IN RE AUTUMN O. ET AL.*
(AC 45575)

Cradle, Clark and Seeley, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children. She claimed that the trial court improperly determined that, pursuant to statute (§ 17a-112 (j)), she was unable or unwilling to benefit from reunification services, had failed to achieve a sufficient degree of personal rehabilitation, and it was in the best interests of the minor children to terminate her parental rights. *Held*:

1. This court declined to review the merits of the respondent mother's claim that the trial court improperly determined that she was unable or unwilling to benefit from reunification services, as that claim was moot: although the trial court found both that the Department of Children and Families had made reasonable efforts to reunify the mother with her children and that she was unable or unwilling to benefit from such reunification efforts, two independent bases for satisfying § 17a-112 (j) (1), the mother challenged only the court's determination that she was unable or unwilling to benefit from reasonable efforts toward reunification, and, because the mother's ability to obtain relief required that she challenge both independent bases, her failure to do so foreclosed any possibility of practical relief.
2. The respondent mother could not prevail on her claim that the trial court improperly determined that she failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B): there was sufficient evidence credited by the court to support its conclusion that she failed to rehabilitate, including evidence that the mother continued to associate with dangerous third parties, A and B, and failed to address the conditions that led to her children's commitment, namely, incidents

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

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.

of violence in her home, as, even after the minor children were committed to the petitioner, the Commissioner of Children and Families, the mother repeatedly invited interaction with A and B, who caused chaos and violence within the home, and A had a chaotic, and often violent, relationship with the mother despite a protective order against A; moreover, police responded to the mother's house numerous times because of the violent, destructive, or otherwise unlawful conduct of A and B; furthermore, the trauma A's presence caused one of the mother's minor children, and her continued association with A and B, demonstrated her failure to appreciate that her tumultuous interpersonal relationships exposed her, and the minor children, to harm.

3. The respondent mother could not prevail on her claim that the trial court improperly determined that it was in the best interests of the minor children to terminate her parental rights: the court considered and made findings under each of the seven factors of § 17a-112 (k), the court's findings as to the children's best interests were factually supported and legally sound, and there was ample evidence in the record to support the court's conclusion, including evidence that established that the mother repeatedly interacted and cohabitated with A and B, individuals that routinely caused a chaotic and violent home environment, and, as a result, she would be unable to provide an appropriate home environment for her children within a reasonable period of time considering their ages and needs and in light of the children's need for stability and permanency.

Argued January 5—officially released March 30, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Litchfield, Juvenile Matters, and tried to the court, *Torres*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Appeal dismissed in part*; *affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent mother).

Matthew Joseph Parenti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney

** March 30, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Joshua Michtom, assistant public defender, for the minor child Autumn O.

Opinion

CRADLE, J. The respondent mother, Michelle O., appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to two of her minor children, Autumn O. and Joshua W., pursuant to General Statutes § 17a-112 (j).[1] On appeal, the respondent claims that the court improperly determined that (1) the respondent was unable or unwilling to benefit from reunification services, (2) the respondent had failed to achieve a sufficient degree of personal rehabilitation, and (3) it was in the best interests of the minor children to terminate her parental rights.[2] We conclude that the appeal is moot as to the first claim and dismiss that portion of the appeal. We otherwise affirm the judgments of the trial court.

The following facts, as found by clear and convincing evidence by the trial court in its memorandum of decision, and procedural history are relevant to our resolution of this appeal. "[The respondent] married Anthony O. on August 17, 1990. Together they had four children, who were subsequently taken from her care. A divorce

[1] The court also terminated the parental rights of the respondent father, Anthony W., the biological father of Joshua W., and the respondent father, Michael H., the biological father of Autumn O. Because neither father is participating in this appeal, we will refer in this opinion to the respondent mother as the respondent. Although the respondent has other minor children not at issue in this appeal, for the purposes of this opinion, we refer to Autumn O. and Joshua W. together as the minor children.

[2] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorneys for the minor children filed statements in this appeal. Autumn O.'s attorney filed a statement adopting the brief filed by the petitioner. Joshua W.'s attorney filed a statement adopting the brief and reply brief of the respondent.

from [Anthony] O. was attempted, but never completed. [The respondent] then engaged in a relationship with Michael H. [The respondent] had two children by him: Aris H. and Autumn O. [Anthony O.] signed the birth certificate for Autumn O. as [he and the respondent] were still married and, therefore, [he] was considered the legal father. However, after . . . involvement [of the Department of Children and Families (department)], the biological father was revealed to be Michael H. [The respondent] described her relationship with Michael H. as very abusive and did not want him around her children.

"[The respondent] has a . . . history [with the department] that dates to 1997. [The department] became involved due to a litany of issues which included: emotional neglect, physical neglect, educational neglect, substance use, intimate partner violence, and unsafe living conditions. Over the years there have been eighteen reports and [the respondent] had the rights to four of her other children terminated in 2008.

"[The respondent's] criminal history dates to 2000 with numerous arrests that include larceny, resisting arrest, breach of the peace, harassment, criminal mischief, threatening and risk of injury to a minor. She was most recently placed on probation on [March 28, 2019], for breach of the peace and threatening behavior. [The respondent] has a protective order history dating back to 2004. She has been both the protected party and the subject of the protective orders. The most recent protective order was issued on August 6, 2019, and expired on February 6, 2020, with the protected person identified as June W."

"[The department] opened [its] case as to these two children in October of 2017. Despite attempts to assist the family with services, Autumn O. and Joshua W. were removed following a New Year's Eve incident on

December 31, 2018. With a protective order in place, [the respondent] invited Anthony W., [Joshua W.'s biological father], to the home where she was residing. Adding to the fray, an argument ensued between herself and her adult son which resulted in broken glass and some superficial injuries to [the respondent]. [The respondent] claimed that she was babysitting her son's children when the older grandchild attempted to bring in his friends and with them, marijuana. [The respondent] objected and a fight ensued. Joshua W. ended up receiving an injury to his foot from the broken glass. [The department] took a ninety-six hour hold, and the children subsequently came into care. Specific steps for [the respondent] were issued by the court on January 4, 2019, December 4, 2019, August 5, 2020, and February 17, 2021. Autumn O. was adjudicated neglected on May 29, 2019. Joshua W. was adjudicated neglected by the court on March 20, 2019.

"The presenting issues at the time of the children's removal included unaddressed substance abuse and intimate partner violence. The specific steps issued set a goal for [the respondent] to address her parenting, substance abuse and develop appropriate coping mechanisms. The steps set a goal for [the respondent] to provide safe and stable parenting free from substance use and violence."

"On June 5, 2018, [the petitioner] filed neglect petitions on behalf of the two minor children. On January 1, 2019, [the department] invoked a ninety-six hour hold as to Autumn O. and Joshua W. [The petitioner] pursued an order of temporary custody and the court granted the motion on January 4, 2019. On January 8, 2019, the order of temporary custody was sustained. On March 2, 2019, Joshua W. was adjudicated neglected and committed to [the petitioner]. On May 28, 2019, the court adjudicated Autumn O. neglected and committed her

to [the petitioner]. On November 23, 2020, after a contested hearing, a permanency plan calling for reunification was granted by the court (*Grogins*, *J.*). The respondent . . . was issued revised specific steps on February 17, 2021, to assist with reunification efforts. . . . The matter of disposition was continued to the [termination of parental rights] hearing as to [the respondent]. On December 7, 2021, [the petitioner] moved to amend the [termination of parental rights] [petition] to include . . . regarding [the respondent], [the ground of] . . . failure to rehabilitate. This motion was granted by the court and effectively modifies the date of adjudication for . . . [the respondent] to December 7, 2021."

The case was tried virtually, via Microsoft Teams, before the court, *Torres*, *J.*, over seven nonconsecutive days in December, 2021, and January and February, 2022.[3] On April 14, 2022, the court issued its memorandum of decision, in which the court found that the petitioner proved by clear and convincing evidence that the department had made reasonable efforts to reunify the respondent with her children, and that the respondent was unable to benefit from reunification efforts. The court further found that the respondent failed to achieve the degree of personal rehabilitation required by the statute and determined that termination of the respondent's parental rights was in the best interests of the minor children. Pursuant to § 17a-112 (j) (3) (B) (i),[4] the court granted the petitions for the termination

[3] The respondent requested that the court conduct the hearing virtually.

[4] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child,

of the respondent's parental rights. This appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the respondent claims that the court improperly concluded that (1) she was unable or unwilling to benefit from reunification services, (2) she had failed to rehabilitate, and (3) it was in the best interests of the minor children to terminate her parental rights.

We begin by setting forth the standard of review and relevant legal principles. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun. . . .

"Section 17a-112 (j) provides in relevant part: The Superior Court, upon notice and hearing . . . may grant a petition . . . if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with

such parent could assume a responsible position in the life of the child . . . ."

the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the [petitioner] for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." (Citation omitted; internal quotation marks omitted.) *In re A'vion A.*, 217 Conn. App. 330, 336–37, 288 A.3d 231 (2023).

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 582–83 n.12, 122 A.3d 1247 (2015).

I

We first address the respondent's claim that the court erred in concluding that she was unable or unwilling to benefit from reunification services. We conclude that

the respondent's appeal is moot with respect to this claim.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . A case is considered moot if [the] court cannot grant the appellant any practical relief through its disposition of the merits . . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . . Our review of the question of mootness is plenary. . . .

"Section 17-112 (j) (1) provides in relevant part that the Superior Court may grant a petition [for termination of parental rights] if it finds by clear and convincing evidence that . . . the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent . . . *unless* the court finds . . . that the parent is unable or unwilling to benefit from reunification efforts . . . . In construing that statutory language, our Supreme Court has explained that [b]ecause the two clauses are separated by the word unless, this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or, alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. . . . [E]ither showing is sufficient to satisfy this statutory element. . . .

"Because either finding, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1) . . . in cases in which the trial court concludes that *both* findings have been proven, a respondent on appeal must demonstrate that both determinations are improper. If the respondent fails to challenge either one of those

independent alternative bases . . . the trial court's ultimate determination that the requirements of § 17a-112 (j) (1) were satisfied remains unchallenged and intact. . . . In such instances, the appeal is moot, as resolution of a respondent's claim of error in her favor could not [afford] her any practical relief."[5] (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re A'vion A.*, supra, 217 Conn. App. 354–55.

Here, the court found, in its memorandum of decision, that the department had made reasonable efforts to reunify the respondent with her children, and that the respondent was unable or unwilling to benefit from reunification efforts. The respondent, in her appellate brief, after identifying the two independent bases for satisfying § 17a-112 (j) (1), only challenges the court's determination that she was unable or unwilling to benefit from reasonable efforts toward reunification. Despite her assertion to the contrary during oral argument,[6] the respondent fails to brief any claim that would challenge the court's finding that the department made reasonable efforts toward reunification.[7] Because the

[5] "For that reason, when an appellate court concludes that the trial court properly found that one of those independent bases was proven, the appellate court lacks subject matter jurisdiction to thereafter consider a claim of error with respect to the alternative basis under § 17a-112 (j) (1). Appellate review of that alternative basis is a 'moot issue' because any decision thereon 'cannot benefit the respondent meaningfully.' *In re Jorden R.*, [293 Conn. 539, 557, 979 A.2d 469 (2009)]; see also id., 554 (appellate courts 'should not address a moot issue substantively')." *In re A'vion A.*, supra, 217 Conn. App. 355 n.14.

[6] The respondent suggested at oral argument before this court that she also implicitly challenged the trial court's determination that the department made reasonable efforts toward reunification because the two bases of § 17a-112 (j) (1) "are the same, and they mirror each other." However, our review of the respondent's brief reveals no such argument, and conflating the two independent bases of § 17a-112 (j) (1) runs contrary to established law. See, e.g., *In re A'vion A.*, supra, 217 Conn. App. 354–55.

[7] Although the respondent mentions the department's "reasonable efforts" throughout her brief, she at no point advances any argument that the services the department provided did not constitute reasonable efforts toward reunification.

respondent's ability to obtain relief on this claim requires that she challenge both independent bases of § 17a-112 (j) (1), her failure to do so forecloses any possibility of practical relief for her first claim. The respondent's first claim is therefore moot, and we decline to review the merits thereof. See id.

II

The respondent next claims that the court improperly found that she failed to achieve a sufficient degree of personal rehabilitation required by § 17a-112 (j) (3) (B). We disagree.

"Failure to achieve a sufficient degree of personal rehabilitation is one of the seven statutory grounds on which parental rights may be terminated under § 17a-112 (j) (3). Section § 17a-112 (j) permits a court to grant a petition to terminate parental rights if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found by the Superior Court . . . to have been neglected . . . in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . . In making that determination, the critical issue is not whether the parent has improved her ability to manage her own life, but rather whether she has gained the ability to care for the particular needs of the child at issue. . . .

"We review the trial court's subordinate factual findings for clear error, and review its finding that the respondent failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire whether the trial court

could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . [I]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 347–48.

The following facts are relevant to our consideration of this issue. In its memorandum of decision, the court stated that "[t]he presenting issues at the time of the children's removal included unaddressed substance abuse and intimate partner violence. The specific steps issued set a goal for [the respondent] to address her parenting, substance abuse and develop appropriate coping mechanisms. The steps set a goal for [the respondent] to provide safe and stable parenting free from substance use and violence." The court then found that the respondent has "made improvements in her personal life. She is maintaining a sober lifestyle, has housing and is gainfully employed. Moreover, her supervised visits go well, and she has a good relationship with each of her children." However, while the respondent maintained that she lived alone, she refused to allow the department to conduct unannounced visits of her home or permit a visit without her attorney present. Furthermore, a number of incidents necessitated a response from the police and the department, and

occurred after the minor children were committed to the care of the petitioner. The court recounted that, "[b]y the end of November of 2020, police reports demonstrated that Brett T., her adult son, was in the home, under the influence, and causing disruption to [the respondent's] home. Further, [the department] reported concerns that she remained associated with Anthony W., a source of Autumn O.'s trauma.[8] [The respondent] acknowledged that she accepted a ride from Anthony W. in September of 2021. In between those time frames, police were called out to the home multiple times. . . . On November 26, 2020, Brett T. began living with [the respondent]. By December 14, 2020, police involvement was required at [the respondent's] home due to Brett T.'s behavior. Brett T. and [the respondent] were arguing, and Brett T. was angry, breaking dishes and [the respondent] spit in his face. On February 3, 2021, the police once again became involved due to Brett T. and [the respondent] arguing. Brett T. appeared intoxicated and there was a referral recommending detoxification treatment for Brett T.

"On March 25, 2021, Brett T.'s behavior continued to be out of control. He acknowledged that he lived in [the respondent's] home. He was under the influence, throwing food around, and making a mess of the home. That same day, police had to be called out a second time. He had been threatening [the respondent] during a derogatory filled argument over Anthony W.'s presence in the home. The following day, police were called out as there had been a fight between [the respondent] and Brett T. Brett T. was arrested for breach of the peace, possession of marijuana and drug paraphernalia.

[8] At trial, the court-appointed psychiatrist, who conducted evaluations of each member of the family, testified that Autumn O. experiences anxiety and post-traumatic stress because of experiences connected with Anthony W. and would be frightened if she saw him again.

"On April 4, 2021, officers responded to [the respondent's home] on a report of another fight over money between [the respondent] and Anthony W. On April 9, 2021, police were dispatched based on concerns that Brett T. was contacting [the respondent]. [The respondent] declined to give a statement and told police officers that she did not want the protective order.

"On April 28, 2021, police responded to a domestic violence complaint where Anthony W. spit in [the respondent's] face and broke a window resulting in [the respondent] cutting her hand. When interviewed, Anthony [W.] stated he lived there and verified his residence by showing police his laundry and his name on bills.

"On April 29, 2021, [the department] observed Brett T. picking up [the respondent] from a visit. On June 6, 2021, police responded to an incident between Brett T. and Anthony W. The officer observed clothes on the ground outside of [the respondent's] home. Brett T. presented as intoxicated, and [the respondent] indicated she left the property to avoid Brett [T.] as he kept trying to break into the home. Brett T.'s items were thrown onto the yard by Anthony W. after the two had engaged in an altercation.

"On September 16, 2021, [the department] observed [the respondent] being dropped off by Anthony W. Anthony W. appeared to be aggressive in his actions while he was in the car and [the respondent] could be seen pleading for her cell phone which she had forgotten in the vehicle. Anthony W. abruptly stopped the vehicle and threw the phone out of the passenger side window. Although [the respondent] contacted Anthony W. for a ride and did not feel unsafe in that situation, [the department] pointed out that there was a full no contact protective order in place between the two. [The respondent] responded that they were not living

together, and she did not see him that much." (Footnote added.)

In its memorandum of decision, the court found that the respondent has made some improvements in her personal life by maintaining a sober lifestyle, housing and employment. The court further found that the respondent has a good parental relationship with her children, and that her supervised visits go well. The court nevertheless explained that "a good parental relationship alone cannot preclude a finding of failure to rehabilitate. . . . [The respondent's] strides to achieve stability in her personal life are not sufficient in and of themselves to warrant a finding of rehabilitation." (Citation omitted.) In finding that the respondent failed to rehabilitate, the court emphasized the respondent's "inability to choose between her toxic relationships and protecting her children." The court found that the respondent "described her husband, [Anthony] O., as 'very abusive,' yet then she became involved with Michael H. Although Michael H. denied involvement with [intimate partner violence] issues, [the respondent] did call police to report harassment by him. Then lastly, Anthony W., where various incidents of [intimate partner violence] led to the opening of the case and the removal of the children. He has been the subject of a full no contact protective order from March 20, 2018, to May 20, 2019, with [the respondent] where her two children were identified as the protected parties. On July 7, 2021, Anthony W. was again the subject of a protective order with [the respondent] being identified as the protected party.

"[The respondent] continued to maintain a relationship with Anthony W. despite knowing it would jeopardize her ability to reunify with her children. [The respondent] sought to secrete the presence of Anthony W. from [the department] by avoiding . . . unannounced home visits [by the department] and precluding their

ability to determine if other individuals were living in her home. This included her adult son, Brett T., and also Anthony W. The evidence demonstrates, and the court finds, that this was at the same time. Anthony W.'s presence was likely the source of Brett T.'s agitation.[9] In one police report, Brett T. laments that a source of his anger/sadness is [his] mother's continual decision to choose men over him." (Footnote added.)

On the basis of the foregoing, the court concluded that the "recurrence of [the respondent] permitting individuals to be present in her life who are a source of trauma for her children and to provide them access to her home, does not demonstrate sufficient rehabilitation to be a resource for her children within a reasonable period of time considering the age and needs of Autumn O. and Joshua W. Based upon the aforementioned facts, the court finds that the respondent . . . has failed to rehabilitate within the meaning of the statute."

On appeal, the respondent claims that the trial court erred in finding that she failed to rehabilitate. Specifically, the respondent argues that the record "clearly demonstrates that [she] has been engaged in services, is making progress and is committed to remaining engaged in services." In support of her argument, the respondent relies on her completion of "a parenting program through Circle of Security, and . . . a domestic violence program through IPV-Fair, as well as continuing ongoing individual counseling and domestic violence counseling through Catholic Charities and the Susan B. Anthony Program." The respondent posits that

[9] The court also found that the respondent's "decision to allow Brett T. to remain in the household speaks to her poor decision making" because of Brett T.'s "history of mental health and substance use issues." Additionally, as discussed in this opinion, Brett T. became violent and destructive on several occasions while living with the respondent, and the police were called as a result.

the record demonstrates she will be able to resume her position as a responsible parent in the foreseeable future. We disagree.

"In determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Citations omitted.) *In re Vincent D.*, 65 Conn. App. 658, 670, 783 A.2d 534 (2001). Further, a court may also rely on "evidence that parents have continued to associate with dangerous third parties in determining that the parents have failed to rehabilitate . . . . See, e.g., *In re Alejandro L.*, 91 Conn. App. 248, 254, 261, 881 A.2d 450 (2005) (considering, inter alia, respondent's inability to sever violent relationship with father of her children despite department's offer of housing assistance and domestic violence prevention services and advice of drug counselors that relationship was impediment to obtaining and maintaining sobriety); *In re Vincent D.*, [supra, 670] (approving trial court's reliance on respondent's 'failure to reside in a drug free environment [apart from child's father], despite her success in overcoming her own drug habit'); *In re Jessica B.*, 50 Conn. App. 554, 561–65, 718 A.2d 997 (1998) (upholding termination of respondent's parental rights based, in part, on decision to live with spouse who abused her and had been convicted of risk of injury for sexually molesting child)." *In re Jorden R.*, 293 Conn. 539, 562–63 n.20, 979 A.2d 469 (2009).

There is sufficient evidence to justify the court's determination that the respondent failed to rehabilitate because she continued to associate with dangerous

third parties[10] and, further, failed to address the conditions that led to her children's commitment. In the present case, incidents of violence in the respondent's home were a primary catalyst in prompting the commitment of the minor children to the petitioner. Despite this, even after the minor children were committed to the petitioner, the respondent repeatedly invited interaction, and even cohabitation, with both Anthony W. and Brett T., who caused chaos and violence within the home. The respondent's continued association with Anthony W. is particularly troublesome, considering that the respondent's chaotic, and often violent, relationship with Anthony W. invariably contributed to the conditions necessitating the minor children's commitment to the care of the petitioner.[11] As already discussed in this opinion, between December, 2020, and July, 2021, police responded to the respondent's house numerous times because of the violent, destructive, or otherwise unlawful conduct of Anthony W. and Brett T.—both of whom the respondent invited to live with her despite the protective order against Anthony W., the past incidents of violence instigated by Anthony W. and Brett T., and the trauma Anthony W.'s presence caused, and continues to cause, Autumn O.[12] The respondent's continued association with Anthony W. and Brett T. demonstrates her failure to appreciate that her tumultuous interpersonal relationships expose her, and the minor children, to harm. Indulging every reasonable presumption in favor of the court's ruling, as our standard of review requires; see *In re A'vion A.*, supra, 217 Conn. App. 348; we conclude that the evidence credited by the court supports its conclusion that the respondent

[10] See *In re Jorden R.*, supra, 293 Conn. 562–63 n.20.

[11] Although this opinion recounts incidents unilaterally instigated by Anthony W. and Brett T., it does so only insofar as is necessary to highlight the continuing threat of harm posed to the minor children that the respondent, by her actions, has failed to take steps to remedy.

[12] See footnote 8 of this opinion.

failed to achieve the requisite degree of personal rehabilitation required by § 17a-112 (j) (3) (B).

III

Last, the respondent claims that the court erred in finding that termination of her parental rights was in the best interests of the children. We disagree.

"[A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous.[13] . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . . In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § 17a-112 [k]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered." (Citation omitted; footnote added; internal quotation marks omitted.) *In re Lil'Patrick T.*, 216 Conn. App. 240, 258, 284 A.3d 999, cert. denied, 345 Conn. 962, 285 A.3d 387 (2022).

[13] "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct." (Internal quotation marks omitted.) *In re Yolanda V.*, 195 Conn. App. 334, 352, 224 A.3d 182 (2020).

The court considered and made findings under each of the seven statutory factors of § 17a-112 (k) before determining, by clear and convincing evidence, that termination of the respondent's parental rights was in the best interests of the minor children. In so finding, the court stated that it would be untenable to provide the respondent with "several more years to attempt another round of education, demonstration of stability, and genuine change" after the "many opportunities" she had already been given, over a long period of time, to learn about intimate partner violence, make changes to her life to avoid those relationships, and establish and maintain a stable and safe environment.

The respondent argues that the court erred in determining that it was in the minor children's best interests to terminate her parental rights. Specifically, the respondent asserts that, "[i]n light of the respondent's consistent engagement of services, [and] that the respondent has been consistent in visitation with her children, this court should find that it is in the best interests of the minor children not to grant the petition terminating the respondent's parental rights."

The respondent further argues that the court incorrectly decided that the termination of her parental rights was in the best interests of the minor children because she has a strong relationship with Autumn O. and Joshua W.[14] The respondent stresses that she "has been consistent with visits, she brings appropriate food and gifts for the children, she engages appropriately and

[14] The respondent also argues that our courts place too much emphasis on permanency and not enough emphasis on the harm caused by the termination of parental rights. Insofar as the respondent suggests we should discount the importance of permanency in determining the best interests of the children, that argument runs against our well settled precedent instructing otherwise. See *In re Davonta V.*, 285 Conn. 483, 494, 940 A.2d 733 (2008) (our Supreme Court "has noted consistently the importance of permanency in children's lives" (internal quotation marks omitted)).

lovingly with the children, and the children are responsive to her."

"In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Furthermore, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives." (Citation omitted; internal quotation marks omitted.) *In re Elijah G.-R.*, 167 Conn. App. 1, 31, 142 A.3d 482 (2016). "[T]he court's inquiry in the dispositional phase of the proceeding was properly focused on whether termination of the respondent's parental rights was in the children's best interest. . . . The respondent's efforts to rehabilitate, although commendable, speak to [her] own conduct, not the best interests of the child. . . . Further, whatever progress a parent arguably has made toward rehabilitation is insufficient to reverse an otherwise factually supported best interest finding." (Citations omitted; internal quotation marks omitted.) *In re Aubrey K.*, 216 Conn. App. 632, 663, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023). Additionally, although the respondent may love her children and share a bond with them, "the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination." (Internal quotation marks omitted.) *In re Sequoia G.*, 205 Conn. App. 222, 231, 256 A.3d 195, cert. denied, 338 Conn. 904, 258 A.3d 675 (2021).

There is ample evidence in the record to support the court's conclusion that it was in the best interests of the minor children to terminate the respondent's parental rights. As discussed in part II of this opinion, the evidence at trial established that the respondent repeatedly interacted and cohabitated with individuals that routinely caused a chaotic and violent home environment,

which supported the court's finding that she would be unable to provide an appropriate home environment for her children within a reasonable period of time considering their ages and needs. In light of the children's need for stability and permanency, the respondent's inability to demonstrate that she could provide a safe home environment in a reasonable amount of time supports the court's conclusion that termination was in the children's best interests. See *In re Brian P.*, 195 Conn. App. 558, 580, 226 A.3d 159 ("[g]iven . . . [inter alia] the court's findings as to the respondents' failure to rehabilitate . . . we cannot conclude that the court's findings as to [the minor child's] need for a 'permanent, safe, supportive, nurturing home' and the respondents' inability to meet that need were clearly erroneous), cert. denied, 335 Conn. 907, 226 A.3d 151 (2020).

On the record before us, we conclude that the court's findings as to the children's best interests are factually supported and legally sound and we will not substitute our judgment for that of the trial court.

The appeal is dismissed with respect to the respondent's claim that the court erred in concluding that she was unable or unwilling to benefit from reunification services; the judgments are affirmed in all other respects.

In this opinion the other judges concurred.

GEORGE KELLY *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL.
(AC 44991)

Alvord, Moll and Harper, Js.

Syllabus

Pursuant to statute (§ 5-142 (a)), a member of any institution or facility of the Department of Mental Health and Addiction Services who sustains an injury as a result of being assaulted in the performance of his duties

and is a direct result of the special hazards inherent in such duties shall continue to receive the full salary that he was receiving at the time of the assault for a specified period.

The plaintiff employee appealed to this court from the decision of the Compensation Review Board affirming the corrected decision of the Workers' Compensation Commissioner determining that he was not entitled to the enhanced, full salary disability benefits of § 5-142 (a). The plaintiff was employed as a per diem psychiatrist at a facility operated by the defendant department when he sustained workplace injuries that rendered him temporarily totally incapacitated from work. The plaintiff filed a notice of claim for workers' compensation benefits, and the defendant filed a form 43 contesting the plaintiff's eligibility for enhanced benefits, claiming, inter alia, that a 1993 collective bargaining agreement between the plaintiff's union and the state had eliminated any right of the plaintiff, as a per diem employee, to receive compensation. The commissioner concluded that the plaintiff was entitled to receive temporary total disability benefits pursuant to a provision (§ 31-310) of the Workers' Compensation Act (§ 31-275 et seq.) but that, although the plaintiff met the requirements of § 5-142 (a), he was not entitled to receive enhanced, full salary benefits pursuant to § 5-142 (a). The commissioner based his findings on a 1989 memorandum of agreement between the plaintiff's union and the state, which was not independently introduced into evidence but was referenced in an exhibit that the plaintiff submitted. The exhibit consisted of a cost sheet for the 1989 memorandum of agreement, which stated that per diem nurses would not be entitled to certain economic benefits but that the state would be responsible for Social Security and workers' compensation, and a sheet labeled a "new supersedence appendix," relating to the creation of the per diem nursing positions. The supersedence appendix listed § 5-142 as one of the statutes that was amended by the agreement. The supersedence agreement was sent to the legislature for approval, as required pursuant to statute (§ 5-278 (b) (1)), because its provision that per diem classifications shall not be entitled to, inter alia, retirement benefits "and other economic benefits," conflicted with various state statutes, including § 5-142 (a). The commissioner noted that a subsequent 1993 collective bargaining agreement, which merely expanded the types of clinical staff, such as the position of psychiatrist, that could be hired under the heading of "per diem" workers, did not create a new class of workers, constituting a change to existing law. The 1993 agreement was not required, therefore, to be sent to the legislature with a supersedence appendix as the supersedence of § 5-142 (a) had already taken place. The commissioner concluded that per diem employees of the department were never intended to access the enhanced benefits of § 5-142 (a). The commissioner thereafter granted in part the plaintiff's motion to correct, making additional findings but not correcting his determination that the plaintiff was not entitled to enhanced, full salary

disability benefits. On appeal, the board affirmed the commissioner's decision. *Held*:

1. Contrary to the plaintiff's claim, the board properly upheld the commissioner's substantive use of the exhibit containing the cost sheet and the supersedence appendix: the plaintiff's counsel offered the exhibit into evidence during his cross-examination of a department witness and never indicated that he was offering the document only for a limited purpose; moreover, the commissioner explicitly stated that he was admitting the document as a full exhibit, with no objection from the department.
2. This court declined to review the plaintiff's claim that the commissioner failed to allocate to the department the burden of proving that he was not entitled to the enhanced benefits of § 5-142 (a), as, regardless of which party bore the burden of proof, the commissioner had before him evidence from which he reasonably could have concluded that the plaintiff's ability to receive § 5-142 benefits had been superseded by a 1989 memorandum of agreement between the plaintiff's union and the state, thus, the allocation of the burden of proof was not dispositive of the commissioner's decision.
3. The board properly upheld the commissioner's conclusion that the plaintiff's right to the enhanced, full salary benefits of § 5-142 (a) was superseded by the 1989 memorandum of agreement between the state and the plaintiff's union: the exhibit and its comparison to the 1993 collective bargaining agreement provided a sufficient basis from which the commissioner could infer that the 1989 memorandum of agreement existed between the state and the plaintiff's union and that that agreement had been submitted to and approved by the legislature along with the documents in the exhibit, as the language reflected in the exhibit and the collective bargaining agreement was phrased in almost exactly the same manner and such a provision had not been contained in the prior collective bargaining agreement; moreover, the supersedence appendix in the exhibit specifically referred to the provision of the agreement governing the per diem nursing positions and listed § 5-142 as one of the statutes that would be amended by that provision, thus, the commissioner reasonably could conclude that the citation to § 5-142 in the appendix would have alerted the legislature that the referenced agreement term conflicted with that statute and, more specifically, that the enhanced, full salary benefits set forth in § 5-142 (a) were among the "other economic benefits" to which per diem employees were not entitled.
4. The plaintiff could not prevail on his claim that the commissioner's analysis was inconsistent as to whether the enhanced benefits of § 5-142 (a) were included among the "other economic benefits" denied to per diem employees as that language was used in the 1993 collective bargaining agreement; in the commissioner's original decision, he concluded that the plaintiff was entitled to regular workers' compensation benefits but

not to enhanced, full salary benefits, and he likewise concluded in his memorandum of decision on the plaintiff's motion to correct that § 5-142 (a) was one of the other economic benefits denied to per diem employees.

5. The plaintiff could not prevail on his claim that the board improperly upheld the commissioner's decision because the commissioner improperly concluded that the 1993 collective bargaining agreement did not need to go through a new supersedence process pursuant to § 5-278: the commissioner reasonably inferred that the legislature already had approved the provision of the 1993 agreement that conflicted with § 5-142 (a) by way of the 1989 memorandum of agreement and that that provision subsequently was incorporated into the 1993 collective bargaining agreement; moreover, the inclusion of additional per diem positions in the 1993 collective bargaining agreement did not impact the language of the conflicting provision but merely expanded the class of per diem employees that already existed.

Argued October 5, 2022—officially released April 4, 2023

Procedural History

Appeal from the corrected decision of the Workers' Compensation Commissioner for the Eighth District determining that the plaintiff was not entitled to certain disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

John D'Elia, for the appellant (plaintiff).

Patrick G. Finley, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Michael K. Skold*, deputy solicitor general, for the appellees (defendants).

Opinion

HARPER, J. The plaintiff, George Kelly, who was employed as a per diem psychiatrist by the defendant Department of Mental Health and Addiction Services (department), appeals from the decision of the Compensation Review Board (board), upholding the determination by the Workers' Compensation Commissioner for the Eighth District (commissioner) that he was not entitled to enhanced, full salary disability benefits pursuant

to General Statutes § 5-142 (a).[1] On appeal, the plaintiff claims that the board erred in upholding the commissioner's decision because the commissioner (1) improperly relied on a supersedence appendix and cost sheet, which the plaintiff had offered into evidence, for substantive purposes; (2) failed to allocate to the department the burden of proving that the plaintiff was not entitled to the enhanced benefits of § 5-142 (a); (3) improperly concluded that a 1989 memorandum of agreement between the plaintiff's union and the state operated to supersede § 5-142 (a) for per diem employees such as the plaintiff; (4) set forth inconsistent conclusions in his original decision and his subsequent decision on the plaintiff's motion to correct; and (5) improperly concluded that a 1993 collective bargaining agreement, which added psychiatrists to the class of per diem employees, was not required to go through "a new supersedence process."[2] We affirm the decision of the board.

The following facts, as found by the commissioner, and procedural history are relevant to our resolution of this appeal. In January, 2013, the plaintiff was hired as a per diem psychiatrist at Connecticut Valley Hospital, a facility operated by the department. Although the plaintiff was per diem and was hired to work on an "intermittent" basis, he routinely worked full-time and

[1] General Statutes § 5-142 (a) provides in relevant part: "If any member of . . . any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease . . . sustains any injury (1) . . . as a result of being assaulted in the performance of such person's duty . . . and (2) that is a direct result of the special hazards inherent in such duties . . . [s]uch person shall continue to receive the full salary that such person was receiving at the time of injury subject to all salary benefits of active employees, including annual increments, and all salary adjustments, including salary deductions, required in the case of active employees, for a period of two hundred sixty weeks from the date of the beginning of such incapacity. . . ."

[2] The plaintiff sets forth seven overlapping claims of error in his brief, which we have distilled into the five issues addressed in this opinion.

performed the same duties as permanent psychiatrists. As a per diem psychiatrist, the plaintiff was not entitled to "retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits," but, in lieu of those benefits, he was paid at an hourly rate 50 percent higher than that paid to a psychiatrist on the permanent staff.

On July 10, 2017, while the plaintiff was working, he was struck multiple times in the head by a patient. The plaintiff sustained injuries that included a concussion, rendering him temporarily totally incapacitated from work. At the time of the plaintiff's injuries, he was being paid at a rate of $197.40 per hour and typically worked a forty hour workweek. In accordance with a directive from the department, the defendant Gallagher Bassett Services, Inc., the state's third-party administrator for workers' compensation claims, began to pay the plaintiff weekly temporary total disability benefits in the amount of $7896, representing 100 percent of his pay rate, pursuant to § 5-142 (a).[3]

The plaintiff filed a formal notice of his claim for workers' compensation benefits on August 2, 2017. On August 11, 2017, the department filed a notice contesting liability (form 43). The department acknowledged that the workplace incident had occurred, but it

[3] An adjuster at Gallagher Bassett Services, Inc., questioned the department's calculation, given the "rather astronomical weekly compensation rate," asking whether the plaintiff's contract had only been for sixteen hours per week and whether the additional twenty-four hours per week would constitute overtime not included in calculating the plaintiff's salary. See *Vecca* v. *State*, 29 Conn. App. 559, 563, 616 A.2d 823 (1992) (explaining that calculation of "full salary" under § 5-142 does not include overtime pay or other salary enhancements); *Chadbourne* v. *Dept. of Mental Health & Addiction Services*, No. 6243, CRB-5-18-1 (January 8, 2019) (explaining that part-time employee's full salary must be calculated on basis of "the actual hours she was contractually obligated to work on a regular basis" during period prior to injury). A human resources associate from the department, however, maintained that the plaintiff was entitled to his full hourly rate multiplied by forty, the number of hours that he typically worked in one week.

reserved the right to challenge and contest the extent of the plaintiff's injuries and disability. The department, through Gallagher Bassett Services, Inc., continued to pay the plaintiff disability benefits in the amount of $7896 per week.[4]

On July 18, 2018, the department filed another form 43, contesting the plaintiff's eligibility for the enhanced benefits pursuant to § 5-142 (a) "insofar as [he] was a per diem employee at the time of his alleged injury." The department contended that "[the plaintiff] bears the burden of proving that he was a 'member' of the facility in which he was working on the claimed date of injury and there is insufficient evidence to prove that he qualifies for [enhanced temporary total disability] benefits pursuant to [§] 5-142 (a)."

The commissioner held a formal hearing on various dates between October 18, 2018,[5] and March 11, 2020. At the hearing, the department did not contest the manner in which the plaintiff was injured or the extent of the plaintiff's disability. Instead, the department's position was that, because of the plaintiff's per diem status, he was not an "employee" of the department as required to qualify for *any* workers' compensation benefits pursuant to the Workers' Compensation Act, General Statutes § 31-275 et seq.,[6] and he was not a

[4] In April, 2018, Gallagher Bassett Services, Inc., proposed voluntary agreements setting the rate for total incapacity at $7896, but the plaintiff did not sign the agreements and they were not submitted to the commissioner for approval pursuant to General Statutes § 31-296.

[5] At the start of the formal hearing on October 18, 2018, the plaintiff filed a motion to preclude the department from contesting liability on the basis that the department's July 18, 2018 form 43 was untimely filed, which the commissioner denied.

[6] The department repeatedly changed its position throughout the proceedings as to whether it viewed the plaintiff as an "employee" who was entitled to receive workers' compensation benefits under the Workers' Compensation Act. Nevertheless, the department's final position, as set forth in its posthearing brief, was that the plaintiff was not an "employee," and the commissioner addressed that issue accordingly.

"member" of the department as required to qualify for the enhanced benefits set forth in § 5-142 (a). In addition, the department argued that, pursuant to General Statutes § 5-278 (e),[7] the 1993 collective bargaining agreement between the plaintiff's union and the state had eliminated any right of the plaintiff to receive compensation pursuant to the Workers' Compensation Act and § 5-142 (a), by way of the agreement's provision that "[i]ndividuals in per diem classifications shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or *other economic benefits*."[8] (Emphasis added.)

Also at the hearing, the plaintiff presented testimony from several witnesses, employed by either the department or Gallagher Bassett Services, Inc., regarding his schedule and duties as a per diem psychiatrist in addition to the department's initial decision to compensate him with full pay benefits in accordance with § 5-142 (a).

The department presented testimony from Linda Yelmini, who previously held several positions with the Office of Labor Relations between 1987 and 2015 and had been the chief negotiator for the state in negotiations for the 1993 collective bargaining agreement. Yelmini testified, among other things, about her background knowledge of the process of negotiating and ratifying the state labor contracts. Yelmini also testified regarding her understanding of the 1993 collective bargaining agreement, specifically, the provision of the

[7] General Statutes § 5-278 (e) (1) provides in relevant part that, "where there is a conflict between any agreement or arbitration award approved in accordance with the provisions of sections 5-270 to 5-280, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any general statute or special act, or regulations adopted by any state agency, *the terms of such agreement or arbitration award shall prevail* . . . ." (Emphasis added.)

[8] Although the 1993 collective bargaining agreement predates the plaintiff's employment, the parties agreed that the material provisions of the more recent collective bargaining agreement are not different from those agreed upon in 1993.

agreement that excludes per diem employees from receiving "retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits," and her view that workers' compensation is included among the "other economic benefits" referenced in that provision.[9]

Throughout the hearing, the plaintiff's counsel questioned whether the provisions of the 1993 collective bargaining agreement could supersede § 5-142 (a) given that the agreement was not accompanied by a supersedence appendix in accordance with § 5-278[10] and the terms of the collective bargaining agreement.[11] Yelmini testified that a supersedence appendix had not been submitted with that agreement because the agreement was reached through arbitration, and her office's position was that a supersedence appendix was not necessary under such circumstances.

During his cross-examination of Yelmini, the plaintiff's counsel offered into evidence, among other things,

[9] Although Yelmini testified concerning her understanding of the 1993 collective bargaining agreement, the commissioner repeatedly stated that he would not assign any weight to her interpretation of the agreement, as it presented a question of law for him to decide.

[10] General Statutes § 5-278 (b) (1) provides in relevant part: "Any agreement reached by the negotiators shall be reduced to writing. The agreement, *together with a request* for funds necessary to fully implement such agreement and *for approval of any provisions of the agreement which are in conflict with any statute* or any regulation of any state agency, and any arbitration award, issued in accordance with section 5-276a, together with a statement setting forth the amount of funds necessary to implement such award, shall be filed by the bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days after the date on which such agreement is reached or such award is distributed. . . ." (Emphasis added.)

[11] The 1993 collective bargaining agreement contains a provision that states in relevant part: "Statutes or regulation shall be construed to be superseded by this [a]greement as provided in the [s]upersedence [a]ppendix or where, by necessary implication, no other construction is tenable. The [e]mployer shall prepare a [s]upersedence [a]ppendix listing any provisions of the [a]greement which are in conflict with any existing statute or regulation for submission to the [l]egislature. . . ."

a two page document associated with a December 7, 1989 memorandum of agreement between the plaintiff's union and the state (exhibit K), which was admitted as a full exhibit without objection. The 1989 memorandum of agreement was not offered into evidence.

The first page of exhibit K is an estimated budget requirement (cost sheet) for a "Memorandum of Agreement dated 12/7/89," prepared by the Office of Policy and Management. That page states in relevant part: "Registered Professional and Licensed Practical Nurses hired on a per diem basis shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits. The State will be responsible for Social Security and Workers' Compensation." The second page of exhibit K is labeled a "new supersedence appendix," relating to the creation of the per diem nursing positions. Under the heading "statute or regulation amended," the document lists, among others, General Statutes §§ 5-142 through 5-144. The plaintiff's counsel directed Yelmini's attention to certain notations on the cost sheet referencing arbitration and asked her whether there was an arbitration award associated with those supersedence documents, but Yelmini stated that she could not recall and that she was not familiar with those documents.

On September 17, 2020, the commissioner issued his written findings and order, accompanied by a memorandum of decision, concluding that the plaintiff was entitled to receive temporary total disability benefits under the Workers' Compensation Act, pursuant to General Statutes § 31-310, but that he was not entitled to the enhanced, full salary benefits pursuant to § 5-142 (a).

First, the commissioner rejected the department's argument that the plaintiff was an independent contractor, rather than an "employee," for purposes of the Workers' Compensation Act. The commissioner also

concluded that the terms of the 1993 collective bargaining agreement did not express a manifest intent to exclude per diem employees from coverage under the Workers' Compensation Act. The commissioner reasoned, in part, that the cost sheet that he found had been submitted with the 1989 memorandum of agreement, as reflected in exhibit K, explicitly stated that "[t]he State will be responsible for Social Security and Workers' Compensation," and he found it "inconceivable that in [the 1993 collective bargaining agreement] the parties [had] negotiated away the right of per diem nurses to claim workers' compensation without specifically stating so."

Next, the commissioner rejected the department's argument that the plaintiff was not a "member" of the department, as required to qualify for the enhanced, full salary benefits set forth in § 5-142 (a). He concluded that "the term 'member' [pursuant to § 5-142 (a)] is synonymous with the term 'employee,' " and, therefore, "absent some other provision or legislative act, a per diem psychiatrist such as [the plaintiff] would meet the definition of [a] 'member' of [the department] for purposes of § 5-142 (a)."[12]

[12] Despite his conclusion, the commissioner subsequently recognized that, "[p]ractically speaking, it is difficult to see [how] § 5-142 (a) would be applied to truly per diem workers. . . . Permanent employees under the [collective bargaining agreement] have defined hours and pay rates. What, exactly, is the full salary of an employee who works only sporadically, when needed, and whose contract of employment lasts only a day?"

In its subsequent review of the commissioner's decision, the board did not address the issue of whether the plaintiff was a "member" of the department entitled to the enhanced benefits of § 5-142 (a), because the department had failed to raise the issue in the context of a cross appeal. Nevertheless, the board expressed that "[w]e share the commissioner's perplexity relative to the issue of how an employee who is employed on an 'intermittent basis' can be deemed eligible for an enhanced benefit which requires as the basis for its calculation the identification of the 'full salary' being paid to the employee at the time of the injury."

On appeal to this court, the department does not claim, or raise as an alternative ground for affirmance, that the plaintiff is not entitled to § 5-142 (a) benefits in the first instance because he is not a "member" of the

Finally, the commissioner concluded that, although the plaintiff met the requirements of § 5-142 (a), the 1989 memorandum of agreement between the plaintiff's union and the state, which was referenced in exhibit K but not independently introduced into evidence, superseded his right to the enhanced, full salary benefits pursuant to that statute. The commissioner rejected the department's argument regarding the 1993 collective bargaining agreement, explaining: "Given the absence of a supersedence appendix from [the 1993 collective bargaining agreement], I would not conclude that the language of [that agreement] was meant to make any change to the existing law as to whether per diem employees should fall outside the scope of § 5-142 (a)." Nevertheless, the commissioner proceeded to explain: "As noted [previously], in December, 1989, the contract between the union and the state had already been amended to expressly provide for the hiring of per diem nurses. I have already addressed the cost sheet that made it clear that those per diem nurses were entitled to workers' compensation benefits. However, the 1989 contract was already in place when the December, 1989 agreement for the hiring of per diem nurses was reached. Therefore, when the subsequent agreement was reached it had to go to the legislature—and it went to the legislature with a 'new supersedence appendix.' (Exhibit K.) While the heading uses the word 'amended,' it is impossible to read this as anything but complete exclusion of per diem nurses from coverage under § 5-142 (a)."

The commissioner explained that the 1993 collective bargaining agreement did not impact the supersedence of § 5-142 (a) that already had taken place, pursuant to the 1989 memorandum of agreement, because the 1993 collective bargaining agreement had not been sent to

department as contemplated by that statute. Consequently, we express no opinion as to this issue.

the legislature with a supersedence appendix, and "[t]he purpose of the 1993 agreement was not the creation of a new class of workers, i.e., per diem workers, because the class already existed. The purpose of the 1993 changes was merely to expand the types of clinical staff that could be hired under the heading per diem." Thus, the commissioner concluded that "per diem employees of [the department] were never intended to have access to the enhanced benefits of § 5-142 (a)." (Footnote omitted.) On the basis of his findings, the commissioner authorized the department to reduce the amount of the plaintiff's compensation benefits to $1292 per week, the amount of temporary total disability benefits that he was entitled to receive under § 31-310.

On September 29, 2020, the plaintiff filed a motion to correct the commissioner's September 17, 2020 ruling and memorandum of decision, and the department subsequently filed an objection to that motion. In his motion, the plaintiff requested that the commissioner correct numerous findings related to the 1989 memorandum of agreement and his reliance on the supersedence documents admitted as exhibit K. The commissioner held a hearing on the plaintiff's motion on November 18, 2020.

On November 30, 2020, the commissioner issued his ruling granting in part the plaintiff's motion to correct. The commissioner explained that his original findings would remain unchanged, but he made certain additional findings at the plaintiff's request, including the following: "The December, 1989 agreement regarding per diem nurses was reached after the effective date of the [collective bargaining agreement] and the details of the agreement were not incorporated in the published version of that [collective bargaining agreement]. A copy of the memorandum of agreement is not in evidence. The [department's] witness, Linda Yelmini, did not negotiate the 1989 [collective bargaining agreement]

nor the December, 1989 memorandum of agreement regarding per diem nurses, and she was not familiar with either." The commissioner declined to correct his determination, as set forth in his original decision, that the plaintiff was not entitled to the enhanced, full salary disability benefits set forth in § 5-142 (a). In a memorandum accompanying his ruling on the motion to correct, the commissioner further set forth his reasoning for the decision.

The plaintiff filed a petition for review of the commissioner's decision with the board. On September 8, 2021, after a hearing, the board issued a written decision affirming the commissioner's decision that the plaintiff was not entitled to the enhanced, full salary disability benefits set forth in § 5-142 (a). This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before reviewing the plaintiff's claims, we set forth the applicable standard of review. "The principles that govern our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .

"This court's review of decisions of the board is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they

result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it. . . . In the context of an administrative appeal, the sufficiency of the evidence to support a finding . . . clearly presents a question of law that we examine . . . under the plenary standard of review." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Frantzen* v. *Davenport Electric*, 206 Conn. App. 359, 367, 261 A.3d 41, cert. denied, 339 Conn. 914, 262 A.3d 134 (2021).

I

The plaintiff first claims that the board erred in upholding the commissioner's decision because the commissioner improperly relied on exhibit K, the cost sheet and supersedence appendix associated with a 1989 memorandum of agreement, as substantive evidence.[13] The department responds that the commissioner was entitled to rely on exhibit K because it was admitted as a full exhibit and had not been offered or admitted for a limited purpose. We agree with the department and, accordingly, reject the plaintiff's claim.

The following additional facts are relevant to our analysis. The plaintiff's counsel offered exhibit K into evidence during his cross-examination of Yelmini, and, with no objection from the department, the commissioner explicitly stated that he was admitting the document as a full exhibit. The commissioner, in his original decision, cited exhibit K in support of his conclusion that § 5-142 (a) had been superseded for per diem

[13] The plaintiff also claims that the commissioner drew unreasonable inferences from exhibit K, which we address in part III of this opinion.

employees through a 1989 memorandum of agreement between the state and the plaintiff's union.

The plaintiff first raised concerns about exhibit K in his motion to correct. At the hearing on the motion, the plaintiff's counsel expressed his disagreement with the commissioner's substantive use of exhibit K, particularly given that the department's argument regarding supersedence had been based on the 1993 collective bargaining agreement, not the 1989 memorandum of agreement. He argued, among other things, that that evidence "was offered for a completely different reason. . . . Yelmini testified that, in the case of an arbitration, you don't need a supersedence appendix, and the only purpose of exhibit K was to show that here is an example of a time when a supersedence appendix is offered which mentions arbitration. . . . The limited and only offer of exhibit K was to say, as a credibility matter, here is an occasion where it appears as if a supersedence appendix listing arbitration was submitted to the legislature."

In the commissioner's ruling on the motion to correct, he disagreed with the plaintiff's characterization of the limited purpose of exhibit K, explaining: "The [plaintiff] proffered exhibit K to show that per diem workers were intended to be covered by [the Workers' Compensation Act], *and* to refute a statement by Yelmini that supersedence appendices are not required in certain circumstances." (Emphasis added.) In his memorandum of decision accompanying that ruling, the commissioner further maintained his reliance on that evidence: "As for the argument that exhibit K was offered by the [plaintiff] for the limited purpose of disproving Yelmini's assertion about the necessity of supersedence appendices and that the [department] should not benefit from it, I cannot agree. . . . [The cost sheet] provided valuable evidence for my determination that the

[department] was wrong in its assertion that the [plaintiff] was not entitled to workers' compensation under [the Workers' Compensation Act], so if disproving that assertion were not part of the [plaintiff's] motivation for offering exhibit K, it certainly ought to have been. . . . I find no justification for allowing the [plaintiff] to make favorable use of this public document and then ignore its other implications simply because they may be harmful to [his] case. Regardless of why the [plaintiff] offered this evidence, it is a full exhibit. Indeed, given my duty to make a correct determination of this question of law, I think it would have been improper for either party, knowing of the existence of this supersedence appendix, to withhold it from me." On review, the board also rejected the plaintiff's argument that exhibit K had been admitted for a limited purpose, noting that "[o]ur review of the record indicates that exhibit K came in as a full exhibit, with no objection from the [department]."

On appeal, the plaintiff claims that the commissioner improperly relied on exhibit K as substantive evidence because that exhibit was offered for the limited purpose of testing Yelmini's credibility, and "[e]vidence which is offered and admitted for a limited purpose only, and the facts found from such evidence, cannot be used for another and totally different purpose." *O'Hara* v. *Hartford Oil Heating Co.*, 106 Conn. 468, 473, 138 A. 438 (1927).

In the present case, however, the record does not reflect that exhibit K was offered and admitted for a limited purpose. See id., 471 (counsel explicitly stated purpose of offer and trial court admitted evidence for purpose claimed); *Stohlts* v. *Gilkinson*, 87 Conn. App. 634, 650, 867 A.2d 860 (court explicitly recognized that evidence was presented only for limited purpose and then improperly proceeded to use it for "totally different purpose" (internal quotation marks omitted)), cert.

denied, 273 Conn. 930, 873 A.2d 1000 (2005). The plaintiff's counsel did not indicate that he was offering the documents only for the purpose of impeaching Yelmini's credibility, and, with no objection from the department, the commissioner admitted exhibit K as a full exhibit.

To the extent that the plaintiff contends that the limited purpose of the evidence should have been clear from the record, despite his counsel's failure to explicitly state as much, we are not persuaded. The plaintiff is correct that, initially, the plaintiff's counsel cross-examined Yelmini regarding the references to arbitration in exhibit K. Those questions reasonably can be construed as an attempt to impeach Yelmini's testimony that a supersedence appendix was not required if an agreement had been reached through arbitration. Nevertheless, after the commissioner recited the language on the cost sheet stating that "[t]he state will be responsible for Social Security and Workers' Compensation," the plaintiff's counsel proceeded to use exhibit K in asking Yelmini whether per diem employees were entitled to workers' compensation benefits.[14]

Because exhibit K was admitted in full, without limitation, we conclude that the commissioner was entitled to rely on that exhibit as substantive evidence. See *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 759, 189 A.3d 587 (2018) ("[a]n exhibit offered and received as a full exhibit is in the case for all purposes . . . and is usable as proof to the extent of the rational persuasive power it may have" (citation omitted; internal quotation marks omitted)); *Houghtaling* v. *Commissioner of Correction*, 203 Conn. App. 246, 279, 248

[14] As a result, the commissioner also used exhibit K as substantive evidence in concluding that the plaintiff was entitled to regular benefits under the Workers' Compensation Act.

A.3d 4 (2021) (evidence "marked as a full exhibit without objection . . . was evidence in the case for all purposes"); see also *Curran* v. *Kroll*, 303 Conn. 845, 864, 37 A.3d 700 (2012) (In considering whether there was sufficient evidence presented to support jury's verdict, reviewing court properly took into account evidence that "was admitted in full, without limitation. In the absence of any limiting instruction, the jury was entitled to draw any inferences from the evidence that it reasonably would support."). Accordingly, the board properly upheld the commissioner's substantive use of exhibit K.

II

The plaintiff next claims that the commissioner failed to allocate to the department the burden of proving that he was not entitled to the enhanced benefits of § 5-142 (a). Specifically, he argues that the department, in filing a form 43, "had the burden of proof since it was interposing a defense to a claim for benefits." He further contends that the department "was required by law to prove how [his] full pay compensation rights had been taken away," and, "[s]ince [the department] failed to prove a defense that it had the burden of proof on, the commissioner should have found for [the plaintiff]." We are not persuaded.

The following additional procedural history is relevant to this claim. At the formal hearing, the commissioner referred to the department as the "moving party," but the question of which party bore the burden of proof remained an issue throughout the proceedings.[15] In his original decision, the commissioner did not state

[15] The plaintiff's contention that "all parties and the commissioner understood [that the department] had the burden of proof" is belied by the record. Indeed, at one point during the formal hearing, the plaintiff's counsel acknowledged that it was his burden to prove that the plaintiff was a "member" of the department pursuant to § 5-142 (a).

which party bore the burden of proof on any of the issues presented.[16]

In his motion to correct, the plaintiff requested that the commissioner correct his ruling to explicitly state that "[the department] had the burden of proof asserting that [the plaintiff] was not entitled to benefits pursuant to . . . § 5-142 (a) . . . ." In ruling on the motion to correct, the commissioner declined to correct his original decision in that respect, explaining: "For purposes of the formal hearing, the parties agreed the [department] was the moving party. However, given that the question presented was jurisdictional in nature, I do not agree the [department] had the burden of proof." In his memorandum accompanying the ruling on the motion to correct, the commissioner further explained: "The question of whether any individual falls within the class of people covered by a legislatively created compensation program is a question of fact for which the burden of proof may properly be assigned to one side or the other. However, the question of whether the *class* to which an individual belongs is covered by a legislatively created compensation program is a question of law and quintessentially jurisdictional. Whatever the equities may be, the fact that the [department] paid [the plaintiff] under § 5-142 (a) for some time before deciding he was not entitled to such payment does not give me the right to ignore the jurisdictional question once it has been raised, and it does not place a burden of proof on the [department]." (Emphasis in original.)

The board agreed with the commissioner, recognizing that a claimant seeking temporary total disability benefits bears the burden of proving certain facts, such as

[16] Because the commissioner had not specified to which party it allocated the burden of proof, the plaintiff's contention that the commissioner "contradicted his original decision," and "inexplicably reversed his decision regarding the burden of proof" in his ruling on the motion to correct, is not supported by the record.

incapacity to work. The board recognized that the plaintiff's medical status was not in dispute but concluded: "[W]e are not persuaded that the burden of proof in this claim rested solely with the [department]."

The following legal principles guide our analysis of this issue. It is well established that a party claiming benefits under the Workers' Compensation Act has the burden of proving certain jurisdictional facts, including "that he is an employee of the employer from whom he seeks compensation." *Gamez-Reyes* v. *Biagi*, 136 Conn. App. 258, 270, 44 A.3d 197, cert. denied, 306 Conn. 905, 52 A.3d 731 (2012); see also *Riveiro* v. *Fresh Start Bakeries*, 159 Conn. App. 180, 189, 123 A.3d 35 (setting forth five elements that claimant has burden of proving to establish prima facie case under Workers' Compensation Act, including that "the claimant is a qualified claimant under the act" (internal quotation marks omitted)), cert. denied, 319 Conn. 930, 125 A.3d 205 (2015).

Similarly, a party seeking the enhanced, full salary benefits set forth in § 5-142 (a) has the burden to prove that he has satisfied the statutory requirements of that section, including that "he is among the class of protected workers." *Nelson* v. *State*, 99 Conn. App. 808, 814, 916 A.2d 74 (2007). The covered group of employees includes "any member of . . . any institution or facility of the Department of Mental Health and Addiction Services giving care and treatment to persons afflicted with a mental disorder or disease, or any institution for the care and treatment of persons afflicted with any mental defect . . . ." General Statutes § 5-142 (a).

Thus, in the present case, the plaintiff, as the party claiming entitlement to § 5-142 (a) benefits, had the burden of proving that he was a "member" of the department pursuant to that section. See *Nelson* v. *State*, supra, 99 Conn. App. 814. The fact that the department had been the party to initiate the hearing before the

commissioner, by way of its form 43, does not impact the burden of proof.[17] See *Riveiro* v. *Fresh Start Bakeries*, supra, 159 Conn. App. 192–93 (burden placed on plaintiff, as party seeking workers' compensation, even where issues were considered as result of defendants filing form 43). The commissioner, therefore, correctly did not impose on the department the burden of proof with respect to that issue.

A closer question is presented as to whether the burden should have shifted to the department after the commissioner concluded that the plaintiff was a "member" of the department and had met the requirements of § 5-142 (a), to prove that the plaintiff's right to receive benefits under § 5-142 (a) had been superseded. The plaintiff contends that the department was "required by law" to prove the supersedence of § 5-142 (a), but he has not provided this court with any legal authority to support that argument.

Our review of § 5-278, the statute governing the supersedence process, and related case law, does not provide guidance on this issue. See, e.g., *Cox* v. *Aiken*, 278 Conn. 204, 216–18, 897 A.2d 71 (2006) (not explicitly allocating burden of proof on issue of supersedence, but noting that defendants, as proponents of that claim, had cited and provided relevant supersedence appendix to court); *Board of Trustees* v. *Federation of Technical College Teachers*, 179 Conn. 184, 197–98, 425 A.2d 1247 (1979) (no allocation of burden of proof on issue of supersedence). Nevertheless, "[i]t is an elementary rule that whenever the existence of any fact necessary in order that a party may make out his case or establish his

[17] To the extent that the plaintiff also argues that the burden of proof should have been imposed on the department because it initially decided to compensate him at the "full salary" rate pursuant to § 5-142 (a), the plaintiff cites no legal authority, and we have found none, supporting that proposition.

defense, the burden is on such party to show the existence of such fact.'' (Internal quotation marks omitted.) *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 214–15, 76 A.3d 168 (2013); see also *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 40, 787 A.2d 541 (2002) (burden fell on employer to establish departure from general rule of compensability for regular benefits under Workers' Compensation Act). Thus, it remains unclear as to whether the plaintiff would bear the burden of proving that § 5-278 was not superseded by a collective bargaining agreement, once that issue was raised, in connection with his ultimate burden of proving that he was entitled to § 5-142 (a) benefits, or whether the department would bear the burden of proving the facts necessary to demonstrate the supersedence of § 5-278, as the proponent of that claim.

We need not decide this question in the present case. Regardless of which party bore the burden of proof, the commissioner had before him evidence from which he reasonably could conclude that the plaintiff's ability to receive § 5-142 (a) benefits had been superseded by a 1989 memorandum of agreement between the state and the plaintiff's union, as we explain in part III of this opinion. The allocation of the burden of proof was not dispositive of the commissioner's decision and, therefore, the plaintiff has failed to demonstrate how any error on the part of the commissioner in declining to impose the burden on the department would require reversal.

III

The plaintiff next claims that the board improperly upheld the commissioner's conclusion that a 1989 memorandum of agreement between the state and the plaintiff's union superseded § 5-142 (a). Specifically, he argues that (1) the commissioner's findings regarding the 1989 memorandum of agreement were made on the basis of ''nonexistent evidence,'' because neither the

agreement nor the complete "submission package" to the legislature had been entered into evidence before the commissioner, and (2) because the commissioner's findings were not supported by the evidence, the commissioner could not reasonably conclude that the supersedence process had been followed regarding such an agreement. We are not persuaded.

The following additional facts are relevant to our analysis. At the formal hearing before the commissioner, Yelmini testified that the documents admitted as exhibit K appeared to be related to a new "supplemental agreement [that] . . . wasn't part of a normal contract negotiation." She explained that exhibit K indicated "that there was a memorandum of agreement between the state and the [plaintiff's union], and, so, it wasn't a part of the regular contract. The memorandum of agreement was dated, according to this, December 7 of 1989." Yelmini made clear that her testimony was based on her review of exhibit K at that moment, as she had no independent recollection of the documents.

Although she was not familiar with exhibit K, Yelmini indicated that she previously had seen similar documents prepared by the Office of Policy and Management. Yelmini testified that the 1989 memorandum of agreement "presumably" had been submitted to the legislature with the cost sheet and supersedence appendix in exhibit K. On questioning from the commissioner and the plaintiff's counsel, Yelmini further testified that, under her interpretation of the documents in exhibit K, per diem employees would be entitled to "regular" workers' compensation benefits but not the enhanced benefits of § 5-142 (a). She also agreed that the language contained in article 9, § 21, of the 1993 collective bargaining agreement[18] was "substantively, if not identically, the same" as the language on the cost sheet of exhibit K.

[18] The 1993 collective bargaining agreement was admitted into evidence before the commissioner and marked as exhibit G.

In his September 17, 2020 written findings and order, the commissioner made the following relevant factual findings in support of his conclusion that § 5-142 had been superseded: "In December, 1989, the state and the union negotiated an agreement whereby the state could hire per diem nurses to fill gaps in coverage. The agreement was that per diem nurses would be paid significantly more than permanent nurses, but they would not be eligible for retirement or other benefits. In presenting that agreement to the legislature for approval, the Office of Policy and Management included a fiscal statement stating that: 'The State will be responsible for Social Security and Workers' Compensation.' [Exhibit K.]. . . . The December, 1989 amendment to the collective bargaining agreement . . . was submitted to the General Assembly along with the supersedence appendix indicating that the agreement would affect, inter alia . . . §§ 5-142 through 5-144."

In his motion to correct, the plaintiff challenged the basis of the commissioner's factual findings and, more specifically, his reliance on exhibit K. The plaintiff set forth the following requested correction: "[The plaintiff] attempted to offer exhibit K, a document made February 21, 1990, after the effective date of the 1989 collective bargaining agreement, through the testimony of Linda Yelmini. It refers to a memorandum of agreement dated December 7, 1989, also after the date of the collective bargaining agreement. The actual memorandum is not in evidence. . . . Yelmini testified she had no recollection of this document and it is unknown if the language of this exhibit, or any of it ever became part of any collective bargaining agreement. . . . Yelmini also testified she had no recollection of the document, and when asked by the commissioner, she testified she was not familiar with the specific document, exhibit K. She had no personal knowledge of the 1989 collective bargaining agreement. . . . There is no evidence as to

what was done with the exhibit K or whether it became the language of any collective bargaining agreement or was added to any collective bargaining agreement. There is no evidence that any language was ever inserted into any collective bargaining agreement that would affect the ability of a per diem psychiatrist like [the plaintiff] from collecting benefits pursuant to . . . § 5-142 (a). There is no evidence that the language of exhibit K ever went before the legislature for ratification under the procedures as set out under . . . § 5-278 et seq., which allow a collective bargaining agreement to supersede state statutes in certain situations where the proper procedures are followed." (Citation omitted; emphasis omitted.)

At the hearing on the motion to correct, the plaintiff's counsel explained that he had received the documents comprising exhibit K during discovery. They had been emailed to him by the department as loose pages, but he "interpreted them to be one document."[19] The plaintiff's counsel argued, among other things, that, because Yelmini was not familiar with exhibit K, no other witness had testified about the documents, and no one had the actual 1989 memorandum of agreement, exhibit K was a "free floating document that has absolutely no meaning or legal significance." He argued that there was

[19] On appeal, the plaintiff raises a concern that "there is no proof of the origins of the two documents making up exhibit K or even whether they had once been part of the same document." The plaintiff's counsel raised a similar concern at the hearing before the board, arguing that "I received exhibit K in discovery and they were loose pages. I didn't know what they were and . . . really, I don't even know if it's a complete document. I offered it, I stapled the document together. I don't even know if that's the way it was meant to be or if it had been assembled that way before or it if was missing pages."

Before the commissioner, however, the plaintiff's counsel had explained: "[I]t was a two page document and I didn't want to separate one part from the other, because . . . it had been given to me in discovery and *it appeared to me that* [*it*] *was a unitary two page document and I can't see it being appropriate to separate the pages out*." (Emphasis added.)

no evidence about whether the supersedence appendix marked as part of exhibit K ever went before the legislature with a 1989 memorandum of agreement, or whether it was, instead, "just a draft or a piece of paper that somebody typed up one day, was floating around in the office, and somehow got sent to [him]."

The commissioner questioned whether he should reopen the evidence to allow the parties to present the 1989 memorandum of agreement, particularly given that "the missing information . . . is all public record."[20] The plaintiff's counsel argued against reopening the evidence, as it was his position that the hearing was over and that the commissioner was bound by the record that existed. The department's counsel argued that the commissioner could open the record and take additional evidence but explained that employees within the Office of Labor Relations had searched through its records for the 1989 memorandum of agreement and had been unable to find it. He contended that, even without the actual 1989 memorandum of agreement, it was clear from the language of article 9, § 21, of the 1993 collective bargaining agreement that the substance of the 1989 memorandum of agreement had been approved by the legislature and incorporated into that contract.[21]

[20] Our review of the record reveals that the commissioner expressed concern about the accuracy of his original decision, but he did not, as the plaintiff argues, "actually [state that] exhibit K, by itself, was insufficient evidence to support his decision at this November 18, 2020 hearing," or make other "general statements about realizing the decision was wrong." When the commissioner stated that, "[i]n essence, exhibit K is insufficient proof of the content of the memorandum of agreement," he was summarizing the plaintiff's position as set forth in the motion to correct.

[21] The department recognized that the 1989 memorandum of agreement had not been appended to the 1993 collective bargaining agreement as had other memoranda of agreements but explained: "We either incorporate it and it becomes part of the collective bargaining agreement itself, or we attach it as a memorandum of agreement that becomes part of the collective bargaining agreement that way. Or, we supersede it in the collective bargaining agreement."

In his ruling on the motion to correct, the commissioner noted, as to his reliance on exhibit K, that "implicit in the [plaintiff's] offer [was] the representation that it was an official record that had been presented to the legislature." The commissioner made an additional factual finding at the plaintiff's request, as previously set forth in this opinion, that the 1989 memorandum of agreement was reached after the 1989 collective bargaining agreement, the memorandum of agreement was not in evidence, and Yelmini was not familiar with either the 1989 collective bargaining agreement or the 1989 memorandum of agreement.

The commissioner ultimately determined, however, that he did not need to reopen the evidence and that his original decision was sustainable even without the 1989 memorandum of agreement. In his memorandum of decision accompanying his ruling on the motion to correct, the commissioner explained: "Regarding the content of the December 7, 1989 [memorandum of agreement], the document is unavailable[22] and, contrary to the [plaintiff's] arguments, I am satisfied that the existing record provides ample evidence of the terms of that agreement and its impact on the question presented here. . . .

"The [plaintiff] argues that we do not know what the [memorandum of agreement] stated, and that there is no evidence it was ever incorporated into the [collective bargaining agreement]. I believe he is wrong on both points. It is reasonable to presume that—at least as to any material changes—the text of [a memorandum of agreement] reached after the printing of any given [collective bargaining agreement] will either be included as a separate item in the printed version of the next

[22] The commissioner accepted as true the parties' representations that they did not have the 1989 memorandum of agreement and that efforts by the department to find a copy of that particular agreement had been unsuccessful.

[collective bargaining agreement], as is often done, or that it will be incorporated into the body of that subsequent [collective bargaining agreement] as one of the enumerated articles. The December 7, 1989 [memorandum of agreement] was not reprinted as a separate item in the published version of the 1993 [collective bargaining agreement]. However, if one reads the [Office of Policy and Management] budget estimate that was attached to the 1989 [memorandum of agreement (Exhibit K)], and then reads article 9, [§] 21, of the 1993 [collective bargaining agreement (Exhibit G, pp. 27–29)], it would require wilful blindness not to recognize that the content of the 1989 [memorandum of agreement] was fully incorporated into the 1993 [collective bargaining agreement] (albeit expanded to include other medical professionals such as the [plaintiff]). . . .

"The [Office of Policy and Management] document appended to the 1989 [memorandum of agreement] stated that per diem nurses 'shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits.' [Exhibit K.] The 1993 [collective bargaining agreement] used *exactly* the same language in limiting the rights of per diem employees, which by then also included per diem psychiatrists. [Exhibit G, p. 27.] Each of those benefits listed as being expressly denied to per diem workers was created by statute, and each of those statutes is listed in the supersedence appendix, right alongside § 5-142 (a). It would be wholly illogical to think that inclusion of § 5-142 (a) on the list was somehow meant to *grant* per diem employees the right to benefits under § 5-142 (a) while the inclusion of all those other statutes was clearly meant to *deny* per diem employees the benefits otherwise available to permanent employees."[23] (Emphasis in original; footnote added; footnotes omitted.)

[23] Consistent with this reasoning, the commissioner had noted in his original decision that the supersedence appendix in exhibit K "did not mention

On review, the board upheld the commissioner's factual findings and concluded that he had drawn reasonable inferences from the evidence. The board recognized that neither party had submitted into evidence the 1989 memorandum of agreement and noted that "the commissioner's frustration with this gap in the evidentiary record was palpable" at the hearing on the motion to correct. Nevertheless, on the basis of exhibit K and its comparison to the 1993 collective bargaining agreement, the board determined that there was sufficient evidence to support the commissioner's finding that the supersedence process had been followed with respect to a 1989 memorandum of agreement. Specifically, the board explained that "the evidentiary record contains the supersedence appendix associated with the 1989 [memorandum of agreement] which specifically states that § 5-142 (a) was one of the provisions affected by the [memorandum of agreement]," and that the commissioner had the benefit of Yelmini's testimony, including her agreement that certain language contained on the cost sheet in exhibit K was "substantively, if not identically, the same" as the language in article 9, § 21, of the 1993 collective bargaining agreement.

The board concluded that, once the commissioner found that the provisions contained in the 1989 memorandum of agreement were essentially incorporated into the 1993 collective bargaining agreement, "it was also within his prerogative to conclude, on the basis of the supersedence appendix contained in exhibit K, that the correct supersedence process for the [memorandum of agreement] was followed." In reaching its conclusion, the board emphasized its deferential standard of review: "We recognize that the [plaintiff] disagrees

any part of chapter 568," i.e., the Workers' Compensation Act, given the notation on the cost sheet that "[t]he State will be responsible for Social Security and Workers' Compensation."

with the inferences drawn by the fact finder in this matter. We concede that a different fact finder might have drawn different inferences from the evidentiary record. However, the fact that such a possibility exists does not provide an adequate basis for reversal by an appellate tribunal."

On appeal, as before the board, the plaintiff challenges the commissioner's factual findings that (1) the state and the plaintiff's union had negotiated an agreement in December, 1989, providing that per diem nurses would be paid significantly more than permanent nurses but would not be eligible for retirement benefits or certain other economic benefits, and (2) that the December, 1989 memorandum of agreement was submitted to the General Assembly along with a supersedence appendix indicating that the agreement would affect, inter alia, §§ 5-142 through 5-144. The plaintiff first argues that, without the 1989 memorandum of agreement, "we do not know if such an agreement actually exists," and, without the complete "submission package" sent to the legislature, "it is impossible to know if exhibit K contains a complete supersedence appendix or the one actually submitted . . . . We do not know on this record if any documents were sent to the legislature in 1989. In fact, the document might be a draft or a different version of the finally submitted cost sheet and the final copy might have included different supersedence language or it could have contained contradictory language." The plaintiff further argues that, without such evidence, the commissioner could not reasonably conclude that the supersedence process set forth in § 5-278 (b) had been followed. We address each of these arguments in turn.

Before addressing these arguments, however, we reiterate that our standard of review, like the board's, is highly deferential. "[T]he power and duty of determining the facts rests on the commissioner . . . . [T]he

commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . .'' (Internal quotation marks omitted.) *Frantzen* v. *Davenport Electric*, supra, 206 Conn. App. 367. Thus, ''[*o*]*nce the commissioner makes a factual finding*, [*we are*] *bound by that finding if there is evidence in the record to support it*.'' (Emphasis in original; internal quotation marks omitted.) *Reid* v. *Speer*, 209 Conn. App. 540, 545, 267 A.3d 986 (2021), cert. denied, 342 Conn. 908, 271 A.3d 136 (2022). ''The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . *We will not change the finding of the commissioner unless the record discloses that the finding includes facts found without evidence* . . . .'' (Emphasis added; internal quotation marks omitted.) *Mele* v. *Hartford*, 118 Conn. App. 104, 107, 983 A.2d 277 (2009). Overall, ''[w]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence.'' (Internal quotation marks omitted.) *Story* v. *Woodbury*, 159 Conn. App. 631, 637, 124 A.3d 907 (2015).

First, our review of the record leads us to conclude that the commissioner's findings were based on reasonable inferences drawn from the evidence. Specifically, exhibit K and its comparison to the 1993 collective bargaining agreement provided a sufficient basis from which the commissioner reasonably could infer that (1) a 1989 memorandum of agreement existed between the state and the plaintiff's union, and (2) that agreement had been submitted to and approved by the legislature along with the documents in exhibit K.

The commissioner reasonably found that, given that the heading of the cost sheet in exhibit K specifically refers to the plaintiff's union and a ''Memorandum of Agreement dated 12/7/89,'' a 1989 memorandum of

agreement between the state and the plaintiff's union existed and contained the provision regarding per diem nursing positions as set forth in exhibit K.[24]

The commissioner's additional inference, that the memorandum of agreement had been submitted to and approved by the legislature with the documents in exhibit K, also was supported by the evidence. Although Yelmini was not familiar with the specific documents in exhibit K, her testimony that the 1989 memorandum of agreement "presumably" had been submitted to the legislature with those documents is consistent with § 5-278 (b) (3), which provides in relevant part that "[a]ny supplemental understanding reached between such parties containing provisions which would supersede any provision of the general statutes or any regulation of any state agency or would require additional state funding shall be submitted to the General Assembly for approval in the same manner as agreements and awards. . . ."

Additionally, in light of the similarity of the language set forth in exhibit K and article 9, § 21, of the 1993 collective bargaining agreement, the commissioner reasonably could conclude that the 1989 memorandum of agreement had, in fact, been submitted to and approved by the legislature with the documents in exhibit K. The language on the cost sheet of exhibit K, associated with the 1989 memorandum of agreement, states in relevant part: "Registered Professional and Licensed Practical Nurses hired on a per diem basis *shall not be entitled to retirement benefits, health or life insurance benefits, paid leave, longevity or other economic benefits.*" (Emphasis added.) Article 9, § 21, of the 1993 collective bargaining agreement similarly states in relevant part that "[i]ndividuals in per diem classifications *shall not*

[24] The cost sheet in exhibit K was dated February 21, 1990, after the date of the referenced memorandum of agreement.

be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits . . . ."[25] (Emphasis added.) In setting forth the positions of per diem employees covered by article 9, § 21, of the 1993 collective bargaining agreement, that provision first lists the positions of registered professional nurse and licensed practical nurse—the same positions referenced in exhibit K as being part of the 1989 memorandum of agreement—then lists the additional positions of occupational therapist, physical therapist, physician, psychiatrist, psychologist, and speech therapist.

Because the language reflected in those documents had been phrased in almost exactly the same manner, and such a provision had not been contained in the prior collective bargaining agreement,[26] the commissioner reasonably inferred that the inclusion of such language in the 1993 collective bargaining agreement resulted from the 1989 memorandum of agreement, along with the documents in exhibit K, being submitted to and approved by the legislature. Thus, in light of exhibit K and its comparison to the 1993 collective bargaining agreement, we simply cannot conclude that the commissioner's decision was supported by "no evidence," as the plaintiff contends. See *Mele* v. *Hartford*, supra, 118 Conn. App. 108–11 (reversing board's decision where "no evidence whatsoever exist[ed] in the record" to support commissioner's finding).

We acknowledge, as the plaintiff argues, that the actual 1989 memorandum of agreement, or the complete "submission package" to the legislature, would

[25] Article 9, § 21, of the 1993 collective bargaining agreement did not include other language contained on the cost sheet, such as that "[t]he State will be responsible for Social Security and Workers' Compensation."

[26] The prior collective bargaining agreement, which went into effect on July 1, 1989, was admitted into evidence before the commissioner and marked as exhibit 2.

have provided stronger, more direct evidence than that evidence in the record on which the commissioner based his findings. The absence of such evidence, however, does not provide a basis for reversing the commissioner's decision. See *Frantzen* v. *Davenport Electric*, supra, 206 Conn. App. 367–68 (considering deferential standard of review, board improperly reversed commissioner's decision on basis of its assertion that decision "could have rested on a more solid evidentiary foundation" (internal quotation marks omitted)).

Similarly, although it hypothetically was possible that the documents in exhibit K were preliminary drafts rather than the final documents submitted to the legislature,[27] we cannot conclude that the commissioner's inference drawn from these documents was "so unreasonable as to be unjustifiable"; (internal quotation marks omitted) *Curran* v. *Kroll*, supra, 303 Conn. 857; given the similarity of the language contained on the cost sheet of exhibit K and article 9, § 21, of the 1993 collective bargaining agreement. See *Riveiro* v. *Fresh Start Bakeries*, supra, 159 Conn. App. 192 ("It is . . . immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.)); see also *Curran* v. *Kroll*, supra, 857 ("[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference." (Internal quotation marks omitted.)).

[27] At oral argument before this court, the department's counsel acknowledged the possibility that the documents in exhibit K "theoretically" could have been drafts.

Next, we conclude that the commissioner reasonably concluded, on the basis of his findings, that § 5-142 had been superseded by the 1989 memorandum of agreement between the state and the plaintiff's union. "[U]nder [§ 5-278 (b) and (e)] a collective bargaining agreement term may supersede inconsistent statutes and regulations, provided that the appropriate procedure has been followed. . . . [Section] 5-278 (b) implicitly requires that, in order for the legislature to approve or reject a collective bargaining agreement term in conflict with law, the particular contract term must be stated distinctly and correctly by the employer in the transmittal of the contract to the legislature. If the notification required by § 5-278 (b) did not apprise the legislature of the conflicting . . . term, then that term . . . would be ultra vires. Put another way, a term at variance with law, not approved by the legislature in accordance with . . . § 5-278 (b), does not enjoy the preferential position provided for legislatively approved conflicting terms by § 5-278 (e), but is rendered a nullity. Neither party to the agreement is therefore entitled to enforce that term." (Internal quotation marks omitted.) *Cox* v. *Aiken*, supra, 278 Conn. 216; see also *State College American Assn. of University Professors* v. *State Board of Labor Relations*, 197 Conn. 91, 99, 495 A.2d 1069 (1985) ("[w]ith respect to a collective bargaining agreement approved pursuant to § 5-278 (b), unless a particular statute or regulation has been referred to specifically in the documents submitted to the legislature, its terms must necessarily prevail over conflicting provisions of the agreement").

Here, the supersedence appendix in exhibit K specifically referred to the provision of the agreement governing the per diem nursing positions and listed § 5-142 as one of the statutes that would be "amended" by that provision. Given that the commissioner reasonably

found that the supersedence appendix had been submitted to the legislature, the commissioner also reasonably could conclude that the citation to § 5-142 in the appendix would have alerted the legislature that the referenced agreement term conflicted with that statute, and, more specifically, that the enhanced, full salary benefits set forth in § 5-142 (a) were included among the "other economic benefits" to which per diem employees were not entitled.[28] See *Cox* v. *Aiken*, supra, 278 Conn. 217 (statute superseded where supersedence appendix specifically mentioned relevant contract provisions and cited statute at issue as one of numerous affected statutes and regulations).

The commissioner, therefore, reasonably concluded that the plaintiff's right to the enhanced, full salary benefits under § 5-142 (a) was superseded by a 1989 memorandum of agreement between the state and the plaintiff's union. Accordingly, the board properly upheld the commissioner's conclusion.

IV

The plaintiff also claims that the commissioner's analysis was inconsistent as to whether the enhanced benefits of § 5-142 (a) are included among the "other economic benefits" denied to per diem employees, as that

[28] In light of the supersedence appendix and its reference to § 5-142, the present case is distinguishable from the cases cited by the plaintiff, in which the legislature had not been sufficiently apprised of the conflicting contract provisions or statutes at issue. See *Nagy* v. *Employees' Review Board*, 249 Conn. 693, 706–707, 735 A.2d 297 (1999) (record did not permit finding that agreement contained provision that conflicted with statutes at issue or conclusion that such provision, if it existed, was submitted to and approved by legislature); *State College American Assn. of University Professors* v. *State Board of Labor Relations*, supra, 197 Conn. 99 ("supersedence analysis" sent to legislature with collective bargaining agreement did not mention any conflict with public act enacting statute at issue); *Board of Trustees* v. *Federation of Technical College Teachers*, supra, 179 Conn. 197 (transmittal letter accompanying collective bargaining agreement indicated existence of conflict with law only in relation to different contract provision).

language is used in the 1993 collective bargaining agreement.[29] Specifically, the plaintiff contends that the commissioner initially concluded, in his original decision, that § 5-142 (a) benefits were not included among the "other economic benefits," but then contradicted that conclusion in his memorandum of decision on the motion to correct when he stated: "The simple fact is that when the very first per diem position was created, § 5-142 (a) was one of the 'other economic benefits' denied to per diem employees." We are not persuaded.

The plaintiff's claim is premised on a misinterpretation of the commissioner's original decision. See *In re Jacquelyn W.*, 169 Conn. App. 233, 241, 150 A.3d 692 (2016) (interpretation of court's decision is subject to our plenary review). The plaintiff reads the decision to hold that "the removal of economic benefits for per diems was not in reference to *any* workers' compensation rights . . . including full pay compensation for qualifying injuries." (Emphasis added.) The plaintiff specifically points to language in the commissioner's conclusion that states that "[t]he argument that [the plaintiff] was an employee but not covered by the Workers' Compensation Act, because such benefits fall under the category of 'other economic benefits' is without any support in fact or law." Considering that portion of the conclusion in the context of the remainder of the original decision, however, it is clear that the commissioner was referring only to the regular workers' compensation benefits set forth under the Workers' Compensation Act, and not the enhanced, full salary benefits set forth in § 5-142 (a). Indeed, immediately following the language relied on by the plaintiff, the commissioner stated: "It is clear, however, that when the state and

[29] As set forth previously in this opinion, article 9, § 21, of the 1993 collective bargaining agreement provides that per diem employees "shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or *other economic benefits* . . . ." (Emphasis added.)

the union first agreed to create a special class of per diem employees, this class of workers was expressly excluded from the economic benefit of . . . § 5-142 (a)."

The commissioner had explained, in the analysis portion of his original decision, that "the argument that the union—and ultimately the legislature—meant to deprive an entire class of workers of the *basic protections* of the Workers' Compensation Act with the catch-all phrase 'other economic benefits' is wholly unsustainable. *However, the argument that the provisions of § 5-142 (a) fall under the umbrella of 'other economic benefits' is not so easily dismissed.*" (Emphasis added.) The commissioner proceeded to reject the department's claim that the "other economic benefits" language set forth in the 1993 collective bargaining agreement operated, by itself, to supersede § 5-142 (a); see, e.g., *State College American Assn. of University Professors* v. *State Board of Labor Relations*, supra, 197 Conn. 99 (explaining that statute must be "referred to specifically in the documents submitted to the legislature" to effectuate supersedence); but he went on to explain that the supersedence appendix accompanying the 1989 memorandum of agreement, marked as part of exhibit K, made clear that § 5-142 (a) benefits were, in fact, included among the "other economic benefits" denied to per diem employees.[30] Accordingly, the commissioner's memorandum of decision on the motion to correct is entirely consistent with his original decision in that regard.

[30] Our analysis is consistent with the board's observation that "the commissioner concluded that it was the 1989 [memorandum of agreement], not the 1993 [collective bargaining agreement], that served to bar per diem employees' entitlement to § 5-142 (a) benefits, and the reference to 'other economic benefits' in the [memorandum of agreement] merely reflected that change in the law."

V

Finally, the plaintiff claims that the board erred in upholding the commissioner's decision because the commissioner improperly held that the 1993 collective bargaining agreement, which added several job classifications to the provision regarding per diem employees, including the position of psychiatrist, was not required to go through a new supersedence process. We are not persuaded.

The following additional facts are relevant to our analysis. In the commissioner's September 17, 2020 written findings and order, he found the following facts related to the 1993 collective bargaining agreement: "By 1993, the state was having difficulty hiring sufficient medical staff to cover all shifts. The state then began hiring per diem psychiatrists to fill in. To that point, however, the [collective bargaining agreement] only included provisions for per diem nurses. That December, the state and the union negotiated an amendment to the collective bargaining agreement that sanctioned the practice of hiring additional per diem medical staff, including psychiatrists. . . . That agreement, incorporated into the 1993 [collective bargaining agreement] as [§] 21 of article 9, provided that 'per diem psychiatrists' would be paid at an hourly rate that was 150 [percent] of the rate paid to a permanent employee with the title of Psychiatrist-4 (a position now classified as 'Principal Psychiatrist'). . . . The new provision specifically provided that per diem medical staff 'shall not be entitled to retirement benefits, health insurance [or] life insurance [benefits], paid leave, longevity or other economic benefits.' . . . No supersedence appendix was submitted to the legislature relative to these 1993 changes regarding per diem workers."

In his accompanying memorandum of decision, the commissioner explained that the 1993 collective bargaining agreement did not impact the supersedence

of § 5-142 (a) that had been effectuated by the 1989 memorandum of agreement: "The purpose of the 1993 agreement was not the creation of a new class of workers, i.e., per diem workers, because the class already existed. The purpose of the 1993 changes was merely to expand the types of clinical staff that could be hired under the heading per diem. The list of per diem professionals under which [the plaintiff] is covered includes the very per diem nurses that were working before 1993. If the legislature had already denied members of the per diem class of employees the benefits of § 5-142 (a), the only way the 1993 changes could have reversed that decision would be if there had been an express intent to do so. This would have required either a statement to that effect in the contract language (there is none), or the attachment of a supersedence appendix specifically listing § 5-142 (a). No such appendix was sent to the legislature."

In the plaintiff's motion to correct, he requested the commissioner to find, instead, that "[t]he 1993 collective bargaining agreement provision of article 9, § 21, was completely new language compared to the earlier 1989 collective bargaining agreement. . . . This would have required submission of a supersede[nce] appendix, because § 5-278 (b) (3) requires this if there is a change in the language of the contract, which there was, by the addition of several new job classes in the 1993 document." The commissioner denied this request, explaining: "That the position of per diem psychiatrist was a new classification is already established by the findings. . . . The rest of the requests made are recitations of evidence or mere argument." The commissioner also recognized that "the 1993 [collective bargaining agreement] used *exactly* the same language [as the Office of Policy and Management document appended to the 1989 memorandum of agreement] in limiting the rights of per diem employees, which by then also

included per diem psychiatrists." (Emphasis in original.)

On review, the board concluded: "[W]e find nothing unreasonable or illogical relative to the commissioner's inference that the supersedence process, specifically with regard to the provisions of § 5-142 (a), was not required again in 1993 because the only change to the contract provisions which had been established by the 1989 [memorandum of agreement] was the addition of several job classifications, including that of psychiatrist, to the list of permitted per diem employees. . . . [W]e agree with the commissioner that the addition of several job classifications eligible for per diem employees did not materially change the statutory provisions governing these employees which had already been put into place by virtue of the prior [memorandum of agreement] and its accompanying supersedence appendix."

We agree with the board. The 1993 collective bargaining agreement was not required to go through the supersedence process because, as explained in part III of this opinion, the commissioner reasonably inferred that the legislature already had approved the provision of the contract that conflicted with § 5-142 (a) by way of the 1989 memorandum of agreement. The commissioner also reasonably inferred that that provision subsequently was incorporated into the 1993 collective bargaining agreement. "[O]nce the legislature has approved a collective bargaining provision that conflicts with a statute or regulation, that approval remains effective with respect to future agreements between the state and a particular bargaining unit, and the conflicting provision need not be resubmitted for approval." *Cox* v. *Aiken*, supra, 278 Conn. 216–17.

The plaintiff nevertheless argues that the 1989 memorandum of agreement pertained only to certain per diem

nursing positions, and, therefore, once the 1993 collective bargaining agreement added six additional job classifications to the provision regarding per diem employees, including the position of psychiatrist, it was required to go through a new supersedence process. In support of his contention, the plaintiff relies on § 5-278 (b) (3), which provides in relevant part that, "[o]nce approved by the General Assembly, any provision of an agreement or award need not be resubmitted by the parties to such agreement or award as part of a future contract approval process *unless changes in the language of such provision are negotiated by such parties*. . . ." (Emphasis added.) We are not persuaded.

The inclusion of additional per diem positions in the 1993 collective bargaining agreement did not impact the language of the provision that conflicted with § 5-142 (a) and had been approved by the legislature by way of the 1989 memorandum of agreement, specifically, that per diem employees "shall not be entitled to retirement benefits, health insurance or life insurance benefits, paid leave, longevity or other economic benefits . . . ." Instead, as the commissioner concluded, the 1993 collective bargaining agreement merely expanded the class of per diem employees that already existed. Accordingly, the board properly upheld the commissioner's conclusion that the 1993 collective bargaining agreement did not need to go through a new supersedence process.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

SARAH BRAASCH *v.* FREEDOM OF INFORMATION COMMISSION ET AL. (AC 45024)

Prescott, Moll and Suarez, Js.

Syllabus

Pursuant to statute (§ 1-216), records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records and, if the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

Pursuant further to a provision (§ 1-210 (b)) of the Freedom of Information Act (§ 1-200 et seq.), nothing in the act shall be construed to require disclosure of records of law enforcement agencies not otherwise available to the public, if the disclosure of such records would result in the disclosure of uncorroborated allegations subject to destruction pursuant to § 1-216.

The plaintiff appealed to this court from the judgment of the trial court dismissing her administrative appeal from the final decision of the defendant Freedom of Information Commission, in which the commission determined that body camera recordings created by the defendant university police department were exempt from disclosure pursuant to § 1-210 (b) (3) (H). Invoking the Freedom of Information Act, the plaintiff submitted a request with the department chief to be provided with a copy of body camera recordings that were generated when department police responded to her residence hall at the university after she called the department's nonemergency line, reporting that a third party, whom the plaintiff did not know, was sleeping in a common room, and that the third party may have been sleeping in the room to provoke the plaintiff. The department, construing the plaintiff's allegations as possible criminal activity, dispatched police officers to the scene. The officers conducted an investigation, which was recorded on the body cameras, in which they interviewed the plaintiff and the third party. After the investigation, the department concluded that the plaintiff's allegations were unfounded. The defendant assistant chief of the department denied the plaintiff's request for the recordings on the ground that they were created in connection with an uncorroborated allegation of a crime. The commission concluded that the department and the assistant chief properly denied the plaintiff's request because the recordings were exempt from disclosure. The trial court rendered judgment dismissing the appeal and granting a motion to seal the body camera recordings filed by the department and the assistant chief. *Held*:

1. The trial court properly concluded that the body camera recordings were exempt from disclosure under § 1-210:

a. The plaintiff could not prevail on her claim that, in applying § 1-210 (b) (3) (H), the commission erroneously found that she had made uncorroborated allegations of criminal activity to the department because she neither stated a belief that criminal conduct had occurred nor subjectively intended to initiate an investigation into possible criminal conduct: the proper inquiry was whether the records sought to be disclosed were compiled in connection with the detection or investigation of a crime, and the plaintiff failed to demonstrate that the commissioner's findings that the department construed the facts that the plaintiff provided as allegations of possible criminal activity and that the police officers investigated whether a crime had occurred were not supported by substantial evidence and were objectively unreasonable; moreover, the plaintiff's subjective intent in calling the nonemergency line did not restrict the department's response to her representations; accordingly, the body camera recordings were generated during the officers' investigation into whether a crime had occurred.

b. The plaintiff's claim that the commission improperly determined that § 1-210 (b) (3) (H) applied even though the video recordings had been made available to D, a dean of the university, was unavailing: the plaintiff did not demonstrate that the department, by making the recordings available to D, thereby made the records available to the "public" under § 1-210 (b) (3), rather, the department made the recordings available only to D for what it believed was a limited educational purpose relating to whether a disciplinary proceeding should be initiated against the plaintiff, D was bound by the restrictions on disclosure imposed by the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g et seq.), and, thus, substantial evidence supported the commission's finding that the recordings were not otherwise made available to the public; moreover, the fact that the department made the recordings available to D and not to her did not violate her right to equal protection because she was not similarly situated to D, as the release of the recordings to D was made for what the department believed to be a limited administrative purpose, whereas the plaintiff acknowledged her intention to publicly disseminate the recordings.

c. The commission did not arbitrarily refuse to require the department and the assistant chief to provide the plaintiff with redacted recordings omitting any discussion of criminality: substantial evidence supported the commission's finding that the police responded to the plaintiff's residence hall and generated the body camera recordings in their investigation into what they interpreted to be the plaintiff's allegation that criminal conduct possibly had occurred; moreover, the plaintiff failed to demonstrate that the disclosure of the recordings would not undermine the legislative policy underlying the exemption in § 1-210 (b) (3) (H) to

shield persons from public scrutiny arising from uncorroborated allegations of criminal activity, particularly in light of the plaintiff's expressed desire to use the recordings in an attempt to sway public opinion concerning the incident.

2. The trial court properly exercised its discretion in granting the motion of the department and the assistant chief to seal the body camera recordings: the commission and the trial court reviewed the recordings in camera to determine whether § 1-210 (b) (3) (H) applied and, having fully litigated and upheld the commission's determination that the exemption applied, the court properly granted the motion to seal to protect the integrity of its judgment and to shield the third party from any possible negative effects of disclosure of the recordings.

Argued September 14, 2022—officially released April 4, 2023

Procedural History

Appeal from the decision of the named defendant determining that certain body camera recordings were exempt from disclosure, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment dismissing the appeal and granting the motion to seal certain body camera recordings filed by the defendant Yale University Police Department et al., from which the plaintiff appealed to this court. *Affirmed.*

Jay M. Wolman, with whom, on the brief, was *Marc J. Randazza*, pro hac vice, for the appellant (plaintiff).

Kathleen K. Ross, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (named defendant).

Aaron S. Bayer, with whom was *Robyn E. Gallagher*, for the appellee (defendant Yale University Police Department et al.).

Opinion

SUAREZ, J. The plaintiff, Sarah Braasch, appeals from the judgment of the trial court dismissing her administrative appeal from the final decision of the Freedom of Information Commission (commission),

one of three defendants in this action. The commission concluded that the other two defendants in this action, the Yale University Police Department (department) and the Assistant Chief of the Yale University Police Department (assistant chief), properly denied the plaintiff's request for a copy of certain body camera recordings that were in their custody. On appeal to this court, the plaintiff claims that the trial court improperly (1) concluded that the recordings were exempt from disclosure under General Statutes § 1-210 (b) (3) (H),[1] and (2) granted the motion of the department and the assistant chief to seal the body camera recordings. We affirm the judgment of the trial court.

The relevant procedural history is as follows. On May 23, 2019, the plaintiff, invoking the Freedom of Information Act (act), General Statutes § 1-200 et seq., submitted a written request with Ronnell Higgins, the director of public safety and chief of the department (chief), to be provided with a copy of body camera recordings that were generated on May 8, 2018, when department police officers responded to her residence hall at Yale University (university) after she had called the department's nonemergency line. On July 9, 2019, the assistant

[1] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (H) uncorroborated allegations subject to destruction pursuant to section 1-216 . . . ."

General Statutes § 1-216 provides: "Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records."

chief, Steven D. Woznyk, denied the plaintiff's request in writing on the ground that the recordings were "created in connection with an uncorroborated allegation of a crime."

On July 27, 2019, the plaintiff filed a complaint with the commission. On November 4, 2019, a contested hearing was held before a hearing officer. On September 9, 2020, the commission voted unanimously to adopt the hearing officer's report dated August 18, 2020, as the commission's final decision. The commission determined that the body camera recordings were exempt from disclosure under § 1-210 (b) (3) (H).

In its final decision, the commission found that, "at approximately 1:40 a.m. on May 8, 2018, [the plaintiff] called [university] police dispatch, identified herself as a student and resident of the Hall of Graduate Studies, and alleged that a woman, who she did not know, was sleeping in a common room. It is also found that the [plaintiff] further alleged to [the department] that this person may have been sleeping in the room to provoke the [plaintiff] as part of an ongoing conflict the [plaintiff] alleged she had with other students that reside in the same residence hall.[2] . . .

"[I]n response to the call . . . [the department] dispatched three police officers (with a supervising officer arriving later to the scene) to conduct a criminal investigation of the allegation that an unauthorized person was in the residence hall trespassing and that this person was harassing the [plaintiff]. . . . [T]he [department] construed the allegations of the [plaintiff] as possible criminal activity. . . .

[2] "The [plaintiff] testified extensively that prior incidents involving other students left her feeling unsafe, that she had advised the university and the [department] of those incidents and her concerns, and that various university personnel and the [department] advised her that if she felt unsafe in the future, she could contact the [department] for any reason."

"[T]he [department] investigated upon arrival at the scene. . . . [T]he [department] officers separately interviewed the [plaintiff] and the accused person, recording their interviews and the scene on their body worn cameras. . . . [S]uch action in turning on the body worn cameras was consistent with [the department's] policy on body worn cameras. . . .

"[A]fter investigating the allegations of the [plaintiff], [the department] determined that the [plaintiff's] allegations were unfounded. . . . [The department] concluded that the accused person was a student and resident of the hall who was therefore authorized to be in the building and common room, and that the accused person was not harassing the [plaintiff]. . . . [The department] notified the [plaintiff] of their findings. . . .

"[T]he body camera video footage in this case was maintained by the [department] as part of the investigation file. . . . [The department] documented its investigation of a 'suspicious person/activity,' in an Incident/Investigation Report, dated May 8, 2018. The [department] referred the matter to the university to investigate whether the [plaintiff] violated any university policies, and thereafter the university provided the [plaintiff] with a copy of the report. . . .

"[T]he in camera records [that were provided to the hearing officer for review] are records of a law enforcement agency, namely the [department], which are not otherwise available to the public, and were compiled in connection with the investigation or detection of a crime, or alleged crime. . . .

"[E]ach in camera record depicts the interactions of the [plaintiff] with the [department] officers that responded to the scene and include the [plaintiff's] recitation of her allegations. . . . [T]he [department] concluded that the accused person was a student and resident of the hall and therefore was not trespassing, and

that the accused person was not harassing the [plaintiff]. . . . [T]he [plaintiff's] allegations are not supported, substantiated or strengthened by the facts uncovered by the [department] in conducting their investigation. It is therefore concluded that the in camera records contain uncorroborated allegations that are subject to destruction, within the meaning of § 1-210 (b) (3) (H) and [General Statutes §] 1-216 . . . .

"[T]he in camera records are permissibly exempt from disclosure pursuant to § 1-210 (b) (3) (H) . . . . Consequently, the [department and the assistant chief] did not violate the [act] as alleged by the [plaintiff]." (Footnote omitted.) In its decision, the commission also discussed and rejected several specific arguments advanced by the plaintiff in support of her contention that the department was obligated to disclose the body camera recordings. We will discuss the commission's additional reasoning as necessary in the context of the claims raised on appeal.

On October 19, 2020, in the Superior Court, the plaintiff commenced an administrative appeal from the commission's decision. On September 21, 2021, following a hearing, the court, *Cordani, J.*, dismissed the plaintiff's appeal. In its memorandum of decision, after setting forth the facts of the case consistent with those found by the commission, the court stated: "The video was compiled by the [department] in connection with its handling and investigation of the plaintiff's call. The plaintiff called a law enforcement agency and complained that there was a stranger in her dorm residence building, who the plaintiff believed had no right to be there, and who the plaintiff believed was there for the purpose of harassing the plaintiff. Clearly, in making the call, the plaintiff sought the assistance of the [department], a law enforcement agency, to investigate her problem and remedy it. The plaintiff clearly intended for and expected the [department] to dispatch

officers as a result of her call. When the officers arrived, they investigated, and the plaintiff cooperated in the investigation. The plaintiff then admits to reporting to the [department] that the stranger was, in fact, harassing her. Clearly, the [department] was responding to and investigating allegations of potential criminal activity.[3] The [commission] factually found the foregoing and the record contains substantial evidence to support the finding. . . . The fact that the plaintiff believed that she was being harassed on an ongoing basis, apparently for months prior to this incident and earlier on the evening of the incident, and had reported such to the [department] previously, further supports the foregoing conclusion.[4] Accordingly, the [commission] found that the [department], in creating the video, was investigating a report of alleged criminal activity, and the record contains substantial evidence supporting the [commission's] finding in this regard.

"In this context, the statute itself, by using the link 'because,' confirms that if disclosure of a record would reveal uncorroborated allegations of a criminal nature, then disclosure of the record would not be in the public interest. The video contains two portions. An interview of the plaintiff and an interview of the stranger. Both portions contain allegations of a criminal nature from

[3] "The fact that the plaintiff now says that she subjectively did not intend to initiate a criminal investigation does not detract from the foregoing conclusion. Also, the fact that the plaintiff did not refer to statutes or all of the elements of the potential crimes of trespass and harassment, does not detract from the conclusion. It would be unusual for a citizen call seeking assistance from a police department to contain statutory citations and references to elements of a crime. The plaintiff essentially reported [the presence of] an unauthorized intruder in a locked dorm who the plaintiff believed was harassing the plaintiff. As a result, three police officers responded to the plaintiff's call."

[4] "The plaintiff apparently suspected that the stranger was one of the persons who were harassing the plaintiff over the previous months and earlier in the evening of the incident."

different points of view. The plaintiff's interview contains the allegations directly with the plaintiff complaining that the stranger is present where she should not be and that the stranger was harassing the plaintiff. The interview of the stranger contains the stranger's responses to the plaintiff's allegations. The purpose of the . . . exception in § 1-210 (b) (3) (H) is to shield a person accused of criminal wrongdoing from unfair public scrutiny if the accusations are uncorroborated.[5] The . . . hearing officer factually found that the video contains uncorroborated allegations of a criminal nature, and the finding is supported by, substantial evidence in the record. . . .

"The video was subject to destruction under § 1-216 because a year had passed and the investigation was closed with an affirmative conclusion that no criminal activity had occurred. The fact that the [department] ultimately concluded that there was no criminal activity does not detract from the finding that there were criminal allegations and a criminal investigation. The foregoing occurs in all cases of uncorroborated allegations. Uncorroborated allegations always start as allegations and are determined to be uncorroborated through investigation." (Footnotes in original.)

On September 2, 2021, prior to the hearing on the administrative appeal, the department and the assistant chief filed a motion pursuant to Practice Book §§ 7-4B (b) and 11-20A, in which they sought an order sealing the body camera recordings, which they had provided to the commission for its in camera review and, thus,

[5] "The plaintiff asserts that some of the factual allegations were corroborated. However, the statutory exemption turns on whether or not the accusations of criminal wrongdoing were corroborated. Here, they were not, as found by the [department] and the [commission]. Further, it is clear that at least some of the critical factual allegations were uncorroborated, including the accusation that the stranger had no right to be in the residence hall and the accusation that the stranger was harassing the plaintiff."

constituted part of the administrative record before the court. The recordings were reviewed in camera by the court. The plaintiff filed a written objection to the motion to seal. On September 20, 2021, the court held a hearing on the motion and on the merits of the appeal and, in a written decision on September 21, 2021, the court granted the motion to seal until further order of the court.

On October 8, 2021, the plaintiff filed the present appeal from the judgment of the court dismissing her appeal from the final decision of the commission, as well as the court's order of September 21, 2021, granting the motion to seal.

I

First, we address the plaintiff's claim that the court improperly concluded that the recordings were exempt from disclosure under § 1-210 (b) (3) (H). We are not persuaded.

The plaintiff raises several subclaims in connection with this claim, all of which we will address in turn after setting forth the applicable legal principles and our standard of review. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct

application of the law to the facts found and could reasonably and logically follow from such facts. . . . Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. This court is required to defer to the subordinate facts found by the commission, if there is substantial evidence to support those findings. . . . Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . The burden is on the [appellant] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Citations omitted; internal quotation marks omitted.) *Allco Renewable Energy Ltd.* v. *Freedom of Information Commission*, 205 Conn. App. 144, 150–52, 257 A.3d 324 (2021).

It is not in dispute that the department is a public agency within the meaning of General Statutes § 1-200 (1).[6] Section 1-210 (a) provides in relevant part: "*Except*

[6] General Statutes § 1-200 (1) provides in relevant part: " 'Public agency' or 'agency' means: (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision

as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. . . ."[7] (Emphasis added.)

As our Supreme Court has observed, "[t]he exemptions contained in [various state statutes] reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]. . . . Our construction of the [act] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed. . . . [T]he burden of proving the applicability of an exemption rests upon the agency claiming it." (Citations omitted; internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 383–84, 194 A.3d 759 (2018).

of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof . . . ."

[7] General Statutes § 1-200 (5) defines "public records or files" as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, videotaped, printed, photostated, photographed or recorded by any other method."

Section 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (H) uncorroborated allegations subject to destruction pursuant to section 1-216 . . . ."

Section 1-216 provides: "Except for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records."

Although the exemption at issue has not been the subject of extensive judicial interpretation, in *Bona* v. *Freedom of Information Commission*, 44 Conn. App. 622, 631, 691 A.2d 1 (1997), this court discussed the statutory exemption at issue in the present case, which was formerly codified in General Statutes (Rev. to 1997) § 1-19 (b) (3) (G). This court in *Bona* observed that the underlying legislative purpose of the exemption "was to provide protection to those individuals who are subject to uncorroborated allegations." Id.

A

In challenging the commission's application of the exemption, the plaintiff raises three interrelated arguments. First, she argues that the commission improperly

based its application of § 1-210 (b) (3) (H) on an erroneous finding that she had made uncorroborated allegations of criminal activity to the department. The plaintiff argues that, regardless of the fact that the department characterized her telephone call to its nonemergency line as a complaint of possible criminal activity in the residence hall, the evidence reflects that the facts that she relayed were later corroborated by the police and that she did not allege criminal activity. According to the plaintiff, "law enforcement agencies are called for a variety of reasons, not exclusively for the purpose of victims making criminal allegations. . . . [The department] may have responded to her call . . . thinking about any possible criminal activity, but their overzealous response does not transform the statements made by [her] into allegations of or an investigation into criminal activity."

Second, the plaintiff argues that it was improper for the commission to apply the exemption codified in § 1-210 (b) (3) (H) in the present case because the facts that she relayed to the department were corroborated by the police. The plaintiff argues that she "made statements that she unexpectedly came upon [the third party in her residence hall], purportedly asleep in the common room. [The department] offered no evidence to suggest that [the plaintiff's] statements that she came upon an unidentified individual in the common room, who may or not have been sleeping there (and, if so, impermissibly), following an evening of being bothered [in] that room by other unknown persons, did not happen. There are no nonconforming facts or evidence." The plaintiff argues that "[t]he exemption [in § 1-210 (b) (3) (H)] essentially protects individuals from being defamed by [requests made under the act] for a false report, such as when an ex-spouse falsely accuses [a] co-parent of striking [a] child or when a police officer plants narcotics at the scene of a stop. It is not intended

to shield truthful reports despite the absence of a criminal conviction, such as when police make a report of a fight they observed, but exercise discretion and decline to charge the combatants."

Third, the plaintiff argues that the commission improperly applied the exemption in § 1-210 (b) (3) (H) in the present case because, contrary to the commission's findings, the evidence reflects that she did not call to report criminal activity, let alone report that the third party had engaged in criminal trespass or harassment, as the commission found. She argues that the evidence did not support a finding that she had reported an unauthorized intruder in the residence hall but merely that "she reported discomfort at the unexpected presence of an individual she did not know who, if sleeping, was doing something not permitted. It is unreasonable to think she was reporting a potential crime; intruders rarely stick around for an argument and wait for the police to arrive." Moreover, the plaintiff argues that "when [she] called [the department], there was no claim of criminal harassment . . . as there were no threats or telephonic, electronic, or written communications [between her and the third party]. That [she] may have felt harassed does not mean she was making a charge of harassment, although she felt obligated to incorrectly opine that there was *potential* criminality when [the department] falsely accused her of calling the nonemergency line for an improper purpose." (Emphasis in original.)

In its final decision, the commission addressed these arguments as follows: "The [plaintiff] . . . argues that because some of the underlying facts in this matter are not disputed, her allegations are corroborated. For example, the [plaintiff] relies on the fact that the accused was resting in the common room and such is not disputed by the [department and the assistant chief]. . . . Here, the in camera records reflect the [plaintiff's]

reiteration of her uncorroborated allegations. The evidence in the record overwhelmingly supports [a finding] that the [plaintiff's] allegations of criminal activity were uncorroborated because the other person did not trespass, nor did she harass the [plaintiff] as alleged. . . .

"[The plaintiff also] argues that the [department] did not respond to a report of criminal activity and therefore the exemption set forth in § 1-210 (b) (3) (H) . . . is not applicable. The [plaintiff] relies, in part, on the fact that [she] was told to call the [department] at any time and not just to report a crime; she dialed the nonemergency dispatch number and not 911; she did not call to report a crime; and she called the police to maintain the peace. The commission . . . is guided by [the Superior Court's decision in *Bona* v. *Freedom of Information Commission*, Superior Court, judicial district of Waterbury, Docket Nos. CV-94-0123208-S, CV-94-0123411-S, (August 10, 1995) (15 Conn. L. Rptr. 149), aff'd, 44 Conn. App. 622, 691 A.2d 1 (1997)], which addressed a similar argument. There, [a] complainant argued that the report requested was not compiled in connection with the investigation of a crime because of statements made by the accuser as to what action she wished the police to take. The Superior Court wrote, 'the wishes of an alleged victim . . . are not controlling with respect to the actions to be taken by the police.' [Id., 157.] Here, the evidence demonstrates that the [department] treated the [plaintiff's] allegations as a report of criminal activity, regardless of the [plaintiff's] wish that the allegations not be treated as such. . . .

"Additionally, the [plaintiff] argues that the [department] Incident/Investigation Report shows [that] the [department] did not respond to a report of criminal activity and notes that the report does not identify [the plaintiff] as a victim, the other person as the accused or perpetrator, and concludes that the matter was not criminal in nature. However, it is not surprising that

the Incident/Investigation Report, which documents the [department's] conclusion that the allegations were unfounded, does not identify a victim, perpetrator, or a crime. The conclusion that the [department] reached after its investigation does not prove that the allegations which prompted the investigation at issue were not criminal in nature." (Citations omitted.)

We note that the plaintiff's arguments primarily are directed at what she describes as the commission's findings that, when she called the police on the nonemergency line, she alleged that the third party was engaged in criminal activity, specifically, that the third party was trespassing and harassing her. The plaintiff mischaracterizes what the commission found. The commission found that the plaintiff had alleged "that a woman, who she did not know, was sleeping in a common room" and "that this person may have been sleeping in the room to provoke the [plaintiff] . . . ." The commission then found that the department "construed the allegations of the [plaintiff] as possible criminal activity."[8] The plaintiff also challenges the commission's finding that the factual allegations that she made were uncorroborated. What the commission found, however, was that the allegations of the plaintiff, having been construed by and investigated by the department as allegations of possible criminal activity, were uncorroborated because the department determined that "the other person did not trespass, nor did she harass the [plaintiff] as alleged." The plaintiff has not demonstrated that substantial evidence does not support the commission's findings concerning what facts she alleged to the police when she called the nonemergency line, how the department construed her allegations, and

[8] The plaintiff testified before the hearing officer that, although she did not want the third party to be charged with a criminal offense, she nonetheless told one of the responding officers that the incident was a "criminal" matter.

the outcome of the investigation undertaken by the department.

The plaintiff argues that the exemption in § 1-210 (b) (3) (H) does not apply because she neither expressly stated a belief that criminal conduct had occurred nor subjectively intended to initiate an investigation into possible criminal conduct. This argument misses the point. The records within the purview of § 1-210 (b) (3) are "[r]ecords of law enforcement agencies not otherwise available to the public which *records were compiled in connection with the detection or investigation of crime* . . . ." (Emphasis added.) Thus, the proper inquiry is whether the records sought to be disclosed were compiled in connection with the detection or investigation of crime. The commission found that the department construed the facts that the plaintiff had provided to be allegations of possible criminal activity and that the police officers at the scene investigated whether a crime had occurred.[9] The plaintiff has not demonstrated that the commission's determinations in this regard were not supported by substantial evidence or that they were objectively unreasonable. There is no basis in law or logic for the plaintiff's claim that her subjective intent in calling the nonemergency line somehow restricted the department's response to her representations or, more specifically, that it dictated whether the department's officers, given their specialized training and experience in the field of law enforcement, would investigate whether criminal conduct had occurred. Accordingly, in determining whether the commission properly applied the exemption codified in § 1-210 (b) (3) (H), it is irrelevant to our analysis whether

[9] The chief testified before the hearing officer concerning how the department responded to the information that the plaintiff had provided. He stated: "[A] call to a police department on a campus at 1:40 in the morning, to say someone is in [a residence hall], no one's supposed to be in there, it is unconscionable for a police department to respond and not try to make a determination as to whether or not there was some criminal activity afoot."

the plaintiff expressly alleged that criminal conduct had possibly occurred or whether she intended to do so. The dispositive fact, which is both reasonable and supported by substantial evidence, is that the department generated the body camera recordings in its investigation of possible criminal activity.

B

Next, the plaintiff argues that the commission improperly determined that the exemption in § 1-210 (b) (3) (H) applied even though "the video records were made available to the administration of [the] [u]niversity . . . ." The plaintiff argues that "[t]he public entity [department] cannot make selective disclosures to private entity [university] administration officials, who are private citizens, while withholding them from the rest of the citizenry." The plaintiff also argues that selective disclosure of the body camera recordings to [university] administration officials amounts to "[a] denial of equal protection . . . ."

The following additional facts are relevant to this claim. The chief testified at the hearing that the body camera recordings were part of the investigative file of the May 8, 2018 incident, and that such recordings were "referred to in the investigation report" that was generated by the department. The plaintiff testified before the hearing officer that a copy of the investigation report had, in fact, been provided to her by a dean of the university in connection with a disciplinary proceeding that had been brought against her by the university. The chief testified that neither the investigation report nor the body camera recordings were available to the public. The chief testified, however, that the department had provided the investigation report to a university dean, who was not a member of the department, in connection with an investigation by the university into

whether the plaintiff should be disciplined in connection with the May 8, 2018 incident. The chief testified that, "[c]onsistent with our responsibilities as a higher education public safety unit, we had to share that information with the dean . . . ." The following colloquy between the plaintiff's attorney and the chief then occurred:

"Q. If [the dean] wanted the video, could he have it?

"A. If he had to do what with?

"Q. To review for purposes of, say, disciplining a student.

"A. Yes. We would review it with him.

"Q. And, in fact, you offered [the plaintiff] an opportunity to review the video?

"A. We did, and she declined.

"Q. Understand, but if it's not subject to disclosure, why then let [the dean] and my client review it?

"A. In fact, I don't even think [the dean] reviewed the video now that I think about it. I'm not certain, counsel."

The chief testified that, although the investigation report had been provided to the dean, the use of the report by university administration officials was limited. The chief stated that, "[i]n higher education, those police report[s] are part of the student's record. We are all trained in [the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g], and we take that very seriously. It would be irresponsible for that dean to release that police report to anyone outside of his office . . . he has to use it for the expressed purposes of administering his . . . student affairs role."

In its decision, the commission addressed this argument, as follows: "[The plaintiff] argues that the [department] should not be permitted to selectively disclose public records to certain private entities or individuals. For example, the [department] released the Incident/Investigation Report to the university, a private entity, and the university subsequently provided the report to the [plaintiff]. However, disclosure of the Incident/Investigation Report is not at issue in this appeal and, therefore, the commission need not address this contention. Furthermore, the commission has held that a public agency does not waive its right to claim an exemption under the [act] by virtue of a prior disclosure (except with regard to the attorney-client privilege). See, e.g., *Goshdigian* v. [*West Hartford*, Freedom of Information Commission, Docket No. FIC 2005-112 (September 14, 2005) p. 2] (town's use of information contained in public records does not waive town's right to claim that such records are exempt from disclosure); *General Electric* [*Co.* v. *Office of Attorney General*, Freedom of Information Commission, Docket No. FIC 1998-089 (April 28, 1998) p. 7] (waiver of exemption by public agency in one instance does not abrogate claim of exemption in other instances); *Ryffel* v. [*Fairfield*, Freedom of Information Commission, Docket No. FIC 1988-083 (June 8, 1988) p. 2] (prior disclosure of contract proposals does not waive or otherwise abrogate exemption to disclosure under § 1-210 (b) (9)). There is also nothing in the [act] which precludes the [department and the assistant chief] from offering the [plaintiff], who was the subject of a university investigation, an opportunity to review the videos in the presence of a [department] officer, while at the same time claiming that the record is exempt from disclosure under the [act]. Finally, to the extent the [plaintiff] alleges that the [department's] policies permitting it to share the report with the university violates [her] constitutional

rights, such alleged violations are outside the scope of the commission's jurisdiction."

In its memorandum of decision, the court responded to the plaintiff's arguments in this regard as follows: "The plaintiff has argued that the [department's] disclosure of the video to the [university] dean and their refusal to similarly disclose the video to her implicate her constitutional rights for equal protection under the law. This argument runs into several difficulties. First, the [commission] did not address this issue below because the [commission] has no authority to rule upon constitutional questions. Accordingly, in this limited administrative appeal, the court should limit itself to a review of what the [commission] actually did and/or had authority to do below. Further, the plaintiff and the [university] dean are not similarly situated. The [department] did not provide the video to the [university] dean pursuant to a . . . request [made pursuant to the act], or pursuant to [the act] at all. The [department] provided the video to the [university] dean on an administrative and limited basis to address any appropriate administrative discipline. The court notes that the plaintiff was allowed to review the video in order to defend against any discipline proposed by the [university] dean. The plaintiff's . . . request [under the act] in this matter is distinct from the foregoing." (Footnotes omitted.)

Initially, we address the plaintiff's argument that the commission improperly determined that the exemption in § 1-210 (b) (3) (H) applied, despite the fact that the recordings at issue were made available to a dean of the university.[10] As stated previously in this opinion, § 1-210 (b) (3) provides that the exemption to disclosure at issue applies to "[r]ecords of law enforcement agencies *not otherwise available to the public* . . . ."

[10] As our previous discussion of the evidence before the hearing officer reflects, the department made the recordings available to the dean, but there is no evidence that the recordings were actually provided to the dean.

(Emphasis added.) Essentially, the plaintiff's argument is that, for purposes of § 1-210 (b) (3), the department made the recordings available to "the public" by making the recordings available to the dean. This argument requires us to interpret the word "public" in § 1-210 (b) (3).

General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from 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." The legislature did not define the word "public" for purposes of § 1-210 (b) (3) but, "[i]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 322, 258 A.3d 1 (2021). The word "public" is defined as "exposed to general view: open," and "of or relating to people in general: universal . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1005. The word "public" is also defined as "generally known" and "open to the view of all . . . ." Random House Webster's College Dictionary (2d Ed. 2005) p. 997.

Applying this plain meaning to the statute reflects that the legislature's reference to records not otherwise made available "to the public" in § 1-210 (b) (3) necessarily pertains to records that have not been made available to all. The plaintiff, however, has not demonstrated that the department made the recordings available to

all. Instead, the plaintiff demonstrated that the department made the recordings available to only one person, a dean of the university, that the department made the recordings available to this person for what it believed was a limited educational purpose, and that the dean was bound by the restrictions on disclosure imposed by FERPA.[11] Thus, there is substantial evidence to support a finding that the recordings at issue were not otherwise made available to the public.

The plaintiff also argues that the fact that the department made the recordings available to the dean and not to her violates her right to equal protection.[12] At the outset, we disagree with the commission and the Superior Court that the commission somehow lacked "jurisdiction" to consider the plaintiff's argument in this regard. The plaintiff did not invite the commission to invalidate one or more provisions of the act on constitutional grounds but, instead, argued that construing the exemption at issue in the circumstances of this case in the manner that it did contravened her equal protection rights. We know of no reason why the commission should not have considered this argument in determining whether the exemption at issue applied in this case. The commission's refusal to consider this argument,

[11] Moreover, the plaintiff, referring to "selective disclosures," suggests that the fact that the department made the recordings available to even one person, the dean, undermines as a matter of law the commission's conclusion that the exemption applied. To the extent that the plaintiff argues that the exemption in § 1-210 (b) (3) (H) cannot apply in a case in which there has been any disclosure of the records at issue, she does not cite to any persuasive authority in support of this argument, and we are unaware of any.

[12] The plaintiff refers to her equal protection rights under the state and federal constitutions. Because the plaintiff has not separately analyzed her claim under the state constitution, we confine our analysis to the federal constitution. See, e.g., *State* v. *Rivera*, 335 Conn. 720, 725 n.2, 240 A.3d 1039 (2020) ("[b]ecause the defendant has not provided an independent analysis of his state constitutional claim under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we consider that claim abandoned and unreviewable" (internal quotation marks omitted)).

however, is harmless because we, in our plenary review, may now consider its merits. See, e.g., *State* v. *Dyous*, 307 Conn. 299, 315, 53 A.3d 153 (2012) (reviewing courts apply plenary review to equal protection claims).

"The [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment to the United States [c]onstitution is essentially a direction that all persons similarly situated should be treated alike. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute [or statutory scheme] in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Consequently], the analytical predicate [of consideration of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [appellant is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Stuart* v. *Commissioner of Correction*, 266 Conn. 596, 601–602, 834 A.2d 52 (2003).

Setting aside other possible deficiencies in the plaintiff's equal protection claim, we readily conclude that the plaintiff is not similarly situated to the dean. Regardless of the fact that the dean did not seek disclosure of the recordings under the act, the chief's testimony reflects that the department made the recordings available to the dean of the university with which it was affiliated for what it believed to be a limited administrative purpose related to whether a private disciplinary proceeding should be initiated against the plaintiff by

the dean. As the chief testified, the recordings were made available to the dean with a distinct expectation that, pursuant to FERPA, the dean was prohibited from making, and would not make, any disclosure of the records at issue to any other entity. The department acted under the belief that the dean was a school official with a legitimate educational interest in reviewing the recordings in the department's possession, and the limitation on disclosure codified in FERPA applied with respect to any materials made available to the dean.[13] This belief sets the dean apart from the plaintiff, who readily acknowledges her strong intention to disseminate the recordings at issue publicly.[14] Accordingly, we conclude that the plaintiff's equal protection argument is not persuasive and does not undermine the commission's application of the exemption at issue in this case.

C

Next, the plaintiff argues that the commission acted arbitrarily in refusing to require the department and the assistant chief to provide her with redacted recordings that omitted any "discussion of criminality . . . ." She argues that, "[e]ven if part of the [recordings] were exempt from disclosure, some portion should have been produced." We are not persuaded.

[13] With respect to FERPA, the plaintiff argues in conclusory fashion that the court's reliance on FERPA was "a red herring" because she had a right to the records "under the law" and, thus, the university had violated FERPA by making them available for her review but not providing her with a copy of them.

[14] Consistent with her testimony before the hearing officer, before this court the plaintiff has represented that she seeks the recordings because, "[f]or years, she has wanted to show the world the truth—to show the world what she was feeling on the morning of May 8, 2018. She wants the world to see the best evidence that she is not the racist [that the university] and her detractors painted her to be, but a woman startled to find a stranger in a dark room on an otherwise isolated floor. Her contemporaneous explanation of why she called for the intervention of campus officials, recorded on the body cameras of the [department], remains wrongly shielded from public airing."

The commission carefully considered and rejected this contention. The commission relied on precedent of this court; *Bona* v. *Freedom of Information Commission*, supra, 44 Conn. App. 622; as well as several relevant commission decisions for the proposition that "the entirety of a record of an investigation into uncorroborated allegations [of criminal activity] is exempt from disclosure pursuant to § 1-210 (b) (3) (H)."

Here, as we have concluded, there is substantial evidence to support the commission's finding that the police responded to the plaintiff's residence hall, interviewed the plaintiff, interviewed the third party, and generated the body camera recordings during an investigation into what they interpreted to be the plaintiff's allegation that criminal conduct possibly had occurred. As we have stated previously in this opinion, this court has recognized that the legislative policy underlying the exemption codified in § 1-210 (b) (3) (H) is to shield persons, like the third party in this case, from public scrutiny arising from uncorroborated allegations of criminal activity. The plaintiff has failed to demonstrate that the disclosure of any portion of the recordings at issue would not undermine that goal, particularly in light of her expressed desire to use any disclosure of the recordings in an attempt to draw renewed public attention to the events specifically related to the third party's presence in a university residence hall on May 8, 2018, in an attempt to sway public opinion concerning the incident. See footnote 14 of this opinion. Accordingly, the plaintiff has not demonstrated that the commission's failure to require production of the recordings with certain redactions reflected that it had acted in an arbitrary manner contrary to a general policy favoring disclosure of public records.

II

Finally, we address the plaintiff's claim that the court improperly granted the motion of the department and

the assistant chief to seal the body camera recordings, which both it and the commission had reviewed in camera. We are not persuaded.

"We review a trial court's decision granting or denying a motion to seal to determine whether, in making the decision, the court abused its discretion. . . . Inherent [therefore] in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . A court's discretion must be informed by the policies that the relevant statute is intended to advance. . . . When reviewing a trial court's exercise of the legal discretion vested in it, our review is limited to whether the trial court correctly applied the law and reasonably could have concluded as it did." (Internal quotation marks omitted.) *Doe* v. *Rackliffe*, 173 Conn. App. 389, 396, 164 A.3d 1 (2017).

In its ruling granting the motion to seal, the court observed that it had "affirmed [the] underlying [commission] final decision on appeal. Accordingly, the video in question is exempt from disclosure under [the act] pursuant to [§ 1-210 (b) (3) (H)]." The court also stated that "[t]he legislature has determined in [§] 1-210 (b) (3) (H) that disclosure of law enforcement records containing uncorroborated allegations of criminal wrongdoing would not be in the public interest. Further, [§] 1-216 provides for the destruction of such records. Accordingly, the court finds that a compelling interest in not unfairly damaging a person's reputation with uncorroborated criminal accusations overrides the public's interest in access to records containing uncorroborated criminal accusations."[15]

The plaintiff argues that the court's ruling contravenes "Connecticut's presumption in favor of public

[15] We note that, in an order clarifying its sealing order, it afforded the plaintiff's attorney an opportunity to review the recordings "to the extent necessary to prosecute this matter and any appeal of this matter . . . ."

access to the court and judicial records." The plaintiff also argues that the court unduly focused on the risk of damage to the reputation of the third party who was the subject of her allegations to the department on May 8, 2018.

It suffices to observe that the commission and the court reviewed the recordings at issue, in camera, to determine whether the exemption in § 1-210 (b) (3) (H) applied. Having fully litigated and upheld the commission's determination that the exemption applied, the court subsequently granted the motion to seal to protect the integrity of its judgment and to thereby shield the third party from any possible negative effects of disclosure of the recordings. Simply put, it would have been contradictory for the court to permit public access to the recordings in the court file after having determined that the recordings were exempt from disclosure. Accordingly, we conclude that the court properly exercised its discretion in sealing the recordings at issue.

The judgment is affirmed.

In this opinion the other judges concurred.

ANNA NOWAK, EXECUTOR (ESTATE OF KENNETH NOWAK) *v.* ENVIRONMENTAL ENERGY SERVICES, INC., ET AL. (AC 44760)

Elgo, Suarez and Bear, Js.

Syllabus

The defendants, E Co. and R, one of E Co.'s directors and principal shareholders, appealed from the judgment of the trial court granting, in part, the equitable petition for a bill of discovery filed by the plaintiff in her capacity as the executor of the estate of her late husband, K. At the time of his death, K was a director and principal shareholder of E Co., which he had founded with R. The plaintiff was not involved in the operations of E Co. during K's life. She suspected corporate misconduct after his death because the defendants, inter alia, failed to provide her

with all of the information she requested regarding E Co.'s financials and operations, excluded her from company meetings, prevented her from entering E Co.'s offices without permission, and sold shares without her consent. In her petition, the plaintiff alleged that probable cause existed to support claims against the defendants for an accounting and shareholder oppression and against R for breach of fiduciary duty. She requested seventeen different categories of records from E Co. and argued that she had no other adequate means of obtaining the requested records. Prior to the rendering of judgment on the petition, E Co. commenced a civil action against the plaintiff in her capacity as executor of K's estate, alleging, inter alia, breach of contract in connection with an agreement pursuant to which E Co. purchased some of its shares that were held by the plaintiff. Thereafter, the trial court granted the petition with respect to eleven of the categories of documents requested. Subsequently, the plaintiff filed an answer, special defenses, and a counterclaim against E Co. in the civil action. The trial court in the civil action granted the plaintiff's motion to cite in R as an additional party, and the plaintiff filed an amended counterclaim, alleging claims of shareholder oppression, an accounting, and breach of fiduciary duty. Thereafter, the defendants appealed to this court in the present matter, arguing, inter alia, that the plaintiff, by raising the same claims in her amended counterclaim in the civil action, admitted that she could have proceeded in the present case by commencing an action and seeking discovery in the ordinary course, which obviated the need for a separate bill of discovery. *Held*:

1. The plaintiff's petition for a bill of discovery and the judgment granting the petition were not moot, and, accordingly, this court had subject matter jurisdiction over the appeal: although it was apparent from the pleadings in the civil action that the defendants produced some documents, there was no indication in the record that they provided to the plaintiff during discovery proceedings in that action all of the discovery ordered by the trial court in the bill of discovery, and, even if the defendants had provided to the plaintiff the discovery ordered by the court in the bill of discovery, the present appeal would have been moot, not the petition or the underlying judgment; moreover, the defendants failed to provide support for their claim that the underlying judgment granting the bill of discovery was rendered moot by the plaintiff's filing in the civil action of her amended counterclaim, and the fact that there was a pending civil action in which the plaintiff had the opportunity to seek the discovery that was ordered in the bill of discovery did not moot the underlying judgment or preclude this court from affirming that judgment.
2. The defendants could not prevail on their claim that the trial court improperly granted the plaintiff's petition for a bill of discovery because the plaintiff failed to establish probable cause to bring any potential cause

of action and the court incorrectly concluded that the bill of discovery was necessary to discover the information requested:

a. The trial court's finding that the plaintiff satisfied her burden of establishing probable cause to bring claims against the defendants for breach of fiduciary duty, an accounting, and shareholder oppression was not improper: in reaching its determination, the court made extensive findings regarding the evidence and testimony presented at the hearing, including finding that R exercised control over E Co. for several years prior to the commencement of the action; moreover, the trial court credited the testimony of the plaintiff regarding her unsuccessful attempts to obtain the information sought, the defendants' conduct in shutting her out of the affairs of E Co., and the basis for her fear that the defendants were withholding information that affected her shares in E Co., and the testimony of the plaintiff's expert, a certified public accountant, that, given his review of the limited records provided, there was potential for financial mismanagement of E Co. and he needed the requested records to determine whether the actions taken by the defendants were oppressive to E Co.'s shareholders or were in breach of fiduciary duties; furthermore, it was not for this court to second-guess the trial court's credibility determinations.

b. The defendants failed to demonstrate the existence of a well founded objection sufficient to warrant a finding that the trial court abused its discretion in granting the plaintiff's petition for a bill of discovery, which was favored in equity: the defendants' assertion that E Co. regularly provided information sought by the plaintiff and would continue to do so was not supported by the record; moreover, the defendants' assertion that the plaintiff had available to her a remedy at law (§ 33-948) to seek a court order to compel E Co. to provide corporate information was unavailing because such a remedy did not preclude the plaintiff from obtaining a bill of discovery; furthermore, the defendants' assertion that the civil action obviated the need for a separate bill of discovery was unavailing because, during the discovery proceedings in the civil action, the defendants objected to the same requests by the plaintiff that were made in the present action, they withheld the requested documents for months, their eventual disclosure of the documents was allegedly incomplete, and the trial court ended the discovery proceeding prior to the completion of the disclosure by denying the plaintiff's motion for a continuance, which was filed due to the defendants' failure to provide all of the requested discovery; additionally, the defendants provided no authority to support their assertion that, in light of the civil action, the plaintiff demonstrated that she could proceed by commencing an action and seeking discovery in the ordinary course, and, to the contrary, case law supported the plaintiff's claim that she was not precluded from seeking the equitable remedy of a bill of discovery merely because she could bring a legal action.

Argued October 6, 2022—officially released April 4, 2023

Procedural History

Petition for a bill of discovery seeking certain information relating to the governance of the named defendant, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Brazzel-Massaro, J.*; judgment granting the petition in part, from which the defendants appealed to this court. *Affirmed.*

Brendan J. O'Rourke, for the appellants (defendants).

Terence J. Gallagher, for the appellee (plaintiff).

Opinion

BEAR, J. The defendants, Environmental Energy Services, Inc. (EES), and Richard Nowak, appeal from the judgment of the trial court granting, in part, the equitable petition for a bill of discovery (petition) filed by the plaintiff, Anna Nowak, in her capacity as the executor of the estate of her late husband, Kenneth Nowak. On appeal, the defendants claim that the court improperly determined that the plaintiff met her burden of establishing probable cause to bring claims against the defendants for corporate misconduct and that the plaintiff had no means, other than the bill of discovery, to discover the majority of the requested records. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. EES, which provides fuel treatment programs for utility companies located primarily in North America, has four principal shareholders.[1] Those shareholders are Richard Nowak, the Marie D'Amico Revocable Trust (trust), the state of Connecticut (state), and the plaintiff.[2] The ownership interest of the state is held by its investment arm, Connecticut Innovations,

[1] Currently, there are two other individual shareholders. Collectively, they own 3.6 shares, which represent a small portion of the total equity.

[2] Prior to his death, Kenneth Nowak was a shareholder of EES. The plaintiff, as executor of his estate, controls approximately 22 percent of EES.

Inc. Pursuant to an amended and restated stockholders' agreement dated April 13, 2010, the trust and the state each have the right to appoint one of the directors on the board of directors (board). The board now consists of three persons, including Pauline Murphy, who represents the state's interests; Peter D'Amico, who represents the trust's interests; and Richard Nowak. Prior to his death, Kenneth Nowak was a member of the board, but his seat has remained unfilled. Kenneth Nowak and Richard Nowak were cofounders of EES, as well as shareholders, directors and officers of EES.

Prior to filing her petition, the plaintiff requested certain information from EES, only some of which was provided to her by EES through its counsel. The plaintiff subsequently filed her petition in which she alleged corporate misconduct by the defendants and argued that probable cause existed to support claims against EES for breach of fiduciary duty, an accounting, and shareholder oppression. Specifically, the plaintiff alleged that, despite there being sufficient funds to do so, EES has not distributed profits in the form of dividends to all shareholders and that the board and Richard Nowak "made a conscious decision to refuse to pay dividends that should have been paid to all shareholders . . . ." She further alleged that Richard Nowak, as the "controlling shareholder," breached his duty of care by causing the board to authorize excessive salaries and/or bonuses for himself and other executives; that she has been improperly excluded from company meetings; and that EES and/or Richard Nowak mismanaged the corporation by submitting for reimbursement as corporate expenses certain expenses for personal travel, meals and entertainment, by failing to investigate the reasonableness of certain corporate tax deductions, and by refusing to pay dividends to all shareholders. According to the plaintiff, Richard Nowak, as a director, an officer and the "effective controlling shareholder of

EES," had a fiduciary duty to act in the best interests of the corporation and its shareholders, which he breached through his unfair and oppressive conduct toward her. In the petition, the plaintiff sought seventeen different categories of records from EES. As the basis for this request, the plaintiff alleged that the documents were material and necessary for her to bring causes of action for breach of fiduciary duty, an accounting and shareholder oppression. She also argued that she had no other adequate means of obtaining the requested records.

A remote hearing was held on the petition over the course of three days, at which the parties presented testimony, including expert testimony, and offered numerous exhibits into evidence. In a memorandum of decision dated June 1, 2021, the court granted the petition, concluding that there was a sufficient basis to support a finding of probable cause to grant the petition as to eleven of the seventeen categories of documents.[3]

[3] The petition was granted as to the following items in the petition: "(1) All written communications to shareholders generally within the past four years, including the financial statements furnished for the past four years under General Statutes § 33-951; (2) EES' historical record of common and preferred shareholders of EES; (3) All of EES' general ledger accounting records to the extent they reflect changes in shareholdings and any dividends paid; (4) All documents concerning executive compensation, including but not limited to salaries, bonuses, benefits bestowed and payments for loan guarantees; (5) EES' financial record 'deferred patent costs' as to which [the plaintiff] requests the following documents: (a) Documents sufficient to identify the patents for which these costs were incurred, (b) Documents sufficient to describe the status of the patents, (c) Documents sufficient to identify the current ownership of the patents, (d) Documents concerning any lease, license or sale of the patents, [and] (e) Documents concerning any other agreements with regard to the patents; (6) Documents sufficient to demonstrate any distributions made to preferred stockholder[s] of EES in the last year; (7) Copies of any EES warrant and/or option agreements or plans, [including] (a) Documents sufficient to show any exercise of any warrants and/or options in the past year, [and] (b) Documents sufficient to show the current ownership of EES warrants and/or options; (8) Documents sufficient to describe the loans to executives in the EES financials; (9) Documents sufficient to identify the motor vehicle costs and construction in progress costs identified in the EES financials; (10) Documents sufficient

The court's conclusion was based on its findings that the plaintiff had demonstrated that the records were material and necessary to determine whether she could pursue causes of action for breach of fiduciary duty, shareholder oppression, and an accounting, and that "the [plaintiff had] no [other] means to discover the majority of the records requested that would be material to the three contemplated causes of action for which the testimony provide[d] probable cause." This appeal followed.

In May, 2021, prior to when the court rendered judgment granting the petition and to the commencement of this appeal, EES commenced a civil action against the plaintiff, in her capacity as executor of the estate of her late husband, alleging claims for breach of contract, fraud, fraudulent inducement, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., in connection with the plaintiff's alleged breach of an agreement entered into by the parties for the purchase by EES of some of the plaintiff's shares in EES (civil action).[4] See *Environmental Energy Services, Inc.* v. *Nowak*, Superior Court, judicial district of Danbury, Docket No. CV-21-6039364-S. The judgment in the present action in equity was subsequently rendered on June 1, 2021. Thereafter, on September 15, 2021, three and one-half months after the rendering of that judgment, the plaintiff in the present action in equity filed an answer, special defenses and counterclaim against EES in the civil action. Subsequently, on April 8, 2022, she filed a motion in the civil action to cite in Richard Nowak as an additional party, which was granted by the court. Thereafter, on May 12, 2022, she filed an amended three count counterclaim

to describe the 'commissions payable' identified on the EES financials; [and] (11) The EES tax returns for each of the years 2014 to 2019."

[4] The defendants' claims in the civil action against the plaintiff related to a separate matter between the parties.

in the civil action, which alleged claims against both EES and Richard Nowak for shareholder oppression, an accounting, and a claim against Richard Nowak for breach of fiduciary duty.

In their principal appellate brief in this appeal, the defendants requested that this court take judicial notice of the civil action.[5] They argue that the plaintiff, by raising the same claims in her amended counterclaim in the civil action, "has, in effect, admitted that she could have proceeded in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." The plaintiff, in response, has not objected to the request for this court to take judicial notice of the civil action and simply argues that the defendants "should not be rewarded with continuing their more than four year avoidance of the disclosure sought herein by pleading elsewhere." She continues to argue that a bill of discovery is the only means by which she can obtain the documents and information sought.

Following oral argument before this court, we ordered the parties "to file simultaneous supplemental memoranda, of no more than five (5) pages in length, on or before October 24, 2022, addressing whether this court should conclude that the underlying judgment is moot, in light of the pending action and counterclaim filed in [the civil action], and, accordingly, vacate the judgment and remand this matter to the trial court with direction to dismiss the petition for the bill of discovery as moot." The parties timely complied with the order. Additional

[5] We take judicial notice of the civil action. See *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 527, 294 A.2d 633 (1972) ("[t]here is no question . . . concerning . . . [the] power [of appellate courts] to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise"); *Pollard* v. *Geico General Ins. Co.*, 215 Conn. App. 11, 13 n.1, 282 A.3d 535 (2022) (same), cert. denied, 346 Conn. 910, A.3d (2023).

facts and procedural history will be set forth as necessary.

I

We begin by addressing the threshold issue of mootness, as it implicates this court's subject matter jurisdiction. See *State* v. *Council*, 344 Conn. 113, 120, 277 A.3d 1251 (2022). "Mootness is an exception to the general rule that jurisdiction, once acquired, is not lost by the occurrence of subsequent events. . . . Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *In re Rabia K.*, 212 Conn. App. 556, 560–61, 275 A.3d 249 (2022).

In their supplemental appellate brief, the defendants argue that the plaintiff, in filing the amended counterclaim in the civil action asserting the same three counts for which she claimed she needed discovery in her petition for a bill of discovery, has thereby rendered moot her petition and the underlying judgment granting the petition. They further argue that the plaintiff's three count counterclaim in the civil action "provides her the very rights of discovery she sought under the bill of discovery," as evidenced by the fact that the trial court in the civil action "has on its docket discovery requests

and objections interposed by [the parties in that action] . . . ." In response, the plaintiff argues that her counterclaim in the civil action has not rendered moot the judgment granting her petition. According to the plaintiff, "[s]hould the bill of discovery be upheld, the breach of fiduciary duty, shareholder oppression and accounting claims may be amplified or even refiled as derivative rather than individual actions," and "[t]he bill of discovery could provide information that would lead to [an] extension or otherwise revised pleading in [the civil] action or even the commencement of another action."

The record reveals the following additional relevant facts. In the civil action, the parties have undertaken discovery, as the plaintiff in the present action in equity filed a first set of document requests and interrogatories, dated March 15, 2022, in which she made twenty-seven requests for various categories of documents, eleven of which are identical to the documents ordered to be disclosed by the trial court in the bill of discovery. Thereafter, in the civil action, the defendants in the present action in equity filed objections to those requests, objecting to all eleven of the relevant requests as being overly broad and burdensome. As a result, they withheld the requested documents pending resolution of their objections. On October 5, 2022, the defendants eventually provided documents in response to the production requests made in the civil action. Thereafter, the plaintiff in the present action in equity filed a motion for a continuance in the civil action, claiming that discovery was not complete. In her reply in further support of her motion for a continuance, she acknowledged the production of documents by the defendants but claimed that they did not produce all of the requested documents. It is unclear from the record whether the eleven categories of documents ordered to be disclosed in the bill of discovery were satisfied by the production of documents in the civil action, and the defendants have

not so claimed in their supplemental appellate brief, which was filed on October 24, 2022, after their production of documents in the civil action.

First, we note that, if the defendants had provided in the civil action, and the plaintiff actually had obtained, the discovery ordered by the court in the bill of discovery, then the present *appeal*, but not the underlying judgment, would be moot, as there would be no relief we could afford the defendants because they would have already provided to the plaintiff the discovery ordered by the court in granting the petition for a bill of discovery. However, there is no indication in the record before us that that has occurred. Although it is apparent from the pleadings in the civil action that some production of documents has taken place, we have no way of knowing which documents were provided. Because the record is unclear as to whether the discovery ordered in the bill of discovery was provided during the course of discovery in the civil action, and we cannot make such a determination on appeal; see *Welsh* v. *Martinez*, 191 Conn. App. 862, 884, 216 A.3d 718 (2019) ("[i]t is axiomatic that this court, as an appellate tribunal, cannot find facts"); we cannot conclude that the appeal has been rendered moot.

Moreover, we also disagree with the defendants' claim that the underlying judgment has been rendered moot by the plaintiff's filing in the civil action of her amended counterclaim. In support of their mootness argument, the defendants assert that the bill of discovery is no longer necessary due to the plaintiff's filing of her amended counterclaim in the civil action and the fact that she now "has adequate means to pursue the discovery she sought in her petition . . . ." First, we note that the defendants have failed to provide citations to authority demonstrating that an underlying judgment can be rendered moot as a result of events that have

occurred during the pendency of an appeal.[6] Moreover, in making their mootness argument, the defendants appear to conflate the issue of mootness with the issue of whether the plaintiff had established her entitlement to a bill of discovery.

The fact that there is a pending civil action in which the plaintiff had or has an opportunity to seek the discovery that was ordered in the bill of discovery does not moot the underlying judgment granting the bill of discovery in this separate, equitable action, nor does it preclude this court from affirming that judgment. Indeed, it is apparent from case law that an action in equity seeking a bill of discovery is separate from a civil action and may be maintained seeking information relating to a civil action that already has been, or has yet to be, brought. See *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 681, 804 A.2d 823 (2002) ("[t]o sustain [a] bill [of discovery], the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action *already brought* or about to be brought" (emphasis added; internal quotation marks omitted)); *Peyton* v. *Werhane*, 126 Conn. 382, 387, 11 A.2d 800 (1940) ("[a] court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances" (internal quotation marks omitted)); see generally *Falco* v. *Institute of Living*, 254 Conn. 321, 324, 757 A.2d 571 (2000) (during pendency

[6] We also note that, if an appeal has become moot through no fault of an appellant, this court, to prevent the appellant from being prejudiced by the judgment, has vacated the judgment. See *Savin Gasoline Properties, LLC* v. *Commission on the City Plan*, 208 Conn. App. 513, 515, 262 A.3d 1027 (2021) (dismissing appeal and granting appellant's motion for vacatur of trial court's judgment because appeal became moot through no fault of appellant).

of action in equity seeking bill of discovery plaintiff filed separate civil action against defendant and third party); *Pottetti* v. *Clifford*, 146 Conn. 252, 254, 257, 150 A.2d 207 (1959) (after plaintiff brought civil action against defendants she brought action in equity for bill of discovery seeking facts to be used as evidence in civil action).

In light of that authority, we conclude that, under the circumstances here, where the record does not contain information about whether the discovery ordered in the bill of discovery thereafter was fully produced during the course of discovery in the civil action, any impact that the discovery proceedings in the pending civil action may have on the present appeal relates more to the issue of whether the plaintiff previously had demonstrated to the court that she lacked adequate means for obtaining the discovery sought—a necessary requirement for obtaining a bill of discovery—and not to the issue of mootness. See part II B of this opinion. Accordingly, this court does not lack subject matter jurisdiction, and we therefore proceed to a review of the merits of the appeal.

II

On appeal, the defendants raise two arguments in support of their claim that the court improperly granted the petition: (1) the plaintiff failed to establish probable cause to bring any potential cause of action, and (2) the court improperly concluded that the bill of discovery was necessary to discover the information at issue. We disagree with both claims.

We first set forth our standard of review and general principles governing bills of discovery. "The power to enforce discovery is one of the original and inherent powers of a court of equity." *Peyton* v. *Werhane*, supra, 126 Conn. 388. "The bill of discovery is an independent action in equity for discovery, and is designed to obtain

evidence for use in an action other than the one in which discovery is sought. . . . As a power to enforce discovery, the bill is within the inherent power of a court of equity that has been a procedural tool in use for centuries. . . . The bill is well recognized and may be entertained notwithstanding the statutes and rules of court relative to discovery. . . . Furthermore, because a pure bill of discovery[7] is favored in equity, it should be granted unless there is some well founded objection against the exercise of the court's discretion. . . .

"To sustain the bill, the petitioner must demonstrate that what he seeks to discover is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. . . . Although the petitioner must also show that [it] has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof. . . .

"Discovery is confined to facts material to the plaintiff's cause of action and does not afford an open invitation to delve into the defendant's affairs. . . . A plaintiff must be able to demonstrate good faith as well as probable cause that the information sought is both material and necessary to [its] action. . . . A plaintiff should describe with such details as may be reasonably

[7] A pure bill of discovery is one that seeks "to obtain evidence to be used in some suit other than that in which discovery is sought." (Internal quotation marks omitted.) *Peyton* v. *Werhane*, supra, 126 Conn. 389. The present action in equity involves a pure bill of discovery, as the only relief sought in the petition is the discovery of facts to be used in a potential action against the defendants. See *Pottetti* v. *Clifford*, supra, 146 Conn. 257.

available the material [it] seeks . . . and should not be allowed to indulge a hope that a thorough ransacking of any information and material which the defendant may possess would turn up evidence helpful to [its] case. . . . What is reasonably necessary and what the terms of the judgment require call for the exercise of the trial court's discretion. . . .

"The plaintiff who brings a bill of discovery must demonstrate by detailed facts that there is probable cause to bring a potential cause of action. Probable cause is the knowledge of facts sufficient to justify a reasonable man in the belief that he has reasonable grounds for presenting an action. . . . Its existence or nonexistence is determined by the court on the facts found. . . . Moreover, the plaintiff who seeks discovery in equity must demonstrate more than a mere suspicion; he must also show that there is some describable sense of wrong. . . . A distinction exists, however, between a would-be plaintiff having to demonstrate the need for the information to determine whether a particular cause of action is worthy of being pursued and a plaintiff having to prove definitively that he has a cause of action and that he will probably prevail ultimately at the trial on the merits. . . . Whether particular facts constitute probable cause is a question of law." (Citations omitted; footnote added; internal quotation marks omitted.) *H & L Chevrolet, Inc.* v. *Berkley Ins. Co.*, 110 Conn. App. 428, 433–35, 955 A.2d 565 (2008); see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680–82. Our review of a trial court's decision involving a question of law is plenary. See *Booth* v. *Park Terrace II Mutual Housing Ltd. Partnership*, 217 Conn. App. 398, 415, 289 A.3d 252 (2023).

A

The defendants first claim that the plaintiff failed to establish probable cause to bring any potential cause of action. We disagree.

In finding that the plaintiff had met her burden of establishing probable cause, the court stated the following in its memorandum of decision: "[T]he parties have already exchanged a number of the discovery requests before the hearing in this matter. However, the discovery requests were extensive and a number of the requests were not provided or were very broad requests which this court has noted. It is also clear that there are a number of requests that cannot be produced by anyone but the defendant[s]. The [plaintiff] has demonstrated that the records are material and necessary in order to determine whether a further action can be pursued for breach of fiduciary duty, oppression of minority shareholders and/or an accounting. Thus, in viewing the testimony and applying the information to the causes of action raised by the [plaintiff] there is a sufficient basis to find that there is probable cause to grant the petition for a bill of discovery . . . ." In reaching that determination, the court made extensive findings regarding the evidence and testimony presented at the hearing, which included expert testimony.

The court's findings can be summarized as follows. Following her husband's death, the plaintiff, who had not been an active part of EES in her personal capacity during her husband's life, had attempted to obtain information about the financials of the company and its operations, of which she did not have a full understanding. She received notice of one shareholders' meeting but did not attend after she received a telephone call that made her feel " 'intimidated and confused.' " Thereafter, she did not receive notices of meetings and was not permitted to enter the offices of EES without prior permission or explaining the basis for her visit, and she discovered the selling of shares without her consent, which made her suspect financial wrongdoing and fear that her shares were being diluted. Specifically, the court found that "[t]he lack of documentation, the

actions of the defendants in precluding her from the building, excluding her from meetings, ignoring her requests for documents, including minutes and notices, [a] refinance [of EES] in which she believed there was collateral used that was the property of Richard Nowak, with some additional benefits to him which were not shared with her as a shareholder or member, all caused her to believe that they were withholding information that affected her shares of the company."

Thereafter, the plaintiff retained the services of a certified public accountant, Dennis Kremer, who has experience in valuation forensics and fraud accreditations. At the hearing, he offered expert testimony that, on the basis of his review of financial records for 2016 and 2018, he had identified numerous "red flags"[8] that

[8] The court described the red flags raised by Kremer as follows: "(1) When asked for all shareholders' meetings and records of all actions taken by the shareholders, there were no shareholders' actions in 2015 through 2018; (2) The bylaws of EES [state that there] should be an annual meeting of shareholders and there has been none up to March, 2018; (3) EES paid dividends and do[es] not know if [it] declared dividends. In this regard, they issued shares and they acquired other companies, [there was] [n]o shareholder meeting to approve the audit or approval of auditors, and [they] do not know when directors were elected at EES. There are no votes about officer compensation; (4) The [plaintiff] never received a 2017 report but there were 2016 and 2018 reports, which were not consistent; (5) The patent costs are problematic because they kept increasing and will be amortized over the useful life but there [were] no questions asked [as] to the description of the patent, who owns it or when it will be amortized over the useful life; (6) There is a loan to the stockholder and based upon some of the information it appears this may be to . . . Richard Nowak but there is no description of why a loan [was given] and [under] what conditions; (7) The loan to Richard Nowak and the intercompany account raises a question as to whether it is a permanent evergreen line of credit and is 'never gonna be repaid'; (8) There is a question as to the licensing agreement [concerning] who it [was with and whether it] was . . . discussed with or approved by the board of directors; (9) [A question exists as to whether an] auto lease of $22,000 per year [was] disguised compensation or just a lease that was too high; (10) There were commissions paid with no disclosure as [to] what [they were] for and, specifically, the person compensated in the amount of approximately $138,000; (11) The expense for construction in progress noted for $519,000 does not contain any particulars; [and] (12) . . . [A]pproximately $400,000 of EES stock [was issued] to Richard Nowak with no

raised concerns of mismanagement, oppression, and improper accounting. He also testified that the documents requested were needed in order to determine whether actions were taken that were oppressive to shareholders or in breach of fiduciary duties.

The court further found that the plaintiff, "with her expert, raised concerns about . . . shares that were given [to Richard Nowak]. At the hearing, [Richard Nowak] addressed some of these questions which have been long-standing by explaining the activity through the introduction of some documents and his explanations, none of which were produced prior to the hearing for the bill of discovery. While [Richard Nowak] provides some information, the materials provided are not disclosed as the only available documents nor are there any assurances that these disclosures satisfy the [plaintiff's] basis for a bill of discovery. The testimony of . . . Kremer indicates that his analysis clearly requires further disclosures to obtain an accurate picture, so to speak, of the operations and financial decisions of the board. Both [the plaintiff] and . . . Kremer testified about the control by [Richard] Nowak, including voting/scheduling shareholder meetings, not scheduling meetings, which would provide an opportunity to elect, appoint, add or change any of the directors, and permitting Richard Nowak to become the only person who was the guarantee for [a certain] line of credit. There were construction loans and stock options for which it appears that no notices, reports or information was given to anyone except Richard Nowak and his close workers . . . . Richard Nowak was the sole person with information about the stock grant, its value, conditions, terms and promises related to the options." (Footnotes omitted.)

description in any meetings or discussion among the members or shareholders. . . . Kremer testified that it is his opinion that there is a potential for financial mismanagement of the company based upon this review which led to the description of the red flags described by him."

We conclude, on the basis of our plenary review of the evidence presented, that the court properly could have concluded that the plaintiff established probable cause to bring all three of the potential causes of action listed in the bill of discovery. To establish a claim for breach of fiduciary duty, a plaintiff must show "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 366–67, 241 A.3d 133 (2020). Moreover, a "fiduciary duty of loyalty is breached when the fiduciary engages in self-dealing by using the fiduciary relationship to benefit [his or] her personal interest." (Internal quotation marks omitted.) *Chioffi* v. *Martin*, 181 Conn. App. 111, 137, 186 A.3d 15 (2018).

"The basis for a right to an accounting is supported by an allegation that a fiduciary relationship exists. . . . The fiduciary relationship is in and of itself sufficient to form the basis for the relief requested." (Citation omitted.) *Zuch* v. *Connecticut Bank & Trust Co.*, 5 Conn. App. 457, 460, 500 A.2d 565 (1985). "Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account." (Internal quotation marks omitted.) *Manere* v. *Collins*, supra, 200 Conn. App. 371. "An accounting is defined as an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due. An

action for an accounting usually invokes the equity powers of the court, and the remedy that is most frequently resorted to . . . is by way of a suit in equity. . . . To support an action of accounting, *one* of several conditions must exist. There must be a fiduciary relationship, *or* the existence of a mutual and/or complicated accounts, *or* a need of discovery, *or* some other special ground of equitable jurisdiction such as fraud." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mankert* v. *Elmatco Products, Inc.*, 84 Conn. App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004).

Finally, "shareholder oppression" is defined in Black's Law Dictionary (11th Ed. 2019) p. 1319, as the "[u]nfair treatment of minority shareholders ([especially] in a close corporation) by the directors or those in control of the corporation." A claim of shareholder oppression "should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [plaintiff's] decision to join the venture." (Internal quotation marks omitted.) *Manere* v. *Collins*, supra, 200 Conn. App. 384.

In the present case, the plaintiff and Richard Nowak are shareholders in EES. Although the defendants argue that Richard Nowak is not a controlling shareholder, that status is not required to establish a fiduciary relationship between the parties. The record shows that he is a cofounder, an officer, a shareholder and a member of the board of directors of EES, and that, for several years, he has exercised control over the affairs of EES. See generally *Katz Corp.* v. *T. H. Canty & Co.*, 168 Conn. 201, 207, 362 A.2d 975 (1975) ("[a]n officer and director occupies a fiduciary relationship to the corporation and its stockholders"). The court found that the plaintiff believed that Richard Nowak controlled EES because of her past experience with him and the way

he acted on behalf of EES after her husband died. She thought that he made all of the decisions for EES.

Furthermore, the plaintiff's expert, Kremer, testified about numerous red flags or concerns he had with the financial management and business dealings of EES, including a loan to Richard Nowak, the terms of which were unclear, an auto lease that might be "disguised compensation," the issuance of approximately $400,000 of EES stock to Richard Nowak without discussion among board members or shareholders, the selling of EES shares without shareholder consent, and commissions paid in the amount of $138,000 without disclosure to whom the payment was made. It was within the discretion of the trial court to accept Kremer's testimony that, in his opinion, there was a potential for financial mismanagement of EES given his review of the limited records provided and that he needed the requested documents to be able to determine whether actions were taken by the defendants that were oppressive to shareholders or in breach of fiduciary duties, as well as his testimony as to the many red flags that caused him to be concerned regarding accounting issues, mismanagement and possible shareholder oppression by the defendants.[9] The plaintiff also testified regarding her unsuccessful attempts to obtain the

[9] Specifically, in rejecting the defendants' argument that the plaintiff's claims were based on conjecture, the court noted that the testimony of Kremer questioned "the lack of documentation for the financial accounting or operations, which indicate concerns such as that the defendants did not properly address the need for meetings and selection of directors, leaving the number to three as a result of failing to schedule meetings so that regular meetings could be scheduled to elect directors; the audit, which has the creation of the audit documents as well as the audit performed by the same firm; and the failure to conduct a valuation of [a] Mercedes [vehicle owned by Richard Nowak that was] used as collateral, and the issuance of a stock grant without the valuation." The court further stated: "The testimony of . . . Kremer indicates that his analysis clearly requires further disclosures to obtain an accurate picture, so to speak, of the operations and financial decisions of the board. . . . Richard Nowak was the sole person with information about the stock grant, its value, conditions terms and promises related to the options." (Footnote omitted.)

information sought from the defendants, their conduct in shutting her out of the affairs of EES, and the basis for her fear that the defendants were withholding information that affected her shares in EES.

The court clearly credited Kremer's testimony and that of the plaintiff in making its finding of probable cause, and it is not for this court to second-guess the trial court's credibility determinations. See *Albuquerque* v. *Albuquerque*, 42 Conn. App. 284, 288, 679 A.2d 962 (1996) ("[c]redibility of witnesses is a matter for the trier of fact and not this court"). The record contained evidence sufficient, for probable cause purposes, to justify a reasonable belief that there were reasonable grounds to believe that the plaintiff, individually or derivatively, may have causes of action against the defendants for breach of fiduciary duty, an accounting, and shareholder oppression. Therefore, the trial court's probable cause finding was proper.

B

The defendants next claim that the court improperly concluded that the bill of discovery was necessary to discover the information at issue. In support of that claim, the defendants make three arguments: (1) the record confirms that EES has regularly provided information sought by the plaintiff and will continue to provide audited financial statements and to respond to inquiries; (2) the plaintiff has available to her a remedy at law pursuant to General Statutes § 33-948 to seek a court order to compel EES to provide corporate information; and (3) in light of the civil action, the plaintiff has demonstrated that she can proceed "in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." We conclude that the defendants' first argument is not supported by the

record, and we are not persuaded by the last two arguments.

As we stated previously in this opinion, a plaintiff who seeks an equitable bill of discovery must demonstrate that (1) the discovery sought "is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought," (2) "there is probable cause to bring a potential cause of action," and (3) the plaintiff "has no other adequate means of enforcing discovery of the desired material . . . ." (Internal quotation marks omitted.) *H & L Chevrolet, Inc.* v. *Berkley Ins. Co.*, supra, 110 Conn. App. 434. The defendants' second claim in the present case focuses on the third requirement. The appellate courts of this state, however, have made clear that, "[a]lthough the [plaintiff] must also show that [she] has no other adequate means of enforcing discovery of the desired material, [t]he availability of other remedies . . . for obtaining information [does] not require the denial of the equitable relief . . . sought. . . . This is because a remedy is adequate only if it is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . The remedy is designed to give facility to proof." (Internal quotation marks omitted.) Id.; see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 681.

In *Pottetti* v. *Clifford*, supra, 146 Conn. 261–62, our Supreme Court addressed and rejected a claim similar to the second and third arguments raised by the defendants in the present case in support of their claim that a bill of discovery was not necessary. In *Pottetti*, after the plaintiff commenced an action against the defendants seeking to recover a certain sum allegedly owed to her by the decedent, she brought an action in equity for a bill of discovery seeking the discovery of facts to be used as evidence in the original action. Id., 254. The

defendants in *Pottetti* claimed that the plaintiff had a "remedy at law for obtaining the information she [sought]." Id., 261. Our Supreme Court rejected that claim, stating: "The remedy of discovery is not limited to situations where the petitioner would be destitute of proof without a discovery of the evidence he is seeking. It is available also when the evidence he seeks is in aid of proof he may already have or be able to produce by other means. . . . It is true that means for the production of evidence and for disclosure generally under our statutes and practice afford a measure of relief. . . . From the very nature of the present case, however, and the peculiar circumstances involved, these means are obviously inadequate. An adequate remedy at law is one which is specific and adapted to securing the relief sought conveniently, effectively and completely. . . . That general equity principle must be applied if discovery is to be effective. . . . The availability of the other remedies suggested by the defendants for obtaining information did not *require* the denial of the equitable relief . . . sought."[10] (Citations omitted; emphasis added.) Id., 262.

[10] We note that, in *Falco* v. *Institute of Living*, supra, 254 Conn. 322–23, our Supreme Court reversed the judgment of this court affirming the trial court's granting of a bill of discovery that sought to compel the disclosure of the name of a patient at the defendant psychiatric hospital, holding that the information sought was protected by the psychiatrist-patient privilege and that no exceptions applied. In determining that the plaintiff in that case had failed to overcome the statutory privilege, the court also referred to the fact that the plaintiff in that action "merely stated in the bill of discovery that '[t]here [were] no other adequate means [of] securing the information conveniently, effectively and completely,' " and failed to present any evidence showing the absence of alternative means of discovering the requested information. Id., 332. It agreed with a dissent by Judge Schaller to this court's opinion in which he rejected the contention that the failure to provide the most convenient way to obtain information could deprive a plaintiff of his constitutional right to redress and to maintain an action. Id.; see also *Falco* v. *Institute of Living*, 50 Conn. App. 654, 669, 718 A.2d 1009 (1998) (*Schaller, J.*, dissenting), rev'd, 254 Conn. 321, 757 A.2d 571 (2000). We conclude that *Falco* is distinguishable from the present case. In *Falco*, the court specifically found that "the plaintiff employed the bill of discovery as a fast and easy alternative to diligent investigation," and made those statements in the

It is clear from *Pottetti* that the availability of a remedy at law does not necessarily preclude a party from obtaining a bill of discovery. Thus, the defendants' claim that the availability to the plaintiff of a remedy at law renders unnecessary the bill of discovery is unavailing. We also note that the defendants have claimed that the bill of discovery is not necessary because the plaintiff has adequate means to obtain the discovery sought in the civil action, when in that civil action they objected to the very same requests by the plaintiff that were made in the present action in equity, withheld the requested documents for months and, when a disclosure was finally made, it allegedly was incomplete and did not include all of the documents sought. Moreover, we also take judicial notice of the trial court's ruling in the civil action in January, 2023, denying the plaintiff's motion for a continuance, which sought a continuance due to the defendants' failure to provide all of the requested discovery. In denying the motion, the court stated: "The deadline for the completion of discovery has long since passed. Although objections to discovery requests were filed in May and September of 2022, no effort was made to have the court intervene to resolve any objections. The parties have had ample time to address any discovery issues." Accordingly, the fact that discovery in the civil action has ended undercuts the defendants' claim

context of rejecting the notion that the statutory privilege could be overcome by the mere assertion that the plaintiff had no other means of discovering the information sought. *Falco* v. *Institute of Living*, supra, 254 Conn. 332. In contrast, in the present case, the trial court made extensive findings concerning the plaintiff's unsuccessful efforts to obtain the requested documents, her lack of understanding concerning the operations and financial affairs of EES, the questionable financial transactions of EES as testified to by Kremer, as well as Kremer's testimony that the documents were needed in order to make a determination as to whether there has been any financial mismanagement of EES, and the control of EES exercised by Richard Nowak, whom, the court found, "was the sole person" with information about certain stock options that had been granted, their value, conditions, terms and any promises that were made related to the options.

that the existence of the civil action obviates the need for the bill of discovery in this separate, independent action in equity brought by the plaintiff.

Moreover, the record simply does not support the defendants' assertion that "EES has regularly provided information sought by the [plaintiff] . . . ." The trial court noted the plaintiff's testimony that " 'a lot of information was withheld from' " her and specifically found that, after the plaintiff retained the services of an attorney, she received some information from the defendants but "has not received all of the information which her former counsel and . . . Kremer . . . requested from the [defendants] to investigate [the plaintiff's] concerns about the financial operations of the company." We also find unavailing the defendants' claim that, in light of the civil action, the plaintiff has demonstrated that she can proceed "in the usual manner by commencing an action and seeking discovery in the ordinary course, thus obviating the need for a separate bill of discovery." The defendants have provided no authority to support that assertion, nor are we aware of any. In fact, case law supports the plaintiff's claim that a party is not precluded from seeking the equitable remedy of a bill of discovery simply because they could bring or have already brought a legal action. See *Falco* v. *Institute of Living*, supra, 254 Conn. 324; *Pottetti* v. *Clifford*, supra, 146 Conn. 254; see also *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680 (bill of discovery "may be entertained notwithstanding the statutes and rules of court relative to discovery" (internal quotation marks omitted)). In any event, the judgment in the bill of discovery action was rendered on June 1, 2021. In the civil action, the plaintiff's answer, special defenses and counterclaim against EES was filed on September 15, 2021, three and one-half months later. On May 12, 2022, almost one year after the judgment in the bill of discovery action, the plaintiff filed her

amended counterclaim against both EES and Richard Nowak in the civil action. Those filings did not undermine the validity of the existing judgment.

As we stated previously in this opinion, "a pure bill of discovery is favored in equity, [and] it should be granted unless there is some well founded objection against the exercise of the court's discretion." (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, supra, 261 Conn. 680–81. The defendants have failed to demonstrate the existence of such an objection sufficient to warrant a finding that the court abused its discretion in granting the petition for a bill of discovery.

The judgment is affirmed.

In this opinion the other judges concurred.

DEUTSCHE BANK TRUST COMPANY AMERICAS, TRUSTEE *v.* KEVIN R. BURKE ET AL. (AC 44906)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant homeowners. The plaintiff had previously filed a foreclosure action, but the prior action was dismissed for dormancy after five years. More than three years after the prior action was dismissed, the plaintiff commenced the present action, seeking a judgment of foreclosure and possession of the property that secured the mortgage. The defendants offered several special defenses, including laches, alleging, inter alia, that the plaintiff inexcusably delayed bringing the present foreclosure action and caused the defendants to suffer prejudice by way of eroding both their equity in the property and their opportunity to modify the loan and sell the property to recover the equity before the market declined. The court, after a trial, rendered a judgment of strict foreclosure, finding, inter alia, that the defendants failed to prove their special defense of laches because the plaintiff's delay was not intentional, wilful, or done with an improper motive, and, therefore, the delay was not inexcusable. On the defendants' appeal to this court, *held* that

the trial court's finding that the plaintiff's delay was not inexcusable was not clearly erroneous and, therefore, the court properly rejected the defendants' special defense of laches: the court properly placed the burden on the defendants to prove their defense, and, here, the unchallenged subordinate factual findings that the plaintiff's delay resulted from inattentiveness and that the defendants bore some responsibility for the delay supported the court's factual conclusion that the plaintiff's delay was not inexcusable.

Argued January 5—officially released April 4, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Cordani, J.*; judgment of strict foreclosure, from which the named defendant et al. appealed to this court. *Affirmed.*

Thomas P. Willcutts, for the appellants (named defendant et al.).

Marissa I. Delinks, for the appellee (plaintiff).

Opinion

DiPENTIMA, J. The defendants Kevin R. Burke and Maura Lee Wahlberg[1] appeal from the judgment of strict foreclosure rendered in favor of the plaintiff, Deutsche Bank Trust Company Americas, as trustee for Residential Accredit Loans, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2005-QA10. On appeal, the defendants claim that the court improperly rejected their special defense of laches. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. On or about March 4, 2005, Burke executed and delivered a

[1] Ridge Homeowners Association, Inc., and MorEquity, Inc., were also named as defendants in the complaint but are not involved in this appeal. Our references in this opinion to the defendants are to Burke and Wahlberg.

note for a loan in the principal amount of $1,500,000 to a predecessor in interest to the plaintiff. The loan was used to refinance certain real property in Fairfield. On or about March 4, 2005, the defendants executed and delivered a mortgage on the property, which secured the indebtedness under the note, to the plaintiff's predecessor in interest. The mortgage was recorded in the Fairfield land records on March 10, 2005. In October, 2008, the note was modified at the defendants' request to reflect a new principal balance of $1,545,133.75. The mortgage was assigned to the plaintiff, and that assignment was recorded in the Fairfield land records on June 25, 2009. The note was endorsed and delivered to the plaintiff prior to the initiation of the present action and has remained in the possession of the plaintiff. The defendants failed to make the January, 2009 payment due under the note and failed to make any subsequent payments. The plaintiff accelerated the mortgage debt sometime in 2009 and, in May, 2009, filed a foreclosure action on the note and mortgage. That prior action was dismissed for dormancy on May 8, 2014. The plaintiff commenced the present foreclosure action on July 3, 2017.[2] The value of the property at the time of trial was $590,000, and the debt was $2,752,982.71; there was no equity in the property.

In its amended complaint, the plaintiff alleged that it was the holder of the note and mortgage, the note was in default and it had elected to accelerate the balance due on the note. The defendants filed an answer to the amended complaint and several special defenses, including laches. In support of that special defense, the defendants alleged that the plaintiff inexcusably delayed bringing the present foreclosure action and caused the defendants to suffer prejudice by way of

[2] The complaint initially sought, inter alia, money damages and a deficiency judgment, but by the time of trial, it sought only a judgment of foreclosure and possession of the property.

eroding both their equity in the property and their opportunity to modify the loan and sell the property to recover the equity before the market declined.

In its August 2, 2021 memorandum of decision, the court found that the defendants failed to prove their special defense of laches. Specifically, the court found that "[t]he plaintiff delayed in foreclosing on the property and collecting on the note, but the plaintiff's delay was not intentional, not wilful, and not done with an improper motive. Instead, the plaintiff's delay resulted from mere inattentiveness. The plaintiff's delay was not inexcusable." (Footnote omitted.) The court further found that the defendants "bore some responsibility for the delays" and that the defendants "also added to delays by failing to timely submit information as required and in the form required, and, after December, 2014, in intentionally refusing to negotiate potential modifications in good faith" due to a possible statute of limitations defense. The court rendered a judgment of strict foreclosure and set the first law day as October 11, 2021.[3] This appeal followed.

We begin with the standard of review and law regarding laches. "The standard of review that governs appellate claims with respect to the law of laches is well established. A conclusion that a plaintiff has [not] been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law. . . . We must defer to the court's findings of fact unless they are clearly erroneous. . . . The defense of laches, if proven, bars a plaintiff from seeking equitable relief . . . . First, there must have been a

[3] The court also found that the defendants did not prove their other special defenses of equitable estoppel, statute of limitations and unclean hands, and rejected the defendants' counterclaims of breach of contract, negligence and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq.

delay that was inexcusable, and, second, that delay must have prejudiced the defendant. . . . The burden is on the party alleging laches to establish that defense." (Emphasis omitted; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Fitzpatrick*, 190 Conn. App. 231, 244, 210 A.3d 88, cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019).

On appeal, the defendants claim that, in rejecting their special defense of laches, the court improperly (1) based its determination that there was no inexcusable delay on the plaintiff's intent and/or motives in causing the delay and (2) found that they did not suffer prejudice as a result of the delay. Because the defendants were required to prove *both* an inexcusable delay and prejudice to prevail on their special defense of laches; see id.; and because we agree with the plaintiff that the court's finding that the plaintiff's delay was not inexcusable was not clearly erroneous, we do not address the defendants' argument regarding prejudice.

In support of their challenge to the court's determination that the delay was not inexcusable, the defendants argue that the law requires the party responsible for the delay to first explain or excuse the delay and that the plaintiff here never did so. The defendants further argue that the court's finding that the plaintiff's delay was not intentional, not wilful, and not done with improper motive was the sole basis for its factual determination that the delay was not inexcusable and, "[a]s such, the trial court imposed a burden of proof upon the defendants relative to demonstrating 'inexcusable delay' that heretofore has not been recognized or approved by this court or the Connecticut Supreme Court—that a failure of proof that a delay was undertaken intentionally and/or with improper motive will defeat a claim of laches."[4]

[4] The defendants additionally argue that the court, in concluding that the plaintiff did not act in bad faith, improperly failed to distinguish between the conduct of the plaintiff as the holder of the defendants' note and that

The defendants rely on *Caminis* v. *Troy*, 112 Conn. App. 546, 963 A.2d 701 (2009), aff'd, 300 Conn. 297, 12 A.3d 984 (2011), in support of their argument that the court erred in finding that the delay was not inexcusable because the plaintiff failed to offer an acceptable excuse for the delay. The defendants' reliance on *Caminis* is misplaced because *Caminis* plainly does not support the defendants' argument. In *Caminis*, this court rejected the plaintiffs' claim that the trial court improperly found that, in proving their defense of laches, the defendants established that the plaintiffs' protracted delay in asserting a violation of their littoral rights was inexcusable. Id., 553. Although we noted that "neither in their briefs nor at oral argument before this court have the plaintiffs offered a satisfactory explanation for their long inaction"; id.; our decision in *Caminis* does not stand for the proposition that it is the burden of the party accused of laches to offer a plausible excuse for the delay. Instead, this court in *Caminis* recognized the burden of the plaintiff-appellants to establish their claim on appeal that the trial court's factual finding was clearly erroneous but did not alter the well established precedent that "[t]he burden is on the party alleging laches to establish that defense." Id., 552. In the present case, the trial court properly placed the burden on the defendants to prove their laches defense.

The defendants are also mistaken in their argument that, in finding that the plaintiff's delay was not done intentionally, wilfully or with improper motive, the court imposed an improper burden and, in effect, determined that a failure to prove intentional delay will

of the plaintiff's mortgage servicers. Because this claim was raised for the first time on appeal, we decline to review it. See, e.g., *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619–20, 99 A.3d 1079 (2014) ("[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.)).

defeat a defense of laches. We do not read the court's decision in such a manner. The court was faced with deciding a number of special defenses and counterclaims in addition to the laches defense. The court found facts relating to the defendants' special defenses and counterclaims in the fact-finding portion of its memorandum of decision. In its analysis, the court rejected the defendants' special defenses of laches, equitable estoppel and unclean hands without specifically stating which of its factual findings were attributable to each of these defenses. Nowhere in the court's decision, however, does it suggest that a finding of intent is required to prove inexcusable delay. Rather, the court examined the circumstances of the present case and, in exercising its discretion, determined that the defendants had not proven their special defense of laches. See *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 805, 216 A.3d 699 ("whether a delay violates the doctrine of laches is an issue left squarely to the discretion of the trial court, to be determined on the basis of the circumstances presented"), cert. denied, 333 Conn. 934, 218 A.3d 593 (2019).

The court found that the plaintiff's delay resulted from inattentiveness and that the defendants bore some responsibility for the delay. These subordinate factual findings are not challenged on appeal. We will not second-guess the court's determination, on the basis of the facts found, that the delay was not inexcusable, as such a factual determination is left squarely to the discretion of the court. See id. Whether a party prevails on a defense of laches is a determination for the trier of fact and is not one for this court to make unless the subordinate facts found make such a conclusion inevitable as a matter of law. See *Federal Deposit Ins. Corp.* v. *Voll*, 38 Conn. App. 198, 211, 660 A.2d 358, cert. denied, 235 Conn. 903, 665 A.2d 901 (1995). We cannot say, as a matter of law, that the court here was compelled to

conclude that the plaintiff was guilty of laches on the facts of the present case. See id. Rather, the court's subordinate factual findings that the defendants contributed to the delay by, for example, refusing to negotiate potential modifications in good faith strongly support the court's factual conclusion that the plaintiff's delay was not inexcusable. See *Cohen* v. *Roll-A-Cover, LLC*, 131 Conn. App. 443, 450–51, 27 A.3d 1 ("In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.)), cert. denied, 303 Conn. 915, 33 A.3d 739 (2011). On the basis of the foregoing, we conclude that the court's finding that the plaintiff's delay was not inexcusable was not clearly erroneous, and, therefore, the court properly rejected the defendants' special defense of laches.

The judgment is affirmed.

In this opinion the other judges concurred.

KEYIN WORTH *v.* CHRISTOPHER PICARD ET AL.
(AC 45090)

Alvord, Prescott and Suarez, Js.

Syllabus

The plaintiff sought to recover, inter alia, damages against the defendant attorney in connection with the enforcement of a summary process execution for possession of real property in which she was residing. State marshals ejected the plaintiff from the residence and removed and placed into storage her personal property. The plaintiff alleged that the defendant, who was the attorney for the mortgagee who obtained the summary process execution following a judgment of strict foreclosure, engaged in impropriety with respect to the eviction and the removal of her personal property from the residence. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiff's claims were barred by absolute immunity arising from the litigation

privilege and that the plaintiff failed to adduce any competent admissible evidence that would create an issue of fact as to whether the defendant had ever been to the home from which the plaintiff was removed or had been in possession of any of her property. The plaintiff appealed to this court, claiming that the court improperly concluded as a matter of law that her claims were barred by absolute immunity pursuant to the litigation privilege. *Held* that this court dismissed the plaintiff's appeal as moot, the plaintiff having failed to challenge every independent basis on which the trial court granted the defendant's motion for summary judgment; moreover, even if this court were to agree with the plaintiff that the court improperly concluded that the litigation privilege applied, it would be unable to afford her any practical relief in connection with that claim in light of the trial court's conclusion that, even if the litigation privilege did not apply, on the basis of the undisputed facts, the defendant was entitled as a matter of law to judgment in his favor.

Argued February 2—officially released April 4, 2023

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Keyin Worth, self-represented, the appellant (plaintiff).

Victoria L. Forcella, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Keyin Worth,[1] brought the underlying civil action against the defendant Christopher Picard.[2] The plaintiff appeals from the judgment

[1] The plaintiff was a self-represented litigant during the proceedings before the trial court and appears in a self-represented capacity in this appeal.

[2] In this appeal, we refer to Picard as the defendant. The defendant is a member of the bar of this state. The plaintiff named him as a defendant "as attorney and as individual."

The plaintiff also named Edward DiLieto and Willie Davis, Jr., both of whom are state marshals, as defendants in their individual and official capacities. Initially, the court, *Roraback*, *J.*, dismissed the plaintiff's complaint with respect to the claims brought against DiLieto and Davis, and the

rendered in the defendant's favor after the court granted his motion for summary judgment.[3] The plaintiff claims that the court improperly concluded as a matter of law that, pursuant to the litigation privilege, the plaintiff's claims were barred by absolute immunity. We dismiss the appeal as moot.

The record reflects the following procedural history. In her amended complaint, the plaintiff alleged claims

plaintiff challenged that ruling in this appeal. After the plaintiff brought this present appeal, however, the court vacated its dismissal of the action with respect to the claims that were brought against DiLieto and Davis. As a result, on November 29, 2022, the plaintiff withdrew the portion of her appeal in which she challenged the judgment rendered in favor of these defendants. In this opinion, we need not, and do not, address the plaintiff's appellate claims that pertain to DiLieto and Davis.

The plaintiff also named Edmar Services, LLC, as a defendant. On February 19, 2019, the plaintiff withdrew her complaint with respect to Edmar Services, LLC.

[3] The plaintiff's brief is not a model of clarity. We note that, with respect to the defendant, the plaintiff also argues that the court erred in "granting [the defendant's] motion for order to conceal the truth and to bar [the] plaintiff from conducting proper discovery when [the defendant] is a self-represented . . . litigant [and] does not enjoy any immunity and privilege." The plaintiff thereafter argues that "[g]ranting [the defendant's] motion for protection put [her] in furtherance of injustice."

To the extent that the plaintiff has attempted to raise a distinct claim of error concerning a ruling made by the trial court, she has failed to clearly identify the ruling at issue and the trial court's factual legal basis for the ruling. She also has not provided the standard of review that this court should apply or an independent and reasoned argument supported by citation to the record and relevant legal authority. See Practice Book § 67-4.

It is well settled that our appellate courts "are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Citations omitted; internal quotation marks omitted.) *Connecticut Coalition Against Millstone* v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008). Although this court is solicitous of self-represented parties and construes the rules of practice liberally in their favor; see, e.g., *Gutierrez* v. *Mosor*, 206 Conn. App. 818, 835, 261 A.3d 850, cert. denied, 340 Conn. 913, 265 A.3d 926 (2021); the latitude shown to self-represented parties does not lead us to overlook the significant briefing defects with which we are presented here.

against the defendant sounding in negligence, negligent infliction of emotional distress, housing discrimination in violation of General Statutes § 46a-64c, unlawful entry and detainer in violation of General Statutes § 47a-43, conversion, and a violation of the Connecticut Unfair Trade Practices Act, codified in General Statutes § 42-110a et seq.[4] The plaintiff's claims were related to events that allegedly occurred on March 27, 2018, when state marshals enforced a summary process execution for possession of real property in which the plaintiff was residing, thereby ejecting her from the residence and removing and placing into storage her personal property from the residence. In broad terms, the plaintiff's claims were related to her belief that the defendant, who was the attorney for the mortgagee who obtained the summary process execution following a judgment of strict foreclosure of the subject property, engaged in impropriety with respect to the eviction and the removal of her personal property from the residence.[5] Thereafter, the defendant denied liability and raised eleven special defenses. With respect to each special defense, the plaintiff left the defendant to his proof.

On January 4, 2021, the defendant filed a motion for summary judgment accompanied by a memorandum of law and exhibits. In his memorandum of law, the defendant argued that, with respect to each cause of action directed at him, the plaintiff was unable to demonstrate that a genuine issue of material fact existed, and that he was entitled as a matter of law to judgment in his favor. Alternatively, the defendant argued that he was entitled to judgment in his favor because he was immune from suit pursuant to the litigation privilege

[4] The court struck a seventh count, sounding in legal malpractice.

[5] We note that, in conjunction with her original complaint, the plaintiff filed an application for a temporary injunction and a restraining order to prevent the defendants from disposing of her personal property. Thereafter, the court issued orders concerning the personal property.

as elucidated in *Scholz* v. *Epstein*, 198 Conn. App. 197, 232 A.3d 1155 (2020), aff'd, 341 Conn. 1, 266 A.3d 127 (2021). On March 22, 2021, the plaintiff filed an objection to the defendant's motion for summary judgment and exhibits. On May 17, 2021, the court, *Roraback, J.*, held a hearing on the motion.

On September 13, 2021, the court granted the defendant's motion for summary judgment. The court concluded, on the basis of the facts before it that were not disputed by the plaintiff's submissions in opposition to the motion for summary judgment, that the plaintiff's claims were barred by absolute immunity arising from the litigation privilege. The court thereafter stated that, "[e]ven if this court were to conclude that the immunity granted by the litigation privilege did not attach to one or more counts directed against the moving defendant, he would still be entitled to summary judgment in his favor on all counts. This is because the plaintiff has failed to adduce any competent admissible evidence that would create an issue of fact as to whether [the defendant] has ever been to the home from which she was removed or been in possession of any of her property." This appeal followed.

In the plaintiff's principal appellate brief, she challenges the court's judgment in favor of the defendant on the grounds that the court improperly relied on *Scholz* v. *Epstein*, supra, 198 Conn. 197, and concluded that the litigation privilege applied. The plaintiff, however, does not challenge one of the independent grounds on which the judgment was based, namely, that, even in the absence of the litigation privilege, the defendant was entitled to judgment in his favor with respect to every count directed at him.

Because the plaintiff does not challenge every independent basis on which the court granted the defendant's motion for summary judgment, we consider

whether the present appeal is moot.[6] "Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . A determination regarding . . . [this court's] subject matter jurisdiction is a question of law . . . [and, therefore] our review is plenary. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way. . . .

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on [her] claim, even if this court were to agree with the appellant on the issues that [she] does raise, we still would not be able to provide [her] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *Bongiorno*

[6] On July 26, 2022, after the plaintiff filed her appellant's brief, this court ordered the parties, sua sponte, "to address whether the portion of the appeal challenging the trial court's September 13, 2021 judgment in favor of the defendant . . . should be dismissed as moot because the plaintiff has challenged only one of the two independent bases for that judgment." In his appellee's brief, the defendant argues that the appeal is moot. In her reply brief, the plaintiff argues that the appeal is not moot because, in her appellant's brief, she adequately challenged both independent bases for the court's judgment. We disagree with the plaintiff. Also, to the extent that the plaintiff, for the first time in her reply brief, challenges the court's determination with respect to the merits of her claims, such arguments are unreviewable. It is well settled that "[a] plaintiff cannot use his reply brief to resurrect a claim that he has abandoned by failing to adequately brief it in his principal appellate brief." *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 613 n.23, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021).

v. *J & G Realty, LLC*, 211 Conn. App. 311, 322, 272 A.3d 700 (2022). In the present appeal, even if we were to agree with the plaintiff that the court improperly concluded that the litigation privilege applied, we would be unable to afford her any practical relief in connection with that claim in light of the court's conclusion that, even if the litigation privilege did not apply, on the basis of the undisputed facts, the defendant was entitled as a matter of law to judgment in his favor. Having concluded that the claim is moot, we must dismiss the appeal. See, e.g., *Wendy V.* v. *Santiago*, 319 Conn. 540, 548, 125 A.3d 983 (2015) (after concluding that claim is moot, proper remedy is to dismiss appeal for lack of subject matter jurisdiction).

The appeal is dismissed.