer being served and revoked the defendant's probation. "Because the court was entrusted with the decision as to whether the defendant was meeting the goals of his probation and we must afford every reasonable presumption in favor of the correctness of that decision . . . on the basis of the record before us, we cannot say that it abused its discretion in finding that the rehabilitative purpose of probation could no longer be served." (Citation omitted.) *State* v. *Oliphant*, 115 Conn. App. 542, 555, 973 A.2d 147, cert. denied, 293 Conn. 912, 978 A.2d 1113 (2009).

Therefore, we conclude that the court did not abuse its discretion when it revoked the defendant's probation

and imposed a sentence that included a period of incarceration.

III

The defendant's final claim is that the court abused its discretion in failing to award him, in connection with his violation of probation file, presentence confinement credit for the period between his May 6, 2020 arrest for threatening in the second degree and October 22, 2020, when he was served with the violation of probation warrant and a bond was set at his arraignment with respect to that charge. For the reasons that follow, we reject this claim.

The following additional procedural history is relevant to the resolution of the defendant's claim. On May 6, 2020, the defendant was arrested for threatening in the second degree and remained in presentence confinement, unable to obtain bail, at Corrigan Correctional Center. More than five months later, on October 22, 2020, the defendant was served with an arrest warrant charging him with violation of probation. On that same day, the court, *Wu*, *J.*, arraigned the defendant thereon and set a $10,000 cash or surety bond. The defendant, however, remained incarcerated for another two months, until December 28, 2020, when he posted bond.

During the October 1, 2021 dispositional phase of the revocation of probation hearing, the defendant orally moved the court to specify on the judgment mittimus[14] that he should receive approximately seven and one-half months of presentence confinement credit, for the period between May 6 and December 28, 2020. The defendant argued that, because the courthouse closures caused by the COVID-19 pandemic delayed service of

[14] "[A] judgment mittimus is . . . a clerical document by virtue of which a person is transported to and rightly held in prison." (Internal quotation marks omitted.) *State* v. *Montanez*, 149 Conn. App. 32, 34 n.1, 88 A.3d 575, cert. denied, 311 Conn. 955, 97 A.3d 985 (2014).

the violation of probation warrant, the court should award him presentence confinement credit on the violation of probation file for the period between May 6 and October 22, 2020, when he was incarcerated pretrial in the separate threatening in the second degree file. The defendant emphasized that the court should exercise its discretion in such a manner because the Commissioner of Correction (commissioner) would not award him presentence confinement credit on the violation of probation file for that period without an indication on the mittimus. The state opposed the defendant's oral motion and requested that the court defer to the commissioner to determine whether the defendant is entitled to presentence confinement credit. The court agreed, stating that the "[commissioner] typically discerns what jail credit is available to a particular individual," whereupon the court denied the defendant's oral motion. The court directed the clerk to indicate on the mittimus that the defendant is entitled to presentence confinement credit "as deemed appropriate by [the commissioner]" and that the violation of probation warrant was not served until October 22, 2020.[15] What appears on the mittimus is the following notation: "The Defendant is entitled to sentence credit of AS DEEMED APPROPRIATE BY D.O.C."

The defendant claims that the court abused its discretion when it refused to award him presentence confinement credit, most notably for the period between May 6 and October 22, 2020.[16] Specifically, the defendant

[15] In his principal appellate brief, the defendant highlights the fact that the court did not indicate on the mittimus that the violation of probation warrant was not served until October 22, 2020, and argues that such failure also constitutes an abuse of its discretion. For the reasons set forth in part III of this opinion, we do not address the merits of that argument.

[16] In his appellate briefs, the defendant repeatedly states that he should be awarded approximately seven and one-half months of presentence confinement credit for the period between his May 6, 2020 arrest and his release on bond on December 28, 2020. Nevertheless, in his principal appellate brief, the defendant acknowledges that the commissioner "will give [him] credit for the time between his bond being set and his posting his bond and being released pretrial." Thus, we discern the defendant's claim to be that the

claims that the COVID-19 pandemic prevented timely service of the violation of probation warrant, and, therefore, the court abused its discretion in deferring to the commissioner and not awarding the defendant jail credit for that period pursuant to General Statutes § 18-98d.[17] The state argues that it is the commissioner, and not the trial court, that has the statutory authority to award the defendant presentence confinement credit.[18] In light of this court's recent decision in *State* v. *Hurdle*,

court improperly failed to award him jail credit for the period May 6 to October 22, 2020.

[17] General Statutes § 18-98d provides in relevant part: "(a) (1) (A) Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, and prior to October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (ii) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement . . . ."

Section 18-98d (a) (1) was amended by No. 21-102, § 21, of the 2021 Public Acts, but the changes do not affect our analysis in this appeal. Accordingly, we refer to the current revision of the statute.

[18] The state argues that, because the commissioner has not yet determined whether to award the defendant presentence confinement credit for the period between May 6 and October 22, 2020, the defendant's claim is not ripe for judicial review, and, therefore, not justiciable. We construe the state's argument to be in response to the defendant's interpretation of § 18-98d that the trial court may award the defendant presentence confinement credit, and to argue that only the commissioner has the statutory authority under § 18-98d to award the defendant such credit. See part III of this opinion. The state also argues that once the defendant's claim regarding such credit is ripe for judicial review, the appropriate procedural mechanism with which to bring this claim would be to file a petition for a writ of habeas corpus challenging the actions of the commissioner, rather than those of the trial court. This issue has been squarely addressed in this court's recent decision in *State* v. *Hurdle*, 217 Conn. App. 453, 288 A.3d 675 (2023), in which this court concluded that, because the commissioner has the sole statutory authority under § 18-98d to determine whether a defendant is entitled to presentence confinement credit, only after that determination is made will the issue of such credit be ripe for judicial review by way of a writ of habeas corpus. Id., 462 n.6.

217 Conn. App. 453, 288 A.3d 675 (2023), the defendant's claim must fail.[19]

In *Hurdle*, this court concluded that, pursuant to the express language of § 18-98d (c), the commissioner has the sole statutory authority to determine a defendant's eligibility for presentence confinement credit and to apply such credit against a defendant's sentence. Id., 464–65. In reaching that conclusion, the court in *Hurdle* relied on the language in § 18-98d (c), which provides in relevant part that "[t]he *Commissioner of Correction* shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence . . . ." (Emphasis added.) See *State* v. *Hurdle*, supra, 217 Conn. App. 463–64. This court further explained in *Hurdle* that, although the language of § 18-98d does not *explicitly* bar a sentencing court from awarding a defendant presentence confinement credit at the time of sentencing, such credit is "strictly a creature of statute"; id., 466; and, therefore, "[i]f the legislature had wanted to authorize sentencing courts to calculate and apply presentence confinement credit as part of their sentencing function," it could have included, but did not include, express language granting such statutory authority to sentencing courts pursuant to § 18-98d. Id., 464.

In construing the express language of § 18-98d (c), the court in *Hurdle* also observed the distinction between a sentence, which is issued by a sentencing court, and

[19] The defendant also claims that the trial court's denial of presentence confinement credit, particularly in light of the unique circumstances created by the COVID-19 pandemic, violated his due process rights. This claim is predicated on the trial court, rather than the commissioner, having the statutory authority to award presentence confinement credit. Because we reaffirm our recent holding in *Hurdle* that the commissioner, and not a trial court, possesses the sole statutory authority under § 18-98d to calculate and apply presentence confinement credit to a defendant's sentence, we need not address this claim further.

presentence confinement credit, which is calculated by the commissioner. Presentence confinement credit is not a part of a sentence, but rather "is a calculation of the amount of credited time a defendant already has served toward completing" a sentence issued and is not meant to reduce a sentence before it is imposed. Id. *Hurdle* further emphasizes the practical considerations of having the commissioner possess the sole statutory authority to determine presentence confinement credit. That is, the process that the commissioner undertakes in determining what presentence confinement credit a defendant is entitled to requires an investigation and examination into a defendant's records, where a sentencing court may not have such records readily available at the time of sentencing, particularly when a defendant has multiple criminal files, to accurately calculate presentence confinement credit. Id., 465 (highlighting that "[t]he information necessary to make an accurate calculation regarding presentence confinement credit is in the hands of the [commissioner]"). We therefore reaffirm here, as this court concluded in *Hurdle*, that it is the commissioner that is the proper authority to ensure that a defendant receives all presentence confinement credit due under § 18-98d.

In sum, we conclude that the court neither erred in finding that the defendant had violated his probation nor abused its discretion in revoking the defendant's probation and imposing a sentence that included a period of incarceration. Furthermore, in the absence of any statutory authority to award the defendant presentence confinement credit, the court did not err in declining to award it.

The judgment is affirmed.

In this opinion the other judges concurred.

HENRY PASCARELLA ET AL. *v.* ROBERT SILVER ET AL.
(AC 44514)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiffs, P and R Co., appealed to this court from the judgment of the trial court determining, inter alia, that they could not prevail on their claim in their declaratory judgment action that the defendant S Co. was barred on the basis of res judicata from bringing any claims against them under a certain participation agreement entered into by the parties and that res judicata did not bar the claims asserted in S Co.'s counterclaim. Pursuant to the participation agreement, in exchange for a monetary investment, S Co. received the right to participate in any increase in the future economic value of certain commercial real estate. In 2006, S Co. commenced an action against the plaintiffs for their failure to comply with the terms of the agreement. The trial court ruled in favor of S Co. on its breach of contract claim, determining that the plaintiffs had failed to make certain payments to S Co. as part of their cash flow distributions. The trial court also found that the agreement had not been terminated or cancelled, and it awarded damages to S Co. The trial court's judgment was affirmed by this court. In 2011 and 2012, S Co. commenced additional actions against the plaintiffs, alleging breaches of the agreement, which it later withdrew. In 2016, the plaintiffs commenced the present action against S Co. and its president, S, seeking a declaratory judgment that, on the basis of res judicata, the defendants had no continuing rights under the agreement and were prohibited from bringing any additional claims thereunder. The plaintiffs withdrew their claims against S shortly thereafter. S Co. then filed a counterclaim seeking, inter alia, a declaratory judgment that the 2006 action adjudicated S Co.'s rights to damages under the agreement only through 2008 and that, under the doctrine of res judicata, S Co. had a continuing right to cash distributions under the agreement. In response, the plaintiffs filed special defenses alleging, inter alia, that res judicata barred all counts of the counterclaim in light of the 2006 action. The trial court granted the plaintiffs' motion to bifurcate the trial, held a trial solely on the issue of res judicata, and determined that res judicata did not apply to the facts of the case. On the plaintiffs' appeal, *held*:

1. The plaintiffs' invocation of res judicata as the basis of their declaratory action was untenable: pursuant to *Tracey* v. *Miami Beach Assn.* (216 Conn. App. 379), the offensive use of res judicata is generally unavailable, but a party that has obtained a valid and final judgment in its favor could maintain an enforcement action to secure vindication of such judgment, and, in the present case, the plaintiffs' claim that their action

could be characterized as an enforcement action was unavailing because, in the 2006 action, they were the defendants, they did not prevail on the breach of contract claim, and they had monetary damages assessed against them, and, on appeal, they provided no legal authority to support their claim.

2. The plaintiffs' first special defense, in which they alleged that the doctrine of res judicata barred S Co. from asserting its counterclaim, was unavailing: the application of res judicata was inappropriate because the underlying claim in the 2006 action, which concerned the alleged breach of the agreement regarding S Co.'s entitlement to distributions for the period between 1997 and 2008, was not the same as that at issue in S Co.'s counterclaim, which was predicated on S Co.'s alleged entitlement to distributions made subsequent to the resolution of the 2006 action, such claim did not exist at the time of the 2006 action, as the trial court in that action specifically found that S Co.'s interest in the agreement was a contingent, speculative investment, that further breaches of the agreement remained hypothetical unless certain contingencies transpired, and that proof of such breaches would require additional evidence beyond that submitted in the 2006 action, and S Co.'s interest in the vindication of a just claim outweighed the public policy goals of promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties; moreover, the application of res judicata was inappropriate because, in the 2006 action, S Co. did not have the opportunity to fully litigate its claimed entitlement to distributions under the agreement beyond those at issue in the 2006 action, as it did not yet exist at the time of that action; furthermore, contrary to the plaintiffs' assertion, in the 2006 action, S Co. had the option to bring a claim for damages for the total breach of the agreement but was not required to do so because, although the agreement was a contract that created continuing obligations on behalf of the plaintiffs with respect to cash distributions and a written statement that P had made in 1999 could have been considered a repudiation of the plaintiffs' obligations under the agreement, such repudiation was not accompanied by a material breach of the agreement, and, as the proper application of res judicata to the facts was flexible, rather than mechanical, in nature, the rules in the Restatement (Second) of Judgments governing claim splitting (§§ 24 and 26) were required to be read together and should not have barred S Co. from maintaining its counterclaim.

Argued October 25, 2022—officially released March 28, 2023

Procedural History

Action seeking, inter alia, a judgment declaring that the defendants are prohibited from bringing any claims against the plaintiffs pursuant to a certain participation agreement entered into by the parties, brought to the

Superior Court in the judicial district of Stamford-Norwalk, where the plaintiffs withdrew their claims against the named defendant; thereafter, the court, *Genuario*, *J.*, granted the plaintiffs' motion to bifurcate the trial; subsequently, the issue of the applicability of the doctrine of res judicata was tried to the court, *Genuario*, *J.*; judgment for the defendant R.S. Silver Enterprises, Inc., from which the plaintiffs appealed to this court. *Affirmed.*

Wesley W. Horton, with whom were *Karen L. Dowd*, and, on the brief, *Scott T. Garosshen*, *Brendan J. O'Rourke*, and *Peter J. Zarella*, for the appellants (plaintiffs).

James M. Nugent, for the appellee (defendant R.S. Silver Enterprises, Inc.).

Opinion

ELGO, J. This case concerns the proper application of the doctrine of res judicata. In their one count complaint, the plaintiffs, Henry Pascarella and Riversedge Partners,[1] predicated their declaratory judgment action against the defendant R.S. Silver Enterprises, Inc.,[2] entirely on that doctrine of preclusion. Following a bifurcated bench trial, the trial court concluded that

[1] While this appeal was pending, Pascarella died, and this court subsequently granted the motion to substitute the coexecutors of his estate, Aldo Pascarella and Cassandra Pascarella Berger, as plaintiffs in his stead.

We also note that the plaintiff Riversedge Partners is a Connecticut general partnership that formerly was known as SPD Associates. In its memorandum of decision, the trial court noted that, "[b]ecause [SPD Associates] is the same entity with a different name, all references to the entity will be [to] its current name Riversedge Partners." For purposes of clarity, we employ the same nomenclature. We therefore refer to Henry Pascarella and Riversedge Partners collectively as the plaintiffs and individually by name in this opinion.

[2] At all relevant times, Robert Silver was the president and owner of R.S. Silver Enterprises, Inc. Although the plaintiffs also named Silver as a defendant, they withdrew the complaint against him shortly after this action was commenced. We therefore refer to R.S. Silver Enterprises, Inc., as the defendant.

res judicata did not apply under the facts of this case. The plaintiffs now challenge the propriety of that determination. We affirm the judgment of the trial court.

The facts underlying this litigation are not in dispute. At all relevant times, Pascarella was a real estate developer and practicing attorney, who previously had worked with Robert Silver, a licensed real estate broker, on several real estate projects. In 1997, Pascarella informed Silver of an investment opportunity regarding commercial real estate located at 200 Pemberwick Road in Greenwich (property). Pascarella subsequently drafted a "participation agreement" (agreement) that the parties entered into in 1997. In exchange for an investment of $1,250,000, the defendant was "given the contractual right to participate 'in any increase in the economic value' and 'future economic enhancement' of the [property]. More specifically, the agreement entitled the [defendant] to split equally all amounts received by the [plaintiffs] in connection with the [property] after the making of certain priority payments." *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 148 Conn. App. 359, 362, 86 A.3d 471, cert. dismissed, 311 Conn. 938, 89 A.3d 351 (2014).

In 2006, the defendant commenced an action against the plaintiffs stemming from their failure to comply with the terms of the agreement (2006 action). Its operative complaint contained four counts that alleged breach of contract, breach of fiduciary duty, and breach of a "letter agreement" between the parties and sought an accounting.[3]

[3] In its original complaint, the defendant alleged in relevant part that it had acquired "a partnership interest" in Riversedge Partners by entering into the agreement. By contrast, in its operative complaint dated January 26, 2009, the defendant alleged that it had acquired "an equity interest" in Riversedge Partners by entering into the agreement. As the trial court emphasized in its memorandum of decision, "[t]he January 26, 2009 amended complaint became the operative complaint for the trial without objection" from the plaintiffs. Moreover, we note that the defendant did not allege an anticipatory breach of contract claim against the plaintiffs. Contra *Land*

Following an eleven day court trial, the court ruled in favor of the defendant on the breach of contract count.[4] In its memorandum of decision, the court found that the agreement had not "been terminated or cancelled and all the rights and obligations thereof are in full force and effect."[5] Significantly, the court specifically found that the defendant's interest in the agreement "was not a partnership interest or an equity interest," but rather was "a contingent speculative investment." As the court explained, for the defendant "to receive its cash flow distributions: (1) [Riversedge Partners] must have positive cash flow after paying all debt service and other expenses; (2) [any] preference payments [made by Pascarella] would have to be paid in full; and (3) Pascarella as managing partner of [Riversedge Partners] would have to decide . . . to make a . . . cash distribution."[6] The court further found that the plaintiffs had breached the agreement by failing to make any payments to the defendant as part of their "cash flow distributions net of the full amount of the Pascarella preference payments." The court thus awarded the defendant $2,602,323 in damages, which included an award of prejudgment interest pursuant to General Statutes § 37-3a. The propriety of that judgment was

Group, Inc. v. *Palmieri*, 123 Conn. App. 84, 87, 1 A.3d 234 (2010) ("[t]he plaintiff instituted a three count complaint against the defendants . . . alleging anticipatory breach of the contract, breach of contract and breach of the implied covenant of good faith and fair dealing").

[4] At trial, the court dismissed the breach of a letter agreement count. It thereafter found in favor of the plaintiffs on the breach of fiduciary duty and accounting counts. Those counts are not germane to this appeal.

[5] At oral argument before this court, the plaintiffs' counsel was asked if there was "anything in the court's decision [in the 2006 action] that indicates that the [agreement] is no longer in full force and effect" following the rendering of that judgment. Counsel answered that query in the negative.

[6] In reaching that determination, the court specifically found that "[§] 4 of the [agreement] gives Pascarella or his designees exclusive control and management of [Riversedge Partners] including the power to decide when and if any cash distributions shall be made. Section 10 [of the agreement] describes that power of control as 'the essence of the [a]greement' and prohibits 'any interference or participation by [the defendant] . . . .' "

affirmed by this court. See *R.S. Silver Enterprises, Inc.* v. *Pascarella*, 163 Conn. App. 1, 35, 134 A.3d 662, cert. denied, 320 Conn. 929, 133 A.3d 460 (2016).

In fashioning relief in favor of the defendant in the 2006 action, the court rejected the defendant's request for the appointment of a receiver over the affairs of Riversedge Partners, stating: "There is no claim in this case for damages consisting of [the defendant's] half of [the cash] distributions after the year 2008. . . . [T]he court takes judicial notice of a new related civil action returnable to this court on January 11, 2012, (Docket No. CV-11-5013782-S) commenced by [the defendant] against [the plaintiffs] for breach of the same [agreement], claiming damages which include the alleged failure of the [plaintiffs] 'to pay to [the defendant] one half of the cash distributions resulting from the operations of [Riversedge Partners].' To the extent that the [defendant] is claiming damages incurred in 2009 and thereafter they would be part of the damages claimed in that new action, which has a claim for the appointment of a receiver during the pendency of the action." That new action referred to by the court was brought by the defendant in 2011 (2011 action). Its complaint contained one count alleging breach of the agreement by the plaintiffs without reference to any dates or time periods. The defendant subsequently withdrew that action.

In August, 2012, the defendant commenced another action that alleged breach of the agreement by the plaintiffs regarding cash distributions "from January 1, 2009, to the present" and breach of fiduciary duty by Pascarella (2012 action).[7] In response, the plaintiffs moved

[7] As the trial court in the present case noted: "The 2012 action asserted that [the defendant] was seeking to recover distributions under the [agreement] that had accrued to its benefit after December 31, 2008, which is the last year for which [the defendant] had introduced evidence of damages in the 2006 action."

for summary judgment on res judicata and prior pending action grounds related to the 2006 action. The defendant did not file a responsive pleading to that motion and withdrew the 2012 action in 2013.

In August, 2016, the plaintiffs commenced the present action against the defendant. Their complaint consisted of one count, in which they sought a declaratory judgment pursuant to General Statutes § 52-29. The plaintiffs alleged in relevant part that, in light of the 2011 and 2012 actions, they had "a bona fide concern that [the defendant] will attempt to commence yet another lawsuit against the plaintiffs in an effort to claim that [the defendant is] entitled to recover any distributions under the [agreement], despite the res judicata effect of the judgment in the 2006 action and the subsequent filings and withdrawal of two further actions—the 2011 and 2012 actions—by [the defendant]." The plaintiffs also alleged that Silver had "recently made statements in the real estate marketplace that he continues to hold an interest" in the property, which created a cloud on its title and negatively impacted their ability to manage and refinance the property.[8] The plaintiffs thus asked the court to render a declaratory judgment "that (i) [the defendant] liquidated its claims in the 2006 action, (ii) based on the doctrine of res judicata, [the defendant] has no continuing or ongoing rights under the [agreement], and (iii) the [defendant is] prohibited from bringing any claims or actions under, or relating to, the [agreement] against the plaintiffs or the [property]."

The defendant filed an answer and three special defenses to that complaint.[9] The defendant also filed a four count counterclaim against the plaintiffs. In count

[8] We reiterate that the plaintiffs withdrew their complaint against Silver soon after this action was commenced. See footnote 2 of this opinion.

[9] In its special defenses, the defendant alleged that the plaintiffs' declaratory action was barred by waiver, estoppel, and the doctrines of "res judicata and/or collateral estoppel."

one, it sought a declaratory judgment that "(i) the 2006 action adjudicated the [defendant's] rights to damages under the [agreement] only through December 31, 2008; (ii) based on the doctrine of res judicata, and/or collateral estoppel, the [defendant] has the continuing and ongoing right under the [agreement] to receive 50 percent of all cash distributions; and (iii) the [plaintiffs] are to provide annual operating reports of Riversedge Partners." In count two, the defendant sought a constructive trust, and count three alleged a breach of the covenant of good faith and fair dealing with respect to the plaintiffs' alleged failure to carry out their obligations under the agreement. In count four, the defendant sought an accounting of "any cash distributions" that the plaintiffs received after December 31, 2008. The plaintiffs, in turn, filed an answer and six special defenses to that counterclaim. Notably, the plaintiffs alleged therein that res judicata barred all counts of the defendant's counterclaim in light of the judgment rendered in the 2006 action.

The plaintiffs filed motions for summary judgment on November 15, 2016, and May 5, 2018, on the ground that any claims by the defendant regarding its rights under the agreement were barred by the doctrine of res judicata. The court denied those motions. On July 15, 2019, the defendant filed a certificate of closed pleadings, in which it requested a court trial.

On November 15, 2019, the plaintiffs filed a motion to bifurcate the trial pursuant to General Statutes § 52-205,[10] claiming that the resolution of their res judicata claims likely would "obviate the need for trial on the remaining claims and counterclaims" of the parties. The court granted that motion and scheduled a trial "of the

[10] General Statutes § 52-205 provides: "In all cases, whether entered upon the docket as jury cases or court cases, the court may order that one or more of the issues joined be tried before the others."

issue of res judicata raised by the pleadings . . . .'' That trial was held on September 30, 2020, at which numerous exhibits were admitted into evidence and the court heard testimony from Silver and Aldo Pascarella, the son of Pascarella.[11] In its subsequent memorandum of decision, the court concluded that the doctrine of res judicata did not apply under the facts of this case, and this appeal followed.

As a preliminary matter, we note the well established legal standard that governs our review in this appeal. The proper application of the doctrine of res judicata presents a question of law, over which our review is plenary. See *Testa* v. *Geressy*, 286 Conn. 291, 306, 943 A.2d 1075 (2008).

I

THE PLAINTIFFS' DECLARATORY ACTION

We first consider the proper application of res judicata with respect to the declaratory action brought by the plaintiffs in 2016. To do so, we must address a critical distinction regarding the plaintiffs' invocation of that doctrine.

As this court recently explained in *Tracey* v. *Miami Beach Assn.*, 216 Conn. App. 379, 288 A.3d 629 (2022), ''[u]nder Connecticut law, the doctrine of res judicata is pleaded as a special defense. . . . Its primary posture is defensive in nature, in that it bars relitigation of a claim on which a valid and final personal judgment has been rendered in favor of a party. . . . [W]e are

[11] Pursuant to Practice Book § 63-8 (e) (1), appellants are required to file with the appellate clerk an ''unmarked'' copy of any transcripts necessary to the appeal. The plaintiffs failed to comply with that requirement. Instead, they submitted a photocopy of the September 30, 2020 transcript that contains handwritten comments, question marks, and underlined or circled statements throughout. We do not condone that practice and remind counsel of their obligation to comply with the rules of appellate procedure when filing transcripts with this court.

aware of no Connecticut appellate authority in which res judicata has been endorsed for offensive use with respect to claim preclusion, and for good reason: Offensive claim preclusion is nonexistent. A plaintiff cannot reassert a claim that he has already won." (Citations omitted; internal quotation marks omitted.) Id., 392. In *Tracey*, this court clarified that the plaintiffs, in bringing their declaratory action, "did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the [prior] action and embodied in the [prior] judgment. . . . [T]he present action is one to enforce a prior judgment of the Superior Court. An action to enforce a prior judgment is the consequence of the doctrine of merger . . . by which a plaintiff's claim is extinguished and rights upon the judgment are substituted for it following the rendering of a valid and final judgment. . . . Accordingly, when a party thereafter seeks to enforce those rights by maintaining an action upon the judgment . . . it is not seeking to relitigate a matter [that] it already has had an opportunity to litigate. . . . Rather, it is attempting to enforce a valid judgment . . . ." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Id., 393–94.

Tracey was decided subsequent to the filing of appellate briefs in this appeal. For that reason, following oral argument in this appeal, this court ordered the parties to file supplemental briefs "addressing the viability of the offensive use of res judicata under Connecticut law, which formed the basis of the plaintiffs' declaratory judgment complaint, and whether the plaintiffs' claim fails as a matter of law if the offensive use of res judicata is rejected."

In their supplemental brief, the plaintiffs do not quarrel with the reasoning set forth in *Tracey*. To the contrary, they submit that they "are seeking the same vindication" as did the plaintiffs in that case. They state:

"Just like in *Tracey*, the plaintiffs are not seeking to use res judicata to recover new relief on some new claim. Rather, they are using res judicata to vindicate the finality of a prior judgment . . . . [The plaintiffs submit] that, to the extent an 'offensive' use is understood as a new claim for new relief, an offensive use of claim preclusion cannot exist . . . . To the extent an 'offensive' use is understood as simply using a procedure such as declaratory or injunctive relief to enforce a prior judgment, such a use is viable." (Citations omitted.) The plaintiffs thus recognize that the offensive use of res judicata generally is unavailable to a plaintiff and maintain that, in bringing the present declaratory action, they sought to enforce the prior judgment rendered in the 2006 action.

In *Tracey*, this court held that a party that has obtained a valid and final judgment in its favor may thereafter maintain an enforcement action to secure vindication of that judgment on its original claim. See *Tracey* v. *Miami Beach Assn.*, supra, 216 Conn. App. 393–96; accord 1 Restatement (Second), Judgments § 18, pp. 151–52 (1982).[12] In the 2006 action at issue here, the court rendered judgment in favor of the defendant—who was the plaintiff in that action—on the breach of contract count and entered an award of monetary damages in its favor regarding "cash distributions for the period 1997 through 2008 . . . ." It is undisputed that the plaintiffs satisfied that monetary judgment in October, 2016.

[12] Section 18 of the Restatement (Second) of Judgments provides: "When a valid and final personal judgment is rendered in favor of the plaintiff:

"(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and

"(2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action." 1 Restatement (Second), supra, § 18, pp. 151–52.

Had they not done so, the defendant, as a plaintiff and prevailing party in the prior action, plainly would be entitled to bring a subsequent action to enforce the judgment in the 2006 action. That is not the case here. Rather, this anomalous case involves parties seeking to maintain an action to enforce a prior judgment who (1) were *defendants* in the prior action, (2) did not prevail on the breach of contract claim at issue, and (3) had monetary damages assessed against them with respect to that claim.[13] They have provided no legal authority indicating that it is permissible for such a party to do so. The plaintiffs were neither the plaintiffs in the 2006 action nor the prevailing party on the cause of action they now purportedly seek to vindicate. See *Tracey* v. *Miami Beach Assn.*, supra, 216 Conn. App. 393 (emphasizing that "the plaintiffs did not attempt to wield the doctrine of res judicata offensively but, rather, sought something fundamentally distinct: vindication of the claim asserted in the [prior] action and embodied in the [prior] judgment"). Although our precedent and the Restatement (Second) of Judgments recognize the right of a plaintiff to bring an action to enforce a judgment on which it has prevailed; see *Garguilo* v. *Moore*, 156 Conn. 359, 361–64, 242 A.2d 716 (1968); *Denison* v. *Williams*, 4 Conn. 402, 404–405 (1822); 1 Restatement (Second), supra, § 18, pp. 151–52; we are aware of no authority that suggests that an action commenced by a defendant, *against* whom judgment has been rendered, properly can be characterized as an action to enforce. Accordingly, the plaintiffs' invocation of res judicata as the basis for their declaratory action is untenable.

II

THE PLAINTIFFS' SPECIAL DEFENSE

We turn next to the plaintiffs' invocation of res judicata as a special defense to the counterclaim filed by

[13] The breach of contract count was the only count on which the defendant prevailed in the 2006 action, and the court's judgment in that regard was predicated on the defendant's entitlement to distribution payments under

the defendant. That procedural posture necessitates a different analysis of the plaintiffs' claim regarding the proper application of that doctrine of preclusion.

Following the commencement of this declaratory action by the plaintiffs, the defendant filed a four count counterclaim against the plaintiffs in which it sought, inter alia, a declaratory judgment that "(i) the 2006 action adjudicated the [defendant's] rights to damages under the [agreement] only through December 31, 2008; (ii) based on the doctrine of res judicata, and/or collateral estoppel, the [defendant] has the continuing and ongoing right under the [agreement] to receive 50 percent of all cash distributions; and (iii) the [plaintiffs] are to provide annual operating reports of Riversedge Partners."[14] In response, the plaintiffs filed an answer and six special defenses to that counterclaim. Relevant to this appeal is their first special defense, in which they alleged that res judicata barred all counts of the counterclaim in light of the 2006 action.

The court held a bifurcated trial on the res judicata issue and thereafter issued a memorandum of decision in which it concluded that the doctrine of res judicata did not preclude the defendant's counterclaim.[15] On our plenary review of that question of law; see *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 347, 63 A.3d 940 (2013); we agree.

"The doctrine of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the

the agreement—the same issue that underlies the plaintiffs' declaratory action in the present case.

[14] The defendant also alleged a breach of the covenant of good faith and fair dealing and sought both a constructive trust and an accounting of "any cash distributions" that the plaintiffs received after December 31, 2008.

[15] In so doing, the court expressly deferred consideration of the plaintiffs' collateral estoppel defense.

same claim or demand. . . . Res judicata prevents a litigant from reasserting a claim that has already been decided on the merits. . . . [C]laim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or might have been made. . . . [T]he essential concept of the modern rule of claim preclusion is that a judgment against [the] plaintiff is preclusive not simply when it is on the merits but when the procedure in the first action afforded [the] plaintiff a fair opportunity to get to the merits. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Weiss* v. *Weiss*, 297 Conn. 446, 459–60, 998 A.2d 766 (2010).

Res judicata is a "judicially created [rule] of reason that [is] enforced on public policy grounds . . . ." (Citation omitted; internal quotation marks omitted.) Id., 460. "Public policy supports the principle that a party should not be allowed to relitigate a matter which it already has had an opportunity to litigate. . . . Thus, res judicata prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Citation omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 157–58, 129 A.3d 677 (2016).

Because the doctrine of res judicata "can yield harsh results," our Supreme Court has emphasized that it "should be flexible and must give way when [its] mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies." (Internal quotation marks omitted.) Id., 158. "[A] decision whether to apply the doctrine of res judicata . . .

should be made based upon a consideration of the doctrine's underlying policies . . . ." (Citation omitted.) *Delahunty* v. *Massachusetts Mutual Life Ins. Co.*, 236 Conn. 582, 591, 674 A.2d 1290 (1996). "[T]he purposes of res judicata [are] promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties." *Weiss* v. *Weiss*, supra, 297 Conn. 465; see also *United States* v. *Liquidators of European Federal Credit Bank*, 630 F.3d 1139, 1152 (9th Cir. 2011) (describing "the goals of res judicata" as "fairness, finality, and avoidance of duplicate judicial proceedings"). Those policies, however, must be "balanced against the competing interest of the plaintiff in the vindication of a just claim." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 350, 15 A.3d 601 (2011). Moreover, in all cases in which res judicata is invoked, "the scope of matters precluded necessarily depends on what has occurred in the former adjudication." *State* v. *Ellis*, 197 Conn. 436, 467, 497 A.2d 974 (1985).

With that context in mind, we note that, "[g]enerally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 156–57. In the present case, the first two elements are not in dispute.[16] We therefore focus our attention on the third and fourth elements of that doctrine.

[16] In their principal appellate brief, the plaintiffs submit that "[t]he four elements of res judicata are met." The defendant, by contrast, maintains that the third and fourth elements are not satisfied in the present case.

A

For res judicata to apply, the same underlying claim must be at issue. Id., 157. Our Supreme Court has adopted a transactional test "as a guide to determining whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of res judicata. [T]he claim [that is] extinguished [by the judgment in the first action] includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a transaction, and what groupings constitute a series, are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Internal quotation marks omitted.) *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604, 922 A.2d 1073 (2007); see also 1 Restatement (Second), supra, § 24, comment (b), pp. 198–99 (transactional test "is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases").

The purpose of the transactional test is "to measure the preclusive effect of a prior judgment"; *Duhaime* v. *American Reserve Life Ins. Co.*, 200 Conn. 360, 365, 511 A.2d 333 (1986); so as to "strike a delicate balance between . . . the interests of the defendant and of the courts in bringing litigation to a close and . . . the interest of the plaintiff in the vindication of a just claim." (Internal quotation marks omitted.) *Cadle Co.* v. *Gabel*, 69 Conn. App. 279, 298, 794 A.2d 1029 (2002). It operates as a screening mechanism to prevent a party from obtaining "a second bite at the apple . . . [when] the

present claims are ones arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not in the [prior action]." (Internal quotation marks omitted.) *Larry* v. *Powerski*, 148 F. Supp. 3d 584, 597 (E.D. Mich. 2015).

It is a fundamental precept of res judicata jurisprudence that "the doctrine . . . does not preclude parties from bringing claims that did not exist at the time of the prior proceeding." *Consolidation Coal Co.* v. *Maynes*, 739 F.3d 323, 327 (6th Cir. 2014); see also *Johnson* v. *Flemming*, 264 F.2d 322, 324 (10th Cir. 1959) ("[t]he doctrine of res judicata generally extends only to facts and conditions as they existed at the time the judgment was rendered and does not apply where there are new facts which did not exist at the time of the prior judgment"). As the United States Supreme Court noted in the seminal case of *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955), "a prior judgment is res judicata only as to suits involving the same cause of action." In ascertaining whether a subsequent action involved the same underlying claim as that advanced in the prior action, the court explained: "That both suits involved 'essentially the same course of wrongful conduct' is not decisive. . . . [A] course of conduct . . . may frequently give rise to more than a single cause of action. . . . The conduct presently complained of was all subsequent to the [prior] judgment. . . . While the [prior] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." (Footnotes omitted.) Id., 327–28.

Guided by that precedent, the United States Court of Appeals for the Second Circuit has stated: "With respect to the determination of whether a second suit is barred by res judicata, the fact that both suits involved

essentially the same course of wrongful conduct is not decisive . . . nor is it dispositive that the two proceedings involved the same parties, similar or overlapping facts, and similar legal issues . . . . A first judgment will generally have preclusive effect only where the transaction or connected series of transactions at issue in both suits is the same, that is whe[re] the same evidence is needed to support both claims, and whe[re] the facts essential to the second were present in the first. . . . If the second litigation involved different transactions, and especially subsequent transactions, there generally is no claim preclusion." (Citations omitted; internal quotation marks omitted.) *Securities & Exchange Commission* v. *First Jersey Securities, Inc.*, 101 F.3d 1450, 1463–64 (2d Cir. 1996), cert. denied, 522 U.S. 812, 118 S. Ct. 57, 139 L. Ed. 2d 21 (1997).

The United States Court of Appeals for the Sixth Circuit similarly has held that "[a] successful plaintiff should not be forever barred from asserting new claims based on continuous wrongful conduct, even if that conduct is identical to the subject of a prior suit. . . . If [parties] were forever barred from asserting claims based on conduct that occurs after a prior suit is decided, defendants [to the prior action] could continue a course of unlawful conduct undeterred." (Footnote omitted.) *Nguyen* v. *Cleveland*, 534 Fed. Appx. 445, 452–53 (6th Cir. 2013). As the court observed: "If a plaintiff sues a defendant more than once based on an ongoing course of conduct, the doctrine of claim preclusion will typically not prevent the plaintiff from asserting a cause of action that arose after the first suit was decided. . . . When allegedly unlawful conduct occurs after a case has been decided, and that conduct gives rise to a new cause of action . . . a new suit based on that cause of action is not barred by the first suit." (Citations omitted.) Id., 452.

This court has adhered to that bedrock principle. In *Cadle Co.* v. *Gabel*, supra, 69 Conn. App. 297–98, we expressly relied on *Lawlor*, as well as the Restatement (Second) of Judgments,[17] for the proposition that res judicata does not apply when "part of the conduct complained of [in the second action] occurred *after* the judgment alleged by the defendants to have preclusive effect." (Emphasis in original.) Because the plaintiff's claim in the subsequent action in that case concerned operative facts that occurred after judgment was rendered in the prior action, this court held that res judicata did not bar the plaintiff's claim. Id., 298–99.

That precept applies equally in the breach of contract context. As the Second Circuit has observed, "[t]he fact that both suits involved essentially the same course of wrongful conduct is not decisive. . . . Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first. . . . While a previous judgment may preclude litigation of claims that arose prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. . . . Thus, when the parties have entered into a contract to be performed over a period of time and one party has sued for a breach, res judicata will preclude the party's subsequent suit for any claim of breach that had occurred prior to the first suit; it will not, however, bar a subsequent suit for any breach that had not occurred when the first

[17] See 1 Restatement (Second), supra, § 24, comment (f), p. 203 ("[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first").

suit was brought." (Citations omitted; internal quotation marks omitted.) *Prime Management Co.* v. *Steinegger*, 904 F.2d 811, 815–16 (2d Cir. 1990).

The defendant's counterclaim in the present case, like the first count of its complaint in the 2006 action, concerns an alleged breach of contract regarding cash distributions due under the agreement. Whereas the 2006 action concerned the defendant's entitlement to distributions "for the period 1997 through 2008," the counterclaim is predicated on the defendant's alleged entitlement to distributions made by Pascarella *subsequent* to the resolution of that prior action. In this regard, it bears emphasis that the court, in rendering judgment in the 2006 action, specifically found that the defendant's interest in the agreement was "a contingent speculative investment" and that the defendant was not entitled to any cash distributions unless a series of contingencies first transpired.[18] "Under Connecticut law, damages may not be predicated on a contingency." *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 193, 90 A.3d 219 (2014). Unless and until the contingencies outlined by the trial court in its decision in the 2006 action transpired; see footnote 18 of this opinion; any further breaches of the agreement by the plaintiffs remained hypothetical. Moreover, proof of such subsequent breaches by the plaintiffs would necessitate additional evidence beyond that submitted in the 2006 action

[18] In rendering judgment in favor of the defendant in the 2006 action, the court specifically found that, "in order for [the defendant] to receive its cash flow distributions, (1) [Riversedge Partners] must have positive cash flow after paying all debt service and other expenses; (2) [any] preference payments [made by Pascarella] would have to be paid in full; and (3) [Pascarella] as managing partner of [Riversedge Partners] would have to decide . . . to make a . . . cash distribution." The court also found that the agreement gave "Pascarella or his designees exclusive control and management of [Riversedge Partners] including the power to decide when and if any cash distributions shall be made" and prohibited "any interference or participation by [the defendant] . . . ." (Internal quotation marks omitted.)

of essential facts that were not present in the prior action. See *Securities & Exchange Commission* v. *First Jersey Securities, Inc.*, supra, 101 F.3d 1463–64; *Prime Management Co.* v. *Steinegger*, supra, 904 F.2d 816. As a result, the claim advanced in the defendant's counterclaim did not yet exist at the time of the 2006 action. See *Nguyen* v. *Cleveland*, supra, 534 Fed. Appx. 452. To paraphrase the United States Supreme Court, while the judgment in the 2006 action precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims that did not exist at the time of that prior action. See *Lawlor* v. *National Screen Service Corp.*, supra, 349 U.S. 328.

Indeed, this court reached that very conclusion in *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 137 Conn. App. 359, 368–69, 48 A.3d 705, cert. denied, 307 Conn. 916, 54 A.3d 180 (2012) (*Landmark*), precedent on which the trial court here relied in its memorandum of decision. Like the present case, *Landmark* involved a breach of contract dispute; like the present case, the defendant in *Landmark* argued that "the claim brought by the plaintiff in the [subsequent] action is a part of the transaction or series of transactions out of which the first action arose . . . [which allegedly] forms a convenient trial unit" and that "the same [agreement] is in dispute, and the plaintiff is seeking the same claim for damages." Id., 362–63. The defendant thus claimed that res judicata barred the second action. Id., 362. On appeal, this court disagreed, stating: "Although we agree with the defendant that the cases overlap to the extent specified, they remain sufficiently distinct to elude the application of the doctrine of res judicata. The injury that provides the foundation for the plaintiff's cause of action in this matter . . . occurred wholly subsequent to the judgment in the previous matter. . . . [T]he conduct complained of occurred *after* the judgment alleged by the

defendants to have preclusive effect. . . . [T]o conclude that [the plaintiff's] claim is now barred by res judicata would be to require omniscience in litigation. . . . Requiring no such omniscience, we conclude that the doctrine of res judicata does not apply under these circumstances." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 368–69. That logic applies equally here.

In addition, we note that the doctrine of res judicata is equitable in nature. See, e.g., *Jones* v. *Alton*, 757 F.2d 878, 885 (7th Cir. 1985) (res judicata "is an equitable doctrine, and subject to equitable principles"); *U.S. Bank, National Assn.* v. *Madison*, 341 Conn. 809, 814, 268 A.3d 64 (2022) (describing res judicata as equitable doctrine); *Sams* v. *Dept. of Environmental Protection*, 308 Conn. 359, 401 n.30, 63 A.3d 953 (2013) ("res judicata is based on equitable principles"). In rendering judgment in favor of the defendant in the 2006 action, the trial court declined its request for the appointment of a receiver due in part to the pendency of the 2011 action, which involved the same parties and the same breach of contract claim regarding cash distributions under the agreement. In its memorandum of decision, the court took judicial notice of that related action and stated: "To the extent that the [defendant] is claiming damages incurred in 2009 and thereafter, they would be part of the damages claimed in that new action, which has a claim for the appointment of a receiver during the pendency of the action." When considered in tandem with the court's determination that the defendant's interest in the agreement was "a contingent speculative investment" that precluded a claim to particular cash distributions unless a series of contingencies first transpired, we believe that the public policy goals of "promoting judicial economy, minimizing repetitive litigation, preventing inconsistent judgments and providing repose to parties"; *Weiss* v. *Weiss*, supra,

297 Conn. 465; in this case are outweighed by the defendant's "interest in the vindication of a just claim." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 300 Conn. 350. Although the defendant may not prevail on his claim of entitlement to additional distributions under the agreement, we conclude that it is not foreclosed from asserting such a claim under the doctrine of res judicata.

B

For res judicata to apply, there also "must have been an adequate opportunity to litigate the matter fully . . . ." *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 156–57. We already have concluded in part II A of this opinion that the defendant's claimed entitlement to additional distributions under the agreement beyond those at issue in the 2006 action did not yet exist at the time of that action. In light of that conclusion, there necessarily was not an adequate opportunity to fully litigate such a claim in the 2006 action. As a result, res judicata is inappropriate on that basis as well. See *Cayer Enterprises, Inc.* v. *DiMasi*, 84 Conn. App. 190, 194, 852 A.2d 758 (2004).

C

As a final matter, we address the plaintiffs' ancillary contention regarding the purported repudiation of their obligations under the agreement in 1999. Relying on the Restatement (Second) of Judgments, the plaintiffs assert that, because their repudiation was accompanied by a material breach of the agreement, the defendant in the 2006 action was obligated to bring a claim for damages for the total breach of the agreement. Its failure to do so, the plaintiffs argue, bars the defendant's counterclaim under the doctrine of res judicata. We do not agree.

The following additional facts are undisputed and relevant to that contention. In April, 1997, Silver issued a promissory note to Riversedge Partners that was guaranteed by the defendant.[19] That contract obligated Silver to repay Riversedge Partners the sum of $200,000 plus interest within one year.

The parties thereafter entered into the agreement at issue in this appeal, which contains the following reference to that promissory note: "In the event [that the defendant] fails to pay any sums due [under this agreement], or due to [Riversedge Partners under the] Promissory Note, a copy of which is attached hereto as Exhibit 'B,' in a timely manner, Pascarella may, at Pascarella's option, elect to equitably reduce or charge the [defendant's interest under the agreement] to compensate Pascarella and the other partners of [Riversedge Partners] for such non-payment." The present case thus involves two distinct contracts—a promissory note that obligated Silver to make repayment to Riversedge Partners and a "participation agreement" that authorized Pascarella to "equitably reduce or charge" the defendant's entitlement to cash distributions under the agreement should repayment of that promissory note not occur.[20]

It is undisputed that neither Silver nor the defendant repaid the promissory note, as the trial court found in the 2006 action. In its memorandum of decision, the court in the 2006 action also found that, "[o]n August

[19] "A promissory note is simply a written contract for the payment of money." (Internal quotation marks omitted.) *Ankerman* v. *Mancuso*, 271 Conn. 772, 777, 860 A.2d 244 (2004).

[20] The court in the 2006 action found that the agreement "provides the [plaintiffs] with two specific remedies for nonpayment of the [promissory] note," pursuant to which (1) they could reduce any distributions to the defendant by the unpaid amount or (2) "when the cash flow situation does not permit a distribution or the [defendant's] share of the distribution is less than the unpaid Silver obligation," they could " 'charge' or lien or impose a trust on future distributions to recoup the nonpayment."

26, 1999, when the promissory note was in default, Pascarella and Silver met . . . to discuss the defaulted note" and that "Pascarella made unsigned handwritten notes of the meeting . . . ."[21] In those notes, Pascarella stated that if Silver did not make repayment within a specified time frame, he would be "out of [the] Riversedge project completely with no remaining interest or carry at all."[22] (Internal quotation marks omitted.)

In light of that unequivocal statement in Pascarella's handwritten notes of the August 26, 1999 meeting, the

[21] In its memorandum of decision in the 2006 action, the court found that "Silver did not agree with the terms of the Pascarella notes" and that "[h]e was not asked to sign and did not sign" them.

[22] In the 2006 action, the plaintiffs claimed that the agreement had been terminated when the deadline specified in Pascarella's handwritten notes passed without repayment of the promissory note. The trial court rejected that claim, stating in relevant part: "The [plaintiffs] claim that the [agreement] was terminated or extinguished by [Pascarella] . . . on December 31, 1999. The court finds by a preponderance of the evidence that there was no termination on that date or in that time frame. Absolutely nothing of note happened at that time. December 31, 1999, only figures in the evidence because it was the 'deadline' given by Pascarella to Silver for a partial payment on the [promissory note] . . . . Exhibit V, which is Pascarella's unsigned [handwritten notes] says 'If *any* payment is not made on time [Silver] is out of [the Riversedge] project completely with no remaining interest or carry at all.' The most that this statement can be considered to be is a warning that Pascarella intended on August 26, 1999, to exercise [Riversedge Partners'] default remedies under the note guarantee and/or the [agreement] if no payment was made on the note by December 31, 1999. No such payment was made, but the note had been in default since October 28, 1997, and matured without payment on April 28, 1998, without consequence. . . . There is no evidence whatsoever that Pascarella . . . took any steps to make such an 'election' or 'exercise' [his] 'option' to invoke one or more of those remedies, or 'extinguish' the investment in satisfaction of a $200,000 promissory note. At the very least the situation called for some form of book entry and written or at least verbal notice to [Silver] as maker of the note, and [the defendant] as guarantor of the note and holder of the [agreement] . . . . Absolutely no such entry was made and no form of notice was given. . . . The record is void of any evidence of any *action* taken by [Pascarella] . . . to terminate or extinguish the [agreement] or cancel the [promissory note] . . . and the court accepts [Silver's] testimony that no notice was given." (Emphasis in original; footnote omitted.) Although the plaintiffs subsequently appealed from the judgment rendered in the 2006 action, they did not challenge the propriety of the court's determinations in this regard. See *R.S. Silver Enterprises, Inc.* v. *Pascarella*, supra, 163

plaintiffs maintain that they repudiated their obligations under the agreement when Silver failed to repay the promissory note in December, 1999. For that reason, they claim that the defendant was required to bring a claim for the total breach of the agreement in the 2006 action. Because it did not do so, the plaintiffs contend that the defendant's counterclaim is barred by the doctrine of res judicata. They rely on the Restatement (Second) of Judgments, which provides in relevant part: "A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action. . . . But if the initial breach is accompanied or followed by a 'repudiation' . . . and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid 'splitting,' to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract."[23] (Citations omitted.) 1 Restatement (Second), supra, § 26, comment (g), p. 240.

At the same time, the plaintiffs acknowledge in their appellate reply brief that, when a party's repudiation is not accompanied by a material breach of a contract that imposes continuing obligations, the injured party has the option, but is not required, to treat it as a total breach. See *Minidoka Irrigation District* v. *Dept. of Interior*, 154 F.3d 924, 926 (9th Cir. 1998) ("[a] contract that creates continuing obligations is capable of a series of partial breaches or a single total breach by repudiation" (internal quotation marks omitted)); *Barlow &*

Conn. App. 4–5; *R.S. Silver Enterprises, Inc.* v. *Pascarella*, supra, 148 Conn. App. 361–62.

[23] After quoting 1 Restatement (Second), supra, § 26, comment (g), the plaintiffs state in their appellate reply brief: "In short, if repudiation accompanies material breach, it moves from '*may*' to '*must*' claim total breach." (Emphasis in original.)

Haun, *Inc.* v. *United States*, 118 Fed. Cl. 597, 616 (2014) ("where a party has repudiated a contract, a claim for breach of contract ripens when performance becomes due or when the other party to the contract opts to treat the repudiation as a present total breach"), aff'd, 805 F.3d 1049 (Fed. Cir. 2015); *Martin* v. *Kavanewsky*, 157 Conn. 514, 518–19, 255 A.2d 619 (1969) (following defendants' statement that they would not perform their contractual obligations, plaintiff "was entitled to treat [it] as a repudiation of the contract" and maintain claim for total breach); *Wilson* v. *Western Alliance Corp.*, 78 Or. App. 197, 202 n.4, 715 P.2d 1344 ("when a plaintiff has already fully performed his part when the repudiation occurs, courts *may* permit a series of actions against the repudiator for nonperformance, especially when payments are based on a contingency" (emphasis in original)), review denied, 301 Or. 446, 723 P.2d 325 (1986); 15 R. Lord, Williston on Contracts (4th Ed. 2014) § 45:19, p. 402 n.10 (noting injured party's options when continuing contract repudiated); 10 J. Murray, Corbin on Contracts (Rev. Ed. 2014) § 53:14, p. 92 (explaining that contracts requiring continuing performance to pay money over period of time are "capable of a series of 'partial' breaches, as well as of a single total breach by repudiation").

It is undisputed that the agreement here was a contract that created continuing obligations on the part of the plaintiffs with respect to cash distributions. Although the statement in Pascarella's handwritten notes that Silver would be " 'out of [the] Riversedge project completely with no remaining interest or carry at all' " if he did not repay the promissory note could constitute a repudiation of the plaintiffs' obligations under the agreement,[24] that repudiation was not accompanied by a material breach of the agreement. It is true,

[24] "A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligation under the contract." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman*

as the plaintiffs contend, that the court in the 2006 action found that the plaintiffs breached the agreement by failing to pay the defendant cash distributions as required thereunder. The court, however, also found that the defendant was not entitled to any cash distribution payments until the latter half of 2003, years *after* the plaintiffs claim to have repudiated their obligations under the agreement.[25] Accordingly, the plaintiffs' breach of the agreement did not accompany their 1999 repudiation of their obligations under the agreement. For that reason, the defendant had the option, but was not required, to treat that repudiation as a total breach of the agreement in the 2006 action.[26] See 1 Restatement (Second), supra, § 26, comment (g), pp. 240–41.

Because an injured party in such circumstances has the option to treat a repudiation as a total breach, the

Enterprises Ltd. Partnership, 157 Conn. App. 139, 161, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015). In their principal appellate brief, the plaintiffs submit that they "breached [the agreement] by failing to pay distributions, and repudiated by saying the deal was over."

[25] In its memorandum of decision in the 2006 action, the court found that "the alleged breach of contract in count one is the failure by [the plaintiffs] to pay to the [defendant] its 50 percent of cash flow distributions . . . after all the Pascarella priority payments had been made. . . . [T]he payment of all Pascarella priority payments [was] completed in mid-2003."

[26] Also unavailing is the plaintiffs' suggestion that the defendant breached the agreement when Silver failed to repay the promissory note in 1999. Unlike the promissory note, the agreement does not contain any provision that obligates Silver or the defendant to make payment on that note. Rather, it merely acknowledges the existence of that separate contract between Silver and Riversedge Partners and grants the plaintiffs the "option . . . to equitably reduce or charge [the defendant's interest under the agreement] to compensate [the plaintiffs] for such non-payment." As the court in the 2006 action found, the agreement "provides the [plaintiffs] with two specific remedies for nonpayment of the [promissory note] . . . . The specified remedy . . . is . . . to 'charge' or lien or impose a trust on future distributions to recoup the nonpayment." In rendering judgment in favor of the defendant in the 2006 action, the court stated that, "[b]ecause there is no setoff or counterclaim pleaded, the court makes no order with regard to the unpaid balance of the $200,000 promissory note . . . made by [Silver] and guaranteed by the [defendant] in favor of the [plaintiffs]."

plaintiffs contend that res judicata bars the defendant's counterclaim, as that doctrine applies to claims that "were actually made or *might have been made*." (Emphasis added; internal quotation marks omitted.) *Joe's Pizza, Inc.* v. *Aetna Life & Casualty Co.*, 236 Conn. 863, 872, 675 A.2d 441 (1996). The plaintiffs overlook the fact that the proper application of res judicata to a particular set of facts is flexible, rather than mechanical, in nature. See *Wheeler* v. *Beachcroft, LLC*, supra, 320 Conn. 158.

In this regard, we note that the various provisions of the Restatement (Second) of Judgments are intended to complement each other and thus must be read together. See, e.g., *Guerrero* v. *Dept. of Corrections & Rehabilitation*, 28 Cal. App. 5th 1091, 1108 n.16, 239 Cal. Rptr. 3d 726 (2018) (reading together §§ 24 and 26 of Restatement (Second) of Judgments); *Day* v. *Davidson*, 951 P.2d 378, 383 (Wyo. 1997) (reading together "the pertinent provisions" of Restatement (Second) of Judgments); *Martinez* v. *Colombian Emeralds, Inc.*, 51 V.I. 174, 223 (2009) (Swan, J., dissenting) ("[N]o section of the Restatement can be read in isolation. . . . They should be read together." (Footnote omitted.)). While § 26 of the Restatement (Second) of Judgments recognizes certain "[e]xceptions" to the general rule concerning "splitting" of a plaintiff's claim; 1 Restatement (Second), supra, § 26, p. 233; we believe it properly must be read in conjunction with § 24, which expressly sets forth the "general rule concerning 'splitting.' " Id., § 24, p. 196.

Section 24 articulates what commonly is known as the transactional test; see part II A of this opinion; by which "the preclusive effect of a prior judgment" is measured; *Duhaime* v. *American Reserve Life Ins. Co.*, supra, 200 Conn. 365; and provides in relevant part that "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect

to all or any part of the transaction, or series of connected transactions, out of which the action arose." 1 Restatement (Second), supra, § 24 (1), p. 196. At the same time, § 24 distinguishes the scenario in which facts material to a particular claim arise *subsequent* to the rendering of a final judgment. See id., § 24, comment (f), p. 203. In that scenario, the Restatement recognizes that a second action on a similar claim may be permitted.[27] See id. ("[m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first"). A court's ability to permit such an action is consistent with the precepts that the transactional test is "a pragmatic standard"; id., comment (b), pp. 198–99; and, more generally, that res judicata is a flexible doctrine. See *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265, 269 (2d Cir. 1977); *Wellswood Columbia, LLC* v. *Hebron*, 327 Conn. 53, 66, 171 A.3d 409 (2017). As we explained in part II A of this opinion, the defendant's counterclaim is predicated on alleged breaches of the agreement by the plaintiffs that occurred subsequent

[27] For that reason, the Restatement (Second) of Contracts, in discussing the "[e]ffect of repudiation," specifically references §§ 24 and 26 of the Restatement (Second) of Judgments in noting that "[a]n injured party who has a claim for damages for total breach as a result of a repudiation, and who asserts a claim merely for damages for partial breach, *runs the risk* that if he prevails he will be barred under the doctrine of merger from further recovery, even in the event of a subsequent breach, because he has 'split a cause of action.' " (Emphasis added.) 2 Restatement (Second), Contracts § 243, comment (b), pp. 252–53 (1981). Such a "risk" necessarily implies that claim preclusion is a possibility—but not a certainty—when a party asserts a claim for partial breach following a repudiation by the opposing party. See *United States* v. *Paxton*, 422 F.3d 1203, 1206 (10th Cir. 2005) ("[r]isk is by definition probable not certain; hence potential rather than actual" (internal quotation marks omitted)), cert. denied, 546 U.S. 1201, 126 S. Ct. 1403, 164 L. Ed. 2d 103 (2006); *Commonwealth* v. *Coggeshall*, 473 Mass. 665, 668, 46 N.E.3d 19 (2016) ("[r]isk is defined as the possibility of loss [or] injury" (internal quotation marks omitted)).

to the judgment in the 2006 action and thus requires proof of material operative facts that were not present in the prior action. Read together, we conclude that, on the particular facts of this case, the rules governing claim splitting memorialized in §§ 24 and 26 of the Restatement and our decisional law should not operate to bar the defendant from maintaining that counterclaim despite the plaintiffs' purported repudiation of their obligations under the agreement.

The judgment is affirmed.

In this opinion the other judges concurred.

FRANCES WIHBEY *v.* ZONING BOARD OF APPEALS OF THE PINE ORCHARD ASSOCIATION (AC 45283)

Bright, C. J., and Elgo and Norcott, Js.

Syllabus

The defendant zoning board of appeals and intervening defendant property owners appealed to this court from the judgment of the trial court reversing the decision of the board that upheld the issuance of a zoning enforcement officer's order directing the plaintiff property owner to cease and desist from using his property for short-term rentals. The plaintiff purchased the property in 2005. In 2018, in response to complaints from several residents concerning alleged disruption to residential life and safety issues caused by short-term vacation rentals, the board adopted several amendments to its zoning regulations, including the prohibition of short-term rentals. Pursuant to the 2018 regulations, a zoning enforcement officer advised the plaintiff that the renting of his property to short-term overnight guests was in violation of the short-term rental ordinance and ordered him to cease and desist from that activity. The plaintiff appealed to the board, claiming that his use of the property for short-term rentals was a protected nonconforming use under the 1994 zoning regulations, which were the governing regulations when he bought the property and began using it for short-term rentals. After a hearing, the board voted to uphold the cease and desist order, and the plaintiff appealed to the trial court, which sustained the plaintiff's appeal and reversed the board's decision, finding that the board incorrectly upheld the cease and desist order and improperly denied the

plaintiff's appeal because the plaintiff's use of the property for rental purposes is and was a lawful, permitted use under the 1994 regulations and became nonconforming only after adoption of the 2018 regulations. *Held*:

1. The defendants could not prevail on their claim that the trial court incorrectly concluded that the short-term rental of a single-family dwelling was permissible under the 1994 regulations: the plain language of the 1994 regulations excluded any use not authorized by the regulations and were therefore permissive, rather than prohibitive, in nature, and, although the 1994 regulations did not specifically identify the renting of property as a permitted use, they expressly permitted the placement of a sign in connection with the rental of a property, which demonstrated that the drafters of the 1994 regulations recognized the renting of property as a permissible use of residential property; moreover, the 1994 regulations did not clearly impose a minimum temporal occupancy requirement for use of a single-family dwelling and only required that a single-family dwelling be a building designed for and occupied exclusively as a home or residence for not more than one family, and, therefore, so long as a single family occupies a building as a home or residence at a given time, the structure is being used as permitted under the 1994 regulations; furthermore, interpreting the 1994 regulations to permit short-term rentals does not lead to absurd or unworkable results and, to the contrary, interpreting those regulations to have permitted long-term rentals but not short-term rentals would lead to the unworkable result that, prior to the 2018 regulations, landowners had to determine where the dividing line was between long-term and short-term, for which the 1994 regulations provided no guidance.
2. The trial court improperly found that the plaintiff had, in fact, established a preexisting nonconforming use of the property for short-term rentals to families: although the board was presented with evidence regarding the plaintiff's rental practices and the tenants to whom he rented, the board did not make a factual determination as to whether the plaintiff had established a lawful nonconforming use or any factual findings as to whether the plaintiff was renting his property to "families" as defined by the 1994 regulations or whether the plaintiff's current use was a permissible intensification or unlawful expansion of such alleged use, and, accordingly, because the board neither made factual findings concerning the plaintiff's nonconforming use claim nor rendered a decision on that claim, it was improper for the trial court to do so in the first instance and the court should have remanded the case to the board for consideration of whether the plaintiff had, in fact, established a lawful nonconforming use.

Argued October 17, 2022—officially released March 28, 2023

Procedural History

Appeal from the decision of the defendant zoning board of appeals upholding a cease and desist order

against the plaintiff, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Sizemore*, *J.*, granted the motion to intervene as party defendants filed by Michael B. Hopkins and Jacqueline C. Wolff; thereafter, the court, *Rosen*, *J.*, sustained the plaintiff's appeal and rendered judgment thereon, from which the defendants, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

Peter A. Berdon, for the appellant (named defendant).

Damian K. Gunningsmith, with whom was *David S. Hardy*, for the appellants (intervening defendants).

Franklin G. Pilicy, with whom was *Daniel J. Mahaney*, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. In the last few years, an increasing number of courts around the country have been required to address the extent to which local zoning regulations and restrictive covenants that have been in place for decades restrict the relatively recent practice of residential property owners renting their homes on a short-term basis through websites like VRBO[1] and Airbnb.[2] This case represents the first opportunity for an appellate court in Connecticut to address this question.[3]

[1] VRBO, formerly Vacation Rentals by Owner, "is a website on which owners can advertise their houses and other properties for rent." *Santa Monica Beach Property Owners Assn.* v. *Acord*, 219 So. 3d 111, 113 n.2 (Fla. App. 2017).

[2] "Airbnb provides an online marketplace for both short-term and long-term housing accommodations wherein 'hosts' lease or sublease their living space to 'guests.' " *La Park La Brea A LLC* v. *Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1100 (C.D. Cal. 2017), appeal dismissed, United States Court of Appeals, Docket No. 18-55113, 2018 WL 7141208 (9th Cir. December 17, 2018).

[3] Although this may be the first appellate case concerning zoning regulation of short-term rental properties in this state, it undoubtedly will not be the last. See M. Nodiff, "Short-Term Rentals: Can Cities Get in Bed with Airbnb?" 51 Urb. Law. 225, 228 (2021) (noting that "Airbnb has grown so large that it is now bigger than all the major hotel chains combined—even though, unlike Hilton and Marriott, it doesn't own a single bed" (internal quotation

The defendants, the Pine Orchard Association Zoning Board of Appeals (board), Michael B. Hopkins, and Jacqueline C. Wolff,[4] appeal from the judgment of the trial court reversing the decision of the board upholding the issuance of a zoning enforcement officer's order directing the plaintiff, Frances Wihbey, to cease and desist from using his property located at 3 Crescent Bluff Avenue in the Pine Orchard section of Branford (property) for short-term rentals. The defendants claim that the court improperly determined, as a matter of law, that the plaintiff's use of the property was lawful under § IV of the 1994 Pine Orchard Association zoning regulations (1994 regulations) because it was consistent with the definition of a "single-family dwelling" and, therefore, was a protected nonconforming use. The defendants also claim, in the alternative, that the court should have remanded the case to the board for consideration of whether, even if short-term rentals were permitted under the 1994 regulations, the plaintiff's rental of the property met the other requirements of those regulations. We reject the defendants' claim that the use of any property in the Pine Orchard Association (Pine Orchard) for short-term rentals was impermissible under the 1994 regulations. We agree, however, that the court improperly determined that the plaintiff had established a lawful nonconforming use of the property when there is no indication in the record that the board decided that question in the first instance. Accordingly, we reverse in part the judgment of the court.

marks omitted)); C. Scanlon, "Re-zoning the Sharing Economy: Municipal Authority to Regulate Short-Term Rentals of Real Property," 70 SMU L. Rev. 563, 566 (2017) ("[n]ever before have property owners been able to connect so easily with potential short-term lodgers through internet platforms scholars call the 'sharing economy' "). Critical to all such appeals, including the present dispute, is the particular terminology employed in the applicable zoning regulations.

[4] Hopkins and Wolff are owners of real property located at 6 Halstead Lane in Branford, which abuts the plaintiff's property, and were granted permission to intervene by the trial court.

The record reveals the following relevant undisputed facts and procedural history. "[Pine Orchard] is an incorporated borough and municipal subdivision of the town of Branford, Connecticut, created by special act of the General Assembly in 1903. [Pine Orchard] has jurisdiction over, among other things, planning and zoning and zoning enforcement. [Pine Orchard's] zoning authority (its executive board) enforces the . . . regulations and employs a zoning enforcement officer . . . to assist in that function. The [board] hears and decides appeals of the zoning authority or [zoning enforcement officer]. . . .

"The plaintiff purchased the property in September, 2005, which consists of a single-family home in the Pine Orchard section of Branford. The property is in a residential zone to which [Pine Orchard's] zoning regulations apply. Since its acquisition, the plaintiff has rented the property to individual families through an online rental platform known as [VRBO]. [See footnote 1 of this opinion.] On average, the property is rented over fifty days per year for rental periods of three days to one week. The property is typically rented around major holidays, Yale University graduation weekends, and during summer weeks, but is available for rental at any time during the year. . . . The property has not been rented for a period in excess of thirty [consecutive] days in the past ten years. . . .

"The plaintiff owns and rents several single-family homes for investment purposes, including the property, and the property is depreciated for income tax purposes. . . . The property is not his primary residence." (Citations omitted.)

Pine Orchard amended the Pine Orchard Association Zoning Ordinance[5] on September 19, 1994. The 1994

[5] The Pine Orchard Association Zoning Ordinance refers to its contents as "regulations." See Pine Orchard Assn. Zoning Regs., § I (effective September 19, 1994); Pine Orchard Assn. Zoning Regs., § 1. Accordingly, this opinion shall refer to the ordinance's contents as regulations.

regulations provide for several permitted uses, including use as "[a] single-family dwelling." Pine Orchard Assn. Zoning Regs., § IV (4.1) (effective September 19, 1994). Section XIII of the 1994 regulations defines a "single family dwelling" as "[a] building designed for and occupied exclusively as a home or residence for not more than one family." Id., § XIII. The 1994 regulations define a "family" as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests. A roomer, boarder or lodger, shall not be considered a member of a family." Id. The terms "dwelling," "roomer," "boarder," and "lodger" are not defined in the 1994 regulations.

In 2018, in response to complaints from several residents concerning alleged disruption to residential life and safety issues caused by short-term vacation rentals, Pine Orchard created a short-term rental committee to investigate how community members used short-term rentals. Pine Orchard thereafter adopted several amendments to its zoning regulations, effective October 19, 2018 (2018 regulations). Section 4 of the 2018 regulations, "Permitted Uses," provides in relevant part: "A single-family dwelling may not be used or offered for use as a Short-Term Rental Property. . . ." Pine Orchard Assn. Zoning Regs., § 4.1. Section 16, "Definitions," was amended to add a definition for "Dwelling Unit," which provides: "One or more rooms connected, constituting a separate, independent housekeeping unit, which contains independent cooking, living and sleeping facilities." Id., § 16. A definition for "Short Term Rental Property" also was added: "A residential dwelling unit that is used and/or advertised for rent for occupancy by guests for consideration for a period of less than thirty (30) continuous days." Id. The definition of a single-family dwelling was not altered.

On August 16, 2019, a Pine Orchard zoning enforcement officer issued a letter to the plaintiff (1) advising

him that the renting of his property to "[s]hort term overnight guests" was in violation of the "short term rental ordinance" and (2) ordering him to cease and desist from that activity. The plaintiff appealed to the board pursuant to General Statutes § 8-7,[6] claiming that his use of the property for short-term rentals was a protected nonconforming use under the 1994 regulations, which were the governing regulations when he bought the property and began using it for short-term rentals.

"General Statutes [§ 8-2] provides in relevant part that zoning regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. . . . A nonconformity has been defined as a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations [were] adopted. . . . For a use to be considered nonconforming . . . that use must possess two characteristics. First, it must be lawful and second, it must be in existence at the time that the zoning regulation making the use nonconforming was enacted. . . . The party claiming the benefit of a nonconforming use bears the burden of proving that the nonconforming use is valid." (Internal quotations marks omitted.) *Stamford* v. *Ten Rugby Street, LLC*, 164 Conn. App. 49, 71, 137

[6] General Statutes § 8-7 provides in relevant part: "An appeal may be taken to the zoning board of appeals by any person aggrieved or by any officer, department, board or bureau of any municipality aggrieved and shall be taken within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days, by filing with the zoning commission or the officer from whom the appeal has been taken and with said board a notice of appeal specifying the grounds thereof. . . ."

A.3d 781, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

The board conducted a public hearing on the plaintiff's appeal on October 28 and November 25, 2019. At that hearing, the plaintiff maintained that short-term rentals of a single-family dwelling were permitted under the 1994 regulations, and, accordingly, because he began renting the property in 2005, prior to the adoption of the 2018 regulations that expressly prohibit the rental of single-family dwellings for fewer than thirty consecutive days, his use of the property was a preexisting nonconforming use. Contrastingly, the zoning enforcement officer testified that the 2018 regulations simply clarified the 1994 regulations and that short-term rentals of a single-family dwelling never were a permitted use. Similarly, Pine Orchard took the position that short-term rentals were not permitted under the 1994 regulations, and, therefore, the plaintiff could not establish a lawful preexisting use.

At the November 25 hearing, board members agreed that short-term rentals were not permitted under the 1994 regulations, and, for this reason, the plaintiff's use of the property was not a preexisting nonconforming use. The board thereafter voted to uphold the cease and desist order. On November 25, 2019, the board formally issued its unanimous decision denying the plaintiff's appeal and affirming the issuance of the cease and desist order. The plaintiff appealed from the board's decision to the trial court pursuant to General Statutes § 8-8 (b).[7] The court, after reviewing the return of record

[7] General Statutes § 8-8 (b) provides in relevant part: "Except as provided in subsections (c), (d) and (r) of this section and sections 7-147 and 7-147i, any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8-3 or a special permit or special exception pursuant to section 8-3c, may take an appeal to the superior court for the judicial district in which the municipality is located, notwithstanding any right to appeal to a municipal zoning board of appeals under section 8-6. . . ."

of the proceedings before the board[8] and the parties' briefs, and hearing oral arguments, issued a memorandum of decision on October 4, 2021, sustaining the plaintiff's appeal. The court held that the board incorrectly upheld the cease and desist order and, therefore, improperly denied the plaintiff's appeal.

At the outset, the court noted that it had to determine whether the plaintiff's use of his property for short-term rentals was lawful under the 1994 regulations. Given the lack of Connecticut case law on the issue, the court began its analysis by reviewing *Lowden* v. *Bosley*, 395 Md. 58, 909 A.2d 261 (App. 2006), in which the Maryland Court of Appeals held that a restrictive covenant, contained in a subdivision declaration governing all homes in the subdivision, that required that a home be used for "single family residential purposes only" did not prohibit short-term rentals of a home to a single family. Specifically, the Maryland court interpreted the "residential use" restriction to mean use for "living purposes" and held that "[w]hen the owner of a permanent home rents the home to a family, and that family, as tenant, resides in the home, there obviously is no violation of the [d]eclaration." Id., 68. Notably, the court reasoned that "[t]he transitory or temporary nature of such use does not defeat the residential status." Id. Thus, "[t]he owners' receipt of rental income in no way detracts from the *use* of the properties as *residences* by the tenants." (Emphasis in original.) Id., 69. The court further noted that, if the covenant were interpreted to implicitly preclude short-term rentals while allowing long-term rentals of the property, the question becomes "at what point does the rental of a

[8] In addition to transcripts of the hearing before the board, the return of record also contains the exhibits submitted at that hearing, including, inter alia, copies of the 1994 and 2018 regulations, the plaintiff's VRBO website advertisement, email complaints by residents of Pine Orchard, the plaintiff's tax returns, and a sample lease used by the plaintiff to rent the property.

home move from short-term to long-term: a week? a month? a season? three months? six months? one year? or several years?" Id., 70.

In the present case, the court also referenced *Yogman* v. *Parrott*, 325 Or. 358, 937 P.2d 1019 (1997), in which the Oregon Supreme Court interpreted a similar restrictive covenant in a subdivision declaration, finding it ambiguous as to whether the requirement that the property be used solely as a "residence" referred to both permanent and short-term residencies. Id., 362. Given that restrictive covenants are construed strictly against enforcement of the covenant, and given the ambiguity in the covenant, the Oregon court construed it against proscribing short-term rentals. Id., 364–66.

Ultimately, the court in the present case determined: "Nothing in the plain language of the 1994 regulations precludes short-term rentals, and the plaintiff's use of the property is consistent with the definition of single-family dwelling, which is a permitted use. The property was designed and used as a single-family dwelling, not as a multi-family dwelling or a commercial building, and is being used 'exclusively as a home or residence' because the renters occupy the home in a residential manner.

"The plaintiff testified [to the board] that he rents the property to families, who often invite other family or friends as guests. . . . When the property is rented to a family, the family cooks, eats food, parks their cars, sleeps, talks, watches television, and ultimately lives in the property for a period of time. See *Pinehaven Planning Board* v. *Brooks*, 138 Idaho 826, 830, 70 P.3d 664 (2003) (holding that short-term rental is residential use because tenants are using it for 'eating, sleeping, and other residential purposes'). Unlike the Pennsylvania ordinance in [*Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, 652 Pa. 224, 207 A.3d 886

(2019)], the 1994 regulations do not proscribe the transient use of the property. Furthermore, Black's Law Dictionary defines 'residence' as '[t]he act or fact of living in a given place for *some time*'; in contrast, 'domicile' means *both* 'bodily presence' and an '[intent] to make the place one's home."[9] Black's Law Dictionary (11th Ed. 2019).[10]

"The case law and the surrounding circumstances show that the plaintiff's use of the property was a permitted use. Moreover, as the *Lowden* court noted, there is no way to distinguish between a short-term and long-term rental absent clearly defined terms in the regulations. An interpretation of the 1994 regulations that implicitly bans short-term rentals while permitting long-term rentals creates an absurd and unworkable result. See General Statutes § 1-2z." (Citation omitted; emphasis in original; footnotes in original.)

The court further rejected the defendants' argument that the use of the property was not lawful because it was being rented to roomers, boarders, or lodgers in contravention of the 1994 regulations. The court relied on Merriam-Webster's definitions of "roomers," "lodgers" and "boarders" in finding that "[t]he record does

[9] "The [board's] reliance on *Griffith* v. *Security Ins. Co.*, 167 Conn. 450, 356 A.2d 94 (1975), for the proposition that a residence implies permanence is misplaced. In *Griffith*, the issue was whether a son was covered under his father's automobile insurance policy, which required that they share the same residence. Id. The parents were divorced and lived separately, and the son lived with his mother. Although the father frequently visited the son's house and kept some belongings there, the court found they did not share a residence because the father clearly did not live there. Id., 455. Here, the plaintiff's guests reside in the property for a period of time."

[10] "The [board] and the intervening defendants claim that 'residence' is distinguished from a 'place of temporary sojourn,' citing [Merriam-Webster Online] Dictionary, available at https://www.merriam-webster.com/dictionary/residence. That is the second definition of 'residence' in Merriam-Webster's; the first definition mirrors the Black's Law Dictionary definition of 'the act or fact of dwelling in a *place for some time*.' (Emphasis added.) Id."

not support the [board's] conclusion that the plaintiff rented the property to 'roomers, lodgers or boarders.' "

The court thus concluded that "[t]he plaintiff's use of the property . . . for rental purposes is and was a lawful, permitted use . . . [and the] use only became nonconforming after adoption of the 2018 regulations . . . ." In so concluding, the court found that the 2018 amendments to the 1994 regulations effected a prospective substantive change in the law. Finally, the court held that the board's decision upholding the issuance of the cease and desist order was illegal, arbitrary, and an abuse of discretion insofar as it relied on the 2018 regulations as the basis for ordering the plaintiff to cease making short-term rentals of his property. Accordingly, the court sustained the plaintiff's appeal and reversed the board's decision.

The defendants thereafter filed a joint petition for certification to appeal, which this court granted. This appeal followed.

I

The defendants first claim that the court incorrectly concluded that the plaintiff could continue to use the property for short-term rentals as a preexisting nonconforming use established under the 1994 regulations. In particular, the defendants argue that the court "erred as a matter of law in concluding that short-term rentals of the property constituted 'use as a single-family dwelling' under the 1994 . . . regulations." Rather, they argue that the "use of any property in [Pine Orchard] for short-term rentals has never been permitted and is inconsistent with use as a 'single-family dwelling,' defined as a property occupied exclusively as a 'home' or 'residence.' " We are not persuaded.

We begin with the applicable standard of review and legal principles that guide our analysis. "Under our well

established standard of review, [w]e have recognized that [a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that . . . deference . . . to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 714–15, 960 A.2d 1018 (2008); id., 715 (applying agency interpretation deference principles to decision of zoning board of appeals).

In the present case, the meaning of "single-family dwelling" and the terms used to define it in the 1994 regulations have not previously been subjected to judicial scrutiny. Moreover, although certain board members stated that the 2018 regulations merely clarified the 1994 regulations, the board did not indicate that it had applied a time-tested interpretation of "single-family dwelling." Accordingly, there is no basis for us to defer to the board's construction, and, therefore, we exercise plenary review in accordance with our well established rules of statutory construction.

"We also recognize that the zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Whenever possible, the language of zoning regulations will be construed so that no clause is deemed superfluous, void or insignificant. . . . The regulations must be interpreted so as to reconcile their provisions and make them

operative so far as possible. . . . When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results." (Citation omitted; internal quotation marks omitted.) Id., 715–16.

"When construing a statute [or zoning regulation], [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . In addition . . . [General Statutes] § 1-1 (a) provides in relevant part that words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. . . . When definitions are not provided in the zoning regulations, courts look to the common understanding expressed in the law and in dictionaries. . . . Moreover, no one aspect of our rules of statutory construction is dispositive." (Citations omitted; internal quotation marks omitted.) *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, 167 Conn. App. 383, 390–91, 142 A.3d 1236, cert. denied, 323 Conn. 935, 151 A.3d 383 (2016).

"Because zoning regulations are in derogation of common law property rights . . . the regulation[s] cannot be construed beyond the fair import of [their] language to include or exclude by implication that

which is not clearly within [their] express terms. . . . Critical to our resolution of this case, doubtful language will be construed against rather than in favor of a [restriction] . . . .'' (Citations omitted; internal quotation marks omitted.) Id., 392; see also *Roraback* v. *Planning & Zoning Commission*, 32 Conn. App. 409, 413, 628 A.2d 1350 (zoning regulations ''must be interpreted in light of our ordinary rule that [w]here the language of the statute is clear and unambiguous, the courts cannot, by construction, read into statutes provisions which are not clearly stated'' (internal quotation marks omitted)), cert. denied, 227 Conn. 927, 632 A.2d 704 (1993). With these principles in mind, we now turn to the defendants' claim that short-term rentals were not permitted under the 1994 regulations.

In accordance with § 1-2z, we begin our analysis with the plain language of the 1994 regulations. As a preliminary matter, we note that Pine Orchard governs a residential area within the town of Branford. Section IV of the 1994 regulations set forth the permitted uses within Pine Orchard and began with the prefatory statement that ''no building shall be erected or altered which is arranged, intended or designed to be used respectively for other than one or more of the following uses.'' Pine Orchard Assn. Zoning Regs., § IV (effective September 19, 1994). Further, § 10.2 provided in part that ''no building structure or land may be used except in accordance with the provision[s] of these regulations.'' Id., § X (10.2). Because the plain language of the 1994 regulations excluded any use not authorized by the regulations, we conclude that the regulations were permissive, rather than prohibitive, in nature. ''Permissive zoning regulations require that [t]he uses which are permitted in each type of zone [be] spelled out. Any use that is not permitted is automatically excluded.'' (Internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. 716 n.8; see also *Graff* v.

Zoning Board of Appeals, 277 Conn. 645, 653, 894 A.2d 285 (2006). Thus, the question before us is to what extent the 1994 regulations "spelled out" that rentals were a permissible use of residential property in Pine Orchard.

Section 4.1 of the 1994 regulations permitted property to be used as a "single-family dwelling." Pine Orchard Assn. Zoning Regs., § IV (4.1) (effective September 19, 1994). Section XIII of the 1994 regulations defined a "single family dwelling" as "[a] building designed for and occupied exclusively as a home or residence for not more than one family."[11] Id., § XIII. A "family" was defined as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any domestic servants or gratuitous guests. A roomer, boarder or lodger, shall not be considered a member of a family." Id. There was no requirement in the 1994 regulations that a single-family dwelling be owner-occupied.

Although the 1994 regulations did not specifically identify the renting of property as a permitted use, § 4.4 permitted "[a] sign not more than five square feet in area when placed in connection with the sale, *rental*, construction or improvement of the premises and for no other purpose . . . ." (Emphasis added.) Id., § IV (4.4). That § 4.4 expressly permitted the placement of

[11] The 1994 regulations also permitted use of property as the "[o]ffice of a physician, surgeon, lawyer, architect, insurance agent, accountant, engineer, land surveyor, or real estate broker, when located in the dwelling used by such person as his private residence; provided there is no display or advertising except for a professional name plate not exceeding 100 square inches in area and without individual illumination." Pine Orchard Assn. Zoning Regs., § IV (4.2) (effective September 19, 1994). The 1994 regulations, however, subjected those uses to additional restrictions, including that "[t]he office shall not impair the residential character of the premises through any external evidence of use other than the sign permitted by this paragraph." Id., § IV (4.2.3). Further, § 4.3 of the 1994 regulations permitted "[a]ccessory use incident to the . . . permitted uses" specified in § IV. Id., § IV (4.3).

a sign in connection with the rental of a property demonstrates that the drafters of the 1994 regulations recognized the renting of property as a permissible use of residential property in Pine Orchard. The defendants do not argue otherwise. In fact, at oral argument before this court, counsel for the defendants agreed that the 1994 regulations permitted long-term rentals of residential properties. Further, as our Supreme Court has recognized, "it is undisputable that the right of property owners to rent their real estate is one of the bundle of rights that, taken together, constitute the essence of ownership of property. . . .

"Owners of a single-family residence can do one of three economically productive things with the residence: (1) live in it; (2) rent it; or (3) sell it. Thus, if the owners of a single-family residence do not choose, for reasons of family size or other valid reasons, to live in the house they own, their only viable options are to rent it or to divest themselves entirely of their ownership by selling it. Stripping the [owners] of essentially one third of their bundle of economically productive rights constituting ownership is a very significant restriction on their right of ownership." (Citations omitted; footnotes omitted.) *Gangemi* v. *Zoning Board of Appeals*, 255 Conn. 143, 151–52, 763 A.2d 1011 (2001).

Thus, in the absence of clear language within the 1994 regulations imposing some restriction on the rental of property as a permissible use, we may not impose such a restriction. See *Watson* v. *Zoning Board of Appeals*, 189 Conn. App. 367, 395, 207 A.3d 1067 (2019) ("the [zoning] regulation cannot be construed beyond the fair import of its language to include or exclude by implication that which is not clearly within its express terms" (internal quotation marks omitted)); *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653

("[b]ecause zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication").

On appeal, the defendants attempt to draw a distinction between short-term and long-term rentals under the 1994 regulations, arguing that short-term rentals would be incompatible with the requirement in the 1994 regulations that the property be used as a "single-family dwelling." In particular, they claim that "by renting his property on a day-to-day basis to different groups of . . . unrelated people for profit, the plaintiff was not using [his] property as a single-family dwelling, i.e., a building 'occupied exclusively as a home or residence for not more than one family.' " In support of this claim, the defendants argue that "the common and ordinary meaning of the regulations [and] the case law of this state interpreting the term 'residence' . . . confirm that the board's interpretation of the regulations" as not permitting short-term rentals of single-family dwellings "was correct as a matter of law." We are not persuaded.

As previously noted, the 1994 regulations contained no specific language imposing restrictions on the rental of property in general. Of particular relevance to the present case, the 1994 regulations did not clearly impose a minimum temporal occupancy requirement for use of a single-family dwelling. The 1994 regulations only required that a single-family dwelling be a "building designed for and occupied exclusively as a home or residence for not more than one family." Pine Orchard Assn. Zoning Regs., §§ IV (4.1) and XIII (effective September 19, 1994). Thus, so long as a single "family" occupies a building as "a home or residence" at a given time, the structure is being used as permitted under the 1994 regulations.

The defendants argue that for a dwelling to be considered a home or residence there must be some degree

of permanence to the family's occupancy. Because the 1994 regulations do not define "home" or "residence," it is appropriate to turn to their common and ordinary meanings. See *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. 717.[12] Merriam-Webster's Collegiate Dictionary defines "home" as "one's place of residence: domicile . . . [a] house" and, secondarily, as "the social unit formed by a family living together." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 594. Black's Law Dictionary defines "home" as "[a] dwelling place." Black's Law Dictionary, supra, p. 880. The American Heritage Dictionary of the English Language defines "home" as "[a] place where one lives; a residence," secondarily as "[t]he physical structure within which one lives, such as a house or apartment," and, thirdly, as "[a] dwelling place together with the family or social unit that occupies it; a household." American Heritage Dictionary of the English Language (5th Ed. 2011) p. 840. Finally, Webster's Third New International Dictionary defines "home" as "the house and grounds with their appurtenances habitually occupied by a family; one's principal place of residence: domicile; a private

[12] "When using a dictionary to understand a word, this court has explained that 'any word in the English language—except for words of specialized contexts, such as mathematics or science—will ordinarily have multiple meanings, depending on the context in which it has been used. . . . That is why we have dictionaries: not to determine *the* meaning of a given word, or even *the preferred* meaning of a given word, but simply to give us a lexicon of the various meanings that the word has carried depending on the various contexts of its use.' " (Emphasis in original.) *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, supra, 167 Conn. App. 396; see also *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 250, 720 A.2d 879 (1998) ("Although we have on occasion looked to dictionaries in order to give meaning to words used in a legal context . . . that does not mean . . . that a dictionary gives *the* definition of any word. A dictionary is nothing more than a compendium of the various meanings and senses in which words have been and are used in our language. A dictionary does not define the words listed in it in the sense of stating what the words mean universally. Rather, it sets out the range of meanings that may apply to those words as they are used in the English language, depending on the varying contexts of those uses." (Emphasis in original.)).

dwelling: house." Webster's Third New International Dictionary (1993) p. 1082.

Those same sources ascribe a subtly different meaning to "residence." Merriam-Webster's Collegiate Dictionary defines "residence" as "the act or fact of dwelling in a place for some time . . . the act or fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit," secondarily as "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn," thirdly as "a building used as a home," and, fourthly, as "the period or duration of abode in a place." Merriam-Webster's Collegiate Dictionary, supra, p. 1060. Black's Law Dictionary defines "residence" as "[t]he act or fact of living in a given place for some time . . . . The place where one actually lives, as distinguished from a domicile . . . . *Residence* [usually] just means bodily presence as an inhabitant in a given place; *domicile* [usually] requires bodily presence plus an intention to make the place one's home." (Emphasis in original.) Black's Law Dictionary, supra, p. 1565. The American Heritage Dictionary of the English Language defines "residence" as "[t]he place in which one lives; a dwelling" and, secondarily, as "[t]he act or a period of residing in a place." American Heritage Dictionary of the English Language, supra, p. 1493. Finally, Webster's Third New International Dictionary defines "residence" as "the act or fact of abiding or dwelling in a place for some time; an act of making one's home in a place. . . . [T]he act or fact of living or regularly staying at or in some place either in or as a qualification for the discharge of a duty or the enjoyment of a benefit," secondarily as "the place where one actually lives or has his home as distinguished from his technical domicile. . . . [A] temporary or permanent dwelling place, abode, or habituation to which one intends to return as distinguished from a place of temporary sojourn or

transient visit. . . . [A] domiciliary place of abode," and, finally, as "a building used as a home: dwelling." Webster's Third New International Dictionary, supra, p. 1931.

Notably, the definition of a single-family dwelling in the 1994 regulations separates "home" and "residence" by the conjunction "or." This suggests that the drafters of the regulations intended to attach different meanings to those terms. See *Celentano* v. *Oaks Condominium Assn.*, 265 Conn. 579, 609, 830 A.2d 164 (2003) ("[i]t is a fundamental tenet of statutory construction that [t]he use of . . . different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings" (internal quotation marks omitted)). Applying this principle, although the dictionary definitions of "home" and "residence" have significant overlap, there are meaningful differences that impact our analysis. In particular, the essence of the definitions of "home" indicate that a home is a "domicile," i.e., "a person's fixed, permanent, and principal home for legal purposes." Merriam-Webster's Collegiate Dictionary, supra, p. 371. By contrast, although "residence" can mean a home, it can also mean a place where someone lives for some period of time without the same sense of permanence associated with a home. Moreover, to interpret "residence," as that term is used in the 1994 regulations, as a place where one dwells with a sense of permanence, distinguished from a place of temporary sojourn, would render that term duplicative of "home" and essentially meaningless. Given that the drafters explicitly wrote the 1994 regulations to state that a single-family dwelling could be a "home" *or* "residence," we conclude that they also found the differences in the meanings attached to each to be significant and chose not to render the term "residence" superfluous.

We also are mindful that our fundamental objective in interpreting zoning regulations is to ascertain and give effect to the apparent intent of the drafters by reading the zoning regulations as a whole. See *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, supra, 167 Conn. App. 390–91. Consequently, as with any legislative enactment, the language at issue must be read in the context of other parts of the regulations to which it relates. See id., 391 ("[a] court must interpret a statute as written . . . and it is to be considered as a whole, with a view toward reconciling its separate parts in order to render a reasonable overall interpretation" (internal quotation marks omitted)). The text of the 1994 regulations demonstrates that the drafters included detailed provisions outlining what residents of Pine Orchard could and could not do. The 1994 regulations spelled out, inter alia, the types of businesses that could operate on a property, the types of accessory buildings that could be constructed and the permissible uses of such buildings, the size of signs residents could display, various uses that required special permits from the zoning authority, the minimum distance houses had to be set back from the front lot line, the minimum size of lots, and the board's authority to bring enforcement actions. See Pine Orchard Assn. Zoning Regs., §§ IV–VII and XIII (effective September 19, 1994). Furthermore, the regulations went into painstaking detail regarding the granting of special use permits and additional conditions that could be imposed on the underlying special use. See id., § V. From this it is evident that, had the drafters wanted to permit rentals of only a particular duration, they could have done so.

The case of *Wilkinson* v. *Chiwawa Communities Assn.*, 180 Wn. 2d 241, 327 P.3d 614 (2014), is instructive. In that case, the Supreme Court of Washington found that a restrictive covenant that limited use of lots to

"single family residential use" while prohibiting "industrial or commercial use" did not prohibit short-term vacation rentals of single-family homes. See id., 246, 251. Significantly, the court found that the covenant clearly contemplated rentals of single-family homes because it included a restriction on the number and appearance of signs "advertising the property for sale or rent." Id., 247, 251. The court determined that, because the covenant at issue specified the rights and duties of residents in great detail, but did not address short-term rentals, the drafters did not intend to prohibit rentals of a particular duration. Id., 251. Similarly, in the present case, the 1994 regulations permitted and regulated the signs placed on a property in connection with the rental of the premises but in no way limited the duration of rentals. See Pine Orchard Assn. Zoning Regs., § IV (4.4) (effective September 19, 1994).

The defendants, however, suggest that we need not engage in this interpretive exercise because our Supreme Court has already determined that a residence "is a place where a person lives with a degree of permanency as distinguished from temporariness." In particular, the defendants point to our Supreme Court's decision in *State* v. *Drupals*, 306 Conn. 149, 49 A.3d 962 (2012).

In *Drupals*, the court interpreted the term "residence" under General Statutes (Rev. to 2011) § 54-251 (a), which required convicted sex offenders to register their "residence address" with the Commissioner of Public Safety (commissioner).[13] Id., 161–66. In that case,

[13] General Statutes (Rev. to 2011) § 54-251 (a) provides in relevant part: "Any person who has been convicted . . . of a criminal offense against a victim who is a minor or a nonviolent sexual offense . . . shall . . . whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record, residence address and electronic mail address, instant message address or other similar Internet communication identifier, if any, with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and shall maintain such registration for ten years . . . . If any person who is subject to registration under this section changes such person's address,

the defendant was required to notify the commissioner, via the sex offender registry unit of the state police (unit), in writing of any change of his "residence address" without undue delay. Id., 160–61. During a period of unstable housing, the defendant failed to provide notice of his address and was thereafter charged with failure to comply with the sex offender registration requirements. Id., 153–56. At trial, the defendant contended that, "on the basis of his understanding of the statutes, he had five days in which to notify the unit of a change of residence address, and that he was not required to provide notice of temporary or transient overnight visits." Id., 156. The trial court disagreed and concluded that even temporary overnight visits constituted a change of residence address that triggered the notification requirements. Id., 157. The defendant appealed from the judgment of conviction and claimed that there was insufficient evidence that he failed to give notice of his change of residence without undue delay. Id., 157–58.

Our Supreme Court determined that, "[i]n order to evaluate the defendant's claim . . . it is necessary for us to determine the contours of what is required to establish where a sex offender registrant 'resides' . . . as used in § 54-251 . . . ." Id., 158–59. Noting that "residence" was not statutorily defined, the court looked to its dictionary definition to ascertain its commonly approved meaning in accordance with § 1-1 (a). Id., 161–62. As in the present case, the court in *Drupals*

such person shall, without undue delay, notify the Commissioner of Public Safety in writing of the new address and, if the new address is in another state, such person shall also register with an appropriate agency in that state, provided that state has a registration requirement for such offenders. . . . During such period of registration, each registrant shall complete and return forms mailed to such registrant to verify such registrant's residence address . . . ."

All references herein to § 54-251 are to the 2011 revision of the statute.

cited the Black's Law Dictionary definition of "residence" as "[t]he act or fact of living in a given place for some time" and further noted the definition of a "resident" as "[a] person who lives in a particular place." (Internal quotation marks omitted.) Id., 162. The court also referenced Webster's Third New International Dictionary (2002), which defines residence as "the act or fact of abiding or dwelling in a place for some time: an act of making one's home in a place . . . ." (Internal quotation marks omitted.) Id. The court then explained that "Connecticut courts have explored what constitutes residency in other probate related contexts, and have established that a person resides in a place where she is physically located for more than a temporary or transient period of time, and where the usual conditions of household life obtain. For example, in the context of establishing residency for the purpose of legally changing one's name, this court has stated that, [a] resident of a place is one who is an actual stated dweller in that place, as distinguished from a transient dweller there . . . ." (Internal quotation marks omitted.) Id. The court determined that "[t]he use of the wording 'for some time' in both the Black's Law Dictionary and the Webster's Third New International Dictionary definitions of residence strongly supports such a result. Consistent with this precedent, we conclude that residence means the act or fact of living in a given place for some time, *and the term does not apply to temporary stays*." (Emphasis added.) Id., 163. In so concluding, the court expressly rejected the notion that "residence is wherever one dwells, no matter how temporarily" and reversed the judgment of conviction. Id. The defendants in the present case assert that the Supreme Court's interpretation of "residence" in *Drupals* requires us to conclude that short-term rentals were not permitted under the 1994 regulations. Because we conclude that *Drupals* is inapplicable to the present case, we are not persuaded.

Although in *Drupals* the court interpreted "residence" according to its common and ordinary meaning, before doing so, it noted that, because it was interpreting a criminal statute, "[the statute] must be construed strictly against the state and in favor of the accused." (Internal quotation marks omitted.) Id., 160. Similarly, with respect to zoning regulations, "[b]ecause zoning regulations are in derogation of common-law property rights, they must be strictly construed and not extended by implication." *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653. These similar rules of construction lead to different outcomes in *Drupals* and the present case. The rule of strict construction in *Drupals* led to a narrower definition of residence because the narrower definition benefited the accused. By contrast, in the present case, a broader definition of residence more strictly limits the restrictions on the landowner's use of his property and is therefore the preferred definition.

In addition, the court in *Drupals* interpreted the common and ordinary meaning of "residence" in the context of a "residence address" that must be registered with the commissioner so that authorities may contact and track individuals convicted of sexual offenses. As the court explained: "In view of the fact that the initial requirement indicates that the registrant must list his place of residence, it is evident from a reading of § 54-251 that the legislature intended 'residence address' and 'address' to be synonymous with 'place of residence,' or more precisely, to denote the physical description of where the registrant resides. Thus, the primary issue is what is required to establish where a person resides under § 54-251." *State* v. *Drupals*, supra, 306 Conn. 161 n.7. With this framework in mind, the court considered whether a registrant was required to provide notice to the commissioner each time his address changed, even temporarily. Id., 161–63. Put in the context of the present case, would a registrant be required to provide

notice of a change of address if he went on vacation to another location for a few days? The court in *Drupals* "reject[ed] the proposed definitions offered by the state to the effect that a residence is where an individual is at the time because this definition would lead to absurd results. For example, if a registrant were in the process of moving from Connecticut to California and was driving a car across the country, pursuant to the state's definition, he would be required to fax the registry every night when he stopped at a motel, even though the registry would be closed if he stopped late at night, and he would possibly have left his motel location before the registry opened in the morning. The absurdity of this scenario is exacerbated if the registrant were traveling on a weekend, when the registry is closed. He would be required to send two separate changes of address to an office where no one could record those addresses until he had already left the location. We must interpret the statute so that it does not lead to absurd or unworkable results." Id., 165.

In the present case, interpreting the 1994 regulations to permit short-term rentals does not lead to any such absurd or unworkable results. To the contrary, interpreting those regulations to have permitted long-term rentals but not short-term rentals would lead to the unworkable result that, prior to the 2018 regulations, landowners had to somehow figure out where the dividing line was between long-term and short-term. Although the 2018 regulations appear to set this dividing line at thirty days, the 1994 regulations contained no clear language regarding the permissible duration for rentals of single-family dwellings, much less any sort of prohibition on rentals for fewer than thirty days. We fail to see how a resident of Pine Orchard could read the 1994 regulations as permitting rentals for a period of thirty days while prohibiting rentals for twenty-nine days or fewer. In either case, the tenant is typically

using the rented property for a vacation or other temporary stay and the sense of permanence the defendants would have us read into the 1994 regulations is lacking.[14] "A property owner should be able reasonably to ascertain from the regulations how to use the property in compliance with them." *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). The defendants' interpretation of the 1994 regulations is unworkable in that it fails to provide such guidance. Consequently, *Drupals*, rather than assisting the defendants, undermines their argument in its contrast to the present case.

At most, the defendants have proffered a reasonable interpretation of residence under the 1994 regulations. But so, too, has the plaintiff. The law is clear that "[w]here more than one interpretation of language is permissible, restrictions upon the use of lands are not to be extended by implication . . . [and] doubtful language will be construed against rather than in favor of a restriction . . . ." (Internal quotation marks omitted.) *Smith Bros. Woodland Management, LLC* v. *Planning & Zoning Commission*, 88 Conn. App. 79, 86, 868 A.2d 749 (2005). The 1994 regulations expressly permit landowners to advertise their property for rent. Thus, the defendants do not dispute that rental of residential property is a permitted use under the 1994 regulations. At the same time, the regulations do not explicitly impose a minimum temporal occupancy requirement.

[14] Ironically, under the defendants' interpretation of "residence," any landowner or renter not occupying a single-family dwelling with a sense of permanence would be in violation of the zoning regulation. Thus, an individual renting a single-family dwelling for a period of thirty days—a permissible use per the 2018 regulations—would run afoul of the defendants' own interpretation of the 1994 regulations, even though the definition of single-family dwelling is the same under both sets of regulations. Consequently, we agree with the trial court that the 2018 amendments to the regulations constituted a substantive change and not merely a clarification of the 1994 regulations, and we reject the defendants' claim to the contrary.

Under such circumstances, and given that the plaintiff's interpretation of residence as used in the 1994 regulations is at least as reasonable as the defendants', we will not extend the regulations to include by implication a limit on the duration of permitted rentals. Thus, we conclude that the definition of a residence does not clearly impose a minimum temporal occupancy requirement. Rather, we conclude that in the 1994 regulations, although a home was intended to convey a sense of permanence, a residence was not. A residence is simply a place where a family lives for some time.

Consequently, we agree with the trial court that, so long as one family dwells in the property, *any* amount of time may constitute "some time" sufficient to make the property the family's residence. Our conclusion is consistent with a majority of cases from other jurisdictions. See, e.g., *Wilson* v. *Maynard*, 961 N.W.2d 596, 602 (S.D. 2021) (because "residential" is commonly understood to pertain to dwelling in place for "some time," "residential purposes" includes the occupation of a home or dwelling for short, indefinite period of time); see also *Slaby* v. *Mountain River Estates Residential Assn., Inc.*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012) ("the cabin would be used for 'residential purposes' anytime it is used as a place of abode, even if the persons occupying the cabin are residing there temporarily during a vacation"); *Lowden* v. *Bosley*, supra, 395 Md. 68 (transitory nature of "residential use" does not defeat residential status); *Tarr* v. *Timberwood Park Owners Assn., Inc.*, 556 S.W.3d 274, 291 and n.14 (Tex. 2018) (unless otherwise provided in covenant, duration of rental has no bearing on whether property is being used for "residential purpose" such as eating or sleeping); *Wilkinson* v. *Chiwawa Communities Assn.*, supra, 180 Wn. 2d 252 ("[i]f a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, this use is residential, not com-

mercial, no matter how short the rental duration" (internal quotation marks omitted)); *Heef Realty & Investments, LLP* v. *Cedarburg Board of Appeals*, 361 Wis. 2d 185, 194, 861 N.W.2d 797 (App.) ("There is nothing inherent in the concept of residence or dwelling that includes time. . . . If the [c]ity is going to draw a line requiring a certain time period of occupancy in order for property to be considered a dwelling or residence, then it needs to do so by enacting clear and unambiguous law."), review denied, 865 N.W.2d 503 (Wis. 2015).

Rather than follow this line of cases, the defendants urge us to adopt the reasoning of *Styller* v. *Zoning Board of Appeals*, 487 Mass. 588, 169 N.E.3d 160 (2021), and *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 652 Pa. 224, in which short-term rentals were found to be impermissible uses of single-family dwellings in a residential zone. We conclude, however, that, contrary to the defendants' assertions, those cases do not involve zoning regulations analogous to the 1994 regulations. Specifically, the regulations at issue in both *Styller* and *Slice of Life, LLC*, include the language "single housekeeping unit" in defining what constitutes a "family." See *Styller* v. *Zoning Board of Appeals*, supra, 600; *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 227. Both courts interpreted "single housekeeping unit" to require the person or persons residing in a home to function as a family and to be "sufficiently stable and permanent" and "not . . . purely transient." *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 232, 252; see also *Styller* v. *Zoning Board of Appeals*, supra, 600 ("permanency and cohesiveness are inherent in the notion of a single housekeeping unit" (internal quotation marks omitted)). Accordingly, both courts held that such language indicated that use as a single-family dwelling connoted a measure of permanency

inconsistent with transient uses such as short-term rentals. See *Styller* v. *Zoning Board of Appeals*, supra, 599–600; *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 252. Although Pine Orchard added a definition of "dwelling unit" in the 2018 regulations that describes it as "constituting a separate, independent housekeeping unit," that phrase is absent from the 1994 regulations. Pine Orchard Assn. Zoning Regs., § 16. Furthermore, the courts in both *Styller* and *Slice of Life, LLC*, acknowledged that they were required to accord deference to the board's reasonable interpretation of its own zoning regulations. *Styller* v. *Zoning Board of Appeals*, supra, 599–600; *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 250. We do not accord similar deference when, as in the present case, the regulation "has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, supra, 289 Conn. 715. Thus, that the courts in *Styller* and *Slice of Life, LLC*, found short-term rentals inconsistent with a property's use as a single-family dwelling is of little value to our resolution of the present case.[15]

[15] We find it significant that almost all courts with similar rules of construction to our own—in which language in a regulation or covenant that is subject to more than one reasonable interpretation will be construed narrowly so as not to infringe upon landowner rights—have reached the same conclusion as we do today. See, e.g., *Slaby* v. *Mountain River Estates Residential Assn., Inc.*, supra, 100 So. 3d 569; *Kinzel* v. *Ebner*, 157 N.E.3d 898 (Ohio App. 2020); *Samar* v. *Zoning Board*, Docket No. 922 C.D. 2018, 2019 WL 1749038 (Pa. Commw. April 16, 2019); *JBrice Holdings, LLC* v. *Wilcrest Walk Townhomes Assn., Inc.*, 644 S.W.3d 179 (Tex. 2022); *Schack* v. *Property Owners Assn.*, 555 S.W.3d 339 (Tex. App. 2018); *Boatner* v. *Reitz*, Docket No. 03-16-00817-CV, 2017 WL 3902614 (Tex. App. August 22, 2017); *Heef Realty & Investments, LLP* v. *Cedarburg Board of Appeals*, supra, 361 Wis. 2d 185; *State ex rel. Harding* v. *Door County Board of Adjustment*, 125 Wis. 2d 269, 371 N.W.2d 403 (App.), review denied, 125 Wis. 2d 584, 375 N.W.2d 216 (1985).

Contrastingly, most courts that have determined that short-term rentals are prohibited generally apply a different canon of interpretation in which

We also are unpersuaded by the defendants' argument that "further context from the regulations" supports the board's construction of "single-family dwelling" as being incompatible with short-term rentals. They argue that, because the 1994 regulations limited the definition of "residence" to "not more than one family," they express a "clear preference for permanency of use by familial units, as opposed to transient serial occupation by different, unrelated groups. Indeed, serial occupation by different, unrelated groups, such as short-term rentals, involves 'more than one' group and is therefore inconsistent with this express limitation." (Emphasis omitted.)

a zoning board's interpretation of the applicable zoning regulation is afforded greater deference. See *Styller* v. *Zoning Board of Appeals*, supra, 487 Mass. 597; *Bostick* v. *Desoto County*, 225 So. 3d 20 (Miss. App. 2017); *Slice of Life, LLC* v. *Hamilton Township Zoning Hearing Board*, supra, 652 Pa. 224. In addition, some courts have relied on certain language not present within the regulations at issue in the present case—such as "single-housekeeping unit" and "lack of profit motive" in the definition of a family or a requirement that the property be used for "residential purposes" or "private occupancy" *as expressly distinguished from* "commercial purposes"—to prohibit short-term rentals. See, e.g., *Wortham* v. *Barrington Hills*, 202 N.E.3d 987, 997 (Ill. App.) (short-term vacation rentals of single-family residential home constituted commercial use in violation of municipal zoning ordinance prohibiting commercial use of residential property except as specifically authorized in ordinance), appeal denied, 197 N.E.3d 1134 (Ill. 2022); *Siwinski* v. *Ogden Dunes*, 949 N.E.2d 825, 830 (Ind. 2011) (by dividing city into residential and commercial districts, zoning scheme implicitly meant residential areas could not support commercial uses; use as short-term rental was commercial and prohibited in residential area); *Hensley* v. *Gadd*, 560 S.W.3d 516, 519, 524 (Ky. 2018) (restrictive covenant limited use to residential purposes and prohibited commercial uses including hotel; court determined short-term renters could not be considered "residents" and use of property for short-term rentals met statutory definition of hotel); *Eager* v. *Peasley*, 322 Mich. App. 174, 190–91, 911 N.W.2d 470 (2017) (restrictive covenant limited use to private occupancy and prohibited commercial use; short-term rental was impermissible commercial use); *Kintner* v. *Zoning Hearing Board*, Docket No. 532 C.D. 2018, 2019 WL 178486, *5 (Pa. Commw. January 14, 2019) (because short-term rentals necessarily involve remuneration, they violated single-family residential zoning ordinance defining " 'family' " as " '[a]s many as six (6) persons living together as a single, permanent and stable nonprofit housekeeping unit' "), appeal denied, 655 Pa. 327, 217 A.3d 1214 (2019).

The defendants' argument conflates the family occupancy requirement of the 1994 regulations with the residence requirement. They are, in fact, separate issues. The residence requirement set forth *what* a family can do on the property. For example, in addition to living there, they could only operate a commercial enterprise under very specific parameters. See Pine Orchard Assn. Zoning Regs., § IV (4.2) (effective September 19, 1994). By contrast, the family requirement defined *who* can live on the property. Although we conclude that the 1994 regulations permitted short-term rentals, they did not permit rentals to *any* group of people. The 1994 regulations define a "single family dwelling" as "[a] building designed for and *occupied exclusively* as a home or residence for *not more than one family*." (Emphasis added.) Id., § XIII. Thus, to comply with the 1994 regulations, the occupants, whether owners, long-term renters, or short-term renters, must constitute not more than one family. This requirement is, accordingly, unrelated to the length of time the family resides on the property.

Courts in other jurisdictions have reached the same conclusion. For example, the Wisconsin Court of Appeals held that short-term rentals were permissible under a zoning ordinance that defined "single-family dwelling" as "a detached building designed for or occupied *exclusively by one family*," and "family" as "one or more persons related by blood or marriage occupying the premises and living together as a single housekeeping unit." (Emphasis added.) *State ex rel. Harding* v. *Door County Board of Adjustment*, 125 Wis. 2d 269, 271, 371 N.W.2d 403 (App.), review denied, 125 Wis. 2d 584, 375 N.W.2d 216 (1985). In that case, the court reasoned that, because the property at issue was designed for and would be occupied exclusively by one family at a time to the exclusion of other families, short-term rentals were consistent with use as a single-family

dwelling. Id.; see also *Brown* v. *Sandy City Board of Adjustment*, 957 P.2d 207, 208, 211–12 (Utah App.) (ordinance defined family as single housekeeping unit but neither included any time limitation for property use nor prohibited short-term rentals), cert. denied, 982 P.2d 88 (Utah 1998); *In re Toor*, 192 Vt. 259, 267–68, 59 A.3d 722 (2012) (Where a zoning ordinance limited use in a residential zone to "occupancy by a family living as a household unit," short-term rentals were permissible because "appellants rent to tenants who use it for the same purpose as appellants. . . . [E]ach renter is a single family that maintains a household during the period of the rental." (Footnote omitted.)).[16]

The defendants suggest that a different conclusion is required in the present case based on how "family" is defined in the 1994 regulations. Those regulations define "family" as "[o]ne or more persons related by blood, marriage or adoption, and in addition, any

[16] Courts in other jurisdictions have, however, reached the opposite conclusion. For example, the Supreme Court of Indiana rejected a homeowner's argument that the court should construe language in a city's zoning code restricting use to single-family dwellings, which were defined as "a separate detached building designed for and occupied exclusively as a residence by one family," to allow for short-term rentals. *Siwinski* v. *Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011). In that case, the court interpreted the definition of single-family dwelling to unambiguously exclude short-term rentals because "one family" did not mean one family at a time, but rather one family, consistent over time. Id., 829–30. For the reasons previously set forth in this opinion, we disagree with the analysis in *Siwinski* and find it unpersuasive. See footnote 15 of this opinion. Similarly, in *Bostick* v. *Desoto County*, 225 So. 3d 20 (Miss. App. 2017), the court found that, "[r]egardless of whether any particular group that rented from [the homeowners] met the definition of a 'family' . . . the transient nature of the rentals resulted in the houses being 'occupied by . . . more than one family,' a non-permitted use under the applicable zoning regulations." (Citation omitted.) Id., 25. Significantly, the court in *Bostick* expressed deference toward the zoning board's interpretation of the zoning regulations. See id., 24 ("unless manifestly unreasonable, we will give great weight . . . to the construction placed upon the words by the local authorities" (internal quotation marks omitted)). As previously noted in this opinion, however, no such deference is required in the present case.

domestic servants or gratuitous guests. A roomer, boarder or lodger, shall not be considered a member of a family." Pine Orchard Assn. Zoning Regs., § XIII (effective September 19, 1994). The defendants argue that, because the definition of "family" specifically provides that "gratuitous guests" are consistent with the use of a home by a single family, "[t]he clear and necessary implication . . . is that *paying* guests are *inconsistent* with use of a property as a single-family dwelling." (Emphasis in original.) The defendants then contend that the "express exclusion of 'roomers, boarders and lodgers' from the definition of 'family' reinforces that 'family' and, in turn, a 'home' or 'residence' is not a place used by temporary paying occupants." Again, we are not persuaded.

First, the defendants conceded at oral argument before this court that the people to whom the plaintiff rents are not roomers, boarders or lodgers. We agree. The ordinary meaning of all three terms is someone who pays to live either in a singular room of another's property or *with* a family in that property and who may receive regular meals while staying with the family. See Merriam-Webster's Collegiate Dictionary, supra, p. 1082 (defining "roomer" as "one who occupies a rented room in another's house"); id., p. 137 ("boarder" is "one that boards; esp[ecially]: one that is provided with regular meals or regular meals and lodging"); id., p. 731 ("lodger" is defined as "roomer"); Black's Law Dictionary, supra, p. 214 (defining "boarder" as "[s]omeone who lives in another's house and receives food and lodging in return either for regular payments or for services provided"); Black's Law Dictionary, supra, p. 1128 ("lodger" is "[s]omeone who rents and occupies a room in another's house"). If a family rents the entire property from a landowner and is not living with the landowner, the family members are, by definition, not roomers, boarders or lodgers. In turn, the family renting the property

may not take in roomers, boarders or lodgers, but they are permitted to have gratuitous guests. Put simply, a family who rents the property has the same rights and restrictions as does the landowner when he occupies the property.

Second, taken to its logical conclusion, the necessary implication of the defendants' interpretation of "family" as prohibiting temporary paying occupants is that all rentals of property would be prohibited within the Pine Orchard residential zone. Such an interpretation is in direct conflict with the express language in § 4.4 of the 1994 regulations permitting signage in connection with the rental of property within Pine Orchard. Furthermore, although the defendants contend that a durational requirement for rentals is implied by the terms used in the regulations, they have offered no way of gauging when exactly a rental would have the necessary sense of permanence to constitute a permitted use. As observed by the trial court, "if the [regulations] were interpreted to implicitly preclude short-term rentals while allowing long-term rentals of the property, the question becomes 'at what point does the rental of a home move from short-term to long-term: a week? a month? a season? three months? six months? one year? or several years?' [*Lowden* v. *Bosley*, supra, 395 Md. 70]." We will not presume that Pine Orchard intended to "exclude from the definition of a single-family dwelling temporary paying occupants" as the defendants claim. See *Watson* v. *Zoning Board of Appeals*, supra, 189 Conn. App. 395 ("[c]ommon sense must be used in construing the regulation, and we assume that a rational and reasonable result was intended by the local legislative body" (internal quotation marks omitted)).

For the foregoing reasons, we conclude that short-term rentals of a single-family dwelling were a permissible use of property under the 1994 regulations. The 1994 regulations expressly contemplated the rental of

property in Pine Orchard, as the defendants concede. Moreover, the classifying of property as a single-family dwelling does not impose a minimum temporal occupancy requirement. Thus, so long as the tenants of a single-family dwelling are a single "family," occupying the structure for living purposes to the exclusion of other families, the structure is being used as permitted.[17] The court, therefore, properly held that short-term rentals were a lawful, permitted use consistent with the definitions of "single-family dwelling" and "family" in the 1994 regulations.

II

The defendants also claim, in the alternative, that the court "exceeded its reviewing authority in finding that the plaintiff *in fact* had established a preexisting nonconforming use of the property for short-term rentals to 'families' notwithstanding that the [board] did not make any findings about the nature or scope of the plaintiff's alleged preexisting nonconforming use, nor did the [board] consider whether the plaintiff's current use may be a permissible intensification or an unlawful expansion." (Emphasis in original.) We agree.

In addressing this issue, the court determined that "[t]he [board] conceded, and the record reflects, that 'in rendering its decision the [board] found a violation of the ordinance in effect in 1994.' . . . The [board] made a finding that the plaintiff's rental of the property was not a permitted use under the 1994 regulations, so 'whether the plaintiff had in fact established a preexisting use' is in fact an issue on appeal here. Moreover, the plaintiff specifically raised the issue on appeal."

[17] The corollary to that proposition, of course, is that rental to multiple families, or any group of individuals that does not meet the definition of "family" set forth in § XIII, was not a permitted use under the 1994 regulations.

(Citation omitted.) We do not read the board's decision so broadly.

"[T]he legality of an extension of a nonconforming use is essentially a question of fact. . . . It is well settled that a court, in reviewing the actions of an administrative agency, is not permitted to substitute its judgment for that of the agency *or to make factual determinations on its own*. . . . Upon appeal the function of the court is [limited] to examin[ing] the record of the hearing before the board to determine whether the conclusions reached are supported by the evidence that was before [the board]." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Wood* v. *Zoning Board of Appeals*, 258 Conn. 691, 708–709, 784 A.2d 354 (2001).

In the present case, the defendants argued in their principal appellate brief that "[the board] did not make any findings about the precise nature or scope of the plaintiff's alleged preexisting nonconforming use, and it did not consider if the plaintiff's current use was a permissible intensification or unlawful expansion of such alleged use," "[it] did not reach consideration of [whether the plaintiff had established a lawful nonconforming use of his property] because it concluded that short-term rentals had not been a permitted use under the 1994 [regulations] . . . [and it] made no specific factual findings on the scope of the plaintiff's claimed preexisting nonconforming use in the first instance . . . ." Similarly, in their reply brief, the defendants stated: "All five members of the [board] voted to uphold the cease and desist order that was issued to the plaintiff. . . . The rationale for their decision was that the plaintiff could not establish a lawful preexisting nonconforming use of the property for short-term rentals because it was not lawful to use the property—zoned for use as a 'single-family dwelling'—for short-term rentals under the 1994 [regulations]. . . . Accordingly, the

[board] did not make any factual findings regarding whether (1) the plaintiff had met his burden to establish a preexisting nonconforming use; (2) what the scope of the preexisting nonconforming use was; and (3) whether the plaintiff's current use was a permissible intensification or unlawful expansion of the nonconforming use. . . . [The board] concluded as a matter of law that the alleged nonconforming use is not lawful under the 1994 [regulations], and therefore it did not—because it needed not—go any further." (Citations omitted.)

Our review of the record confirms that, although the board was presented with evidence regarding the plaintiff's rental practices and the tenants to whom he rented, the board did not make a factual determination as to whether the plaintiff had established a lawful nonconforming use. Nowhere in the record before us are there any factual findings as to whether the plaintiff was renting his property to "families" as defined by the 1994 regulations; see footnote 17 of this opinion; or whether the plaintiff's current use was a permissible intensification or unlawful expansion of such alleged use. See Pine Orchard Assn. Zoning Regs., § VII (7.1.1) (effective September 19, 1994) ("[a] non conforming use, structure or lot is one which existed lawfully, whether by variance or otherwise, on the date these Zoning Regulations or any amendment thereto became effective, and which fails to conform to one or more of the applicable zoning regulations or such amendment thereto"); id., § II ("[n]othing in these Regulations shall prohibit the continuance of existing nonconforming uses of any building or land as they exist on the effective date of these Regulations"); Pine Orchard Assn. Zoning Regs., § 10.2 ("[n]o nonconforming use of land shall be enlarged, extended or altered").[18] Accordingly, because the board

[18] In his appellate brief, the plaintiff notes that the board did not issue a collective statement of reasons for denying his appeal of the cease and desist order. He made similar statements in his briefs to the trial court. The

neither made factual findings concerning the plaintiff's nonconforming use claim nor rendered a decision on that claim, it was improper for the court to do so in the first instance. Consequently, we agree with the defendants that the court should have remanded the case to the board for consideration of whether the plaintiff had, in fact, established a lawful nonconforming use. See *Wood* v. *Zoning Board of Appeals*, supra, 258 Conn. 709 ("[b]ecause the board, not the trial court, was required to render a decision with respect to the

defendants have not suggested otherwise, and our review of the record confirms that, although the members of the board individually made statements as to why they were voting to deny the plaintiff's appeal, the board made no collective statement of its reasoning.

Typically, "[i]n the *absence* of a statement of purpose by the zoning [agency] for its actions, it [is] the obligation of the trial court, and of this court upon review of the trial court's decision, to search the entire record to find a basis for the [agency's] decision." (Emphasis in original; internal quotation marks omitted.) *Verrillo* v. *Zoning Board of Appeals*, 155 Conn. App. 657, 673, 111 A.3d 473 (2015); see also *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc.* v. *Planning & Zoning Commission*, 220 Conn. 527, 545, 600 A.2d 757 (1991) (when no collective statement is provided by zoning agency, court must "search the record for a basis upon which to uphold the [agency's] decision"). That obligation stems from the "strong presumption of regularity" that attaches to municipal land use agency decision making. *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 205, 491 A.2d 1058 (1985); see also *Levine* v. *Zoning Board of Appeals*, 124 Conn. 53, 57, 198 A. 173 (1938) ("[t]here is a presumption that [zoning agencies] have acted . . . upon valid reasons" (internal quotation marks omitted)); *Parker* v. *Zoning Commission*, 209 Conn. App. 631, 684–85, 269 A.3d 157 (in light of strong presumption of regularity applied to municipal land use proceedings, reviewing court presumes that agency made "all necessary findings that are supported by the record" when decision lacks specificity), cert. denied, 343 Conn. 908, 273 A.3d 694 (2022).

This case presents the exceptional circumstance in which the municipal land use agency and the intervening defendants have affirmatively and explicitly disclaimed any rationale for the board's denial of the plaintiff's appeal other than that short-term rentals were not permitted under the 1994 regulations as a matter of law. Throughout this litigation, the defendants steadfastly maintained that the board did not reach the factual question of whether the plaintiff had established a lawful nonconforming use in light of that threshold legal determination. In light of that affirmative representation, we will not search the record for a basis to uphold the board's decision that the board itself has told us repeatedly does not exist.

[plaintiff's] nonconforming use claim in the first instance, the trial court improperly decided that claim on the merits instead of remanding the case to the board for its consideration of that claim"); *Cummings* v. *Tripp*, 204 Conn. 67, 82–83, 527 A.2d 230 (1987) ("the party claiming the benefit of a nonconforming use . . . [bears] the burden of proving a valid nonconforming use in order to be entitled to use the property in a manner other than that permitted by the zoning regulations"); *Point O'Woods Assn., Inc.* v. *Zoning Board of Appeals*, 178 Conn. 364, 368–69, 423 A.2d 90 (1979) ("[i]n the first instance, it is the board, as the trier of fact, which must determine whether a nonconforming use is in existence").

The judgment is reversed in part and the case is remanded to the trial court with direction to remand the case to the board for a determination of whether the plaintiff established a lawful nonconforming use; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

DICKIE K. MURCHISON, JR., ET AL. *v.* CITY OF WATERBURY (AC 45050)

Prescott, Moll and Cradle, Js.

Syllabus

The defendant city of Waterbury appealed to this court from the judgment of the trial court awarding the plaintiffs, two former firefighters employed by the city, terminal leave pay pursuant to the city's collective bargaining agreement with the firefighters' union. Subsequent to the termination of their employment with the city, the plaintiffs reached their normal retirement age under the agreement and began collecting pension benefits under a city ordinance that governed the distribution of retirement benefits for firefighters. The city then informed the plaintiffs that they would not receive terminal leave pay for accumulated and unused sick time, which, under the agreement, was to commence at the time of their retirement or death. The city claimed that the plaintiffs

had resigned from their employment, rather than retired, and were therefore ineligible for terminal leave pay. The trial court denied the parties' motions for summary judgment on the plaintiffs' claims for breach of contract, concluding that the term retirement was ambiguous, as it was not defined in the terminal leave pay provision or anywhere else in the parties' agreement. The court reasoned that, on the one hand, because the pension benefits the plaintiffs were receiving must necessarily constitute a retirement benefit, it was reasonable to infer under one provision of the ordinance that they had entered retirement when they began collecting pensions benefits. On the other hand, the court determined, other provisions of the ordinance could be read to imply that only those who left their employment after reaching their retirement age could be deemed retired. The case was tried to the court, which determined that the testimony of the witnesses did not support the city's claim that the plaintiffs' rights to receive terminal leave pay were contingent on their continued employment until the time when terminal leave pay became due and payable. Relying on the contra proferentem rule, which applies only if extrinsic evidence does not resolve a contractual ambiguity, the court construed the ambiguity as to the meaning of the word retirement against the city and concluded that, regardless of when the plaintiffs retired, they had a vested interest in terminal leave pay, which became due and payable when they reached their respective retirement ages. *Held*:

1. The trial court improperly found that the plaintiffs were entitled to terminal leave pay because the term retirement as used in the terminal leave pay provision was ambiguous, and the court failed to resolve that ambiguity: the term retirement was not defined in the terminal leave pay provision or elsewhere in the agreement, the express language of the ordinance rendered unclear the intent of the negotiating or drafting parties, and the parties offered reasonable interpretations in the use of that term, thus, the use of "retirement" in the terminal leave pay provision created an ambiguity as to whether the drafters intended a firefighter to be retired under that provision and entitled to receive terminal leave pay if he terminated employment with the city before reaching retirement age; accordingly, because the trial court failed to resolve the ambiguous nature of the word retirement, it failed to determine whether the plaintiffs had retired under the terminal leave pay provision and, thus, could not have properly found that the plaintiffs were entitled to terminal leave pay.
2. The trial court improperly applied the contra proferentem rule to resolve the ambiguity in the word retirement in the terminal leave pay provision of the parties' agreement against the city: there was no extrinsic evidence before that court as to the meaning of the word retirement, the record contained no evidence that the city had drafted the agreement, and no witness testified regarding the drafting or negotiation process so as to illuminate the parties' intent regarding the language at issue; moreover,

even if such extrinsic evidence were before the court and failed to resolve the ambiguity, there was no evidence to support the proposition that the city had drafted the agreement.

Argued January 9—officially released March 28, 2023

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, denied the parties' motions for summary judgment; thereafter, the case was tried to the court, *Gordon*, *J.*; judgment for the plaintiffs, from which the defendant appealed to this court. *Reversed*; *new trial.*

Daniel J. Foster, for the appellant (defendant).

Robert W. Smith, for the appellees (plaintiffs).

Opinion

MOLL, J. The defendant, the city of Waterbury, appeals from the judgment of the trial court awarding the plaintiffs, Dickie K. Murchison, Jr., and John J. Bigham, firefighters formerly employed by the defendant, terminal leave pay pursuant to their collective bargaining agreement (agreement).[1] On appeal, the defendant claims that the court improperly concluded that the plaintiffs were entitled to terminal leave pay because (1) the plaintiffs "retired" within the meaning of the terminal leave pay provision of the agreement and (2) any ambiguity in the agreement should be construed

[1] Each plaintiff's employment was governed by a separate agreement. Murchison's employment was governed by the terms of an agreement for the years 2008 to 2011 between the defendant and Local 1339, International Association of Firefighters, AFL-CIO (union), and Bigham's employment was governed by the terms of an agreement for the years 2011 to 2014 between the defendant and the union. For purposes of this appeal, any differences between the agreements are immaterial, and, therefore, in the interest of simplicity, we refer to a single "agreement."

against the defendant.[2] We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. Murchison was employed as a firefighter by the defendant between July 11, 1988, and November 18, 2008, and Bigham was employed as a firefighter by the defendant between September 11, 1989, and August 13, 2012. Each plaintiff's employment was governed by the terms of an agreement between the defendant and Local 1339, International Association of Firefighters, AFL-CIO (union).[3] Subsequent to the termination of his employment, on July 11, 2013, Murchison reached his "normal retirement age" (retirement age) and began collecting his pension benefits on his "normal retirement date" (retirement date), August 1, 2013, pursuant to article thirty-three of the agreement (pension provision) and the Final Amended Ordinance Regarding the Pension and Retirement System (ordinance), which govern the calculation and distribution of retirement and survivor benefits for firefighters.[4] On September 11, 2014, Bigham reached his retirement age and began collecting his pension benefits on his retirement date, October 1, 2014, pursuant to the same terms.

The defendant informed each plaintiff by letter, after pension benefit payments had commenced, that he would not receive terminal leave pay under article eleven of the agreement. Article eleven, § 2, of the

[2] In its principal appellate brief, the defendant also claims that the trial court erred in denying its motion for summary judgment. During oral argument before this court, the defendant's counsel acknowledged that this claim is not reviewable and, therefore, we need not discuss it further.

[3] See footnote 1 of this opinion.

[4] The pension provision governs the calculation and distribution of the plaintiffs' pension benefits and provides that "[e]mployees shall be entitled to retirement and survivor benefits pursuant to the terms and conditions of the ordinance . . . ." We therefore consider the ordinance as part of the pension provision. See part I of this opinion.

agreement (terminal leave pay provision)[5] provides in relevant part: "Upon the *retirement* or death of any employee who was actively employed as of June 30, 2004, such employee, or the employee's dependent survivors, as the case may be, shall receive terminal leave pay . . . [for] accumulated and unused sick [time][6] . . . at the time of his *retirement* or death . . . . Terminal leave pay shall be payable in four (4) equal installments on or about the *date of retirement* or death and the first three anniversaries thereof." (Emphasis added; footnote added.)

On April 29, 2015, the plaintiffs commenced this action by way of a two count complaint against the defendant, alleging breach of contract as to Murchison in count one, and alleging breach of contract as to Bigham in count two, on the basis of the defendant's failure to begin distribution of each plaintiff's terminal leave pay when he began collecting his pension benefits pursuant to the agreement. On January 8, 2018, the parties filed motions for summary judgment, accompanied by supporting memoranda of law, exhibits, and affidavits. On February 21, 2018, the defendant filed an objection to the plaintiffs' motion for summary judgment, accompanied by exhibits and affidavits. On that same day, the plaintiffs filed an objection to the defendant's motion for summary judgment.

[5] The terminal leave pay provision that governed Murchison's employment is in article eleven, § 2c, of the agreement, and that same provision that governed Bigham's employment is in article eleven, § 2b, of the agreement. For ease of reference, we refer only to § 2 of the agreement and provide only the relevant language of that provision.

[6] We pause to note that the terminal leave pay provision of the 2008–2011 agreement, which governed Murchison's employment, uses the term "sick days," while the same provision of the 2011–2014 agreement, which governed Bigham's employment, uses the term "sick hours." This distinction is immaterial, in that the amount of sick time that each plaintiff accumulated during his employment with the defendant is neither in dispute nor germane to this appeal. The terminal leave pay provision of each agreement is the same in all other relevant respects. See footnote 1 of this opinion.

On August 14, 2018, the trial court, *Brazzel-Massaro*, *J.*, issued a memorandum of decision denying the parties' motions for summary judgment. The court concluded that judgment on either of the motions could not be rendered because it could not determine, based on the record before it, whether the plaintiffs had " 'retired' for purposes of the terminal leave pay provision." The court explained that the terminal leave pay provision, specifically its use of the term "retirement," and the ordinance were "susceptible to more than one reasonable interpretation and are therefore ambiguous." On November 7, 2019, the court, *Gordon*, *J.*, conducted a bench trial to, inter alia, determine the meaning of the term "retirement" as used in the terminal leave pay provision.[7] On October 1, 2021, the court issued a memorandum of decision rendering judgment in favor of the plaintiffs, awarding terminal leave pay in the amounts of $28,307.98 to Murchison and $33,451.55 to Bigham. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court erred in awarding the plaintiffs terminal leave pay, arguing that the plaintiffs only *resigned* from employment with the defendant, and did not "retire," for purposes of the terminal leave pay provision. The plaintiffs counter that the word "retirement" as used in the terminal leave pay provision refers to the dates on which the plaintiffs became eligible to begin collecting their pension benefits and/or the dates on which they began collecting those benefits, and, therefore, the court did not err in awarding them terminal leave pay. We conclude that

[7] Both trial courts, as well as the parties, have used the terms "retirement" and "retirement date" in addressing the ambiguity in the terminal leave pay provision. For ease of reference, we generally refer to whether the plaintiffs have "retired" or the definition of the term "retirement" for purposes of that provision.

the court erred in awarding the plaintiffs terminal leave pay because (1) the term "retirement" as used in the terminal leave pay provision is ambiguous, and, (2) as the defendant correctly states in its appellate briefs, the court failed to resolve that ambiguity in its decision awarding the plaintiffs terminal leave pay.[8]

We begin by setting forth the relevant sections of the ordinance, which, as noted previously, are part of the pension provision and thus govern the retirement system and distribution of pension benefits under the agreement. See footnote 4 of this opinion. Under § 35.01 of the ordinance, a firefighter reaches retirement age when he or she completes "[twenty-five] [y]ears of [s]ervice as a [f]ull-[t]ime [f]irefighter . . . with the [defendant], regardless of age" and reaches his or her retirement date on "the first day of the month following the later of a [p]articipant's[9] . . . [r]etirement [a]ge or the [p]articipant's termination of service with the [defendant]." (Footnote added.) Under § 35.03, a firefighter who is a participant in the retirement system[10] becomes vested in his or her pension benefit "only after completion of [ten] [y]ears of [s]ervice . . . ."[11] Under § 35.04,

[8] The defendant also claims that the court did not identify any evidence in the record to support its conclusion that the plaintiffs were entitled to such pay. In light of our conclusion that the court did not resolve the question of whether the plaintiffs "retired" for purposes of the terminal leave pay provision, there are no findings for this court to review, and, thus, we do not discuss this aspect of the defendant's claim.

[9] "Participant" is defined as "any person in the service of the [defendant] who is eligible to participate in the [r]etirement [s]ystem . . . and who is actually participating thereunder." For purposes of this opinion, any reference to a "participant" in the retirement system specifically refers to any firefighter participant.

[10] Each plaintiff was a participant in the retirement system during his employment with the defendant, and each terminated his employment before reaching his retirement age, but after his pension benefits had vested, such that he became eligible to begin collecting pension benefits upon reaching his retirement date.

[11] Under § 35.01, "[p]ension" is defined as "the payments made by reason of the retirement or termination of service of a [p]articipant, including pension benefits for service . . . ." In that regard, a "[p]ensioner" is defined as "a recipient of [p]ension [b]enefits" under the retirement system.

a participant who terminates employment with the defendant *before* reaching his or her retirement date, but *after* those benefits have vested after the completion of ten years of service under § 35.03, is entitled to receive his or her pension benefits "commencing on the first day of the month following the date such [p]articipant would have attained his or her . . . [r]etirement [a]ge if the [p]articipant had remained employed by the [defendant] . . . ." Alternatively, under § 35.11, a participant "who has attained . . . [r]etirement [a]ge shall be eligible to retire and receive a [p]ension benefit commencing on or after the [f]irefighter['s] . . . [r]etirement [d]ate." Section 35.18 states that a participant who is eligible to collect his or her pension benefits upon retirement age may "retire from service with the [defendant]" by filing "a written statement in the form prescribed" with the retirement board.

The following additional facts and procedural history are relevant to the disposition of the defendant's claim. In moving for summary judgment, the plaintiffs argued that the terminal leave pay provision unambiguously provides, in relevant part, that the plaintiffs are entitled to such pay "[u]pon . . . *retirement*," which is "payable in four (4) equal installments on or about [the respective plaintiff's] *date of retirement*," and that, because they "retired" when they had reached their respective retirement ages, and began collecting their pension benefits on their respective retirement dates, they are also entitled to receive terminal leave pay. (Emphasis added.) The defendant, however, argued that the plaintiffs would have been eligible to "retire" for terminal leave pay purposes only if they had remained employed by the defendant until their retirement age. The defendant further argued that, because the plaintiffs had terminated their employment *before* reaching such age, they "resigned" rather than retired from their positions and are considered only to be "pensioners,"

and are, therefore, not eligible to receive terminal leave pay.

The summary judgment court, *Brazzel-Massaro*, *J.*, concluded that the terms of the terminal leave pay provision are ambiguous and denied the parties' motions for summary judgment. The court explained that "[t]he cross motions before the court center around whether the plaintiffs effectively retired for purposes of the terminal leave pay provision. According to the plaintiffs, retirement occurs when a participant begins receiving a pension, regardless of whether such pension is deferred. In contrast, the defendant appears to construe retirement as occurring only when the departing participant is eligible to begin receiving a pension immediately upon his or her separation from employment. The defendant thus contends that, although the plaintiffs are pensioners, they are not retirees and are therefore not entitled to terminal [leave] pay. Resolution of the parties' motions requires the court to interpret the bargaining agreement and ordinance. . . . Because it is undisputed that the plaintiffs are receiving vested benefit pensions pursuant to the ordinance, such a pension must necessarily constitute a retirement benefit, and it is therefore reasonable to infer [from § 35.18] that the plaintiffs entered retirement when they began receiving such pensions. . . . Elsewhere in the ordinance, however [in §§ 35.04 and 35.11], it is implied that only participants who leave after reaching their . . . retirement age can be deemed retire[d]." (Citations omitted; emphasis omitted; internal quotation marks omitted.) In sum, the court concluded that the term "retirement" as used in that provision was ambiguous[12] and, therefore, "the . . . agreement and ordinance are susceptible to more than one reasonable interpretation . . . .

[12] We pause to note that, although the ordinance is part of the pension provision, it is not part of the terminal leave pay provision. See footnote 4 of this opinion.

As a matter of law, summary judgment is inappropriate when the language of a contract as to the parties' intent is ambiguous. . . . Consequently, summary judgment is not appropriate in the present case." (Citations omitted; internal quotation marks omitted.)

The matter was tried to the court, *Gordon*, *J.*, on November 7, 2019, to determine principally whether the plaintiffs had "retired" for purposes of the terminal leave pay provision[13] and, consequently, were entitled to receive terminal leave pay. The plaintiffs presented the testimony of five witnesses, the first three of whom listed here, at the time of trial, were employees of the defendant.[14] First, Karen Lang, the pension and benefits manager, testified that, under the ordinance, the pension benefits available to participants vary based on years of service. Second, Mari Kenney, an administrative assistant in the fire chief's office, testified that she prepared the plaintiffs' employment termination documents, which included her calculation of what she believed to be the terminal leave pay each plaintiff was entitled to receive, and that those documents were given to the payroll and the human resources departments. She also testified that employees in the fire department, but not necessarily the defendant, considered the plaintiffs retired. Third, Nadine Watton, the payroll manager, testified that "retirement date" refers to the date that a participant is eligible to collect his or her pension benefits. She also testified that she would describe the plaintiffs as pensioners, but not retirees. Finally, each plaintiff testified that he began receiving his pension benefits on his retirement date, after he reached his retirement age, or twenty-five years after

[13] Prior to trial, on November 4, 2019, the parties filed a joint trial management report, stating that the sole issue to be resolved at trial would be the interpretation of the term "retire" or, alternatively, "date of retirement" as used in the terminal leave pay provision.

[14] The defendant did not call any witnesses at trial.

his initial date of hire. Kenney and Watton testified that they did not participate in the negotiation of or the drafting of the agreement, and no other witness testified to participating in the same.

On October 1, 2021, the court issued a memorandum of decision rendering judgment in favor of the plaintiffs, awarding terminal leave pay in the amounts of $28,307.98 to Murchison and $33,451.55 to Bigham. The court explained that, "[a]lthough the testimony of the witnesses varied slightly regarding *when* retirement begins (some witnesses testified that retirement begins upon separation from employment, while others testified that retirement begins once the employee starts receiving retirement benefits), none of the witnesses testified, as the defendant contends, that terminal [leave] pay is only available to those employees who are actively employed by the [defendant] at the time of their retirement. In other words, although there was conflicting testimony regarding the *timing* of retirement, no witness supported the proposition advanced by the [defendant] that the plaintiffs' vested right to receive terminal [leave] pay was contingent upon the plaintiffs' continued employment with the [defendant] until the moment the terminal [leave] pay became due *and payable*." (Emphasis in original.) The court concluded, "based on the testimony provided, and . . . fair and reasonable interpretations of the [agreement] and the ordinance, that *regardless of when the plaintiffs 'retired,'* both plaintiffs had a vested interest in terminal [leave] pay that became due and payable when the plaintiffs reached their respective . . . retirement ages." (Emphasis altered.)

The court emphasized that its conclusion that "the plaintiffs are entitled to receive terminal [leave] pay is buttressed by the fact that to conclude otherwise would deprive the plaintiffs of significant rights and benefits they acquired based on their years of service to the

[defendant]. Moreover, if the [defendant] intended to make continued employment a condition precedent to receiving terminal [leave] pay, the [defendant] could and should have insisted that the [agreement] be amended to state that requirement explicitly. For example, in addition to requiring that an employee be 'actively employed as of June 30, 2004,' the [defendant] could have insisted that [the terminal leave pay provision] be revised to clarify that, in order to receive terminal [leave] pay, the employee must be actively employed with the [defendant] up until . . . '[r]etirement [a]ge.' Alternatively, the [defendant] could have insisted that the definition of . . . '[r]etirement [a]ge' in § 35.11 . . . be amended to clarify that continued employment was a prerequisite to 'retirement.' More fundamentally, the [defendant] could have insisted that the [agreement] and/or the ordinance contain a definition of the term 'retire,' making it clear that continued employment with the [defendant] was a condition precedent to receiving terminal [leave] pay." The court explained that, in considering the testimony of the witnesses, the relevant portions of the agreement and the ordinance, and the evidence in the record, it concluded "that the plaintiffs are entitled to receive terminal [leave] pay based on their years of service to the [defendant] and the express terms of the [agreement] and ordinance."

We next set forth the applicable standard of review and legal principles. "Resolution of the [defendant's] claim involves interpretation of the bargaining agreement and the ordinance as incorporated into the bargaining agreement. It is axiomatic that a . . . bargaining agreement is a contract. . . . Like any other contract, a . . . bargaining agreement may incorporate by reference other documents, statutes or ordinances to be included within the terms of its provisions. . . . When a contract expressly incorporates a [municipal ordinance] by reference, that [ordinance] becomes part of

a contract for the indicated purposes just as though the words of that [ordinance] were set out in full in the contract. . . . Accordingly, our interpretation of the bargaining agreement, as well as the ordinance incorporated therein, is guided by principles of contract law." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Greene* v. *Waterbury*, 126 Conn. App. 746, 750–51, 12 A.3d 623 (2011).

"[If] a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . If a contract is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . [If] the language of a contract is ambiguous, the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous." (Internal quotation marks omitted.) *Johnson* v. *Vita Built, LLC*, 217 Conn. App. 71, 84, 287 A.3d 197 (2022).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal

quotation marks omitted.) *C & H Shoreline, LLC* v. *Rubino*, 203 Conn. App. 351, 356–57, 248 A.3d 77 (2021). "Accordingly, our review is twofold. First, we must determine de novo whether the contractual language is ambiguous. If we conclude that it is, we must determine whether the trial court's factual findings are clearly erroneous." *Perez* v. *Carlevaro*, 158 Conn. App. 716, 722, 120 A.3d 1265 (2015).

The language at issue in the present case is found in the terminal leave pay provision of the agreement, the relevant text of which previously has been set forth in full in this opinion. That provision details that firefighter employees become eligible for terminal leave pay "[u]pon . . . retirement," where the first of four installments is due, as is relevant here, on the "date of retirement." The term "retirement" is not defined in the terminal leave pay provision or anywhere else in the agreement. In the absence of such a definition and in order to interpret the use of that term in the terminal leave pay provision, the parties have turned to the various uses and definitions of the term "retirement" in the ordinance, the relevant text of which also has been set forth previously in this opinion.

On the one hand, under § 35.11 of the ordinance, once a participant "has attained" retirement age, he or she is "eligible to *retire and receive*" pension benefits on or after his or her retirement date. (Emphasis added.) Under § 35.11, calculation of a participant's pension is computed on the basis of 2 percent for each year of service completed after June 30, 2003, multiplied by the participant's final average base pay. Notably, the final average base pay calculation for those participants who retire under § 35.11 also includes, if applicable, holiday pay and drivers' pay. In that regard, we infer from the express language of § 35.11 that only those participants who terminate employment upon reaching retirement

age—and not before—can retire and receive a full pension. This inference is bolstered by § 35.04, under which a participant "with a [v]ested [b]enefit who terminates service with the [defendant] prior to" his or her retirement date is entitled to pension benefits; indeed, under § 35.04, a participant is still entitled to receive pension benefits—when he or she "*would have* attained" normal retirement age had he or she "remained employed" by the defendant—as long as he or she has become vested in such benefits after the completion of ten years of service under § 35.03. (Emphasis added.) But such a participant does not appear to be entitled to a full pension. Although the final average base pay calculation is substantially similar to that in § 35.11, it does not include holiday pay or drivers' pay. The express language of § 35.04 suggests that those participants become pensioners for purposes of the pension provision of the agreement. The ordinance can be read, however, to consider all participants who are eligible to collect pension benefits to be retired; § 35.18 states that a participant who is eligible to collect his or her pension benefits upon retirement age may "*retire* from service with the [defendant]" by filing "a written statement in the form prescribed" with the retirement board, "setting forth at what time subsequent to such date a [p]articipant desires to be retired."[15] (Emphasis added.) Section 35.18 does not contain any express language that indicates that a participant who terminates employment *before* reaching retirement age is not considered "retired" once he or she does reach such age and files a written statement with the retirement board pursuant to that section.

Because (1) the term "retirement" is defined neither in the terminal leave pay provision nor elsewhere in the agreement, (2) the express language of the ordinance

[15] The record reflects that Murchison filed such a written statement with the retirement board, and there is no evidence suggesting that Bigham did not file the same.

renders unclear the intent of the negotiating or drafting parties, and (3) the parties have offered reasonable interpretations in the use of that term, "retirement" as used in that provision creates an ambiguity as to whether the drafting parties intended a firefighter to be considered "retired" under that provision—and entitled to receive terminal leave pay—if he or she terminates employment with the defendant before reaching retirement age. Resolving the ambiguity of the use of the term "retirement" in the terminal leave pay provision to determine whether the plaintiffs are entitled to such pay necessitates looking beyond the four corners of the agreement to discern the intent of the drafting parties.[16]

The court, although tasked with resolving that ambiguity, did not do so; instead, it concluded, in a somewhat circular fashion, that the plaintiffs were entitled to terminal leave pay "regardless of *when* [they] 'retired,' " because "both plaintiffs had a vested interest in terminal [leave] pay that became due and payable when [they] reached their . . . retirement ages." (Emphasis in original.) Regarding the testimony of the witnesses, the court noted only that "the testimony of the witnesses varied slightly regarding *when* retirement begins" and that "there was conflicting testimony regarding the *timing* of retirement . . . ." (Emphasis in original.) Put simply, the court did not resolve the crux of the dispute, i.e., resolving the ambiguity as to whether the plaintiffs "retired" under the provision. The court concluded only that the plaintiffs are entitled to such pay because they would otherwise be deprived of the "significant rights and benefits they acquired based on their years of service to the [defendant]" if denied such pay.[17]

[16] See part II of this opinion.

[17] This court gleans from its review of the record, including the trial transcripts, the trial record, and the memorandum of decision, that the trial court implicitly concluded that the phrase "actively employed as of June 30, 2004," as used in the terminal leave pay provision, and not the term "retirement," is ambiguous, and necessarily relied on that conclusion. Because we conclude that the term "retirement" is the ambiguous language

In sum, we conclude that the term "retirement" as used in the terminal leave pay provision is ambiguous because it is susceptible to more than one reasonable interpretation. Because the court failed to resolve that ambiguity, it could not have properly found that the plaintiffs were entitled to terminal leave pay.

II

The defendant next claims that, because there was no evidence in the record that it drafted the agreement, the trial court erred in construing any ambiguity in the terminal leave pay provision against it. The plaintiffs counter that, regardless of any ambiguity in the provision, the evidence established that the term "retirement" refers to the date that they became eligible to collect, and/or began collecting, their pension benefits. We agree with the defendant. We note that, although our resolution of the defendant's first claim is dispositive of this appeal, because it is sufficiently likely to arise on remand, we will also address the defendant's second claim. See *Budlong & Budlong, LLC* v. *Zakko*, 213 Conn. App. 697, 714 n.14, 278 A.3d 1122 (2022) ("[a]lthough our resolution of the defendant's first claim is dispositive of this appeal, we also address the defendant's second claim because it is likely to arise on remand").

We begin by setting forth the applicable standard of review and legal principles. "[W]hen the words used in the contract are uncertain or unambiguous, parol evidence of conversations between the parties or other circumstances antedating the contract may be used as an aid in the determination of the intent of the parties which was expressed by the written words." (Internal quotation marks omitted.) *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 324, 186 A.3d 771, cert. denied, 329

in the provision, any purported ambiguity on which the court may have relied with respect to the phrase "actively employed as of June 30, 2004," is immaterial.

Conn. 913, 186 A.3d 1170 (2018). "Because the parol evidence rule is not an exclusionary rule of evidence . . . but a rule of substantive contract law . . . the [defendant's] claim involves a question of law to which we afford plenary review. . . . [I]t is well established that the parol evidence rule is . . . a substantive rule of contract law that bars the use of extrinsic evidence to vary the terms of an otherwise plain and unambiguous contract. . . . The rule does not prohibit the use of extrinsic evidence for other purposes, however, such as to prove mistake, fraud or misrepresentation in the inducement of the contract." (Citation omitted; internal quotation marks omitted.) *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 727, 284 A.3d 341 (2022).

"[E]xtrinsic evidence may be considered in determining contractual intent only if a contract is ambiguous." (Internal quotation marks omitted.) *Konover* v. *Kolakowski*, 186 Conn. App. 706, 720, 200 A.3d 1177 (2018), cert. denied, 330 Conn. 970, 200 A.3d 1151 (2019). "Where the language is ambiguous . . . we must construe those ambiguities against the drafter [sometimes referred to as the contra proferentem rule]." (Internal quotation marks omitted.) *C & H Shoreline, LLC* v. *Rubino*, supra, 203 Conn. App. 356. Applying the contra proferentem rule is appropriate only "[i]n the event that review of extrinsic evidence of the parties' intent fails to resolve a contractual ambiguity . . . ." *Gold* v. *Rowland*, 325 Conn. 146, 160, 156 A.3d 477 (2017).

In the present case, in awarding the plaintiffs terminal leave pay, the court stated that, if the defendant had "intended to make continued employment a condition precedent to receiving terminal [leave] pay, the [defendant] could and should have insisted that the [agreement] be amended to state that requirement explicitly." The court further explained that the defendant could have "insisted" that (1) "[the terminal leave pay provision]

be revised to clarify that, in order to receive terminal [leave] pay, the employee must be actively employed with the [defendant]" until retirement age, (2) § 35.11 be amended to clarify "that continued employment was a prerequisite to 'retirement,' " or (3) a definition be provided for the term "retire."

By construing any ambiguity in the agreement against the defendant, the court improperly applied the contra proferentem rule. First, the contra proferentem rule applies only if extrinsic evidence does not resolve the contractual ambiguity. *Gold* v. *Rowland*, supra, 325 Conn. 160 ("the application of contra proferentem is premature in situations [in which] there has not yet been any attempt to resolve the ambiguity through the ordinary interpretive guides—namely, a consideration of the extrinsic evidence" (internal quotation marks omitted)); *Cruz* v. *Visual Perceptions, LLC*, 311 Conn. 93, 108, 84 A.3d 828 (2014) (contra proferentem rule is last resort if court is unable to resolve ambiguity in contractual language by considering extrinsic evidence). On the basis of our review of the record, we conclude that the court did not have proper extrinsic evidence before it with which to resolve the ambiguity in the terminal leave pay provision. That is, no witness testified as to the drafting or negotiation process to illuminate the parties' intent as to the language at issue. Therefore, in construing against the defendant any purported ambiguity that it implicitly found in the language of the agreement without proper extrinsic evidence before it, the court improperly applied the contra proferentem rule.[18] Second, even if such extrinsic evidence were before the court and failed to resolve the ambiguity in the agreement, there is no evidence in the record to support the proposition that the defendant drafted the agreement. Kenney and Watton both testified that they did not participate in the negotiation or drafting

[18] See footnote 17 of this opinion.

of the agreement, and no other witness testified to such participation. Therefore, the contra proferentem rule could not be properly applied in the present case. See *C & H Shoreline, LLC* v. *Rubino*, supra, 203 Conn. App. 359 (discussing when contra proferentem rule applies against contract drafters).

In sum, because the court failed to resolve the ambiguity of the use of the term "retirement" in the terminal leave pay provision, we conclude that it could not have found, on the basis of the record before it, that the plaintiffs were entitled to terminal leave pay. As a result of the court's error, the judgment must be reversed and the case is remanded for a new trial.[19]

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

LONG MANOR OWNERS' ASSOCIATION, INC. *v.* GABRIEL D. ALUNGBE ET AL.
(AC 45055)

Bright, C. J., and Alvord and Moll, Js.

Syllabus

The defendant property owner appealed to this court from the judgment of foreclosure by sale rendered in favor of the plaintiff condominium owners' association for, inter alia, unpaid common charges on his condominium unit. The trial court appointed K, the property manager of the condominium complex, as the receiver of rents, on the plaintiff's motion, to which the defendant did not object. During the trial, which was held

[19] We recognize, of course, that none of the parties on remand has an obligation to present extrinsic evidence, whether testimonial or documentary, to resolve this ambiguity. Nor does any party have an obligation to present evidence as to who drafted the agreement, such that, in the event that extrinsic evidence did not resolve the ambiguity, the contra proferentem rule could properly be applied. We simply note that a plaintiff who fails to present any evidence that would permit the fact finder to resolve a material ambiguity risks failing to satisfy his burden of proof.

remotely, the defendant temporarily lost connection to the proceeding but was able to rejoin the proceeding without further disruption. Following the judgment of foreclosure by sale, the defendant filed a motion to reargue, which was denied. *Held*:

1. The defendant could not prevail on his unfounded claim that the trial court denied him the opportunity to testify and to present evidence during the trial: although the defendant temporarily lost his connection to the remote proceeding, this court's review of the record revealed that, following the disruption, the defendant promptly returned to the proceeding and continued to participate, he was given ample opportunity to testify in his case-in-chief, and did so, and he had numerous opportunities to present evidence to support his defense that he did not owe the amounts that the plaintiff claimed were due; moreover, the court explained to the defendant that it was not admitting his proffered exhibits because they lacked foundation and that he would have had to identify documentation showing that the checks that he claimed to have submitted but were not accounted for were actually received and cashed by the condominium association or the law firm handling the collection effort, and the defendant failed to identify any admissible evidence that would have made such a showing.
2. This court declined to review the defendant's unpreserved claim that the court erred in appointing K as the receiver of rents, the defendant having failed to object to the plaintiff's motion for an order appointing the receiver of rents or move for the discharge of the receiver.
3. This court declined to review the defendant's claims that the court erred in awarding the plaintiff the amount of the debt, as well as attorney's fees and other fees, in failing to require the plaintiff and K to disclose the amount of late fees they charged, in granting a receiver fee of $90 per hour, in failing to consider all of the testimony and evidence presented during the trial, and in denying the defendant's motion to reargue, as these claims were inadequately briefed and were deemed abandoned; moreover, although self-represented litigants are afforded some latitude in complying with the rules of procedure and substantive law, the defendant's appellate brief suffered from significant deficiencies, and, with respect to each of these claims of error, the argument section of his brief failed to include any statement of the standard of review and contained virtually no relevant legal citations and no citations to the actual record, and, instead, the defendant improperly relied on documents, which he had included in his appendix to this court, that were not admitted into evidence by the trial court.

Argued February 1—officially released March 28, 2023

Procedural History

Action to foreclose statutory liens for unpaid common charges on a condominium unit owned by the

named defendant, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Aurigemma, J.*, granted the plaintiff's motion to appoint a receiver of rents; thereafter, the case was tried to the court, *Hon. Joseph M. Shortall*, judge trial referee; judgment of foreclosure by sale; subsequently, the court, *Aurigemma, J.*, denied the named defendant's motion to reargue, and the named defendant appealed to this court. *Affirmed.*

Gabriel D. Alungbe, self-represented, the appellant (named defendant).

Jillian A. Judd, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant Gabriel D. Alungbe,[1] a self-represented party, appeals from the judgment of foreclosure by sale rendered in favor of the plaintiff, Long Manor Owners' Association, Inc., arising out of outstanding common charges in connection with the defendant's condominium unit in Long Manor Condominiums in New Britain (complex). The defendant claims that the trial court erred in: (1) denying him his due process rights and the opportunity to present evidence at the trial to determine the amount of the debt; (2) awarding the plaintiff the amount of the debt, as well as attorney's and other fees; (3) appointing David Karat, the property manager of the complex, as receiver of rents; (4) failing to require the plaintiff and Karat to disclose the amount of late fees they charged; (5) granting Karat a receiver fee of $90 per hour; (6) failing to require the plaintiff and Karat to produce evidence regarding water and sewer statements; (7) denying his requests to conduct the trial via alternative

[1] The plaintiff's complaint also named as defendants Jacqueline N. Alungbe, Achieve Financial Credit Union, and the Connecticut Department of Social Services. Because those defendants are not participating in this appeal, we refer in this opinion to Gabriel D. Alungbe as the defendant.

means; (8) failing to consider all of the testimony and evidence presented during the trial; and (9) denying his motion to reargue vis-à-vis the foreclosure judgment.[2] We affirm the judgment of the trial court.

The following procedural history is relevant to our consideration of the defendant's claims. In 1994, the defendant acquired title to 62 Short Street, Unit 5 (unit), in the complex. On April 8, 2019, the plaintiff commenced the present action seeking foreclosure of its statutory lien on the unit for outstanding "common expense assessments," late fees, and charges owed by the defendant pursuant to General Statutes § 47-258.

On December 2, 2019, pursuant to Practice Book § 17-19,[3] the trial court, *Hon. Joseph M. Shortall*, judge trial referee, defaulted the defendant for failing to appear at a trial management conference pursuant to a prior court order.[4] On January 16, 2020, the plaintiff filed a motion for an order appointing Karat as the receiver of rents. In support of its motion, the plaintiff argued that a receiver of rents was necessary to mitigate "the waste and loss that will likely occur, the substantial and immediate risk that the [plaintiff] will recover less

[2] The defendant also asserts that the trial court erred in denying a motion that he filed seeking to dismiss a motion for judgment of strict foreclosure filed by the plaintiff. The record reflects that the court did not adjudicate the motion to dismiss, and the defendant's principal appellate brief is devoid of any substantive analysis vis-à-vis the motion to dismiss. Thus, we do not consider this particular claim further.

[3] Practice Book § 17-19 provides: "If a party fails to comply with an order of a judicial authority or a citation to appear or fails without proper excuse to appear in person or by counsel for trial, the party may be nonsuited or defaulted by the judicial authority."

[4] On December 6, 2019, the defendant filed a motion to open the default entered on December 2, 2019. On December 16, 2019, the plaintiff filed an objection. On December 30, 2019, the court, *Aurigemma*, *J.*, marked off the plaintiff's objection, stating that the court would "consider the objection when the motion [to open] to which it is addressed appears on the calendar." The court did not act on the motion to open thereafter. The defendant does not claim any error on appeal with regard to the December 2, 2019 order of default or his motion to open.

than the debt owed to it, and the potential additional harm to other unit owners." The defendant did not object to the plaintiff's motion. On February 3, 2020, the trial court, *Aurigemma, J.*, granted the motion and appointed Karat as the receiver of rents.

On August 2, 2021, the plaintiff filed a motion for judgment of strict foreclosure, which was accompanied by, inter alia, an affidavit of debt. On September 27, 2021, the plaintiff filed an updated affidavit of debt averring that the defendant was indebted to it in the amount of $7415.46. The debt included common charges assessed for the period August, 2018, through April, 2019, late fees, and the amount owed for outstanding water bills.

On October 13, 2021, following a trial conducted remotely, the court rendered a judgment of foreclosure by sale. The court determined the fair market value of the unit to be $60,000. The court also determined the debt owed to the plaintiff to be $7415.46 and awarded the plaintiff attorney's fees and other fees in the sum of $4725, such that the total amount owed to the plaintiff was $12,140.46. On October 18, 2021, the defendant filed a motion to reargue, which the court denied on the same day. This appeal followed.[5] For the reasons that

[5] On November 2, 2021, after the defendant had filed this appeal, he filed a motion to clarify the amount the court determined to be owed to the plaintiff; the court issued an order the next day reflecting that the total amount of debt and fees owed by the defendant was $12,140.46. On November 15, 2021, the defendant filed a "motion to determine that judgment has been satisfied," which represented that a payment of $12,140.46 had been sent to the plaintiff. On December 2, 2021, the court granted the defendant's motion, stating that, "[p]rovided that the plaintiff has received the funds as represented by the defendant, then the judgment has been satisfied and the sale should not go forward."

In addition, on February 22, 2022, the court entered a postjudgment order awarding the plaintiff $858.80 in costs and the foreclosure committee in this case $810 in fees and costs. The defendant did not file an amended appeal challenging the February 22, 2022 order.

In its appellate brief, the plaintiff argues that this appeal is moot because the defendant has paid the $12,140.46 amount owed vis-à-vis the foreclosure

follow, we reject the defendant's claims, which we consider in three categories.

I

Without any citation to the trial transcript, the defendant first makes the serious but unfounded claim that the trial court denied him the opportunity to testify and to present evidence during the trial. Specifically, he claims that during the trial, which was conducted remotely, he "was suddenly disconnected a short time after [he] started pleading his case. The defendant then called the court and begged the judge to reconnect the remote proceeding but the judge refused." The defendant proceeds to argue that he did not have the opportunity to present evidence that would have established that he did not owe the plaintiff for any outstanding charges. This claim requires little discussion.

It suffices to state that, upon this court's careful review of the trial transcript, the defendant's claim is wholly belied by the record. The transcript reveals the following. First, although the defendant's connection to the remote proceeding was disrupted, the defendant promptly returned to the proceeding and continued to participate. Second, the defendant was given ample opportunity to testify in his case-in-chief, and he did

judgment. Assuming arguendo that the judgment has been satisfied, we conclude that this appeal is not moot because, were we to determine that the appeal had merit, we could order the plaintiff to make restitution to the defendant. See *Wells Fargo Bank, NA* v. *Cornelius*, 131 Conn. App. 216, 219–21, 26 A.3d 700 (defendant's appeal from judgment of foreclosure by sale was not rendered moot by plaintiff's filing of satisfaction of judgment indicating that defendant had paid all amounts due because this court could order restitution if defendant's claims had merit), cert. denied, 302 Conn. 946, 30 A.3d 1 (2011). In support of its mootness claim, the plaintiff also appears to assert that the fees and costs that the court awarded in the February 22, 2022 order have been paid out of funds held by Karat as the receiver of rents. The February 22, 2022 order is not at issue in this appeal and, therefore, whether the costs and fees awarded therein have been paid is not germane here.

so. Finally, the defendant also had numerous opportunities to present evidence to support his defense that he did not owe the amounts that the plaintiff claimed were due. In fact, on numerous occasions, the court explained to the defendant that it was not admitting his specifically proffered exhibits because they lacked foundation and that he would have to identify documentation showing that the checks that he claimed to have submitted but were not accounted for were actually received and cashed by the condominium association or the law firm handling the collection effort. The defendant failed to identify any *admissible* evidence that would make such a showing. Accordingly, we reject the defendant's claim that the court denied him the opportunity to testify and to present evidence.[6]

II

The defendant raises as his third claim on appeal that the court erred in appointing Karat as the receiver of rents. We decline to review this claim because the defendant neither objected to the plaintiff's motion for an order appointing Karat as the receiver of rents nor moved for the discharge of the receiver. See General Statutes § 52-513; Practice Book § 21-17. Accordingly, we decline to review the defendant's unpreserved claim.

III

The defendant also raises, by way of his second, fourth, fifth, sixth, eighth, and ninth claims on appeal, that the court erred in awarding the plaintiff the amount of the debt, as well as attorney's and other fees, in failing to require the plaintiff and Karat to disclose the amount of late fees they charged, in granting Karat a receiver fee of $90 per hour, in failing to require the

[6] Because the trial was conducted remotely using electronic means, the defendant's seventh claim on appeal that the court erred in denying his unidentified requests to conduct the trial via alternative means is without merit.

plaintiff and Karat to produce evidence regarding water and sewer statements, in failing to consider all of the testimony and evidence presented during the trial, and in denying the defendant's motion to reargue. We decline to review these claims because they are inadequately briefed.

"Practice Book § 67-4 sets forth detailed requirements regarding the contents and organization of an appellant's brief. Among its provisions is the requirement that an appellant's brief contain '[a] statement of the nature of the proceedings and of the facts of the case bearing on the issues raised,' and that this statement 'shall be supported by appropriate references to the [record] and shall not be unnecessarily detailed or voluminous.' . . . Practice Book § 67-4 (d). As to each claim of error, the argument section of the brief must include a 'brief statement of the standard of review . . . .' Practice Book § 67-4 (e). The contents and organization of the appendix are governed by Practice Book § 67-8. The commentary to Practice Book § 67-8 expressly cautions that an appellant should not include anything in the appendix that 'is not necessary for the proper presentation of the issues and was not part of the proceedings below.'

"Both this court and our Supreme Court '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. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited.' . . . *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016);

see also *Parnoff* v. *Mooney*, 132 Conn. App. 512, 518, 35 A.3d 283 (2011) ('[i]t is not the role of this court to undertake the legal research and analyze the facts in support of a claim or argument when it has not been briefed adequately' . . .)." (Emphasis omitted.) *Seaport Capital Partners, LLC* v. *Speer*, 202 Conn. App. 487, 489–90, 246 A.3d 77, cert. denied, 336 Conn. 942, 250 A.3d 40 (2021). In addition, although we acknowledge that self-represented litigants are afforded 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.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005).

In the present case, the defendant's appellate brief suffers from significant deficiencies. With respect to each of these claims of error, the argument section of his brief fails to include any statement of the standard of review and contains virtually no relevant legal citations and no citations to the actual record. Instead, the defendant improperly relies on documents, which he has included in his appendix to this court, that were not admitted into evidence by the trial court. "Adequate briefing is necessary in order to avoid abandoning an issue on appeal." *Seaport Capital Partners, LLC* v. *Speer*, supra, 202 Conn. App. 490. Because we conclude that the defendant has failed to brief the above referenced claims properly, we deem these claims abandoned.

The judgment is affirmed.

In this opinion the other judges concurred.