IN RE PRINCE S. ET AL.*
(AC 45929)

Alvord, Elgo and Suarez, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her two minor children. The children had been adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. The Department of Children and Families issued specific steps to the mother for reunification, which required her, inter alia, to gain insight through parenting and individual counseling into the effect of her mental health issues on her children. After a trial was held on the petitions, the court found that termination was in the best interests of the children. *Held:*

1. The trial court properly found, by clear and convincing evidence that the respondent mother failed to achieve a sufficient degree of personal

* 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.

rehabilitation as required by statute (§ 17a-112); the record contained ample evidence that the mother failed to comply with the specific steps ordered by the court in multiple aspects, including her failure to obtain and maintain adequate housing and legal income, to cooperate with substance abuse evaluations, to visit the minor children as often as the department permitted, and to gain insight into the effect of her mental health issues on them, and the record also supported the court's finding that the mother could not assume a responsible position in the life of either child within a reasonable time considering their ages and needs.

2. The respondent mother could not prevail on her claim that the trial court, in determining that the mother had failed to sufficiently rehabilitate, improperly relied on hearsay evidence, specifically, testimony from the department's social worker regarding the mother's lack of insight as to the effect of her mental health on the minor children: assuming, without deciding, that the testimony was improperly admitted into evidence, the testimony was cumulative of other properly admitted evidence, including the department's social study, documentary and testimonial evidence of the mother's in-patient psychiatric hospitalization and treatment, and additional testimony from the social worker on the issue of the mother's mental health to which the mother did not object, thus, any error in the admission of the statement in question was harmless; moreover, even if this court were to conclude that the evidence was not cumulative, the trial court's conclusion was not based solely on its finding that she had failed to gain insight into the impact of her mental health issues, rather, it was predicated on several additional factual findings, including the mother's failure to visit the minor children as often as the department permitted, her failure to maintain a legal income, her failure to obtain adequate housing, her failure to obtain a lasting benefit from parenting and counseling programs, and her refusal to cooperate with a substance abuse treatment center to which she was referred by the department and, thus, she failed to demonstrate that the court's decision to overrule her objection to the social worker's testimony on hearsay grounds likely affected the result of the trial.

Argued March 15—officially released June 1, 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 New London, Juvenile

** June 1, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Matters at Waterford, and tried to the court, *Hon. John C. Driscoll*, judge trial referee; judgments granting the petitions, from which the respondent mother appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

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

Opinion

ELGO, J. The respondent mother appeals from the judgments of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights as to Prince S. and Arella G., her minor children.[1] On appeal, the respondent claims that the court improperly (1) concluded that she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B), and (2) relied on hearsay evidence in so concluding. We affirm the judgments of the trial court.

The following facts, which the trial court found by clear and convincing evidence, are relevant to our resolution of these appeals. "[Prince] is the biological child of [the respondent and Mague S.]. [Arella] is the biological child of [the respondent and George L.]. . . .[2] In February, 2020, [the minor children] were living with

[1] The court also terminated the parental rights of Mague S., the father of Prince, and George L., the father of Arella. Because they have not appealed, we refer to the respondent mother as the respondent. We refer to Prince and Arella collectively as the minor children.

In addition, we note that the attorney for the minor children filed a statement adopting the brief of the petitioner in this appeal pursuant to Practice Book §§ 67-13 and 79a-6 (c).

[2] The court found that Prince was nine years old and Arella was six years old at the time of trial in April, 2022.

[the respondent] in the home of [the respondent's parents]. Local police responded to a domestic complaint and learned that [the respondent] had multiple outstanding failure to appear warrants.[3] [The respondent] was taken into custody, and the [Department of Children and Families (department)] was notified. Upon investigation, the maternal grandparents advised the department that [the respondent] had serious mental health issues, including hallucinations. They further alleged that [the respondent] was abusing alcohol and marijuana and leaving the children in [their] care for extended periods of time. The maternal grandparents did not hold themselves out as a resource. [Following the respondent's subsequent incarceration] [t]he department contacted [Mague S.] and arranged to place [Prince] with him. [Mague S.] was not a resource for [Arella].

"On March 6, 2020, the [petitioner] obtained an ex parte order of temporary custody for [Arella and a] neglect petition was filed as well. The respondent was served in the correctional institution . . . . On March 13, 2020, the order of temporary custody was sustained and [Arella] was placed with a maternal relative. [The respondent] was subsequently appointed counsel, and later was discharged [from confinement] and returned to live with [her parents].

"On June 12, 2020, a neglect petition was filed in the interest of [Prince]. It, as did [Arella's] neglect petition, alleged a history of domestic violence, inadequate living

[3] Admitted into evidence at trial was a criminal history report prepared by the Department of Emergency Services and Public Protection. That report indicates that the respondent had been arrested for, inter alia, assault in the third degree in violation of General Statutes § 53a-61, criminal mischief in the third degree in violation of General Statutes § 53a-117, disorderly conduct in violation of General Statutes § 53a-182, and multiple counts of failure to appear in the second degree in violation of General Statutes § 53a-173.

conditions, inadequate supervision of the children, substance abuse by both parents, criminal charges pending against both parents, and [the respondent's] mental health issues. On October 2, 2020, the [petitioner] sought and obtained an ex parte order of temporary custody of [Prince]. The department learned that [Mague S.] had returned [Prince to the respondent] without [notifying] the department. [Prince] was found in [the respondent's] home, [which was] found to be in deplorable condition. [The respondent's] issues remained unabated and unaddressed as of that date. On October 9, 2020, [the respondent] agreed to sustain the order of temporary custody. . . .

"On October 30, 2020, [the respondent] filed a written plea of nolo contendere. . . . [Prince] was adjudicated neglected and committed to the [petitioner]. [Prince] has remained in the [petitioner's] care and custody since October 2, 2020. [The respondent] . . . [was] given specific steps for reunification in October, 2020.

"On March 9, 2021, [the respondent] submitted a plea of nolo contendere as to [Arella who was] adjudicated neglected and committed to the [petitioner]. [The respondent's] specific steps for reunification were reaffirmed. [The] specific steps required her, in part, to: gain insight through parenting and individual counseling into the effect of her mental health issues on her children; [to] cooperate with a substance abuse evaluation, treatment, and testing; to get and maintain adequate housing and income; and [to] visit her children. [The respondent's] compliance [with those steps] has been inconsistent and inadequate.

"When the case began, [the respondent's] home with the maternal grandparents was problematic. The residence was infested with cockroaches. This physical concern could be addressed and corrected. [The respondent] claims it has been [corrected] and [that]

the department has not [conducted] a home visit to confirm this. The greater difficulty was with the maternal grandparents, whose residence it was. Neither [grandparent] is able to be a long-term caregiver for the children, and [the respondent] repeatedly imposed upon them as caregivers. Most problematic was the maternal grandfather's predilection for pornography, to which [Arella] was exposed. [The respondent] observed her child watching pornographic videos under her bed covers. The child recorded sexually inappropriate videos. [The respondent] has made no effort to correct this. Her counselor indicated that she has little insight into child safety.

"[The respondent] has not obtained independent housing. Periodically she has moved in with friends or lived in a car. She has not obtained her own home. [The respondent's] lack of income is a barrier to housing. [The respondent's] exhibits establish a very limited work history and income, and ultimately the loss of this limited employment. [The respondent's] aunt testified [at the termination trial] that [the respondent] had given all of her income to the aunt . . . for the purpose of buying and insuring a car. [The respondent] had no driver's license and had only made preliminary arrangements for licensure at the time of the commencement of the trial. [The respondent's] prospects for independent housing and income are remote, at best.

"As noted, the department's involvement commenced with [the respondent's] arrest on multiple failure to appear warrants. [The respondent] ultimately was placed on probation, and has avoided new arrest, and is cooperative with her probation.

"However, [the respondent's] family disclosed, and testified to the fact, that [the respondent's] behavior was out of control. She took little or no responsibility for [the minor] children. She was more interested in

partying with friends than in parenting. She was often angry, paranoid, and avoidant. These behaviors predated the department's referral to, and the respondent's participation in, a virtual parenting program. [The respondent] completed that program in January, 2021. [The respondent] demonstrated no insight gained from the program. Her parenting did not improve, as her out of control behaviors continued, according to her family.

"[The respondent] was referred to and completed a program at a center for behavioral health in April, 2021. It did not amend her behaviors. In May, 2021, [the respondent] was referred to a psychiatrist for medication evaluation. [The respondent] has been attending a different local provider and her therapist there questioned whether [the respondent] had the insight or ability to benefit from counseling. [The respondent] discharged herself from this service prematurely. [The respondent] had been diagnosed with major depressive disorder, severe, with psychotic features.

"In July, 2021, [the respondent's] family convinced her to go to the local hospital and [the respondent] was hospitalized in a psychiatric ward for approximately one month. Upon discharge, [the respondent] was diagnosed with schizophrenia, and began services at the hospital's mental health center. [The respondent was] discharged from hospital services and began individual counseling with a local community mental health service. Her counselor at this service reports that [the respondent] is pleasant, but demonstrates no insight into the effect her mental health issues have on her children and her parenting. Despite reasonable efforts to obtain services for [the respondent, she] has been unable to benefit from mental health supports.

"The department referred [the respondent] to a local drug treatment and counseling center. [The respondent] did not schedule an intake. While [the respondent] has

tested negative for marijuana through probation, she was also observed during a virtual visit purchasing 'nip' bottles of alcohol and blunt papers. While this demonstrates a clear lack of insight as to proper parenting, it also justifies continued concerns regarding [the respondent's] lifestyle choices.

"While [the respondent] has avoided new involvement with the criminal justice system, [she] provided a photo of herself to [Prince's] foster mother on July 14, 2022, showing [the respondent] with serious facial injuries. [The respondent] provided no explanation for the injuries, which appear to be the result of an assault.

"The department attempted to arrange regular virtual visitation between [the respondent] and the children. [The respondent] often did not call or participate in visits. She was frequently late. Despite attempts at correction, she frequently made inappropriate remarks to the children about reunification. On August 23, 2021, [the respondent's] visitation was suspended by order of the [trial court]. Prior to the trial, [the respondent] made no effort to reinstate visitation, despite returning to and completing in March, 2022, the same virtual parenting program that she completed in 2021.

"The department made appropriate and reasonable referrals for services, with which [the respondent] either did not comply, or from which she gained inadequate benefit. Ultimately, on October 5, 2021, the [trial court] approved a permanency plan, which did not include reunification with any parent.[4]

"[Prince] is doing well in foster placement, recognizes [the respondent's] deficits, and does not want to reunify. [Arella] has conflicted feelings. [Arella] has had multiple

[4] The petitioner filed petitions to terminate the respondents' parental rights as to the minor children on November 3, 2021.

placements, and is not as secure or as stable in placement as [Prince]. However, [Arella] has greater needs, as demonstrated by her unprotected access to pornography, and [the respondent's] lack of insight into that issue. [The respondent] has inadequate parenting skills, and her mental health treatment has not progressed to any appreciable insight into how her mental health concerns adversely affect her children.

"In summary, the department made reasonable efforts to reunify [the respondent] by connecting her with necessary services. [The respondent] was unable or unwilling to cooperate with those efforts. . . . [The respondent] did not adequately visit the children, and her visitation was suspended. [The respondent] has not obtained adequate housing or employment. [The respondent] attended parenting classes, but demonstrated no lasting benefit. [The respondent] attended some counseling programs but demonstrated no lasting benefit. [The respondent] did not cooperate with a substance abuse referral for evaluation. . . . [T]he [petitioner] has proven by clear and convincing evidence: that the department made reasonable efforts to locate [the respondent]; the department made reasonable efforts to reunify the children with [the respondent]; that [she] was unable or unwilling to benefit from reunification efforts; the court determined such efforts were no longer required because the court approved a permanency plan other than reunification; and both children had been found in prior proceedings to have been neglected and [the respondent] has failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age[s] and needs of the children, [the respondent] could assume a responsible position in the life of either child." (Footnotes added.) The court further found that

termination was in the best interests of the minor children and, accordingly, granted the petitions to terminate the respondent's parental rights. From those judgments, the respondent now appeals.

I

The respondent first claims that the court improperly concluded that she failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B). We do not agree.

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." *In re Danuael D.*, 51 Conn. App. 829, 840, 724 A.2d 546 (1999).

"We review the trial court's subordinate factual findings for clear error,[5] and review its finding that the

[5] "Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has

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."[6] (Citations omitted; footnote added; internal quotation marks omitted.) *In re Jayce O.*, 323 Conn. 690, 715–16, 150 A.3d 640 (2016). Applying that standard, we conclude that there is sufficient evidence in the record to support the trial court's finding that the respondent failed to achieve a sufficient degree of personal rehabilitation.

We begin by noting that specific steps "are a benchmark by which the court will measure the respondent's conduct to determine whether termination is appropriate pursuant to § 17a-112 (j) (3) (B)." (Internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App.

been committed." (Internal quotation marks omitted.) *In re Jacob W.*, 330 Conn. 744, 770, 200 A.3d 1091 (2019).

[6] In her principal appellate brief, the respondent argues that the evidential sufficiency standard adopted by our Supreme Court "should be replaced" by a clear error standard. She acknowledges that this court is incapable of modifying or overruling the precedent of the Supreme Court; see *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 419, 234 A.3d 111 (2020); and merely seeks to preserve her claim for further appellate review.

308, 329, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). The specific steps issued by the court in the present case required the respondent, among other things, to get and maintain adequate housing and a legal income, to cooperate with substance abuse evaluations, to visit the minor children as often as the department permitted, and to gain insight into the effect of her mental health issues on them. In its memorandum of decision, the court found that the respondent had not maintained a legal income and had failed to schedule an intake with a drug relapse prevention agency to which she had been referred by the department. The court also found that the respondent had failed to obtain adequate housing, noting that "[p]eriodically she has moved in with friends or lived in a car [and she] has not obtained her own home." Those findings are supported by evidence in the record and, thus, are not clearly erroneous. Moreover, in light of the uncontroverted evidence that (1) the maternal grandparents were unwilling to be long-term caregivers, (2) the respondent had repeatedly imposed upon them as caregivers, and (3) the maternal grandfather possessed a predilection for pornography, which resulted in the exposure of such materials to Arella, the court reasonably could infer that residing with the maternal grandparents was not a suitable housing option.

The court also found that the respondent failed to comply with the specific step requiring her to visit the minor children "as often as [the department] permits." The court found, and the evidence in the record confirms, that the respondent routinely was a "no-call/no-show" and did not participate in numerous visitation appointments.[7] After the respondent failed to attend a

[7] The evidence indicates that the respondent did not participate in visits scheduled on August 18, 2020, September 3, 2020, September 10, 2020, September 17, 2020, October 10, 2020, November 14, 2020, December 11, 2020, December 23, 2020, January 8, 2021, January 15, 2021, May 11, 2021, May 18, 2021, May 25, 2021, June 10, 2021, June 24, 2021, and July 15, 2021.

visitation appointment scheduled on July 15, 2021, the department filed a motion to suspend visitation, which the court granted by order dated August 23, 2021. As the court noted in its memorandum of decision, the respondent thereafter "made no effort to reinstate visitation" with the minor children.[8] A respondent's refusal to take visitation seriously is a ground on which the trial court properly may rely in concluding that a respondent has failed to achieve a sufficient degree of personal rehabilitation. See *In re Lil'Patrick T.*, 216 Conn. App. 240, 254, 284 A.3d 999 (failure to rehabilitate determination predicated in part on court's finding "that the respondent attended about one half of the available visits"), cert. denied, 345 Conn. 962, 285 A.3d 387 (2022); *In re Mariah S.*, 61 Conn. App. 248, 266, 763 A.2d 71 (2000) (failure to rehabilitate determination predicated in part on court's finding that "the respondent consistently refused to take her visitation and counseling obligations seriously"), cert. denied, 255 Conn. 934, 767 A.2d 104 (2001); *In re Noelle C.*, Superior Court, judicial district of Middlesex, Docket No. CP-15-009255-A (July 28, 2020) (failure to rehabilitate determination predicated in part on court's finding that respondent refused to participate in visitation with minor children for fourteen months prior to termination trial); *In re Brianna Rose B.*, Superior Court, judicial district of Windham, Docket No. CP-07-015192-A (March 3, 2009) (failure to rehabilitate determination predicated in part on court's finding that respondent's attendance at scheduled visits initially was intermittent and that respondent "then stopped coming").

The specific steps also required the respondent to gain insight into the effect of her mental health issues

[8] The respondent's last documented visit with Arella occurred on June 21, 2021, nine months prior to the start of the termination trial. Her last documented visit with Prince was in January, 2021, fourteen months prior to trial.

on the minor children. It is undisputed that the respondent was diagnosed with "major depressive disorder, severe, with psychotic features" in June, 2021. She subsequently was diagnosed with "schizophrenia, paranoid, chronic, with acute exacerbation" while hospitalized as part of an inpatient psychiatric treatment program. In its memorandum of decision, the court found that, although the respondent had attended parenting classes and counseling programs, she had demonstrated "no lasting benefit."[9] More specifically, the court found that the respondent's "mental health treatment has not progressed to any appreciable insight into how her mental health concerns affect her children." That finding is supported by evidence in the record—namely, the October 22, 2021 social study submitted in support of the termination petitions. That study states in relevant part: "Though [the respondent] has attended mental health . . . treatment, [she] has failed to make progress . . . in order to live a healthy, stable life and meet the needs of her children. She continues to demonstrate behaviors associated with untreated, significant mental health needs. When attending services, [the respondent] denied a need for services and indicated to . . . providers that she was engaged in services because [the department] told her to. [The respondent] shows no insight [into] her mental health needs nor does she display coping skills." Because that social study was admitted as a full exhibit at trial without objection, the court was entitled to rely on it in making its findings. See *In re Leilah W.*, 166 Conn. App. 48, 71, 141 A.3d 1000 (2016).

[9] In its decision, the court also found that, despite completing the inpatient psychiatric treatment program at the hospital, the respondent "has been unable to benefit from mental health supports." That finding undermines the respondent's claim that the court failed to consider her posthospitalization efforts to rehabilitate. To the contrary, the court specifically noted certain positive aspects of the respondent's posthospitalization efforts, including her cooperation with probation, her negative drug tests, and her completion of a parenting education program.

In addition, the court heard testimony at trial from department social worker Christina Garabedian. In response to a question regarding "feedback" from service providers on whether the respondent was benefiting from those services "in any meaningful way," Garabedian testified that the respondent "continues to not understand the jeopardy that she put her children in and the safety factors that were present in her care and she has not been able to . . . make sufficient progress to eliminate those factors . . . ." Garabedian also was asked what barriers existed to the respondent "being a safe and appropriate caregiver to her children," to which Garabedian responded: "The most significant barrier . . . is her mental health. [The respondent] has very serious mental health issues . . . . [Those issues will] not be stabilized and resolved to the point at which she could be considered a reliable and responsible caregiver for her children."[10] The court, as arbiter of credibility, was entitled to credit that testimony. See *In re Nevaeh W.*, 317 Conn. 723, 737, 120 A.3d 1177 (2015) ("[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony" (internal quotation marks omitted)); *In re Brianna L.*, 139 Conn. App. 239, 251, 55 A.3d 572 (2012) (whenever evidence is admitted without objection, trier of fact can rely on it). On that evidence, the court properly could conclude that the respondent had failed to comply with the specific step requiring her to gain insight into the effect of her mental health issues on the minor children.

As our Supreme Court has explained, "the failure to comply with specific steps ordered by the court typically weighs heavily in a termination proceeding." *In re Devon B.*, 264 Conn. 572, 584, 825 A.2d 127 (2003); see also *In re Brian T.*, 134 Conn. App. 1, 25, 38 A.3d

[10] The respondent did not object to those questions or Garabedian's responses at trial.

114 (2012) (*Robinson*, *J.*, concurring) ("specific steps are intricately intertwined with the failure to rehabilitate"). The record before us contains ample evidence to substantiate the court's finding that the respondent failed to comply with the specific steps in multiple respects. The record also supports the court's finding that the respondent could not "assume a responsible position in the life of either child" within a reasonable time when considering their ages and needs. Indulging every reasonable presumption in favor of the court's ruling, as our standard of review requires; see *In re Jayce O.*, supra, 323 Conn. 716; we conclude that the record contains sufficient evidence to support the court's conclusion that the respondent failed to achieve the requisite degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B).

II

The respondent also claims that the court improperly relied on hearsay evidence in reaching that conclusion. In response, the petitioner contends that any error in the admission of that evidence was harmless. We agree with the petitioner.

"Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing . . . of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *In re Jordan T.*, 119 Conn. App. 748, 762, 990 A.2d 346, cert. denied, 296 Conn. 905, 992 A.2d 329 (2010). "[I]f erroneously admitted evidence is merely cumulative of other evidence presented in the case, its admission does not

constitute reversible error." *Swenson* v. *Sawoska*, 215 Conn. 148, 155, 575 A.2d 206 (1990).

At trial, the following colloquy occurred during the direct examination of Garabedian by the petitioner's counsel:

"[The Petitioner's Counsel]: [H]ave you had some feedback directly from any clinical member at [Sound Community Services, Inc.]?

"[Garabedian]: Yes. I've spoken with [the respondent's] therapist, Jody Castella, on a couple of the occasions. And she reports, you know, in terms of [the respondent's] personality and presentation, very positively that [the respondent] is a pleasant young woman, a likable young woman, but that she truly lacks insight into how much her mental health has impacted her life and—

"[The Respondent's Counsel]: Objection, Your Honor. This is far—this is complete hearsay.

"[Garabedian]: Okay.

"[The Petitioner's Counsel]: I think it's in the—Ms. Garabedian, is this in your update?

"[Garabedian]: It's not in my update, it is in the case record so—

"[The Petitioner's Counsel]: The narrative?

"[Garabedian]: —in the narratives.

"[The Petitioner's Counsel]: Oh, we can—I mean, to me it's substance over form, Your Honor, but we can offer the narrative but it seems that—

"The Court: I'm going to allow it.

"[The Petitioner's Counsel]: Go ahead.

"[Garabedian]: Yeah, yeah, that [the respondent] has really failed to appreciate how much her mental health has impacted her and her relationship with her children in terms of having been separated from her children and not having them in her care."

Assuming without deciding that the aforementioned statement was improperly admitted into evidence, it was cumulative of other properly admitted evidence. As discussed in detail in part I of this opinion, the October 22, 2021 social study submitted in support of the termination petitions substantiates the court's finding that the respondent's "mental health treatment has not progressed to any appreciable insight into how her mental health concerns affect her children."[11] More specifically, the study documents the department's discussions with the respondent about her ongoing need for mental health and substance abuse treatment for her dual diagnosis, her minimization and denial of her need for treatment, and her report to providers that "I'm just playing whatever game DCF wants me to play." This pattern of minimization since the respondent's release from incarceration with one month long stay at York Correctional Institution's psychiatric unit in April, 2020, persisted throughout the department's work with the respondent, notwithstanding its having referred her to services at CarePlus and Stonington Institute. After her diagnosis with major depressive disorder, severe, with psychotic features, at Reliance House in February, 2021, the respondent was discharged on May 19, 2021, for lack of engagement with mental health treatment and

[11] The respondent maintains that such evidence cannot support the court's findings regarding her mental health and its impact on the minor children, as it is not "medical" evidence. She has provided no authority for that bald assertion. Contra *In re Leilah W.*, supra, 166 Conn. App. 70–71 (rejecting claim that petitioner was required to present testimony of "a mental health provider" and concluding that court properly relied on social study that was admitted without objection in making findings regarding respondent's mental health).

discontinuing attendance despite outreach. When the department encouraged the respondent in June, 2021, to return to Reliance House, the respondent stated that she "was content." Subsequently, the respondent was involuntarily admitted for in-patient psychiatric treatment for one month at Backus Hospital with a diagnosis of schizophrenia, paranoid, chronic, with acute exacerbation. The court properly may consider such evidence in making its factual findings. See *In re Lillyanne D.*, 215 Conn. App. 61, 80 n.15, 281 A.3d 521 ("the court may rely on the social study in both the adjudicatory and dispositional phases of a termination of parental rights proceeding"), cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); see also *In re Anna Lee M.*, 104 Conn. App. 121, 128, 931 A.2d 949, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007); *In re Tabitha P.*, 39 Conn. App. 353, 368, 664 A.2d 1168 (1995).

In addition, the court heard additional testimony from Garabedian to which the respondent did not object. For example, *prior* to the aforementioned colloquy, Garabedian was asked what barriers existed to the respondent "being a safe and appropriate caregiver to her children," to which she responded: "The most significant barrier . . . is her mental health. [The respondent] has very serious mental health issues . . . . [Those issues will] not be stabilized and resolved to the point at which she could be considered a reliable and responsible caregiver for her children." Later in her testimony, Garabedian testified that the respondent "continues to not understand the jeopardy that she put her children in and the safety factors that were present in her care and she has not been able to . . . make sufficient progress to eliminate those factors . . . ." The respondent did not object to that testimony. Because the court had documentary and testimonial evidence that was probative of the same issue as the

evidence in controversy, including in-patient psychiatric hospitalization and treatment; see *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 204, 128 A.3d 901 (2016); we conclude that any error in the admission of the statement in question was harmless.

Even if we were to conclude that the evidence at issue in this claim was not cumulative of other evidence before the court, the respondent could not prevail. The court's determination that she had failed to sufficiently rehabilitate was not based solely on its finding that she had failed to gain insight into the impact of her mental health issues. Rather, it was predicated on several additional factual findings, including the respondent's failure to visit the minor children as often as the department permitted, her failure to maintain a legal income, her failure to obtain adequate housing, her failure to obtain a lasting benefit from parenting and counseling programs, and her refusal to cooperate with a substance abuse treatment center to which she was referred by the department. For that reason, she has not demonstrated that the court's decision to overrule her objection to Garabedian's statement on hearsay grounds likely affected the result of the trial.

The judgments are affirmed.

In this opinion the other judges concurred.

VALERIE NETTLETON *v.* C & L DINERS, LLC
(AC 44554)

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

Syllabus

Pursuant to statute (§ 31-60 (b)), the Labor Commissioner shall adopt regulations that carry out the purposes of the minimum wage laws, and such regulations shall entitle employers, as part of the minimum fair wage, to a tip credit by including gratuities in an amount equal to a certain percentage of the minimum fair wage per hour for persons who are

employed in the restaurant industry and who regularly and customarily receive gratuities.

The plaintiff, who had been employed as a server at a restaurant owned and operated by the defendant, sought damages from the defendant, claiming that it violated state minimum wage laws and regulations by failing to segregate her service and nonservice duties, to record properly the amount it claimed as a tip credit in the wage record, and to have her sign a weekly tip credit statement. At the time the plaintiff was employed by the defendant, the applicable wage regulations (§§ 31-62-E3 and 31-62-E4) provided that, for gratuities to be recognized as part of the minimum fair wage, the employer should record the amount received in gratuities claimed as credit on a weekly basis as a separate item in the wage record and obtain a weekly statement signed by the employee attesting that she had received in gratuities the amount claimed as credit. In addition, although the regulations did not define service or nonservice duties, the allowance for gratuities was to be permitted only for the time an employee worked in service duties, which was required to be segregated and recorded from the employee's time spent working in nonservice duties. The defendant required the plaintiff to perform side work during her shifts as a server, including handling to-go orders and preparing certain foods, and it claimed the tip credit for all of the plaintiff's shifts without ever recording or segregating nonservice work. In her complaint, the plaintiff sought penalty damages pursuant to statute ((Supp. 2016) § 31-68 (a) (1)), which at that time provided that an employee who was paid less than the minimum fair wage could recover twice the amount owed less any payment actually received, unless the employer could establish that it made such underpayment with a good faith belief that it was in full compliance with the law. The defendant asserted good faith as a special defense. Both parties moved for summary judgment on the plaintiff's complaint and the defendant's special defense. Before the trial court issued a decision, the Labor Commissioner, through the Department of Labor, modified the regulations to amend § 31-62-E3, to repeal § 31-62-E4, and to amend another regulation (§ 31-62-E2 (d)) to define "duties incidental to service" as the performance of twenty-three specific tasks. The department also added a regulation (§ 31-62-E3a), known as the 80/20 rule, which provides that an employer is not required to segregate a service employee's time spent performing nonservice duties unless the employee performs such nonservice duties for more than two hours or for more than 20 percent of the employee's shift, whichever is less. Thereafter, the court granted the defendant's request to file a supplemental memorandum of law, in which it claimed that the new regulations applied retroactively. In her reply memorandum, the plaintiff claimed that, as the effective date of the new regulations was after all of the events at issue, the plain language precluded retroactivity. The court subsequently rendered summary judgment for the plaintiff but denied her motion as to penalty

damages, granted the defendant's motion as to its good faith defense and awarded damages to the plaintiff. On the defendant's appeal and the plaintiff's cross appeal to this court, *held*:

1. The trial court improperly rendered summary judgment for the plaintiff on her claims that the defendant violated § 31-62-E3 (b) and (c) of the regulations by failing to record on a weekly basis the amount claimed as a credit in the wage record and by failing to have her sign a weekly tip credit statement attesting that she received tips in the amount of the tip credit claimed by the defendant as such noncompliance did not give rise to a private cause of action under § 31-68 (a): although the defendant did not comply with the record keeping requirements of § 31-62-E3 of the regulations, and compliance with the regulation was a factor reasonably within the control of the defendant, other relevant factors to be considered in making a determination as to whether a provision's requirements are mandatory or directory favored construing the record keeping provisions as directory, including the language of § 31-62-E3, which did not expressly invalidate the taking of a tip credit and was stated in affirmative terms unaccompanied by negative language, the purpose of the requirements, which were designed to secure order, system and dispatch in paying employees and for convenience and not substance, the full regulatory scheme, which did not suggest an intent to impose mandatory requirements as to the format of the required records, and the fact that holding the record keeping requirements to be mandatory would result in a windfall to the plaintiff as she never claimed that she received less than the applicable statutory minimum fair wage during any week in the course of her employment; accordingly, the defendant's noncompliance with the regulation did not invalidate the tip credit and give rise to a private cause of action under § 31-68 (a) (1).

2. The defendant could not prevail on its claim that the trial court incorrectly concluded that the defendant violated § 31-62-E4 of the regulations when that court decided that the plaintiff's side work duties were not incidental or related to her service duties:

   a. Because the meaning of "service duties" in § 31-62-E4 was susceptible to more than one reasonable interpretation, this court considered extratextual evidence, including examples from the department's informal guidance, which were instructive, though not dispositive, as to whether a particular task was a "service duty."

   b. The definition of "duties incidental to service" in § 31-62-E2 (d) of the regulations did not apply retroactively: the regulatory history, including the department's responses to public comments that it sought to "afford predictability and reduce the need for interpretation" of duties incidental to service, indicated that the department intended to provide a more precise definition of the term; moreover, circumstances surrounding the amendment, including that the new definition was added at the same time that the department formally adopted the 80/20 rule

and repealed § 31-62-E4 of the regulations, suggested that the department sought to change rather than clarify existing regulations.

c. The trial court properly determined that there was no genuine issue of material fact as to whether the plaintiff performed certain nonservice duties on a regular basis: although there was a genuine issue of material fact as to whether certain tasks, such as cleaning and restocking, constituted service duties, other tasks, such as assisting take-out customers and preparing food, were nonservice duties as a matter of law, and there was uncontroverted evidence, including deposition testimony from the plaintiff, the defendant's district manager, and the general manager of the restaurant at which the plaintiff worked that the plaintiff regularly performed those duties without the defendant segregating the time she spent on them.

d. Contrary to the defendant's claim, the trial court properly determined that the de minimis doctrine, which allows employers, in recording working time, to disregard insubstantial or insignificant periods of time beyond scheduled working hours that cannot as a practical matter be precisely recorded for payroll purposes, did not apply: the defendant failed to satisfy its burden to come forward with evidence to negate the reasonable inferences to be drawn from the plaintiff's evidence as its bare assertion before the trial court that the amount of time the plaintiff spent on nonservice work was de minimis was insufficient; moreover, the department's regulation provided that, if employers were not able to segregate service from nonservice time, they must pay the full minimum wage for the employee's entire shift, and the undisputed evidence established that the plaintiff performed nonservice duties every shift for her two years of employment with the defendant.

3. The trial court improperly rendered summary judgment for the defendant on its good faith defense: although the defendant claimed that undisputed evidence established that it took steps to learn and comply with the law, including consulting with counsel and relying on guidance from the department allowing it to claim tip credit for nonservice work performed by the plaintiff for less than 20 percent of her shift, the advice the defendant cited indicated that its counsel informed the defendant that its practices of requiring service employees to prepare food and wait on take-out customers did not comply with regulations, and conflicting evidence existed as to whether the defendant's policies actually complied with the department's 80/20 guidance.

Argued September 15, 2022—officially released June 6, 2023

Procedural History

Action to recover damages for the defendant's alleged violations of minimum wage laws and regulations, and for other relief, brought to the Superior Court in the judicial district of New Haven and transferred to the

judicial district of Hartford, where the court, *Moukawsher*, *J.*, granted in part the motions for summary judgment filed by the plaintiff and the defendant; subsequently, the court, *Moukawsher*, *J.*, granted the plaintiff's motion for judgment and rendered judgment in accordance with its decision, from which the defendant appealed and the plaintiff cross appealed to this court. *Reversed in part*; *further proceedings*.

David R. Golder, with whom were *Carolyn A. Trotta*, and, on the brief, *Allison P. Dearington*, for the appellant-cross appellee (defendant).

Richard E. Hayber, with whom were *Michael Petela* and *Thomas Durkin*, for the appellee-cross appellant (plaintiff).

Opinion

BRIGHT, C. J. Pursuant to Connecticut wage laws, an employer may claim a credit for gratuities received by service employees in the restaurant industry as a percentage of the minimum fair wage (tip credit) it would otherwise be required to pay, and the Labor Commissioner (commissioner), acting through the Department of Labor (department), is tasked with adopting regulations regarding the tip credit. See General Statutes § 31-60 (b);[1] see also Regs., Conn. State Agencies § 31-62-E1 et seq. (March 8, 2015).[2] The defendant, C & L Diners, LLC, appeals, and the plaintiff,

[1] General Statutes § 31-60 (b) provides in relevant part: "The Labor Commissioner shall adopt such regulations . . . as may be appropriate to carry out the purposes of this part. Such regulations . . . shall recognize, as part of the minimum fair wage, gratuities in an amount (1) equal to twenty-nine and three-tenths per cent, and . . . effective January 1, 2015, and ending on June 30, 2019, equal to thirty-six and eight-tenths per cent of the minimum fair wage per hour for persons, other than bartenders, who are employed in the hotel and restaurant industry, including a hotel restaurant, who customarily and regularly receive gratuities . . . ."

[2] Unless otherwise indicated, all references to § 31-62-E1 et seq. of the Regulations of Connecticut State Agencies are to the 2015 version of the regulations, which were in effect at the time of the underlying events.

Valerie Nettleton, cross appeals, from the judgment of the trial court rendered in favor of the plaintiff on her claims for violations of the minimum wage regulations. The court rendered summary judgment for the plaintiff on her complaint alleging that the defendant violated §§ 31-62-E3 and 31-62-E4 of the Regulations of Connecticut State Agencies and for the defendant on its good faith defense to the plaintiff's claim for penalty damages pursuant to General Statutes (Supp. 2016) § 31-68 (a).[3] On appeal, the defendant claims that the court improperly concluded that (1) § 31-68 (a) provides a private cause of action for a recordkeeping violation under § 31-62-E3 of the regulations and (2) the "side work" performed by the plaintiff while working as a server constituted "nonservice" work under § 31-62-E4 of the regulations. In her cross appeal, the plaintiff claims that the court improperly concluded that there was no genuine issue of material fact that the defendant established its good faith defense. We agree with the defendant's first claim and the plaintiff's claim and, accordingly, reverse in part the judgment of the trial court and remand the matter for further proceedings.[4]

[3] General Statutes (Supp. 2016) § 31-68 (a) provides in relevant part: "If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under sections 31-58, 31-59 and 31-60 or by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

Unless otherwise indicated, all references to § 31-68 in this opinion are to the version in the 2016 supplement to the General Statutes, which was in effect at the time of the underlying events.

[4] On November 16, 2022, the defendant notified this court that it filed a voluntary bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut on November 8, 2022. Pursuant to 11 U.S.C. § 362 (a), the defendant's appeal was stayed until February 14, 2023, when the

The record reveals the following relevant facts and procedural history. The defendant owns and operates several Denny's restaurants in Connecticut, Massachusetts, and Rhode Island. The plaintiff was employed by the defendant as a server at its restaurant in Westbrook, Connecticut from October 26, 2016, through November 21, 2018. When the plaintiff was hired in 2016, the minimum wage was $9.60 per hour, and she understood that she would earn $6.07 per hour, plus tips. When the minimum wage increased to $10.10 per hour in 2017, the plaintiff earned $6.38 per hour, plus tips.

The defendant uses "DINE," a digital payroll system, to record the number of hours worked by its employees and the amount each server earns in tips; the system automatically tracks each server's credit card tips, but each server must manually enter the amount of cash tips received during his or her shift before leaving for the day. At the end of each server's shift, a manager reviews the credit card and cash tips recorded in the system, pays the server in cash for the credit card tips received, and provides the server with a "tip slip" listing the amount of tips earned during the shift, which the server signs. The defendant also requires that each server sign a biweekly "Sign Off Report," which provides the hours worked by the employee, including their clock in and clock out times for each day, and the amount earned in cash tips and credit card tips during the pay period.

While working as a server, the plaintiff, in addition to being assigned a section of tables to serve, was assigned "side work" to complete during her shifts, which included rolling silverware; cleaning syrup bottles; sweeping her section; cleaning the juice machine; cleaning the soda machine; cleaning all surfaces in the server

Bankruptcy Court issued an order granting relief from the automatic stay for this court to issue an opinion in the present case.

aisle; making and preparing coffee; cleaning the coffee pots; filling the jelly and sugar caddies; cleaning glass racks from the dishwasher; refilling to-go cups, lids, and boxes; setting up her section's tables with silverware; filling ketchup bottles; wiping down the windowsills and booths in her section; cleaning and stocking the salad bar; and changing out sanitizer and cloths. The plaintiff was unable to estimate how much time she spent on each individual task. When asked during her deposition if she could estimate how much time she spent performing side work generally, she initially estimated 30 to 40 percent of her shift but then stated: "I can't specify to how much time I spent on any specific side work task because it depends. It would depend on a lot. I know I spent a lot of time performing side work." In addition to side work, the plaintiff also would cash out other servers' customers, seat customers at tables, handle to-go orders, and heat up chocolate lava cake or apple crisp in a microwave. The defendant pays servers at the same rate for their entire shift, including the time spent performing side work.

In November, 2018, the plaintiff initiated the underlying action against the defendant pursuant to § 31-68 (a). Although the plaintiff initially commenced the action as a putative class action on behalf of herself and other servers, she subsequently withdrew the class allegations in September, 2019, and she filed the operative amended complaint in October, 2019. In the first count, the plaintiff alleged that the defendant violated § 31-62-E4 of the regulations by failing to segregate her service and nonservice duties (E4 claim).[5] In the second count,

[5] Section 31-62-E4 of the Regulations of Connecticut State Agencies, which was repealed effective September 24, 2020, provides: "If an employee performs both service and nonservice duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and nonservice duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

she alleged that the defendant violated § 31-62-E3 (b) and (c) of the regulations by failing to record on a weekly basis the amount claimed as a credit in the wage record and by failing to have her sign a weekly "tip credit statement" attesting that she received tips in the amount of the tip credit claimed by the defendant (E3 claims).[6] The plaintiff also sought penalty damages pursuant to § 31-68 (a) (1). The defendant filed an answer and special defenses, asserting, among other things, that it had a good faith belief that it complied with the applicable law.

In January, 2020, the plaintiff filed a motion for summary judgment as to her complaint and the defendant's good faith defense. The plaintiff also filed a memorandum of law in support of the motion with several exhibits, including copies of the plaintiff's personnel file and wage records and excerpts from transcripts of depositions of herself; Herman Li, the defendant's managing member; Patty Cillo, the defendant's district manager; and Lynda Correira, the general manager of the Westbrook restaurant where the plaintiff worked.

As to her E3 claims, the plaintiff argued that there was no dispute that the defendant failed to record the amount of the tip credit claimed "on a weekly basis as a separate item in the wage record" in violation of § 31-62-E3 (b) of the regulations and failed to obtain "weekly a statement signed by the employee attesting that [she]

[6] Section 31-62-E3 of the Regulations of Connecticut State Agencies provides in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record even though payment is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage. Such statement shall contain the week ending date of the payroll week for which credit is claimed. . . ."

has received in gratuities the amount claimed as credit for part of the minimum fair wage" in violation of § 31-62-E3 (c) of the regulations. As to her E4 claim, the plaintiff argued that the undisputed evidence established that she performed side work during every shift and that such side work constituted "nonservice work," as it was performed "away from the tables."

In March, 2020, the defendant also moved for summary judgment on the plaintiff's complaint and its good faith defense. As to the E3 claims, the defendant claimed that § 31-60-2 of the Regulations of Connecticut State Agencies[7] "directly contradicts [§] 31-62-E3 (c) and allows compliance if there is 'substantial evidence' that the money and tips claimed was received by the employee, and [the defendant] here has provided more than substantial evidence [establishing that fact] . . . ." (Emphasis omitted.) The defendant also claimed that the plaintiff failed to allege any harm, i.e., unpaid wages, resulting from the alleged recordkeeping violation and that a technical violation of the recordkeeping

[7] Prior to September 24, 2020, § 31-60-2 of the Regulations of Connecticut State Agencies, which is among the general provisions in the tip credit regulations, provided in relevant part: "For the purposes of this regulation, 'gratuity' means a voluntary monetary contribution received by the employee from a guest, patron or customer for service rendered. (a) Unless otherwise prohibited by statutory provision or by a wage order gratuities may be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (2) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record, even though payment is made more frequently and (3) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall provide substantial evidence that the amount claimed, which shall not exceed the allowance hereinafter provided, was received by the employee. For example, a statement signed by the employee attesting that wages received, including gratuities not to exceed the amount specified herein, together with other authorized allowances, represents a payment of not less than the minimum fair wage . . . for each hour worked during the pay period, will be accepted by the commissioner as 'substantial evidence' for purposes of this section, provided all other requirements of this and other applicable regulations shall be complied with. . . ."

requirements is not actionable. As to the E4 claim, the defendant argued that the side work performed by the plaintiff was "either service work or 'incidental to' or 'related' to her service [duties]" and, therefore, did not need to be separately recorded to preserve the defendant's ability to claim the tip credit. In the alternative, the defendant claimed that the plaintiff's E4 claim failed because the defendant complied with the department's enforcement policy regarding § 31-62-E4 of the regulations, pursuant to which a tip credit may be taken so long as any nonservice duties account for less than 20 percent of the service employee's total working time during each shift (80/20 rule). The defendant also claimed that "per [department] guidance and Second Circuit law, [any] potential damages [were], at most, de minimis."

The parties filed memoranda in opposition to the motions for summary judgment and reply memoranda in support of their motions, primarily repeating their respective arguments. The court, *Moukawsher*, *J.*, held a remote hearing on the motions on August 13, 2020, and took the matter under advisement. Before the court issued a decision, the relevant regulations were amended pursuant to legislation passed during a special session on July 22, 2019. See Public Acts, Special Sess., July 22, 2019, No. 19-1 (Spec. Sess. P.A. 19-1). Section 5 of Spec. Sess. P.A. 19-1 provides in relevant part: "[T]he Labor Commissioner shall post on the eRegulations System a notice of intent to adopt regulations . . . concerning employees who perform both service and nonservice duties and allowances for gratuities permitted or applied as part of the minimum fair wage pursuant to section 31-60 of the general statutes. . . . Such notice shall also provide for the repeal of section 31-62-E4 of the regulations of Connecticut state agencies upon the effective date of regulations adopted pursuant to this section. Regulations adopted pursuant to

this section shall be: (1) In accordance with the Fair Labor Standards Act, 29 [U.S.C. §] 203 (m) (2) and 29 [C.F.R. §] 531.56 (e), as interpreted by [§] 30d00 (e) of the federal Department of Labor's Field Operations Handbook, prior to November 8, 2018, which was previously referred to as the '80/20 rule,' and (2) effective when posted to the eRegulations System web site by the Secretary of the State."

The department complied with that directive and posted the amended tip credit regulations, effective September 24, 2020. See Regs., Conn. State Agencies § 31-62-E1 et seq. (September 24, 2020). The department repealed § 31-62-E4 of the regulations and added § 31-62-E3a of the regulations, which provides that an employer is not required to segregate a service employee's time spent performing nonservice duties unless the employee performs such nonservice duties for more than two hours or for more than 20 percent of the employee's shift, whichever is less.[8] The department also amended § 31-62-E2 of the regulations, defining "duties incidental to such service" as the performance of twenty-three specific tasks; see Regs., Conn. State Agencies § 31-62-E2 (d) (September 24, 2020); and § 31-62-E3 of the regulations, changing the recordkeeping requirements set forth in subsections (b) and (c) by replacing the weekly reporting of gratuities with reporting "on a daily, weekly, or bi-weekly basis." See

[8] Section 31-62-E3a of the Regulations of Connecticut State Agencies provides: "(a) On any day that a service employee performs nonservice employee duties: (1) For two hours or more, or (2) For more than 20 percent of the service employee's shift, whichever is less, the employer shall not claim credit for gratuities as part of the minimum fair wage for that day. (b) If a service employee performs nonservice duties during the course of a day's work in excess of the lesser of subdivision (1) or (2) of subsection (a) of this section, the employer shall segregate and record time spent on nonservice duties to claim a credit for gratuities as part of the minimum fair wage for that day."

Regs., Conn. State Agencies § 31-62-E3 (September 24, 2020).[9]

On September 25, 2020, the defendant sought permission to file a supplemental memorandum of law addressing the impact of the new regulations on the present case, which the court granted after a hearing. In its supplemental memorandum, the defendant claimed that the new regulations applied retroactively because the department simply clarified the prior regulations by specifying what constitutes compliance with the recordkeeping requirements under § 31-62-E3 of the regulations and by defining "duties incidental to service" as used in the regulations. In her reply memorandum, the plaintiff claimed that, because the effective date of the regulations is September 24, 2020, "[t]he plain language precludes retroactivity . . . ."

The trial court issued its memorandum of decision on December 11, 2020, rendering summary judgment in favor of the plaintiff, but denying her motion as to penalty damages, and denying the defendant's motion as to liability, but granting its motion as to its good faith

[9] Section 31-62-E3 of the Regulations of Connecticut State Agencies (September 24, 2020) provides in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a daily, weekly, or bi-weekly basis in a wage record even though the payment is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any service employee shall obtain substantial evidence as described in Section 30-60-2, such as a daily, weekly, or bi-weekly attestation or statement in electronic or written format demonstrating that the service employee has received in gratuities not less than the amount claimed as credit for part of the minimum fair wage. Such attestation or statement shall contain the week ending date of the payroll week for which credit is claimed. Such attestation or statement may include documentation via an electronic point of service system or any other method that verifies the amount a service employee has received in gratuities for the pay period in question. Such attestation, statement, or substantial evidence shall satisfy the requirements of subsection (b) and this subsection."

defense. The court first determined that the defendant's records did not account for the taking of the tip credit on a weekly basis, as required by § 31-62-E3 of the regulations as it was written at all relevant times and, therefore, that the defendant was not allowed to take the tip credit. The court reasoned that "the regulations require employers to keep two records before they may take a tip credit against the mandatory minimum wage: 'record on a weekly basis as a separate item in the wage record' . . . 'the amount received in gratuities claimed as a credit for part of the minimum fair wage' [and] 'obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage.'

"Unfortunately, [although] [the defendant] keeps tip records, it doesn't keep the required tip records. First, it has a system called 'DINE' that requires servers each day to report cash tips and verify tips charged by credit card. If the system were only cumulative it might meet the requirement because employees could see on this wage record on a weekly basis the tips claimed for the credit. . . . Second, [the defendant's] employees are presented biweekly with a 'Sign Off Report.' It lists the biweekly total cash and credit card tips. If it showed a weekly breakdown, it too might comply. But it doesn't.

"[The defendant] claims that not complying with the words of the regulation shouldn't matter. It says that what matters is that it can show [that the plaintiff], between tips and employer payments, always earned at least the minimum wage, and that ensuring she gets the minimum wage is what the regulations are about. Put another way, [the plaintiff] wasn't harmed, so she can't complain. If only the regulations said this, [the defendant] would be right. But they don't. They don't say to combine what [the defendant] paid with what tips [the plaintiff] received to ensure that the combination

of both provided [her] with the minimum wage. They do not turn on whether [the plaintiff] was 'harmed.'

"Instead, § 31-62-E3 [of the regulations] says that: 'Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . .' This means that when the provisions aren't complied with, the gratuities aren't recognized at all. The server keeps the gratuities, and the minimum wage must be paid to the server without regard to the gratuities.

"[The defendant] claims the regulation at § 31-60-2 should be read as relieving [it] of this mechanism by allowing it to substitute 'substantial evidence' of compliance. But . . . this section also says that [the defendant] must additionally comply with all of the other regulations, one of which—§ 31-62-E3—expressly and without qualification conditions its right to take the credit on bookkeeping compliance. . . .

"Contrary to [the defendant's] thinking, the law is mechanical. The court is given no discretion. If [the defendant] failed to keep the required records, it wasn't allowed to take the tip credit. While [the defendant] thinks this is pointless, the regulation can easily be seen as imposing for enforcement purposes a simple weekly record that the employee, the employer, the [department], and the court can all look at to see if the credit taken equals the tips earned. It imposes a stiff if simple penalty. The court hasn't the power to change it.

"While both sides have spent time discussing differing views in other nonbinding court decisions, reviewing guidance from the department, and considering agency practices, none of these things matter. When the words in the regulations unambiguously require weekly records that must be the court's sole focus."

The court next determined that the side work performed by the plaintiff was nonservice work and that,

because the defendant failed to segregate the time spent on side work from the time spent on service duties, the defendant improperly claimed the tip credit pursuant to § 31-62-E4 of the regulations. Finally, the court concluded that the defendant's "undisputed activities, in light of the circumstances prevailing, establish[ed] that a reasonable fact finder could only conclude that it believed in good faith that it was complying with the law." Accordingly, the court granted the plaintiff's motion for summary judgment as to liability on both counts of her complaint but denied her motion as to penalty damages pursuant to § 31-68 (a) (1) (B). The court also denied the defendant's motion for summary judgment as to liability but granted its motion as to its good faith defense.

On January 4, 2021, the plaintiff moved for judgment in accordance with the court's decision in the amount of $10,437.12, which included $9137.33 in damages and $1299.79 in interest calculated at 4.5 percent per annum pursuant to General Statutes § 37-3a.[10] The court granted the motion and rendered judgment for the plaintiff in that amount on February 10, 2021. This appeal and cross appeal followed. Additional facts will be set forth as necessary.

Before addressing the parties' claims, we first set forth our standard of review. "Because the decision to grant a motion for summary judgment is a question of law, our review of the trial court's decision is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Estate of Brooks* v. *Commissioner of Revenue*

[10] During oral argument before this court, the parties agreed that the plaintiff's calculation of damages was the same for her E3 and E4 claims.

Services, 325 Conn. 705, 709, 159 A.3d 1149 (2017), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018).

I

The defendant first claims that the court improperly rendered summary judgment for the plaintiff on her E3 claims. Specifically, the defendant claims that the court misconstrued the relevant statutes and regulations in concluding that § 31-68 (a) authorized a private cause of action for a recordkeeping violation under § 31-62-E3 of the regulations when there is no attendant failure to pay wages. The defendant argues that § 31-62-E3 of the regulations is directory, not mandatory, such that a purely technical violation of the regulation does not invalidate the tip credit and give rise to a private cause of action under § 31-68 (a).[11] For her part, the plaintiff claims that the court properly determined that compliance with the regulations is a condition precedent to taking the tip credit and that an employer's failure to comply is therefore actionable under § 31-68 (a). We agree with the defendant.

The defendant's claim requires that we construe the wage statutes and regulations. "Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement. . . . This

[11] General Statutes (Supp. 2016) § 31-68 (a) (1) provides for a private cause of action "[i]f any employee is paid by his or her employer less than the minimum fair wage . . . to which he or she is entitled under [under the minimum wage statutes] or by virtue of a minimum fair wage order . . . ." Whether the plaintiff was paid less than the minimum fair wage to which she was entitled "by virtue of" § 31-62-E3 of the regulations turns on whether § 31-62-E3's recordkeeping requirements are mandatory or directory. That is, if the recordkeeping requirements are directory, the defendant's noncompliance would not invalidate the tip credit and, therefore, the plaintiff would not have been paid less than the minimum fair wage to which she was entitled.

principle applies with even greater force to an agency's interpretation of its own duly adopted regulations." (Citations omitted; internal quotation marks omitted.) *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 200 Conn. 489, 496–97, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S. Ct. 781, 93 L. Ed. 2d 819 (1986). Nevertheless, "[b]ecause we do not have the benefit of either a prior judicial or a time-tested agency construction of the applicable provisions, we construe the statutes and regulations in a plenary fashion. . . . Moreover, because regulations have the same force and effect as statutes, we interpret both [in accordance with General Statutes § 1-2z]." (Citation omitted; footnote omitted.) *Williams* v. *General Nutrition Centers, Inc.*, 326 Conn. 651, 657, 166 A.3d 625 (2017). Section 1-2z provides that "[t]he 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." In addition, "[w]e also note that the minimum wage law should receive a liberal construction in order that it may accomplish its purpose." (Internal quotation marks omitted.) *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 259, 253 A.3d 13 (2020).

Before turning to the regulatory language, we first set forth the following background regarding the tip credit regulations. "In 1958 . . . the department issued a revised wage order for restaurant employees that for the first time recognized that gratuities could count toward the minimum wage under certain circumstances. . . . The 1958 wage order contained definitions of service and nonservice restaurant employees . . . that are substantially identical to those presently contained in § 31-62-E2 (c) and (d) of the Regulations of Connecticut

State Agencies. . . . It also provided that [g]ratuities received *by a service employee* may be allowed as part of the minimum fair wage . . . .

"[I]n 1980, the legislature replaced the discretionary phrase [the commissioner] *may* recognize, as part of the minimum fair wage, gratuities . . . for persons employed in the hotel and restaurant industry . . . General Statutes (Rev. to 1979) § 31-60 (b); with the mandatory language [the commissioner] *shall* recognize . . . ." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of Labor*, 325 Conn. 72, 82–83, 155 A.3d 1255 (2017).

Currently, "[§] 31-60 (b) begins by authorizing the commissioner to adopt such regulations . . . as may be appropriate to carry out the purposes of [the minimum wage statutes]. It concludes by providing that [t]he commissioner may provide, in such regulations, modifications of the minimum fair wage herein established . . . for such special cases or classes of cases as the commissioner finds appropriate to prevent curtailment of employment opportunities, avoid undue hardship and safeguard the minimum fair wage herein established." (Internal quotation marks omitted.) Id., 89. Thus, "the statutory language reasonably can be read to delegate to the department the authority to carve out exceptions to the tip credit in order to accomplish the remedial purpose of the minimum wage law, which is to require the payment of fair and just wages." (Internal quotation marks omitted.) Id., 88–89.

We now turn to the regulations that were in effect when the plaintiff was employed by the defendant. Section 31-62-E3 of the regulations provided in relevant part: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . (b) the amount

received in gratuities claimed as credit for part of the minimum fair wage shall be recorded on a weekly basis as a separate item in the wage record even though payment is made more frequently, and (c) each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage. Such statement shall contain the week ending date of the payroll week for which credit is claimed. Gratuities received in excess of twenty-three percent of the minimum fair wage . . . per hour, need not be reported or recorded for the purpose of this regulation."

The plaintiff brought the underlying action pursuant to § 31-68 (a), alleging that, because the defendant failed to maintain records pursuant to § 31-62-E3 of the regulations, the defendant was not entitled to claim the tip credit and, therefore, she was not paid the full minimum fair wage to which she was entitled under the wage order. The defendant concedes that it did not maintain the precise records required under the regulations but contends that § 31-62-E3 of the regulations is directory and, therefore, its noncompliance does not invalidate the tip credit and give rise to a private cause of action.[12]

Although the regulation uses the term "shall," our Supreme Court has explained "that the use of the word shall, though significant, does not invariably create a

[12] We note that judges of the Superior Court have reached different conclusions as to whether the recordkeeping requirements under § 31-62-E3 of the regulations of are mandatory or directory. Compare *Anderson* v. *Reel Hospitality, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6123912-S (July 26, 2022) (after considering relevant factors, court concluded that § 31-62-E3's recordkeeping requirements are directory), with *McCants* v. *Outback Steakhouse of Florida, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20-6133189-S (April 20, 2021) (applying same factors and concluding that requirements are mandatory).

mandatory duty. . . . Indeed, [the court] frequently ha[s] found statutory duties to be directory, notwithstanding the legislature's use of facially obligatory language such as shall or must." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, 314 Conn. 749, 757, 104 A.3d 713 (2014); see also *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 597, 181 A.3d 550 (2018) ("that the language of the rule only uses the word 'shall,' and does *not* also contain the 'more permissive' word 'may,' further suggests that the use of the word 'shall' therein is directory" (emphasis in original)).

Thus, in determining whether a provision's requirements are mandatory or directory, we look to other relevant considerations, which include: "(1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance. . . .

"The first two factors are addressed to the statutory text. A reliable guide in determining whether a statutory provision is . . . mandatory is whether the provision

is accompanied by language that expressly invalidates any action taken after noncompliance with the provision. . . . By contrast, where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions. . . . Furthermore, a requirement stated in affirmative terms unaccompanied by negative words . . . generally is not viewed as mandatory." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Ins. Co. of the State of Pennsylvania*, supra, 314 Conn. 758–59.

Section 31-62-E3 of the regulations does not expressly invalidate the taking of the tip credit, and it is stated in affirmative terms unaccompanied by negative language: "Gratuities shall be recognized as constituting a part of the minimum fair wage when all of the following provisions are complied with . . . ." In contrast, § 31-62-E4 of the regulations is stated in negative terms and expressly invalidates actions that fail to comply with its requirements: "If an employee performs both service and nonservice duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, *no allowances for gratuities may be applied as part of the minimum fair wage*." (Emphasis added.) The juxtaposition of these provisions in consecutive regulations concerning the tip credit favors construing § 31-62-E3's recordkeeping requirements as directory, as "[i]t is a well established rule of statutory interpretation that, when a statute concerning one subject contains a particular provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *D'Angelo Development &*

Construction Co. v. *Cordovano*, 278 Conn. 237, 246, 897 A.2d 81 (2006).

Further, as noted by the defendant, the statutory and regulatory scheme sets forth a specific penalty for the failure to maintain the required records, which also supports construing the recordkeeping requirements in § 31-62-E3 of the regulations as directory. Specifically, General Statutes § 31-69 (c) provides for a civil penalty for an employer's failure "to keep the records required under this part or by regulation made in accordance with this part" and § 31-62-E15 of the Regulations of Connecticut State Agencies provides that an employer who fails to keep the required records "shall be subject to the penalty provided in section 31-69 of the Connecticut General Statutes."

The plaintiff, however, contends that the penalty referenced in § 31-62-E15 of the regulations applies only to the recordkeeping requirement of § 31-62-E14 of the Regulations of Connecticut State Agencies—not § 31-62-E3—and that § 31-62-E15 "nowhere indicates that it is the exclusive penalty, consequence or remedy." Therefore, according to the plaintiff, "[t]he regulations merely add a penalty as an additional consequence of an employer's failure to maintain employment records." We are not persuaded by the plaintiff's arguments.

First, § 31-62-E14 of the regulations specifically references the records required to be kept under § 31-62-E3 of the regulations. See Regs., Conn. State Agencies § 31-62-E14 (a) ("'true and accurate records' means accurate legible records for each employee showing . . . (10) separate itemization on payroll records of each allowance (meals, lodging, *gratuities*) used as part of the minimum fair wage [and] (11) statements signed by employee in accordance with section 31-62-E3 when credit for gratuities is claimed as part of minimum fair wage" (emphasis added)). Second, although there is no

indication that the penalty imposed under § 31-69 and referenced in § 31-62-E15 of the regulations is the exclusive remedy for a violation of the recordkeeping provisions in § 31-62-E3 of the regulations, "where a statute by its terms imposes some other specific penalty, it is reasonable to assume that the legislature contemplated that there would be instances of noncompliance and did not intend to invalidate such actions." *Electrical Contractors, Inc.* v. *Insurance Co. of the State of Pennsylvania*, supra, 314 Conn. 759. Accordingly, we conclude that the first two factors favor construing the recordkeeping provisions in § 31-62-E3 of the regulations as directory.

Turning to the third factor, whether the requirements at issue relate to a matter of substance or one of convenience, our Supreme Court has explained that the focus of this inquiry is "whether the prescribed mode of action is the essence of the thing to be accomplished . . . . If it is a matter of substance, the statutory provision is [generally held to be] mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory . . . ." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 598.

The defendant argues that "[t]he recordkeeping regulations regard . . . matters of convenience and order (i.e., tracking the payment of wages and tips), not the substance or essence of the matter (i.e., the actual payment of wages and tips)." The plaintiff contends that "[t]he essence of [§ 31-62-E3 of the regulations] is to ensure that restaurants do not take a tip credit from the weekly tips of its servers without involving those servers in a procedure that ensures that enough tips were earned to cover the tip credit claimed. If restaurants choose to disregard these procedures, then they

owe the full minimum wage. If they pay less, then they may be sued for damages." We agree with the defendant.

As our Supreme Court has explained, pursuant to § 31-60 (b), the department has "the authority to carve out exceptions to the tip credit in order to accomplish the remedial purpose of the minimum wage law, which is to require the payment of fair and just wages." (Internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 88–89. The department issued a wage order for § 31-62-E1 of the Regulations of Connecticut State Agencies that provides in relevant part: "Wage Order: (a) Rate: The following minimum wages are ordered . . . $9.60 per hour on 1-1-16; and $10.10 per hour on 1-1-17 except those persons employed under this wage order as service employees (waitpersons) shall be paid . . . $6.07 per hour plus gratuities on 1-1-16; and $6.38 per hour and gratuities on 1-1-17. . . ."[13] To ensure that service employees are properly compensated in accordance with § 31-62-E1 of the regulations, subsections (b) and (c) of § 31-62-E3 of the regulations required that "*the amount received in gratuities claimed as credit for part of the minimum fair wage* shall be recorded on a weekly basis as a separate item in the wage record" and that "each employer claiming credit for gratuities as part of the minimum fair wage paid to any employee shall obtain weekly a statement signed by the employee attesting that he has received in gratuities *the amount claimed as credit for part of the minimum fair wage*." (Emphasis added.)

The purpose of these provisions is to ensure that service employees receive the amounts claimed as a credit toward the minimum fair wage by their employers. As the plaintiff stated in her memorandum of law

[13] We note that the language of this wage order was in effect at the time of the underlying events but that this information is no longer available on the department's website.

in support of her motion for summary judgment, the rule requiring a signed statement "ensures that servers are not underpaid wages." To be sure, an employee's acknowledgment that she has received the amount claimed as the tip credit is a matter of substance. At the same time, however, the requirements that the acknowledgment be written, as opposed to digital, and that it be done weekly, as opposed to daily, are "designed to secure order, system and dispatch in the proceedings . . . ." (Internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 598. For this reason, the form in which the records are kept is not "the essence of the thing to be accomplished"; (internal quotation marks omitted) id.; but, rather, a means to accomplish the end, which is "payment of fair and just wages." (Internal quotation marks omitted.) *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 89; see also *Ravetto* v. *Triton Thalassic Technologies, Inc.*, 285 Conn. 716, 725, 941 A.2d 309 (2008) ("the wage statutes were designed to [effectuate] the statutory policies of compensating employees and deterring employers from failing to pay wages" (internal quotation marks omitted)). Accordingly, this factor also supports the defendant's construction of the regulations.

As to the fourth factor, whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme demonstrate an intent to impose a mandatory requirement, we note that there is limited regulatory history regarding § 31-62-E3 of the regulations. Nevertheless, given that the regulations reference the penalty provision in § 31-69 for failure to maintain the required records and that, unlike § 31-62-E4 of the regulations, § 31-62-E3 does not expressly invalidate actions that fail to comply

with its requirements, we conclude that the full regulatory scheme does not suggest an intent to impose mandatory requirements as to the format of the required records.

As to the fifth factor, whether holding the recordkeeping requirements to be mandatory would result in an unjust windfall for the party seeking to enforce the duty, it bears emphasis that the plaintiff has not alleged that she earned less in gratuities than the amount claimed as a credit by the defendant in any given week. Despite the absence of such an allegation, the plaintiff would be entitled to more than $10,000 in damages and interest simply because the defendant did not maintain the required records on a weekly basis, rather than on the daily and biweekly bases in which they were kept. Thus, holding the recordkeeping requirements under § 31-62-E3 (b) and (c) of the regulations to be mandatory would result in an unjust windfall for the plaintiff. Our Supreme Court's decision in *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 961 A.2d 349 (2008), on which the defendant relies, is instructive on this point.

In *Weems*, the defendant employer claimed that, under General Statutes § 31-71e, which provides that "[n]o employer may withhold or divert any portion of an employee's wages unless . . . (2) the employer has written authorization from the employee for deductions on a form approved by the commissioner" the requirement that an employer use a form approved by the commissioner was directory "because it is drafted in affirmative, rather than negative terms, and does not explicitly provide a penalty or a right of action for noncompliance, or provide guidance for the department's decision to approve or deny a particular form." Id., 789.

Our Supreme Court agreed that the requirement was directory, reasoning that the statute did not "expressly

invalidate deductions made on unapproved forms, and the only penalty provision that arguably [was] implicated by the failure to seek department approval . . . [did] not invalidate the transaction, but provides merely for fines, a term of imprisonment or both. . . . Moreover . . . an interpretation of § 31-71e requiring the automatic invalidation and refund of *any* wage deductions made on unapproved forms conceivably could result in unwarranted windfalls for employees . . . . Although it is well established that the wage collection statutes are remedial in nature, namely, intended to prevent the employer from taking advantage of the legal agreement that exists between the employer and the employee . . . and should be construed liberally in the employees' favor . . . that construction does not require windfalls for technical violations." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 792–94.

The plaintiff contends that *Weems* is distinguishable from the present case because compliance with the recordkeeping requirements in § 31-62-E3 of the regulations is a condition precedent to taking the tip credit. In support of her contention, the plaintiff relies on *Engle* v. *Personnel Appeal Board*, 175 Conn. 127, 394 A.2d 731 (1978).

Notably, the plaintiffs in *Weems* also relied on *Engle* in support of their argument that § 31-71e's requirement that an employer use a form approved by the commissioner was mandatory. See *Weems* v. *Citigroup*, *Inc.*, supra, 289 Conn. 793 n.26. Our Supreme Court, however, "disagree[d] with the plaintiffs' reliance on *Engle* v. *Personnel Appeal Board*, supra, 175 Conn. 129–30, in which [the] court concluded that, under General Statutes § 5-209, the approval of the state personnel commissioner was mandatory before a state employee could be compensated at a higher rate for performing tasks attendant to a higher job classification for more than

sixty days. The statutory language in question provided: Any state employee who is assigned, by his appointing authority, duties and responsibilities of a job classification higher than the class in which he is placed, on a continuous basis for a period of more than sixty working days, shall be compensated for such time in excess of sixty days at a rate in the higher class which shall not be less than one step in that class above his existing rate of pay, *provided such payment shall be approved by the personnel commissioner*. Service in a higher classification under this section shall not constitute permanent status in such class. . . . [In *Engle*, our Supreme Court] rejected a state employee's claim that the [personnel] commissioner's approval was not necessary for her to be paid at a higher level, stating that [a]dopting the plaintiff's position would effectively eliminate the proviso from the statute. The statute expressly makes payments contingent on approval by the personnel commissioner; if [that] commissioner is powerless to withhold approval once the work has been performed, then the proviso is meaningless. . . . The court further noted that the proviso was important to the essence of the civil service statutes, which were intended to give the personnel commissioner . . . broad powers to administer the state personnel system and was to supervise carefully any changes in employee placement, as well as to limit provisional and emergency appointments. . . . Requiring the approval of the personnel commission avoided the possibility of all appointing authorities from using § 5-209 to circumvent other requirements of the State Personnel Act, and perhaps even subvert the goals of the merit system." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, supra, 793–94 n.26.

Our Supreme Court concluded that the facts involved in *Engle* were distinguishable from those involved in

Weems for two reasons. Id., 794 n.26. "First, § 31-71e (2) lacks the explicit proviso language of § 5-209. Second, the essence of the wage statutes is to protect employees from being taken advantage of by their employers. . . . If the employee has knowingly and voluntarily consented to the deduction at issue, and even benefited from it, then invalidating deductions because of a technical violation does not further the purpose of the wage collection statutes." (Citation omitted.) Id.

The same reasoning applies in the present case. At the end of each shift, the defendant required each server to record and verify in its digital payroll system, which automatically tracked the credit card tips received by each server, the amount they received in tips; the server entered any cash tips received and confirmed the amount of credit card tips received. The servers also signed a biweekly report stating the amount of tips the server earned, listing separately the credit card and cash tips. Thus, the plaintiff confirmed the amount she received in tips at the end of each shift and at the end of each pay period. Significantly, she does not allege in her complaint and has never claimed that the defendant claimed a tip credit in an amount greater than the amount she received in tips in any week. Nor has she ever claimed that she did not receive the applicable statutory minimum fair wage during any week in the course of her employment. Accordingly, as in *Weems*, the plaintiff here "knowingly and voluntarily consented to the deduction at issue" and, therefore, invalidating those deductions due to a technical violation of the regulation would not further the purpose of the wage order. Id.

Finally, the sixth factor favors the plaintiff because compliance is reasonably within the control of the defendant, as the defendant controls its recordkeeping practices and the format of its records. Nevertheless,

this is the only factor that does not support the defendant's construction of the regulation, and we are not persuaded that this factor outweighs the other factors. See *Doe* v. *West Hartford*, 328 Conn. 172, 186–87, 177 A.3d 1128 (2018) ("although we agree with the defendants that ensuring that a marshal fulfills the statutory endorsement requirement is, to some degree, within the control of a plaintiff, we nevertheless disagree that this circumstance is enough to overcome the other considerations weighing in favor of a conclusion that the endorsement requirement is directive").

Thus, in balancing all the relevant factors, we conclude that the recordkeeping requirements in § 31-62-E3 (b) and (c) of the regulations are directory and, therefore, that the defendant's noncompliance with those requirements does not invalidate the tip credit and does not give rise to a private cause of action. Accordingly, the court improperly rendered summary judgment for the plaintiff on her E3 claims.[14]

II

The defendant next claims that the court improperly rendered summary judgment for the plaintiff on her E4 claim. We are not persuaded.

In support of her motion for summary judgment on her E4 claim, the plaintiff relied on two of the department's publications regarding the tip credit in the restaurant industry: a 2015 booklet published by the department; see Conn. Dept. of Labor, Wage and Workplace Standards Division, "Basic Guide to Wage and

[14] Because we agree with the defendant's claim that the recordkeeping requirements are directory, such that the defendant's noncompliance does not invalidate the tip credit, we do not consider the defendant's claim that the court improperly failed to apply the September 24, 2020 amendments to the regulations retroactively in the present case.

Hour and Related Laws Regarding the Restaurant Industry" (2015) (Guide); and a printout from the department's website dated August 31, 2018, titled "Gratuities in the Restaurant Industry" (department's website).[15]

The Guide discusses the phrases "duties relating solely to the service of food and/or beverages" and "patrons seated at tables or booths" used in the definition of "service employee" in § 31-62-E2 (c) of the regulations. As to the duties relating solely to service, the Guide provides that "[e]ach task performed by a [server] must be analyzed to establish whether . . . it can be classified as 'service' to determine if a tip credit is appropriate. This means that a tip credit . . . can be taken only for [servers] only during the time for which they are actually serving patrons at tables or booths, or performing closely related duties, and when they are receiving gratuities. Examples of tasks which are classified as service duties (tip credit appropriate): Taking food and beverage orders from patrons at tables or booths; [c]onveying the order to the kitchen or bar; [p]icking the order up and delivering it to the patron; [p]rocessing the patron's payment for the meal to a register or cashier; [c]learing the tables/booths when the patron leaves; [c]leaning the immediate service area; [r]esetting the table/booths for new patrons; [r]efilling condiment containers for the service person's own station; [w]rapping silverware in napkins for the service person's own station; [v]acuuming/sweeping the floor surrounding the service person's own station; [f]illing a patron's drink order from a soft drink dispenser or coffee station; [c]utting a slice from a pie in a dessert display case, placing it on a plate, and bringing it to a patron; [and] [b]ringing dirty dishes and silverware to a dishwashing area. . . . Examples of tasks which are [nonservice] duties (tip credit not appropriate): General cleaning of the establishment; [p]reparing food for

[15] This information is no longer available on the department's website.

patrons (cooking, peeling, cutting, mixing, etc.); [o]perating a dishwashing machine; [s]hoveling snow from a sidewalk; [s]weeping the parking lot; [and] [w]ashing windows. The Restaurant Wage Order requires that the tip credit can be taken only while the employee performs service duties, or functions incidental to service duties." Guide, supra, pp. 10–12.

As to the phrase "patrons seated at tables or booths," the Guide provides in relevant part: "Restaurants having a take-out section in addition to table/booth service are not entitled to a tip credit on employees who staff the take-out area, or on those who staff the take-out area in addition to serving patrons at tables and booths." Id., 13.

In addition, the Guide set forth the department's enforcement policy regarding § 31-62-E4 of the regulations, stating: "Since classifying specific duties (service versus [nonservice]) for purposes of having the employee segregate them on a time record is often difficult, the division has initiated an enforcement policy which will make detailed classification largely moot. We will allow use of a tip credit if these [nonservice] (and/or questionable service-related) duties comprise 20 [percent] or less of the service person's total working time on a particular shift. As long as these [nonservice] (and/or questionable service-related) tasks are only occasionally performed and are of short duration, the employer need not require the employee to segregate them on the time record or pay the full minimum wage while they are being executed. If it is reasonably clear that the service person spent 80 [percent or more] of his or her time performing service and incidental duties on a given shift, use of the tip credit will not be challenged." (Emphasis omitted.) Id. The Guide further explained: "You should note that this 20 [percent] enforcement policy is not intended to allow an employer to assign a tip credit service person to do [a nonservice]

job such as dishwashing or food preparation for 20 [percent] of his or her work time. It is solely intended as a mechanism to provide some protection from a complaint in which an employee seeks payment of the full minimum wage for an entire shift because he or she performed a [nonservice] task for several minutes. The 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a service shift.

"An employer is still required to pay the full minimum wage when a [normally] service employee, either by design or change, performs less than the required 80 [percent or more] service duties on a shift. Further, if a [normally] service employee is assigned to perform work which would usually be performed by a [nonservice] employee, the time record must reflect the change in assignment and the full minimum wage must be paid." Id.

The department's website also provided examples of " '[s]ervice' (and closely related) duties," which included the following six tasks: "[t]aking food and beverage orders from patrons"; "[b]ringing the orders to the table or booth"; "[c]leaning up the immediate area of service"; "[f]illing the condiment containers at the tables or booths"; "[v]acuuming their own immediate service area"; and "[r]eplacing the table setting at their own service area." The website also listed the following eight nonservice duties: "[c]leaning the rest rooms"; "[p]reparing food"; "[w]ashing dishes"; "[h]ost or [h]ostess work (Note: each waiter or waitress may show patrons to their seats within their own service area without losing their 'service' classification, but if a waiter or waitress shows all patrons to their seats, there can be no tip credit taken on that employee and the full minimum wage must be paid)"; "[g]eneral set-up work before the restaurant opens"; "[k]itchen clean-up";

"[g]eneral cleaning work"; and "[w]aiting on take-out customers." (Emphasis omitted.)

The plaintiff claimed that, based on the definition of "service employee" in § 31-62-E2 (c) of the regulations and the examples provided by the department in the Guide and on its website, for a task "to be a 'service duty' it must be performed in the 'immediate service area,' otherwise it is a 'nonservice' duty." Relying on the lists of side work produced by the defendant during discovery, the deposition testimony of the defendant's managers, and her own deposition testimony, the plaintiff claimed that "there [was] no factual dispute that this . . . side work was required to be performed and was performed away from the tables . . . ." She noted that her "nonservice duties" included taking "to-go orders, rolling a full bucket of silverware, food prep, cleaning the restaurant, cleaning the kitchen, cleaning and restocking the back of the restaurant, preparing salads, making milkshakes, smoothies, fruit bowls, desserts, cleaning and filling syrup bottles, cleaning the juice machine, cleaning the soda machine, cleaning all surfaces in the server aisle, making coffee, cleaning and stocking the coffee area, transporting glass racks, filling the sugar caddy in the back of the [restaurant], stocking to-go area, hosting, being a cashier, cleaning and stocking butter bar station, cleaning insides [and] outsides of four refrigerators. . . . There is no issue of fact as to whether these duties were performed, and per our jurisprudence they are not 'incidental to service' because such a broad interpretation of that phrase would swallow the rule."

Conversely, in support of its motion for summary judgment on this claim, the defendant argued that all the side work duties performed by the plaintiff were in accord with the tasks identified as "service duties" in the Guide. The defendant argued that "it is clear that all of the duties the plaintiff listed constitute side work

which was absolutely incidental to her service work. [Her] customers sat in debris-free chairs because she kept her section clean; they had jelly for their toast and sugar for their coffees because [she] kept the service caddies full; they ate their eggs and pancakes (which the plaintiff did not cook) with knives and forks because the plaintiff rolled silverware for her tables. None of these duties . . . actually constitutes 'nonservice work' such that a server should not perform it." Notably, although the plaintiff identified handling "to-go orders" as a nonservice duty, the defendant did not address that task in its analysis.[16] In the alternative, the defendant argued that the 80/20 rule as stated in the department's enforcement policy should apply and that any potential damages were de minimis.

Although both parties relied on the department's guidance as to the meaning of service and nonservice duties, the court explained that it agreed "that what appears there seems [to be] a sensible and useful reference, but it does not have the force of law. Instead . . . the plain meaning of the words do."

Prior to 2020, § 31-62-E4 of the regulations provided: "If an employee performs both service and nonservice duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and nonservice duties and the time spent on each cannot be definitely

[16] The defendant noted that the plaintiff identified the following "nonservice duties" during her deposition: "cleaning syrup bottles, filling up glassware racks, restocking bus buckets, as well as other necessary items for service (such as plates, bread, soup cups, napkins and straws, sugars, mints, creamers, etc.), making coffee, sweeping and wiping down the line, wiping down her side stations (including the soda machine, juice machine and coffee maker), cleaning and stocking the salad bar station, keeping the window sills, seats and floors beneath her tables clean, filling or combining condiment jars and salt and pepper shakers, and rolling silverware."

segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

Also prior to 2020, the relevant regulations; Regs., Conn. State Agencies § 31-62-E1 et seq. (March 8, 2015); did not define service or nonservice duties. Section 31-62-E2 (c) and (d) of the regulations, however, did define service and nonservice employees as follows: "(c) 'Service employee' means any employee whose duties relate solely to the serving of food and/or beverages to patrons seated at tables or booths, and to the performance of duties incidental to such service, and who customarily receives gratuities. . . . (d) 'Nonservice employee' means an employee other than a service employee, as herein defined. A nonservice employee includes, but is not limited to, countergirls, counterwaitresses, countermen, counterwaiters and those employees serving food or beverage to patrons at tables or booths and who do not customarily receive gratuities as defined above."

Relying on the plain meaning, the court reasoned that "[n]onservice is obviously the opposite of service. Service plainly involves serving. It is equally plain that serving in a restaurant involves bringing food and drink to customers, including the small things they might consume such as condiments and the like. Things incidental to serving food and drink plainly include finding out what things the customers want to eat and drink, getting customers the things they might eat and drink with, and maintaining a place—a table and its immediate environs—where they might eat and drink.

"These things are plainly part of service, and service is important to the tip credit. The tip credit parameters make sense because they relate to things people are most likely to tip a server for. People are most likely to tip servers for good service. Servers' work doing

other things might be useful to keep a restaurant going, but they aren't part of serving. Because they are not part of serving, customers are less likely to focus their largess on the server if—for instance—they find a clean bathroom or eat in a restaurant with a clean kitchen, clean windows, well-washed dishes and tasty food. The [department] sensibly concluded that arranging for things like these is nonservice work not incidental to service. For our purposes here we can call it side work.

"The evidence shows that [the plaintiff] did side work. Undisputed evidence shows that [the plaintiff], like other employees, was required to clean portions of the restaurants away from the tables, prepare food, act as a cashier, act as hostess; stockpile napkins, coffee, condiments, and table settings; fill ice machines and many other activities. The trouble is we don't know how long any of this took. Some twenty-four pages of lists of side work were produced, but there was no record of the time [the plaintiff] or anyone else spent at them. [The defendant] suggests that it would be absurd to require the segregation of a tiny amount of time used for this side work, but [the defendant] hasn't shown that it *was* a tiny amount of time, and [the plaintiff] lists substantial side work activities she regularly performed. We don't know how substantial because [the defendant] has never done anything to quantify or limit the work in such a way that a court might come to its aid and say the work was so insubstantial as to push the requirement that the hours be segregated into absurdity.

"And we certainly can't hold that [the defendant] is saved by its own failure to keep the required records. Our Supreme Court has already disapproved of this illogic in its 2003 decision in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, [265 Conn. 210, 239, 828 A.2d 64 (2003)]. According to *Schoonmaker*, in cases where employers haven't kept legally required wage-related records,

employees only have to show they have in fact performed work for which [they were] improperly compensated and [produce] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Once they have done that . . . [t]he burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to provide it, the court may then award damages to the employee, even though the result be only approximate.

"[The defendant] makes much of recent changes in the law in [§ 31-62-E3a of the] Regulations of Connecticut State Agencies (effective September 24, 2020). These regulations adopt a rule that allows an employer to take a tip credit so long as the side work doesn't exceed 20 [percent] of the employee's total time. While some objective guidance is likely helpful in this area, nothing about the enactment of the new regulations can change the plain language of the old regulations. . . .

"[The defendant] says the court should apply the new regulations retroactively. This the court clearly cannot do. These regulations do not clarify the substantive rules. They change them. As our Supreme Court held in . . . *Carr* v. *Planning & Zoning Commission*, [273 Conn. 573, 595–96, 872 A.2d 385 (2005)], changes in the substantive law, unlike changes in court procedure, may not be retroactively applied without offending the constitution.

"[The defendant] in this and much of its other arguments sounds the same theme. The regulations are too mechanical. The penalties are too harsh. The [department] has never enforced them in the way sought here. So, in [the defendant's] view the court should find some rationale to avoid what the lawmakers said and decide

for itself what is just. But the court can't do that. A rule maker with legislative authority made the judgment calls reflected in the law. That rule maker has now adjusted them. The court is obliged to respect that power going forward, but it must apply to the past the rules of the past." (Emphasis in original; footnotes omitted; internal quotation marks omitted.)

On appeal, the defendant claims that the court improperly decided as a matter of law that the plaintiff's side work duties were not incidental to or related to her service duties. It argues that the court "failed to articulate which side work duties were nonservice work and instead wrongly conflated the two concepts, presuming that any duty labeled as side work was nonservice work." (Internal quotation marks omitted.) The plaintiff responds that the court properly defined nonservice work and determined that the side work assigned by the defendant was not service work. She argues that "[i]t is no failure of the court that it did not itemize each task that [the] defendant calls side work and rule which are service and which are nonservice. It ruled that nonservice work was performed by [the plaintiff] and paid at the service task rate. That finding is enough to establish liability under [§ 31-62-E4 of the regulations]." We conclude that the undisputed evidence supports the court's conclusion that the defendant violated § 31-62-E4 of the regulations.

A

As an initial matter, we disagree with the court's conclusion that the "plain meaning" of § 31-62-E4 of the regulations controlled the issue. "In seeking to determine [the] meaning [of a statute or regulation, we] . . . first . . . consider the text of the [regulation] . . . itself and its relationship to other [regulations] . . . . 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 . . . shall not be considered. . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Citation omitted; internal quotation marks omitted.) *MSW Associates, LLC* v. *Planning & Zoning Dept.*, 202 Conn. App. 707, 725–26, 246 A.3d 1064, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

As previously noted in this opinion, § 31-62-E3 (c) of the regulations defines "service employee" as "any employee whose duties relate solely to the serving of food and/or beverages to patrons seated at tables or booths, and to the performance of duties incidental to such service . . . ." Thus, a service duty is any duty that either "relates solely to" or is "incidental to" the serving of food or drinks to customers "seated at tables or booths."

The defendant relies on the dictionary definition of "incidental," i.e., "happening as a result of or in connection with something more important"; Webster's New World College Dictionary (3rd Ed. 1996) p. 682; and claims that the plain meaning of "incidental to" or "related to" is expansive and, therefore, includes as service duties those tasks identified by the plaintiff as side work. The plaintiff, in contrast, emphasizes the spatial aspect of the language in the definition of "service employee" and on the department's website and claims that any task must take place at the tables and booths or in the server's immediate service area. She argues that "[s]ervice work is work that involves serving customers seated at tables or booths. It simply does not include any other tasks. The defendant's side work was done away from the tables and booths and not in the 'immediate area of service.' "

As demonstrated by the parties' respective interpretations, the meaning of "service duties" is susceptible to

more than one reasonable interpretation. Considering that "service duties" is not defined in the regulations and that the definition of "service employee" includes language that supports the parties' respective positions, both interpretations are reasonable. See, e.g., *Brown* v. *Commissioner of Correction*, 345 Conn. 1, 11–12, 282 A.3d 959 (2022) ("[t]he test to determine ambiguity is whether the statute [or regulation], when read in context, is susceptible to more than one reasonable interpretation" (internal quotation marks omitted)); *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language of the first sentence of [the regulation] is ambiguous"). Accordingly, we conclude that § 31-62-E4 of the regulations is ambiguous as to which tasks are service duties and, therefore, it is necessary to consider extratextual evidence.

B

Because the court determined that the relevant language was plain and unambiguous, it did not consider extratextual evidence as to the meaning of service duties or duties incidental to service. Thus, although the court noted that the guidance provided by the department was reasonable, it does not appear that the court relied on that guidance in its analysis of the plaintiff's E4 claim. We recognize that an agency's informal guidance is not entitled to deference, as it is not promulgated through the agency's rule-making authority. Nevertheless, our Supreme Court has explained that, when "an agency's interpretation is reasonable and is not contradicted by previous interpretations, [there is] no reason to disregard it entirely, especially if the provision at issue touches on questions of law and policy within the agency's expertise and regarding which this court has little experience." *Commissioner*

of Correction v. *Freedom of Information Commission*, supra, 307 Conn. 66 n.18; see also *Crandle* v. *Connecticut State Employees Retirement Commission*, 342 Conn. 67, 82, 269 A.3d 72 (2022) ("[T]he United States Supreme Court recognized that, although interpretations contained in opinion letters do not warrant *Chevron*-style deference, they are entitled to respect . . . to the extent that those interpretations have the power to persuade . . . . This formulation seems consistent with our jurisprudence holding that, although an agency's interpretation of a statute is not binding, it is entitled to deference when it is time-tested and reasonable." (Citations omitted; internal quotation marks omitted.)); see generally *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

In the present case, the provision at issue involves the payment of the minimum fair wage in a particular industry, which unquestionably is within the department's expertise. See General Statutes § 31-58 (b) (in establishing minimum fair wage, "the commissioner . . . (1) may take into account all relevant circumstances affecting the value of the services rendered, including hours and conditions of employment affecting the health, safety and general well-being of the workers"). The department promulgated the regulation at issue and recognized that additional guidance was necessary to apply it. See *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 90 ("the department . . . has published instructional materials that clearly delineate how it applies the credit to food service workers"). Thus, in applying § 31-62-E4 of the regulations, we conclude that the department's examples in its informal guidance are instructive, though not dispositive, as to whether a particular task is a "service duty."[17]

[17] Although we find the department's guidance instructive as to the meaning of "service duty," we are not persuaded by the defendant's argument that any reliance on the department's guidance must compel subsequent

C

The defendant also argues that the court erred in failing to apply the new definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020), which lists twenty-three tasks that are "incidental to service." The defendant contends that clarifying the "definition of 'duties incidental to service' does not affect any substantive rights." The plaintiff argues that the new definition of "duties incidental to service" effects a substantive change in the law and, therefore, may not be applied retroactively. According to the plaintiff, "under the new

reliance on the department's enforcement policy adopting the 80/20 rule because it is part of the same guidance. Simply put, the department's enforcement policy is not instructive to our analysis of § 31-62-E4 of the regulations, which includes no durational requirement to trigger the employer's obligation to segregate and record nonservice work. Thus, although § 31-62-E4 of the regulations is ambiguous as to the meaning of "service duties," it is not ambiguous as to any durational requirement. Section 31-62-E4 of the regulations expressly requires that any nonservice duties be segregated from service duties and paid at the full minimum wage. If the employer fails to segregate, then no tip credit may be taken for any part of the shift. Accordingly, because the department's enforcement policy finds no support in the text of the regulations, we do not find it persuasive as to the meaning of § 31-62-E4 of the regulations. Cf. *Fast* v. *Applebee's International, Inc.*, 638 F.3d 872, 880 (8th Cir. 2011) ("Because the regulations do not define 'occasionally' or 'part of [the] time' for purposes of [29 C.F.R.] § 531.56 (e), the regulation is ambiguous, and the ambiguity supports the [federal Department of Labor's] attempt to further interpret the regulation. . . . We believe that the . . . interpretation contained in the [Wage and Hour Division's Field Operations] Handbook—which concludes that employees who spend 'substantial time' (defined as more than 20 percent) performing related but nontipped duties should be paid at the full minimum wage for that time without the tip credit—is a reasonable interpretation of the regulation." (Citation omitted.)), cert. denied, 565 U.S. 1156, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (2012). The defendant's reliance on the department's 80/20 enforcement policy also is misplaced in light of the Guide's caution that "[t]he 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a service shift." The undisputed evidence in the present case is that the service work identified by the plaintiff was not only predictable but also occurred on a regular basis.

[rule], numerous duties that were nonservice under the [department's] prior rule . . . are now 'service' or 'duties incidental to service.' For example, 'rolling silverware,' 'setting up food stations,' 'setting up dining areas,' and 'stocking service areas with supplies such as coffee, food, tableware, and linens' are 'duties incidental to service' pursuant to [§ 31-62-E2 (d) (17) and (18) of the amended regulations]. These tasks occur away from the tables and booths and were nonservice work when [§ 31-62-E4 of the regulations] was in effect." We conclude that the definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020) does not apply retroactively.

"We presume that, in enacting a statute, the legislature intended a change in existing law. . . . This presumption, like any other, may be rebutted by contrary evidence of the legislative intent in the particular case. An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act. . . . An amendment that is intended to clarify the original intent of an earlier statute necessarily has retroactive effect. . . .

"To determine whether the legislature enacted a statutory amendment with the intent to clarify existing legislation, we look to various factors, including, but not limited to (1) the amendatory language . . . (2) the declaration of intent, if any, contained in the public act . . . (3) the legislative history . . . and (4) the circumstances surrounding the enactment of the amendment, such as, whether it was enacted in direct response to a judicial decision that the legislature deemed incorrect . . . or passed to resolve a controversy engendered by statutory ambiguity . . . . In the cases wherein [our Supreme Court] has held that a statutory amendment had been intended to be clarifying and, therefore,

should be applied retroactively, the pertinent legislative history has provided uncontroverted support . . . for the conclusion that the legislature considered the amendatory language to be a declaration of the legislature's original intent rather than a change in the existing statute." (Citation omitted; internal quotation marks omitted.) *Praisner* v. *State*, 336 Conn. 420, 429, 246 A.3d 463 (2020).

The defendant focuses on the fourth factor and argues that, "[w]ithout question, [the department] clarified what was meant by 'duties incidental to service' in response to the ambiguities highlighted by recent legislation. . . . The law has long allowed for servers to perform 'duties incidental to service' while earning a tip credit wage and that term has always had broad connotations." Notably, the defendant does not direct our attention to any part of the regulatory history that provides "uncontroverted support . . . for the conclusion that the [department] considered the amendatory language to be a declaration of [its] original intent rather than a change in the existing [regulations]." (Internal quotation marks omitted.) *Praisner* v. *State*, supra, 336 Conn. 429. In fact, the regulatory history supports the opposite conclusion.

For example, Attorney David R. Golder, who represents the defendant in the present case, submitted a written comment regarding the department's proposed changes, suggesting that the list of tasks in the definition of "duties incidental to service" should not be exhaustive. See Conn. Dept. of Labor, Response to Public Comment on Notice of Intent To Adopt Regulations Concerning Allowances for Tip Credit Gratuities Permitted or Applied as Part of the Minimum Fair Wage, Tracking No. PR2020-014 (July 7, 2020) p. 3, available at https://www.cga.ct.gov/2020/rrdata/pr/2020REG2020-014-PUB.PDF (last visited March 28, 2023). In its response, the depart-

ment concluded "that the list provided is intended to be exhaustive *in an effort to afford predictability and reduce the need for interpretation of duties not so included*." (Emphasis added.) Id., p. 4. Considering that the department's guidance previously had provided various examples of service and nonservice duties in the Guide and on its website, the department's response stating that it sought to "afford predictability and reduce the need for interpretation" by providing an exhaustive list of twenty-three specific tasks that constitute "duties incidental to service" suggests that it intended to change the existing regulations. Put differently, the department recognized that "duties incidental to service" had been open to interpretation, as evidenced by the department's prior guidance on the issue, and determined that a more precise definition was necessary.

In addition, although the defendant insists that the circumstances surrounding the amendments to the regulations support construing the new definition as clarifying, the defendant ignores the fact that the new definition was added at the same time that the department formally adopted the 80/20 rule and repealed § 31-62-E4 of the regulations, which undeniably changed the existing regulations. Given that the department defined "duties incidental to service" when it promulgated the new 80/20 rule, the circumstances surrounding the amendment suggest that the department sought to change, rather than clarify, the existing regulations.

Consequently, we conclude that neither the regulatory history nor the circumstances surrounding the amendment provide uncontroverted support that the department intended the new definition of "duties incidental to service" to clarify the existing regulations. See *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156, 186, 927 A.2d 793 (2007) (presumption against retroactive application of legislation "may be rebutted only by a clear and unequivocal expression of

legislative intent to the contrary" (internal quotation marks omitted)). In the absence of uncontroverted evidence to the contrary, we presume that the department intended to change the existing regulations. Accordingly, the definition of "duties incidental to service" in § 31-62-E2 (d) of the Regulations of Connecticut State Agencies (September 24, 2020) does not apply retroactively.

D

Turning to the tasks at issue in the present case, we note that the court determined that several tasks constituted "nonservice" work even though the department's guidance included similar tasks as "service duties." The court concluded that the undisputed evidence established that the plaintiff "was required to clean portions of the restaurants away from the tables, prepare food, act as a cashier, act as hostess; stockpile napkins, coffee, condiments, and table settings; fill ice machines and many other activities." There is a genuine issue of material fact as to whether certain of these tasks are service duties, considering the service duties listed in the department's Guide, which included "refilling condiment containers for the service person's own station," "wrapping silverware in napkins for the service person's own station," and "cleaning the immediate service area." Guide, supra, pp. 10–11.

For example, the plaintiff testified that she had to "[clean] all surfaces in the server aisle that I worked in that night, which would include all of the counters, all of the machines . . . all of the shelves, the front of the cabinets, the back of the walls, [and] the sink." Viewed in the light most favorable to the defendant as the nonmoving party, there is a question of fact as to whether this task falls within "cleaning the immediate service area" and constitutes a service duty. Likewise,

the department's guidance on the classification of service and nonservice tasks could be read to include, as service duties, restocking napkins and coffee and filling ice machines for the server's station.

As the foregoing comparison demonstrates, on the basis of the examples provided in the department's guidance, there is a genuine issue of material fact as to whether certain tasks identified by the court as "nonservice duties" are incidental to the plaintiff's service of patrons seated at tables and booths. The ultimate determination involves a fact intensive inquiry as to the nature of the task, where it is performed, and its relation to the service of patrons at tables and booths. Thus, in many cases, whether the tasks performed by a server are service duties or incidental to such service cannot be determined as a matter of law.[18] The department's use of examples in its guidance reinforces this point—the examples are illustrative because these terms are not reducible to simple definitions due, in part, to the different configurations of restaurants and the variety of food and beverages that are served in such establishments. For this reason, the trier of fact must analyze

[18] Several trial court decisions have concluded that whether a particular task is a service duty cannot be decided as a matter of law. See *Rodriguez* v. *Kaiaffa, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-17-6088349-S (September 13, 2021) (concluding that genuine issue of material fact existed as to whether side work was incidental to service work); *Stevens* v. *Vito's by the Water, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-15-6062506-S (November 25, 2016) (63 Conn. L. Rptr. 502) (same); *Palmer* v. *Friendly Ice Cream Corp.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-04-4025113-S (May 25, 2010) (49 Conn. L. Rptr. 882) (same); *Bucchere* v. *Brinker International, Inc.*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X01-CV-04-4000238-S (November 8, 2006) (same). But see *Anderson* v. *Reel Hospitality, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X07-CV-20- 6123912-S (July 26, 2022) (rendering summary judgment for plaintiffs on claims for violation of § 31-62-E4 of regulations after concluding that tasks performed by plaintiffs were nonservice work as matter of law).

each task separately to determine whether it is a service duty or incidental to service duties, which will involve comparing the task to those tasks categorized by the department, evaluating the layout of the restaurant to determine where the work is being performed in relation to the plaintiff's station and her tables, and considering the relationship between the plaintiff's serving of patrons with her performance of the task.

Certain tasks, however, may be categorized properly under the regulations as a matter of law. For example, assisting take-out customers and preparing food do not involve serving "patrons seated at tables or booths." Regs., Conn. State Agencies § 31-62-E3 (c). Indeed, preparing the food is what is done *before* it is served. The department's guidance is consistent with this construction of the regulations. The Guide expressly states that "[r]estaurants having a take-out section in addition to table/booth service are not entitled to a tip credit on employees . . . who staff the take-out area in addition to serving patrons at tables and booths." Guide, supra, p. 13. In addition, the Guide lists "[p]reparing food for patrons (cooking, peeling, cutting, mixing, etc.)" as a nonservice duty. Id. The department's website also lists "[p]reparing food" and "[w]aiting on take-out customers" as nonservice duties.

On appeal, the defendant claims that "[t]he dispute is whether certain of [the] plaintiff's duties were 'incidental to' or 'related to' her service duties. . . . Neither our statutes nor regulations support the conclusion that cutting lemons for drinks or microwaving a pre-made dessert constitutes 'nonservice' work. . . . [Given the expansive definition of incidental], no reasonable interpretation of [the regulations] could yield a conclusion other than that the duties identified by [the] plaintiff as 'side work' are . . . 'connected' or 'related' to serving patrons." The defendant highlights a few of the tasks identified by the plaintiff, which we agree are not cate-

gorically excluded from service duties either under the definition of service employee or pursuant to the department's guidance. Notably, however, the defendant fails to address the uncontroverted evidence establishing that the plaintiff was required regularly to assist take-out customers and prepare food.

During her deposition, the plaintiff testified that she was required to prepare and handle "to-go" orders during every shift. The plaintiff also introduced photographs of text messages between her and her manager, Correira, in which the plaintiff complained about assisting take-out customers while being paid below the minimum wage. The messages are dated August 13, 2018, three months before the plaintiff stopped working for the defendant. When asked about the text messages during her deposition, Correira explained that her boss, Cillo, "told [her] to have [the plaintiff] stop taking to-go orders immediately. . . . For the managers to do it until she investigated [the plaintiff's complaint]." Correira explained that the defendant implemented this policy of having the managers handle take-out orders *after* the plaintiff voiced her complaint. Cillo testified that servers process to-go orders "once in a while" and "sometimes," but that the manager on duty "mostly does it . . . especially in a unit like Westbrook." On the basis of this evidence, it is undisputed that the plaintiff regularly assisted take-out customers until she voiced her complaint in August, 2018, although there is a dispute as to how often she was required to do so during each shift.

As to "preparing food," the plaintiff explained: "I am making Cobb salads, fruit salads, Caesar salads. The Cobb salads, there are several different ingredients to those. And I can't just put a cover on it because some

of them require the cook to cook the chicken or the beef or the fish to put on the salad. But I am the one who is getting the blue cheese dressing out from underneath the salad bar and putting that in a to-go container for the person to have salad dressing." The plaintiff also testified that she was required to stock the salad bar, which required that she cut slices of cucumber and stock the various cheeses. Cillo likewise testified at her deposition that servers "do make salads. Yes. They make salads. If somebody orders a chicken Caesar salad, the server puts the salad together, which consists of salad, tomatoes, cucumbers and onions for the most part in our stores, put the dressing on the side, and the cook hands them a plate with the meat, [which] they just put . . . right on the salad." Cillo also agreed that the servers are required to cut fruit. In addition, four of the different "side work" lists produced by the defendant included the directive: "NO EXTRA CUT VEGGIES. THEY SHOULD ALL BE CUT FRESH EACH TIME." Thus, the undisputed evidence also establishes that the plaintiff prepared food.

Consequently, although we agree with the defendant that there are genuine issues of material fact as to the proper characterization of some of the tasks that the plaintiff performed, the undisputed evidence establishes that the plaintiff performed nonservice duties—waiting on take-out customers and preparing food—and that the defendant failed to record the time she spent performing such nonservice duties. For that reason, although we disagree with the court's conclusion that all side work tasks performed by the plaintiff are, as a matter of law, nonservice duties, the court properly determined that there was no genuine issue of material fact that the plaintiff performed certain nonservice duties on a regular basis.

E

Finally, in its reply brief, the defendant claims that the court improperly rejected its de minimis defense.[19] We are not persuaded.

"The de minimis doctrine permits employers to disregard, for purposes of the [Fair Labor Standards Act], otherwise compensable work [w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours. . . . It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. . . . [Federal courts] [consider] three factors in determining whether otherwise compensable time should be considered de minimis*:* (1) the practical administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis." (Citations omitted; internal quotation marks omitted.) *Singh* v. *New York*, 524 F.3d 361, 370–71 (2d Cir. 2008).

"An important factor in determining whether a claim is de minimis is the amount of daily time spent on the additional work. There is no precise amount of time that may be denied compensation as de minimis. No rigid rule can be applied with mathematical certainty.

[19] Because this issue was raised for the first time in the defendant's reply brief, the plaintiff did not have the opportunity to respond in her appellee's brief. See *State* v. *Myers*, 178 Conn. App. 102, 106–107, 174 A.3d 197 (2017) ("[I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing. . . . Under our rules of appellate practice, issues cannot be raised and analyzed for the first time in an appellant's reply brief. . . . This rule is a sound one because the appellee is entitled to but one brief and should not therefore be left to speculate at how an appellant may analyze something raised for the first time in a reply brief, which the appellee cannot answer." (Citations omitted; internal quotation marks omitted.)). Nevertheless, we consider the defendant's de minimis claim as an argument in support of its preexisting claim that the court improperly rendered summary judgment for the plaintiff on her E4 claim. See *State* v. *Gary S.*, 345 Conn. 387, 414 n.26, 285 A.3d 29 (2022).

. . . Rather, common sense must be applied to the facts of each case. Most courts have found daily periods of approximately [ten] minutes de minimis even though otherwise compensable." (Citation omitted.) *Lindow* v. *United States*, 738 F.2d 1057, 1062 (9th Cir. 1984).

The United States Department of Labor has issued an interpretative regulation regarding the de minimis doctrine, which provides in relevant part: "In recording working time under the [Fair Labor Standards] Act, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. . . . This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. . . ." (Citations omitted.) 29 C.F.R. § 785.47.

In the present case, the defendant argued in its motion for summary judgment that "[e]mployers may 'disregard, for purposes of the [Fair Labor Standards Act], otherwise compensable work "[w]hen the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours."' *Singh* v. *New York*, [supra, 524 F.3d 370] (quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692, [66 S. Ct. 1187, 90 L. Ed. 1515] (1946)). 'It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.' *Anderson* v. *Mt. Clemens Pottery Co.*, supra, 692. [The United States Department of Labor]

makes clear that a server is still a server even when they perform nontipproducing duties for short amounts of time. See [U. S. Dept. of Labor] Opinion Letter, 2018 WL 5921455, *3 ('some of the time spent by a tipped employee performing tasks that are not listed . . . may be subject to the de minimis rule contained in Wage and Hour's general [Fair Labor Standards Act] regulations at 29 C.F.R. § 785.47'). Accordingly, per [United States Department of Labor] guidance and Second Circuit [case] law, these potential damages are, at most, de minimis."

In its opposition to the plaintiff's summary judgment motion, the defendant repeated its de minimis argument and added that "the . . . Guide makes clear the types of work [the department] considers to be side work involve job duties that take continuous hours and not the minutes and seconds that [the] plaintiff alleges here. (Exhibit A, p. A13) (instructing that side work that takes extensive amounts of continuous time, like 3.5 hours or 5 hours, is nonservice work). For this additional reason, [the] plaintiff's [E4] claim fails." (Emphasis omitted.) In its reply to the plaintiff's opposition to its motion for summary judgment, the defendant discussed its de minimis defense in two sentences, stating: "At most, the time spent on nonservice work was de minimis. Alternatively, even if [the trial] court finds that some side work is nonservice work and more than de minimis, [the trial] court should employ the 80/20 rule, which has been adopted by the [department]." Significantly, the defendant did not reference any evidence in the summary judgment record regarding how long it took to perform the various tasks identified by the plaintiff and, instead, asserted that the plaintiff's failure to provide estimates of how long it took to perform the tasks was fatal to her E4 claim.

The court acknowledged the defendant's de minimis claim but determined that, pursuant to the burden shifting analysis adopted in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 239, it was the defendant's burden to come forward with evidence to negate the reasonableness of the inferences to be drawn from the plaintiff's evidence and that the defendant failed to satisfy its burden in this regard. Our Supreme Court recently explained that the "burden shifting analysis assists the plaintiff in establishing the *amount* of improperly paid work. . . . Under § 31-62-E4 of the [regulations], the plaintiff has to establish only that she performed nonservice and service work together, not that she performed nonservice work for any specific length of time; *Schoonmaker* does not require plaintiffs to establish with certainty the amount of uncompensated work performed. That having been said . . . *Schoonmaker* does not lower the plaintiff's burden of proving whether she performed such work in the first instance." (Citations omitted; emphasis in original.) *Rodriguez* v. *Kaiaffa, LLC*, supra, 337 Conn. 282–84.

On appeal, the defendant relies on a recent Superior Court decision in which the court, *Schuman, J.*, denied cross motions for summary judgment on claims under § 31-62-E4 of the regulations because it determined that the employer was "entitled to show that . . . [the nonservice] tasks took only a de [minimis] amount of time." See *Rodriguez* v. *Kaiaffa, LLC*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-17-6088349-S (September 13, 2021).[20] The entirety of the defendant's discussion of the issue, however, consists of a single paragraph in its reply brief, in which the defendant argues: "Judge Schuman recognized that, even if some of the side work was nonservice

[20] In *Rodriguez* v. *Kaiaffa*, supra, 337 Conn. 289, our Supreme Court affirmed the court's granting of class certification. Thereafter, Judge Schuman addressed the parties' claims on the merits.

work, a de minimis defense is valid under the [Connecticut wage laws]. Judge Schuman declined to decide that inherently factual defense on summary judgment. [The defendant] presented evidence similar to that in *Rodriguez* . . . but the trial court overlooked it, and instead denied [the defendant's] de minimis defense on the ground that it did not have segregated records. This was error. Indeed, the trial court's own ruling that 'we don't know how long any of this took' suggests that there was a factual issue precluding summary judgment." In support of its claim that it "presented evidence similar to that in *Rodriguez*,"[21] the defendant directs our attention to the plaintiff's deposition in which she stated that a chocolate lava cake or an apple crisp would need to be microwaved for "one minute and fifteen seconds and one minute and thirty seconds . . . ."

In its brief discussion of this issue, the defendant does not set forth a plain statement of the de minimis doctrine or identify the factors courts ordinarily consider in determining whether it applies in a particular case. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between

[21] In *Rodriguez*, the court explained that the defendants in that case "presented evidence that one of the [side work] items, filling the butter cups, took only a few minutes to complete. . . . Other items on the [side work] list include cleaning and refilling the coffee machines and wiping down the milkshake and milk machines." *Rodriguez* v. *Kaiaffa, LLC*, supra, Superior Court, Docket No. X03-CV-17-6088349-S.

the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.)); see also id., 726 ("[a]lthough the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed"). The defendant provides one citation to the record but fails to explain how evidence of the amount of time it takes to microwave a dessert applies to the nonservice tasks—waiting on take-out customers and preparing food—identified by the court. Given the lack of analysis in the defendant's cursory discussion of this issue, we conclude that this claim is inadequately briefed. See *Bongiorno* v. *J & G Realty, LLC*, 211 Conn. App. 311, 323, 272 A.3d 700 (2022) ("[when] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived" (internal quotation marks omitted)); *Darin* v. *Cais*, 161 Conn. App. 475, 483, 129 A.3d 716 (2015) (when issue "receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

Although we are not required to reach the merits of the defendant's inadequately briefed claim, we nonetheless address it because it was raised before the trial court and addressed by the court in rendering summary judgment for the plaintiff. On the basis of our plenary review of the record, we are not persuaded that there is a genuine issue of a material fact regarding the application of the doctrine in the present case. As previously noted, in determining whether the de minimis doctrine applies, federal courts generally consider: "(1) the practical administrative difficulty of recording additional time; (2) the size of the claim in the aggregate; and (3) whether the claimants performed the work on a regular basis." *Singh* v. *New York*, supra, 524 F.3d 371.

Section 31-62-E4 of the regulations appears to address the practical administrative difficulty in recording the time by providing that, "[i]f an employee performs both service and nonservice duties and *the time spent on each cannot be definitely segregated and so recorded*, or is not definitely segregated and so recorded, *no allowances for gratuities may be applied* as part of the minimum fair wage." (Emphasis added.) In other words, the department recognized that it might be difficult to record separately time spent performing nonservice duties and directed employers that, if they cannot segregate and record that time, they must pay the full minimum wage for the employee's entire shift. Moreover, the gravamen of the defendant's argument regarding the administrative difficulty in recording time spent performing nonservice work is that servers perform the nonservice work "while they are simultaneously serving customers." If this explanation were justification to avoid the recording requirements of § 31-62-E4 of the regulations, an employer could subvert the regulations simply by deliberately structuring an employee's work tasks during each shift accordingly.

The second and third factors, the size of the claim in the aggregate and whether the work was performed on a regular basis, also weigh against the application of the de minimis doctrine in the present case. As we concluded in part II D of this opinion, the undisputed evidence established that the plaintiff performed nonservice duties during each shift—waiting on take-out customers and preparing food. The defendant neither disputed that the plaintiff was required to perform these tasks nor submitted evidence regarding how much time the plaintiff spent performing those tasks. Thus, the improperly compensated work was performed regularly, which, given that the plaintiff was employed by the defendant for approximately two years, necessarily increases the size of the claim in the aggregate. See,

e.g., *Perez* v. *Mountaire Farms, Inc.*, 650 F.3d 350, 374 (4th Cir. 2011) ("Each of these employees was being paid at a rate of ten dollars per hour, and each would be entitled to compensation for 10.204 minutes of work per day. Applying these figures to an annual work schedule of [50] weeks, the amount of compensable time per employee is about 42.5 hours per year, which amounts to compensation of about $425 per employee per year. We conclude that this annual amount per employee is significant for an employee earning ten dollars per hour, because that annual amount represents a full week's wages."), cert. denied, 565 U.S. 1241, 132 S. Ct. 1634, 182 L. Ed. 2d 246 (2012); see also *Kosakow* v. *New Rochelle Radiology Associates, P.C.*, 274 F.3d 706, 719 (2d Cir. 2001) ("[R]egular arrival for fifteen minutes of preparatory work would not constitute de minimis activity. It would not be difficult to calculate, in the aggregate it constituted a significant amount of time, and it occurred regularly."); *Lindow* v. *United States*, supra, 738 F.2d 1063 ("[c]ourts have granted relief for claims that might have been minimal on a daily basis but, when aggregated, amounted to a substantial claim").

Accordingly, the defendant's bare assertion before the trial court that, "[a]t most, the time spent on nonservice work was de minimis," was insufficient to create a genuine issue of material fact as to the application of the de minimis doctrine in the present case.

III

In her cross appeal, the plaintiff claims that the court improperly rendered summary judgment for the defendant on its good faith defense under § 31-68 (a) (2).[22] We agree.

[22] Section 31-68 (a) was amended during a special session on July 22, 2019, after the plaintiff initiated the underlying action. See Spec. Sess. P.A. 19-1, § 6. Relevant to the plaintiff's E4 claim in the present case, the 2019 amendment to § 31-68 added a new subdivision to subsection (a) that specifically addresses claims brought for violations of § 31-62-E4 of the regulations.

Section 31-68 (a) provides in relevant part: "If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled . . . by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court."[23] General Statutes (Supp. 2016) § 31-68 (a).

See Spec. Sess. P.A. 19-1, § 6. Those changes became effective January 6, 2020, and the current revision of General Statutes § 31-68 (a) (2) provides: "Notwithstanding the provisions of subdivision (1) of this subsection, if any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under section 31-62-E4 of the regulations of Connecticut state agencies, such employee shall recover, in a civil action, (A) twice the full amount of such minimum wage or overtime wage less any amount actually paid to such employee by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (B) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to such employee by the employer, with costs as may be allowed by the court. *A good faith belief includes, but is not limited to, reasonable reliance on written guidance from the Labor Department.*" (Emphasis added.)

Thus, under the current revision of the statute, a plaintiff is not entitled to recover attorney's fees for a violation of § 31-62-E4 of the regulations if the employer establishes the good faith defense, which can be based on reasonable reliance on written guidance from the department. Although the defendant argued in its motion for summary judgment that these changes applied to the present case, the trial court did not address the changes to the statute in rendering summary judgment for the defendant on its good faith defense, and the parties have not addressed the issue on appeal. Thus, we do not address that issue.

[23] Prior to 2015, an award of penalty damages under § 31-68 was a matter of discretion. See General Statutes (Rev. to 2013) § 31-68 (a) (providing that

The term "good faith" is "well defined as meaning [a]n honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. . . . It is a subjective standard of honesty of fact in the conduct or transaction concerned, taking into account the person's state of mind, actual knowledge and motives. . . . Whether good faith exists is a question of fact to be determined from all the circumstances." (Internal quotation marks omitted.) *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 368–69, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016).

Similarly, under federal law, "an employer who violates the compensation provisions of the [Fair Labor Standards] Act is liable for unpaid wages and an additional equal amount as liquidated damages. . . . [L]iquidated damages may be remitted if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not in violation of the [law]. . . . [T]he

employee who was paid less than minimum fair wage "*may* recover, in a civil action, twice the full amount of such minimum wage less any amount actually paid to him by the employer, with costs and such reasonable attorney's fees as may be allowed by the court" (emphasis added)); see also *Ravetto* v. *Triton Thalassic Technologies, Inc.*, supra, 285 Conn. 724 (noting that identical language in General Statutes (Rev. to 2007) § 31-72 "provides for a discretionary award of double damages, with costs and reasonable attorney's fees" (internal quotation marks omitted)). Our Supreme Court explained that, under the previous version of the statute, "it [was] appropriate for a plaintiff to recover attorney's fees, and double damages . . . only when the trial court . . . found that the defendant acted with bad faith, arbitrariness or unreasonableness." (Internal quotation marks omitted.) Id.

Our legislature amended § 31-68 in 2015; see Public Acts 2015, No. 15-86, § 1; to make an award of double damages plus costs and attorney's fees mandatory, unless the employer establishes that the employer had a good faith belief that the underpayment of wages complied with the law.

employer bears the burden of establishing, by plain and substantial evidence, subjective good faith and objective reasonableness. . . . The burden . . . is a difficult one to meet, however, and [d]ouble damages are the norm, single damages the exception . . . .

"To establish good faith, a defendant must produce plain and substantial evidence of at least an honest intention to ascertain what the [law] requires and to comply with it. . . . Good faith in this context requires more than ignorance of the prevailing law or uncertainty about its development. It requires that an employer first take active steps to ascertain the dictates of the [Fair Labor Standards Act] and then move to comply with them. . . . That [the employer] did not purposefully violate the provisions of the [Fair Labor Standards Act] is not sufficient to establish that it acted in good faith." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Reich* v. *Southern New England Telecommunications Corp.*, 121 F.3d 58, 70–71 (2d Cir. 1997).

In its motion for summary judgment as to its good faith defense, the defendant claimed that the undisputed evidence established that it took steps to learn and comply with the law. The defendant noted that it "set up the operations so that side work constituted less than 20 [percent] of a server's job duties to comply with the 80/20 rule," which Li referenced during his deposition: "I believe that—I think there's an 80/20 rule that applies, [so I] mak[e] sure that . . . they are not spending too much time doing side work instead of [serving] the customers." The defendant also noted that it had hired Jackson Lewis P.C., a law firm specializing in labor law, to represent it in a similar lawsuit in 2006, and that, following that litigation, its attorneys did not recommend that it change its policies. The defendant also argued that it relied on the department's guidance,

as its "operations conformed to the 80/20 rule of [side work]."

In her opposition to the defendant's motion, the plaintiff argued, inter alia, that the defendant "articulated no active steps to comply with the law, and there is substantial evidence that the defendant knew it was violating the law but continued to do so. The plaintiff even complained to her general manager Lynda Correira that she had to take to-go orders and was not being paid minimum wage for it. . . . Correira . . . testified that [the defendant] stopped having [the plaintiff] take to-go orders, *but continued to have other servers take to-go orders*." The plaintiff further argued that, "to the extent the [department] ever used the 80/20 rule as an enforcement policy, it explicitly limited its use to rare occasions when nonservice work unexpectedly arose; the [department] prohibited any reliance upon it when the duties in question are regularly assigned . . . . Here, the defendant's reliance on the enforcement policy would be inappropriate according to the [Guide] because the duties were regularly and routinely assigned. . . . Even if the 80/20 rule were the law (it is not) . . . the plaintiff herself testified she spent 30 to 40 percent of [her] shift on such nonservice work. . . . This is the testimony which should be credited for the purposes of the defendant's motion . . . ."

After the motions for summary judgment had been briefed, the court ordered that "the defendant may submit a supplemental authority, a supplemental exhibit, and a three page memo explaining them. The plaintiff may file a three page response no later than July 20, 2020." The defendant thereafter filed a copy of a memorandum dated May 30, 2006 (2006 memo), that was prepared by its attorneys in connection with the 2006 lawsuit. The 2006 memo discussed the requirements under § 31-62-E4 of the regulations and opined that the

defendant's position "that all side work duties necessarily are incidental to customer service" was "supported by federal tip credit law, which envisions a certain amount of side work as functions for which payment of a tip credited wage is appropriate. Based on off-the-record conversations with the Connecticut Department of Labor, we believe that [the] [d]epartment's unofficial interpretation of this regulation comports with the federal law." The 2006 memo also discussed the department's informal guidance concerning service and nonservice duties and set forth the list of such duties from the department's website, which specifically listed "[p]reparing food," "[g]eneral cleaning," and "[w]aiting on take-out customers" as nonservice duties. The defendant also submitted an order from the 2006 case, in which a court denied a motion for class certification. In its accompanying memorandum, the defendant argued that the 2006 memo "made clear to [the defendant] that it had strong defenses to the side work . . . claims."

In her reply memorandum, the plaintiff argued that "[i]t is questionable whether [the 2006 memo] was seen because the [2006] memo is almost fifteen . . . years old, and there is no evidence that any [of the defendant's] witness[es] ever reviewed it at all, let alone within a decade of the relevant period. The [2006] memo does not state anywhere that the defendant's business practices complied with the law, but instead states the arguments [that would be made]. It does not show that counsel advised the defendant [its] policies were compliant."[24]

In rendering summary judgment for the defendant on its good faith defense, the court reasoned as follows.

[24] The plaintiff also argued that, "[i]n the event the court finds the outdated [2006] memo relevant and sufficient to create a genuine issue of material fact on good faith, the court should . . . hold off on good faith until the parties can conduct discovery to minimize delay and prejudice associated with the late disclosure/waiver [of attorney-client privilege]."

"Much has been made of the [department's] lack of enforcement activity for some [seventy] years. The department's indication that it would not pursue side work claims amounting to less than 20 [percent] of an employee's times has been pointed out as well. [The defendant] has offered evidence that, against that backdrop, the company relied on the advice of counsel, consulted with its insurer, considered the failure of an enforcement action in Rhode Island, relied on its franchisor, its payroll company, and its payroll technology. Of great significance, [the defendant] itself won a victory in this court on similar wage claims.

"[The plaintiff] says the company should have done more. [She] faults [the defendant] for the extent of its effort and for getting the answer wrong. But no reasonable fact finder could agree. The totality of the circumstances so plainly points the other way as to make summary judgment on this issue appropriate. [The defendant] took a view supported by prior court decisions and in the face of guidance and inactivity by the regulatory agency that it plainly appears to have taken sincerely at face value. . . . It believed it could rely on views of side work like the 80/20 rule. It may have been wrong, but there is no doubt that [the defendant] believed it was right.

"Against this backdrop, the court is convinced that [the defendant's] undisputed activities, in light of the circumstances prevailing, establish that a reasonable fact finder could only conclude that it believed in good faith that it was complying with the law. Therefore, [the defendant] will not be liable for the doubling of the minimum wage authorized as damages under . . . § 31-68 (a) (2)."

In her cross appeal, the plaintiff claims that there are several disputed issues of fact. The plaintiff claims that the defendant's alleged reliance on the advice of counsel

is disputed because "[t]he most the [defendant] says is that [its] lawyers did not tell them that they were not compliant."[25] The plaintiff also notes that there is evidence establishing that the defendant continued to require other servers to wait on take-out customers after she complained about waiting on take-out customers and alerted the defendant to the department's website specifically listing that task as a nonservice duty. According to the plaintiff, "[a] jury [could] infer that the defendant did not investigate the plaintiff's E4 complaint" and "did not attempt to learn and comply with the law because their side work so clearly exceeded what the department . . . published was service work." (Internal quotation marks omitted.) The defendant responds that the court properly concluded that the undisputed evidence established that the defendant relied on the advice of counsel and the department's guidance and, therefore, had a good faith belief that it was complying with the law. We agree with the plaintiff.

Although the court's analysis focused on the defendant's reliance on both the advice of counsel and the 80/20 rule, the evidence, viewed in the light most favorable to the plaintiff, does not conclusively establish that the defendant acted in good faith. The 2006 memo, which included the guidance from the department's website, does not state that requiring service employees to prepare food and wait on take-out customers complied with the regulations. To the contrary, the guidance reproduced in the 2006 memo specifically identifies these tasks as nonservice duties, which would support the inference that the defendant was aware that it was not complying with the law. In addition, as to the defendant's reliance on the department's enforcement policy

[25] We note that the plaintiff also claims that there is no evidence in the record that the defendant was aware of the 80/20 rule. The plaintiff, however, is mistaken. As previously noted in this opinion, Li testified during his deposition that he "believed" there was an 80/20 rule.

regarding § 31-62-E4 of the regulations, there is conflicting evidence regarding whether the defendant's policy actually complied with that rule. As the plaintiff argued in opposing summary judgment on the defendant's good faith defense, the department's enforcement policy states that the 80/20 rule "is not intended to allow an employer to assign a tip credit service person to do [nonservice] job such as dishwashing or food preparation for 20 [percent] of his or her work time. . . . The 20 [percent] should consist of short term, irregular, and largely unpredictable [nonservice] tasks the employee may be called upon to perform during a service shift." Moreover, although the defendant's witness testified that servers spent approximately 10 to 15 percent of their shifts performing side work, the plaintiff testified that she spent approximately 30 to 40 percent of her shift performing side work. Thus, even assuming that the defendant's reliance on the department's enforcement policy was reasonable, there is a genuine dispute as to whether the defendant actually complied with its own understanding of the law. Consequently, we disagree with the court's conclusion that the undisputed evidence establishes that the defendant "believed in good faith that it was complying with the law."

Accordingly, we reverse the judgment of the trial court granting summary judgment for the defendant on its good faith defense under § 31-68 (a) (2) and remand the matter for a trial on the issue of good faith as it relates to the defendant's violation of § 31-62-E4 of the regulations.[26]

[26] Because the defendant has not challenged on appeal the court's calculation of damages on the plaintiff's E4 claim, the only issues to be tried on remand are the plaintiff's claim for double damages and reasonable costs and attorney's fees pursuant to § 31-68 (a) (1). Because the parties have not addressed whether the 2019 amendment to § 31-68 regarding E4 claims applies to the defendant's good faith defense or limits the plaintiff's right to attorney's fees; see footnote 22 of this opinion; we leave that issue for the trial court to address in the first instance.

The judgment is affirmed as to the summary judgment rendered for the plaintiff on the first count of the amended complaint, and the case is remanded solely for a trial as to the defendant's good faith defense under General Statutes (Supp. 2016) § 31-68 (a) (2) with regard to that count; the judgment is reversed as to the second count of the amended complaint and the case is remanded for further proceedings according to law on that count.

In this opinion the other judges concurred.

R. H. *v.* M. H.*
(AC 45186)

Bright, C. J., and Clark and Seeley, Js.

Syllabus

The defendant mother, whose marriage to the plaintiff father previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's application for an emergency ex parte order of custody with respect to the parties' minor children and granting his postdissolution motion to modify custody. In his application for an emergency ex parte order of custody, in which he requested temporary sole custody of the children, the plaintiff alleged that, in violation of an agreement between the parties that was filed with the trial court, the defendant had tested positive on an alcohol use monitoring program, and thereafter missed multiple requests to test, while or immediately after the children had been in her care. The trial court granted the application and ordered that a hearing on the ex parte order take place, although such hearing never occurred. Thereafter, the trial court approved an agreement of the parties that modified the ex parte order. Subsequently, the trial court heard evidence on various postdissolution motions of the plaintiff, including a motion to modify custody. The trial court granted that motion, awarded sole legal custody of the children to the plaintiff, and ordered that the children were to reside primarily with the plaintiff. With respect to the parties' son, R, the trial court

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

further ordered, inter alia, that the defendant was entitled to supervised, in-person visitation, after she had engaged in sessions with a mental health professional, and to incrementally increased, unsupervised visitation on a schedule approved by the plaintiff in consultation with R's therapist. The plaintiff could suspend such visitation or reinstate the requirement of supervised visitation if he determined, in consultation with R's therapist, that the unsupervised visits were causing negative behavioral or emotional consequences for R. *Held*:

1. The defendant's argument that the trial court erred in granting the plaintiff's application for an emergency ex parte order of custody was not persuasive:

a. Contrary to the defendant's claim, the emergency ex parte order was supported by sufficient evidence: it was reasonable for the trial court to infer from the information in the guardian ad litem's affidavit, which was included with the application, that the defendant had drank to excess while the children were in her care and that her intoxication posed an immediate and present risk of physical danger or psychological harm to the children, as her positive and missed blood alcohol tests occurred on a weekday morning at a time when the defendant was responsible for getting her children ready for and transporting them to school; moreover, the application was filed on the same day that the incident occurred, and, if the trial court allowed the defendant to escape the reach of the applicable statute (§ 46b-56f) merely because the children were not in the defendant's physical custody at the exact moment that the application was filed, and would not be in her care for the following few days, it would have construed the statute too narrowly; accordingly, the trial court's determination that there was an immediate and present risk of physical danger or psychological harm to the children was not clearly erroneous.

b. The trial court's failure to hold a hearing on the plaintiff's application for an emergency ex parte custody order did not violate the defendant's right to due process: the trial court scheduled a hearing on the ex parte order, which was to take place within the fourteen day period required by § 46b-56f (c), and the parties appeared before the court on that date but the hearing did not proceed because the parties were attempting to reach an agreement and, several times thereafter, the parties again appeared before the court but consented to keep the order in place and to continue the hearing to a later date while they further attempted to negotiate an agreement; moreover, the parties thereafter filed an agreement, which the trial court approved, that modified the ex parte order; accordingly, the only reason that a hearing on the application did not occur before the ex parte order was superseded was that the defendant expressly agreed, on multiple occasions, to keep the order in place while the parties attempted to reach a final agreement, and the defendant subsequently consented to the agreement that modified and superseded the order, rendering any hearing unnecessary.

2. The trial court improperly delegated its judicial authority by giving the plaintiff the authority to decide the nature and scope of the defendant's visitation with R: the trial court's order clearly granted the defendant a specific right to visitation, which it then allowed the plaintiff, in consultation with R's therapist, to suspend or terminate; moreover, pursuant to the applicable statute (§ 46b-56 (c)), the trial court was required to consider the best interests of R, including his physical and emotional safety, his temperament, and his developmental needs, in deciding the visitation dispute, and the delegation of that responsibility to a nonjudicial entity was impermissible; accordingly, this court reversed the trial court's judgment as it related to the defendant's visitation with R because the trial court effectively delegated to the plaintiff its attendant obligations under § 46b-56 (c).
3. This court declined to review the defendant's claim that the trial court's handling of her confidential medical information violated her privacy rights: the defendant failed to preserve her evidentiary claim that certain testimony by two witnesses regarding her medical history violated her individual privacy rights because she never raised an objection to such testimony at trial, and, accordingly, the trial court was never presented with, and never ruled on, her claim; moreover, the defendant failed to file an appeal form indicating that she wanted this court to review the trial court's denial of her request to remove her personal identifying information from its memorandum of decision or to amend her appeal to indicate such an intention pursuant to the applicable rule of practice (§ 61-9).

(*One judge concurring in part and dissenting in part*)

Argued November 14, 2022—officially released June 6, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Albis*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Albis*, *J.*, granted the plaintiff's application for an emergency ex parte order of custody with respect to the parties' minor children; subsequently, the court, *Albis*, *J.*, granted the plaintiff's motion to modify custody of the parties' minor children, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

M. H., self-represented, the appellant (defendant).

Kenneth J. McDonnell, for the appellee (plaintiff).

Opinion

CLARK, J. In this custody dispute, the defendant mother, M. H.,[1] appeals from the judgment of the trial court granting the postdissolution motion of the plaintiff father, R. H., for modification of custody and access seeking sole legal and physical custody of the parties' two minor children. On appeal, the defendant argues that the court improperly (1) granted the plaintiff's October 30, 2019 application for an emergency ex parte order for custody of the children, (2) delegated its judicial authority by giving the plaintiff decision-making authority over the defendant's access to the children, and (3) infringed on her privacy rights, first by allowing testimony about her medical information and, second, by including her medical information in its November 18, 2021 memorandum of decision without sealing the decision. We agree with the defendant's second claim but disagree with her remaining claims. Accordingly, we reverse in part and affirm in part the judgment of the trial court.

We begin by setting forth the relevant facts, as found by the trial court, and procedural history of this case. The parties' marriage was dissolved on March 11, 2019, and their separation agreement was incorporated into the judgment of dissolution. Pursuant to that judgment, the parties had joint legal custody and shared physical custody of their eleven year old daughter, S, and ten year old son, R. Each week, the defendant had the children from Monday to Wednesday, the plaintiff had them from Wednesday to Friday, and the parties alternated visitation on the weekends. The judgment also provided that the parties would keep the children enrolled in the Haddam-Killingworth school district and would work with a parenting coordinator. The parties'

[1] The defendant restored her maiden name after the plaintiff commenced this action and is now known as M. S.

ability to coparent deteriorated shortly after the court rendered judgment.

On June 12, 2019, the plaintiff filed a postjudgment motion for contempt alleging that the defendant ceased attending meetings with the parenting coordinator. The plaintiff also alleged that the defendant moved to an apartment in Middletown, which required the children to wake up at 5:30 a.m. to get to school on time. Lastly, he alleged that the defendant, without consulting the plaintiff, contacted a state trooper and a counselor about S purportedly conducting inappropriate Internet searches. According to the plaintiff, the defendant claimed to have discovered the inappropriate search through a monitoring program that she had installed on S's phone, but she refused to provide login credentials for that program to the plaintiff. Along with the motion for contempt, the plaintiff also filed a motion to open the judgment and modify custody and access, which asserted substantially the same factual allegations and sought an order granting him sole legal and physical custody of the children.

On July 15, 2019, while the two motions were pending, the court approved an agreement between the parties appointing Victoria Lanier as guardian ad litem for the minor children. The parties also agreed to postpone the adjudication of all outstanding motions and requests.

On September 18, 2019, the parties filed another agreement with the court, this time agreeing that Keith Roeder, a psychologist specializing in family matters, would perform a custody evaluation, which would include observations of each parent's interactions with the children. The parties each agreed to not "drink alcohol to excess" during their parenting time with the children, a term they defined as a blood alcohol content

(BAC) of 0.08 or higher, and the defendant agreed to utilize Soberlink, an alcohol use monitoring program.[2]

On October 30, 2019, the plaintiff filed an application for an emergency ex parte order of custody pursuant to General Statutes § 46b-56f (a).[3] The plaintiff requested temporary sole custody of the children, alleging that he learned that the defendant had tested positive on Soberlink and had missed multiple Soberlink tests while or immediately after the children had been in her care. In support of his application, the plaintiff attached an affidavit from the guardian ad litem. The guardian ad litem averred that the children were in the defendant's care on the night of October 29, 2019, and that, on October 30, 2019, "[a]t 6:49am . . . [the defendant] had a BAC reading of .103, and then missed her next test at 7:04am. I texted [the defendant] at 6:57 am inquiring about the positive test and she indicated that it was from mouthwash and she would retest in ten minutes. At 7:25am I received an email from Soberlink that [the defendant's] device regained cellular connection and that she had a positive test at 7:25am of .092. At 7:34am, I contacted [the defendant] via phone at which time [the defendant] indicated that she could not talk on the phone or re-test because she was in the classroom with 20 students at the school where she teaches. [The defendant] has missed all subsequent requests to test." In light of this information, the court, on the same day, granted the plaintiff's application for an emergency ex parte order of custody. The court ordered that the parties would have joint legal custody of the children but

[2] The record does not reflect whether the court acted on the September 18, 2019 agreement.

[3] General Statutes § 46b-56f (a) provides: "Any person seeking custody of a minor child pursuant to [General Statutes §] 46b-56 or pursuant to an action brought under [General Statutes §] 46b-40 may make an application to the Superior Court for an emergency ex parte order of custody when such person believes an immediate and present risk of physical danger or psychological harm to the child exists."

added that the plaintiff would have temporary sole physical custody and the defendant would have "reasonable visitation as agreed by the parties and with such supervision as [the plaintiff] may approve or require." The court further ordered that a hearing on its ex parte order would take place thirteen days later, on November 12, 2019, though that hearing did not occur.

On June 8, 2020, the court approved an agreement of the parties that modified the October 30, 2019 ex parte order. Under the agreement, the defendant was to abstain from alcohol use and utilize Soberlink four times a day for forty-five days. If the defendant had no positive or missed tests in that forty-five day period, then she would be required to test only in the morning on the date of a visit before the visit commenced and then again periodically throughout the course of a visit with the children. The parties also agreed to engage in family therapy. Once the defendant completed forty-five days of consistent negative Soberlink tests and engaged in family therapy, the agreement provided for an expansion of the defendant's access to the children, allowing unsupervised visitation on Wednesdays and Sundays from 10 a.m. to 7 p.m.

On November 13, 2020, after the court modified the ex parte order, it held a status conference on the parties' pending motions. Both parties had motions to modify custody pending before the court, as well as a number of other motions, including motions for contempt. The parties agreed that a hearing on their pending motions would be appropriate and that the resolution of those motions would address the ultimate issue of custody. A hearing was scheduled to begin in April, 2021.

On November 17, 2020, the plaintiff filed a motion for contempt, alleging that the defendant had failed to pay one half of the children's out-of-pocket medical expenses, which was her responsibility pursuant to the

dissolution judgment. On December 21, 2020, the plaintiff filed another application for an emergency ex parte order of custody. In that application, the plaintiff stated: "The guardian ad litem believes that it would be detrimental to the child, [R], to not afford him of immediate services that are in accordance with his diagnosis, and that the [Planning and Placement Team] meeting occur as planned today so that any adjustments to [R's] schedule/schooling be made prior to the start of the new school year. As such, she supports an immediate order of decision-making in favor of the [plaintiff]." The court declined to grant ex parte relief on the plaintiff's application but ordered that a hearing be scheduled on the matter.

On January 7, 2021, the court, *Albis*, *J.*, held a hearing on the plaintiff's December 21, 2020 application. The court heard testimony from the guardian ad litem that the defendant was using the joint legal custody granted to her in the court's October 30, 2019 order to veto certain medical services for the children unless such services were provided in accordance with her specified terms. The guardian ad litem also testified that the defendant threatened to file complaints against the children's providers any time they did not fully comply with her requests or acted in a manner with which she disagreed. At the end of that hearing, the court ordered that the parties would continue to have joint legal custody of the children but that the plaintiff would have final decision-making authority in the event of an impasse on decisions about S's therapy or R's therapy, education, or medical treatment. It further ordered that the defendant could communicate with the children's providers to get information but expressly prohibited her from threatening them. The court, however, made clear that this order was temporary and that the ultimate issue of custody would be resolved following the hearing on all pending motions, which was scheduled to begin in April, 2021.

On March 19, 2021, the plaintiff filed an amended motion for contempt, alleging that the defendant violated the court's January 7, 2021 order by filing a complaint against the guardian ad litem in the Superior Court. The plaintiff also alleged, inter alia, that the defendant called the children's school and threatened to file a complaint against school officials with the Connecticut Commission on Human Rights and Opportunities. The defendant filed an objection to this motion on March 22, 2021.

On April 7, 2021, the plaintiff filed a motion to open and modify, seeking modification of the portion of the dissolution judgment that allowed the defendant to claim the children on her taxes while she paid the children's medical insurance premiums.

Over the course of six separate dates between April 9 and October 7, 2021, the court heard evidence concerning the plaintiff's June 12, 2019 motion for contempt; June 12, 2019 motion for modification; November 17, 2020 motion for contempt; March 19, 2021 amended motion for contempt; and April 7, 2021 motion for modification.[4] On November 18, 2021, the court, *Albis*, *J.*, issued a memorandum of decision addressing each of those motions. The court found, inter alia, that "the vast majority of [the parties'] issues and problems were generated by the [defendant]." (Internal quotation marks omitted.) It found that "the [plaintiff] has been a steady hand in raising the children through the periods of conflict with the [defendant] and her attempts to cope with her personal issues. Since October 30, 2019 . . . the children have generally done well academically, socially, and behaviorally. The [plaintiff] has sought and procured appropriate medical, mental health, and educational supports for the children. He

[4] The defendant filed many motions and requests postdissolution but withdrew each of them before the court issued its decision.

has made significant changes in his own parenting behavior, often at the suggestion of professionals like [S's] therapist . . . or the [guardian ad litem], that have given the children more structure and stability and reduced their exposure to parental conflict."

With respect to the defendant, the court found that she "has not caused physical harm to her children, and there is no reason to believe she is a threat to do so. But she fails to recognize the emotional and psychological harm she has caused [the children] by her actions: [1] her predominant role in the destruction of the parties' ability to co-parent; [2] her ongoing effort to prove herself a superior parent to the [plaintiff], often by denigrating or obstructing him; [3] her alternating between seeking treatment for alcohol abuse and denying that she has an alcohol problem; [4] her insistence that her mental health issues consist only of depression caused by her separation from the children after the ex parte order of October 30, 2019; and [5] her habit of taking the offensive against anyone whom she perceives as criticizing, hindering, or disagreeing with her." Importantly, the court found "that the [defendant's] focus on asserting her positions and vindicating herself from perceived criticism has had a direct negative impact on the children and will likely continue to do so until she receives appropriate treatment."

Although the court denied each of the plaintiff's motions for contempt,[5] it granted the plaintiff's June 12, 2019 motion for modification and awarded the plaintiff sole legal custody of the children. It also ordered that the children would reside primarily with the plaintiff. The court explained that "the [defendant] must engage in mental health treatment to address her childhood trauma before there is a substantial enhancement

[5] The plaintiff did not cross appeal from the denial of his motions for contempt.

of her parenting time with either child. She must gain a better understanding of that trauma and the tools to cope with its effects, as well as a better understanding of how her words and actions impact the children."

With respect to the defendant's access to the children, the court limited the defendant's visitation with S to family therapy sessions "and such further contact . . . as the parties may agree upon recommendation of the family therapist." The court further ordered: "After the [defendant] has engaged in at least four sessions with [a mental health professional who has a doctoral level degree and a specialization in the treatment of childhood trauma] and said professional has stated, in writing, his or her opinion that the [defendant] is ready to engage productively in family therapy with [S] . . . then the [plaintiff] shall engage [S] in family therapy for [S] and the [defendant] with a qualified family therapist chosen by the [plaintiff]. [S] and the [defendant] shall each engage in the family therapy with such frequency and for so long as the therapist shall recommend." The court also noted S's "informed preference . . . not to have the parenting time that the [defendant] seeks" and that S "harbors deep resentment over the [defendant's] past actions . . . ."

With respect to the defendant's access to R, the court ordered that the visitation between the defendant and R that his school was already facilitating and supervising may continue "with such frequency and for so long as the school is willing and able to provide such access." Additionally, the court ordered supervised, in-person visitation between R and the defendant, but only "[a]fter the [defendant] has engaged in at least four sessions with her mental health professional and the same has been confirmed in writing to the [plaintiff] by the mental health professional . . . . The first three in-person visits shall occur within sixty days after [the plaintiff] has received such confirmation, shall be no longer than one

hour each, and shall be supervised by a professional supervisor selected and paid for by the [plaintiff]." The orders further provided that, "[u]nless the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the supervised visits are causing negative behavioral or emotional consequences for [R], then the [defendant] shall thereafter be entitled to reasonable, incrementally increased, unsupervised visitation with [R] on a schedule approved by the [plaintiff] from time to time. If at any time the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the unsupervised visits are causing negative behavioral or emotional consequences for [R], then the [plaintiff] may either suspend the [defendant's] visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with [the plaintiff] responsible for the cost of supervision, if any . . . ."

The court also granted the plaintiff's April 7, 2021 motion for modification, allowing the plaintiff to claim the children on his taxes indefinitely and ordering the plaintiff to maintain health and dental insurance for the children.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first argues that the court erred in granting the plaintiff's October 30, 2019 application for an emergency ex parte order of custody because there was insufficient evidence to support the application and because the court failed to hold a hearing on it. We are not persuaded.[7]

[6] We note that the defendant did not address this ruling in her appellate brief. We therefore deem abandoned any claim concerning that aspect of the decision. See *Traylor* v. *State*, 332 Conn. 789, 810 n.18, 213 A.3d 467 (2019).

[7] The defendant filed her appellate brief on June 13, 2022. On July 26, 2022, this court, sua sponte, ordered the parties to address whether the portion of the appeal challenging the trial court's October 30, 2019 emergency ex parte custody and visitation order had become moot, ordering the plaintiff to address the issue in his appellate brief and the defendant to address it in her reply brief, if she filed one. The plaintiff filed his appellate brief on

A

The defendant argues that the evidence was insufficient to support the court's October 30, 2019 emergency ex parte custody order. Specifically, she argues that the children were not in her care at the time of the application and, thus, there was not an immediate and present risk of physical danger or psychological harm.

Section 46b-56f provides in relevant part: "(a) Any person seeking custody of a minor child pursuant to [General Statutes §] 46b-56 or pursuant to an action brought under [General Statutes §] 46b-40 may make an application to the Superior Court for an emergency ex parte order of custody when such person believes an immediate and present risk of physical danger or psychological harm to the child exists. . . . (c) The court shall order a hearing on any application made pursuant to this section. If, prior to or after such hearing, the court finds that an immediate and present risk of physical danger or psychological harm to the child exists, the court may, in its discretion, issue an emergency order for the protection of the child . . . ."

This court has made clear that "[t]he proper standard of proof in a trial on an order of temporary custody is the normal civil standard of a fair preponderance of the evidence. . . . We note that [a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the

August 24, 2022, and argued that the defendant's challenges to the ex parte order are moot because the November 18, 2021 decision superseded the October 30, 2019 order. The defendant did not file a reply brief. Nevertheless, we conclude that, although the November 18, 2021 orders superseded the October 30, 2019 order, the defendant's challenge to the ex parte order is not moot because we are bound by this court's decision in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 365, 190 A.3d 68 (2018), which held that "a § 46b-56f order is not subject to dismissal pursuant to the mootness doctrine."

record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . With those principles in mind, we will review the evidence presented . . . to determine whether the court's determination is supported by the evidence in the record." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 365, 190 A.3d 68 (2018).

The court was presented with the following relevant evidence. The plaintiff's October 30, 2019 application for an ex parte order included an affidavit from the guardian ad litem stating that the children were in the defendant's care on October 29, 2019, and referencing the parties' September 18, 2019 agreement that prohibited each party from having a BAC of 0.08 or higher while caring for the children. The affidavit also stated that, on October 30, 2019, the defendant had a BAC reading of 0.103 at 6:49 a.m., she missed her next test at 7:04 a.m., and she had a BAC reading of 0.092 at 7:25 a.m. It was reasonable for the court to infer that, because she had a BAC level of 0.103 at 6:49 a.m., the defendant drank to excess in the preceding hours, while the children were in her care. It was similarly reasonable for the court to infer that, because these tests took place on a Wednesday morning at a time when the defendant was responsible for getting her children ready for school and safely transported there, her intoxication posed an immediate and present risk of physical danger or psychological harm to the children, especially in light of her prior documented alcohol abuse issues.

The defendant argues that § 46b-56f (a) could not have been satisfied here because any risk of injury to the children was not " 'immediate and present' " at the

time the plaintiff filed the application. She notes that October 30, 2019, was a Wednesday and that the visitation schedule at the time called for the plaintiff to pick up the children from school on Wednesdays and have physical custody of them from Wednesday evening to Friday morning. She therefore argues that, because the children were already at school by the time the plaintiff filed the application and would be in the plaintiff's custody for the next several days, she could not have posed an immediate and present danger to the children at the exact time the plaintiff filed the application. We disagree.

Section 46b-56f requires that an application for an emergency ex parte order of custody be accompanied by an affidavit that sets forth, inter alia, the conditions warranting an emergency ex parte order. See General Statutes § 46b-56f (b). Thus, when a court is considering whether to issue an ex parte order, it has not yet had the benefit of evidence from the respondent; it is instead limited to the sworn statements of the applicant and must decide whether, on the basis of that information, a temporary ex parte order should issue. The statute gives a court the authority to issue an emergency order of custody for the protection of a child without a hearing if it finds that an immediate and present risk of physical danger or psychological harm to the child exists. See General Statutes § 46b-56f (c). Here, the plaintiff submitted evidence with his application indicating that the defendant was intoxicated while the children were in her care and that she refused to comply with the Soberlink testing, both of which violated the parties' September 18, 2019 agreement. The application was also filed on the same day that this conduct occurred. We conclude that the evidence in the plaintiff's application supported the court's determination that the danger

to the children was "immediate and present" under § 46b-56f (a).[8]

Furthermore, even if the court knew that the children were neither in the defendant's physical custody nor would be for a few days, allowing the defendant to escape the reach of § 46b-56f simply because the children were not in her physical custody at the exact moment that the plaintiff filed the application would construe the statute too narrowly. See *Barrett* v. *Montesano*, 269 Conn. 787, 797, 849 A.2d 839 (2004) ("[B]ecause [t]he law favors rational and sensible statutory construction . . . we interpret statutes to avoid bizarre or nonsensical results. . . . [I]f two constructions of a statute are possible, we will adopt the one that makes the statute effective and workable." (Citations omitted; internal quotation marks omitted.)). Thus, the court's determination that there was an immediate and present risk of physical danger or psychological harm to the children was not clearly erroneous.

We therefore conclude that the October 30, 2019 emergency ex parte order was supported by sufficient evidence.

B

The defendant also argues that the court violated her right to due process by failing to hold a hearing on the plaintiff's October 30, 2019 application for an emergency ex parte custody order.

The following procedural history is relevant to our consideration of this issue. When the court granted the plaintiff's application for an ex parte order of custody

[8] We also note that the defendant had every right to challenge this determination at the hearing on the application scheduled for November 12, 2019, by presenting evidence and arguments on why there was no immediate and present danger to the children. She declined to do so, however, and instead consented to having the order remain in effect.

on October 30, 2019, it scheduled a hearing on the ex parte application to take place on November 12, 2019. On November 12, 2019, the parties appeared in court, but the hearing did not proceed because the parties attempted to reach an agreement. Although they failed to reach an agreement at that time, they agreed to keep the ex parte order in place and to postpone the hearing while they continued to negotiate. On December 18, 2019, the parties were still attempting to come to an agreement, so they again consented to continue the matter and keep the ex parte order in place. On January 6, 2020, the parties requested a special assignment date to have a hearing on the ex parte application. The parties agreed to have the hearing on the ex parte application on May 8, 2020, but the hearing ultimately did not take place on that date. Although it is unclear from the record why the hearing did not take place, on June 5, 2020, the parties filed an agreement with the court indicating that they were agreeing to "modify the ex parte custody order dated October 30, 2019," to include, inter alia, that the parties would share joint legal custody of the children but that the plaintiff would continue to have physical custody. The agreement also required the defendant to undergo alcohol testing for a period of time before she could have unsupervised visitation with the children. The court approved the parties' agreement, finding it to be in the best interests of the children.

On November 13, 2020, the court held a status conference on the parties' outstanding motions. During the ensuing discussion, the defendant indicated that docket entry #209 might still be outstanding. The court replied: "That was an objection to [the October 30, 2019] ex parte motion . . . and the motion has been acted upon, and, if I recall, orders entered and then subsequently modified by agreement of the parties. . . . So, I don't think that's still on the table. The motion it addressed has been resolved, at least to this point the additional

motions to modify would determine whether further changes from the current orders would be made." The defendant indicated to the court that she understood, and the court, with the agreement of the parties, subsequently ordered the caseflow coordinator to schedule hearing dates on the pending motions, including the parties' motions to modify custody and access.

Section 46b-56f (c) provides in relevant part: "The court shall order a hearing on any application made pursuant to this section. If, prior to or after such hearing, the court finds that an immediate and present risk of physical danger or psychological harm to the child exists, the court may, in its discretion, issue an emergency order for the protection of the child . . . . If relief on the application is ordered ex parte, the court shall schedule a hearing not later than fourteen days after the date of such ex parte order. *If a postponement of a hearing on the application is requested by either party and granted, no ex parte order shall be . . . continued except upon agreement of the parties or by order of the court for good cause shown.*" (Emphasis added.)

Here, the court scheduled a hearing on the ex parte order to take place on November 12, 2019, which was within the fourteen days that § 46b-56f (c) requires. The parties appeared on November 12, 2019, December 18, 2019, and January 6, 2020, each time for a scheduled hearing on the ex parte application. Each time, however, they agreed to keep the ex parte order in place and to continue the hearing to a later date while they attempted to reach an agreement. They eventually scheduled a hearing for May 8, 2020, which never took place. Although the record is not clear as to why that hearing did not occur, it is reasonable to infer that it was due, at least in part, to the parties' ongoing attempts to reach an agreement because, on June 5, 2020, the

parties filed an agreement, dated May 28, 2020, proposing to modify the ex parte order. Three days later, the court approved that agreement, finding that it was fair and equitable under all the circumstances and in the best interests of the children. On November 13, 2020, after the court modified the ex parte order, the court held a status conference on the pending motions and informed the defendant that the October 30, 2019 ex parte order had been superseded by the parties' agreement and that any remaining custody issues would be resolved with the pending motions. The parties agreed that a hearing on the pending motions would be appropriate and that the hearing would begin in April, 2021.

On the record before us, we cannot conclude that the defendant's due process rights were violated. The only reason that a hearing on the ex parte application did not occur before the ex parte order was superseded is that the defendant expressly agreed, on multiple occasions, to keep the ex parte order in place while the parties attempted to reach a final agreement. The defendant subsequently consented to the agreement that modified and superseded the ex parte order, and that agreement rendered any hearing on that order unnecessary. Accordingly, the defendant's due process claim fails.

II

The defendant next argues that the court improperly delegated its judicial authority by giving the plaintiff the authority to decide the nature and scope of her visitation with R in its November 18, 2021 orders.[9] The

[9] The defendant specifically challenges the court's decision to give the plaintiff the power to (1) control the defendant's right of access to the children's medical records; (2) know the name and contact information of the defendant's mental health professional; (3) choose the family therapist who will work with the defendant and S; (4) determine the frequency of visitation between the defendant and R, including the ability to cancel visits and modify visitation if the plaintiff determines the visits are causing negative behavioral or emotional consequences for R; (5) receive reports related to the defendant's alcohol testing; and (6) receive, on request, information

plaintiff argues that the court did not delegate its judicial authority but, rather, exercised its authority in making the orders at issue in this appeal. We agree with the defendant.[10]

"It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind

about the dates and duration of the defendant's mental health treatment and notification of any missed sessions. We address only the defendant's fourth contention because that is the only claim that could be construed as a challenge to the orders on the ground that they constituted an impermissible delegation of judicial authority.

[10] The defendant also claims that the court improperly delegated its judicial authority in the October 30, 2019 ex parte order. We decline to review this claim because it is moot. As discussed in footnote 7 of this opinion, this court has held that "§ 46b-56f order[s] [are] not subject to dismissal pursuant to the mootness doctrine." *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 365. In so holding, the court cited decisions in which courts have held that challenges to protection orders issued pursuant to General Statutes § 46b-15 are not subject to dismissal on mootness grounds because of the collateral consequences of such orders. Id., citing *Putman* v. *Kennedy*, 279 Conn. 162, 164–65, 900 A.2d 1256 (2006) and *Gail R.* v. *Bubbico*, 114 Conn. App. 43, 47 n.5, 968 A.2d 464 (2009). Although the court in *Kyle S.* did not elaborate further about what, if any, collateral consequences may flow from an ex parte temporary custody order issued pursuant to § 46b-56f, it is clear that a decision from this court invalidating just that portion of the § 46b-56f order pertaining to visitation on the ground that it was an improper delegation of judicial authority would do nothing to alleviate any potential collateral consequences of the ex parte order that was issued in the present case. See *Williams* v. *Ragaglia*, 261 Conn. 219, 227, 802 A.2d 778 (2002) ("the application of the collateral consequences mootness doctrine is not predicated on a showing of the probability of such consequences, but, rather, on a showing of the *reasonable possibility* of collateral consequences" (emphasis in original)). This court is therefore incapable of granting any practical relief to the defendant with respect to this claim. As a result, we dismiss the defendant's challenge to the portion of the ex parte order pertaining to visitation as moot because that order was superseded by the subsequent visitation order. See, e.g., *Santos* v. *Morrissey*, 127 Conn. App. 602, 605, 14 A.3d 1064 (2011) (claim challenging visitation order that was superseded by subsequent order is moot).

the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Internal quotation marks omitted.) *Lehane* v. *Murray*, 215 Conn. App. 305, 311, 283 A.3d 62 (2022). Although our standard of review of a trial court's decision regarding custody and visitation orders typically is one of abuse of discretion; *J. Y.* v. *M. R.*, 215 Conn. App. 648, 659, 283 A.3d 520 (2022); "whether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review." *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

By its plain terms, § 46b-56 (a) authorizes the court—and the court alone—to "make or modify any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction under the provisions of chapter 815p. . . ." Section 46b-56 (b), in turn, provides in relevant part that, "[i]n making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . ." Lastly, § 46b-56 (c) provides in relevant part that, "[i]n making or modifying any order as provided in subsections (a) and (b) of this section, *the court shall consider the best interests of the child*, and in doing so, may consider, but shall not be limited to, one or more of" the seventeen factors enumerated therein. (Emphasis added.) Although a court may seek advice and heed recommendations from

a nonjudicial entity when issuing orders pursuant to § 46b-56; see *Keenan* v. *Casillo*, 149 Conn. App. 642, 660, 89 A.3d 912, cert. denied, 312 Conn. 910, 93 A.3d 594 (2014); our appellate courts have made clear that a court may not delegate its statutory decision-making authority to a nonjudicial entity. See, e.g., *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980); *Nashid* v. *Andrawis*, 83 Conn. App. 115, 119, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004); *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 628–29, 561 A.2d 443 (1989).

Many of the earlier improper delegation cases in Connecticut arose in instances in which the court had clearly removed itself entirely from the decision-making process. See, e.g., *Nashid* v. *Andrawis*, supra, 83 Conn. App. 120–21. More recent cases, however, have addressed some of the nuances that arise in the context of orders addressing child custody and visitation. See, e.g., *Lehane* v. *Murray*, supra, 215 Conn. App. 309 (trial court did not improperly delegate its judicial function by ordering that father could "alter, change or modify" mother's visitation schedule); *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 370–71 (court improperly removed itself from decision-making process by permitting therapist to decide nature and scope of father's contact with child); *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 172 (order granting teenage children control over father's access was not improper delegation).

Three recent cases are particularly instructive for present purposes. We begin with *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 143. In *Zilkha*, the trial court had found that the defendant's relationship with his children was strained due to years of fighting between the parties and the children's tendency to side with the plaintiff. Id., 161–62. As a result, the trial court's postdissolution order limited the defendant's visitation with his fifteen year old children to voluntary visitation

at their discretion. Id., 165. The defendant argued that the trial court impermissibly delegated its judicial authority to the children in giving them sole discretion over his visitation. Id., 168. This court concluded that, when the court crafted its order, "rather than delegating its responsibility, the court exercised its authority and met its obligation to decide issues of custody and visitation . . . . This adjudication by the court was the antithesis of a delegation because it plainly decided that the defendant should not have any *right* to custody or visitation. The fact that the court's order left open the possibility of voluntary visits at the discretion of the teenagers does not transform the court's decision-making into impermissible delegation." (Emphasis in original.) Id., 172.

A few months after this court decided *Zilkha*, it decided *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 353. In *Kyle S.*, the father claimed that the court erred in delegating the determination of the scope, nature, and duration of his contact with his child to the child's therapist. Id., 370. He argued that this constituted an improper delegation. Id. In its oral decision, the trial court ordered that "[the child's therapist] will dictate the scope of [the father's] contact with [the child] in a therapeutic setting." (Emphasis omitted; internal quotation marks omitted.) Id., 370–71. The court went on to state that it was "restricting . . . contact so that the mental health professional can be in charge." (Emphasis omitted; internal quotation marks omitted.) Id., 371. This court reversed that decision, concluding that the court "improperly removed itself from the decision-making process by permitting [the therapist] to decide the *nature and scope* of [the plaintiff's] contact with [the child]." (Emphasis added.) Id., 373.

Most recently, this court decided *Lehane* v. *Murray*, supra, 215 Conn. App. 305. The parties in *Lehane* filed several postdissolution motions regarding custody and

visitation, and the trial court issued a memorandum of decision awarding the defendant sole legal and physical custody of the parties' son. Id., 308. The court also ordered "that the plaintiff shall have parental access to the minor child every other weekend and every Wednesday overnight, and that the defendant may alter, change or modify [that] schedule, along with the location, date and time of the exchanges." (Internal quotation marks omitted.) Id. The plaintiff argued on appeal that the trial court's order had impermissibly delegated to the defendant the authority to " 'decide the nature and scope' " of the plaintiff's access to their son. Id., 316. We disagreed, explaining that "the court's order allowing the defendant to 'alter, modify or change' the plaintiff's visitation schedule does not give him the authority to 'decide the nature and scope' of her relationship with their son." Id. We reasoned that "the court did not, as the plaintiff contends, give the defendant 'unbridled' authority to modify her right to visit their son; *nor did the court give the defendant unilateral authority to suspend or terminate her parenting access to their son*. The court's order permits the defendant to modify the plaintiff's visitation *schedule*, not to modify her *right* to visitation. The court established specific parameters regarding the plaintiff's visitation with the parties' son, and the defendant is governed by those parameters in exercising the limited discretion afforded to him by the court. In other words, although the court's order allows the defendant to 'alter, change or modify' the plaintiff's visitation *schedule*, it does not permit him to reduce, suspend or terminate her access to their son." (Emphasis altered.) Id., 315.

With this as our backdrop, we turn to the order in this case. The November 18, 2021 order pertaining to visitation with R provides in relevant part: "After the [defendant] has engaged in at least four sessions with her mental health professional and the same has been

confirmed in writing to the [plaintiff] by the mental health professional, the [defendant] shall also be entitled to have in-person visits with [R]. The first three in-person visits shall occur within sixty days after [the plaintiff] has received such confirmation, shall be no longer than one hour each, and shall be supervised by a professional supervisor selected and paid for by the [plaintiff]. Unless the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the supervised visits are causing negative behavioral or emotional consequences for [R], then the [defendant] shall thereafter be entitled to reasonable, incrementally increased, unsupervised visitation with [R] on a schedule approved by the [plaintiff] from time to time. If at any time the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the unsupervised visits are causing negative behavioral or emotional consequences for [R], then the [plaintiff] may either suspend the [defendant's] visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with [the plaintiff] responsible for the cost of supervision, if any . . . ."

On the basis of our review of the court's order, we conclude that a portion of the order pertaining to the defendant's visitation with R is an improper delegation of authority because the court effectively delegated to the plaintiff, in consultation with the child's therapist, the authority to suspend or terminate the defendant's visitation with R and its attendant obligation to consider the best interests of R pursuant to § 46b-56 (c) before doing so. The plaintiff contends that the court's order in this case is like the order in *Zilkha* because "the court likewise decided that the defendant should not have any right to visitation." The court's order makes clear on its face, however, that the defendant was granted a specific right to visitation. The order states in no uncertain terms that, "[a]fter the [defendant] has

engaged in at least four sessions with her mental health professional and the same has been confirmed in writing to the [plaintiff] by the mental health professional, the [defendant] *shall also be entitled* to have in-person visits with [R]. The first three in-person visits shall occur within sixty days after [the plaintiff] has received such confirmation, shall be no longer than one hour each, and shall be supervised by a professional supervisor selected and paid for by the [plaintiff]." (Emphasis added.) The court went on to state that the defendant "shall thereafter *be entitled* to reasonable, incrementally increased, unsupervised visitation with [R] on a schedule approved by the [plaintiff] from time to time." (Emphasis added.) Although the court properly exercised its authority in awarding the defendant visitation in the first instance, the order became impermissible when the court gave the plaintiff the authority, after consultation with the child's therapist, to deny this incrementally increased, unsupervised visitation with R and the ultimate authority to suspend or terminate the defendant's right to visitation altogether. See *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 373 ("[p]ut another way, the court in the present case improperly removed itself from the decision-making process by permitting [the child's therapist] to decide the nature and scope of [the parent's] contact with [the child]").

In *Lehane*, this court, in upholding a visitation order, explained that "the court did not . . . give the defendant 'unbridled' authority to modify her right to visit their son; nor did the court give the defendant unilateral authority to suspend or terminate her parenting access to their son." *Lehane* v. *Murray*, supra, 215 Conn. App. 315. Instead, that order simply permitted "the defendant to modify the plaintiff's visitation *schedule*, not to modify her *right* to visitation." (Emphasis in original.) Id. In the present case, the court's order did not merely permit the plaintiff to modify a visitation *schedule*; it

did precisely what this court emphasized the order in *Lehane* did *not* do: it permitted the plaintiff to unilaterally "suspend the [defendant's] visitation . . . ." See id. The fact that the court's order required the plaintiff to act reasonably and consult with R's therapist before exercising this authority does not salvage the order. On the contrary, that requirement further illustrates how the court improperly ceded its duty to consider the best interests of the child pursuant to § 46b-56 (c)—which requires a court to consider, inter alia, "[t]he physical and emotional safety of the child" and "the temperament and developmental needs of the child"—to the plaintiff and the child's therapist.

We note that the overwhelming majority of jurisdictions that have addressed whether a court can delegate this authority to a custodial parent have similarly concluded that this type of delegation is improper.[11] We

[11] See, e.g., *Pratt* v. *Pratt*, 56 So. 3d 638, 643 (Ala. Civ. App. 2010) ("a visitation order awarding reasonable visitation with the minor children at the discretion of the [custodial parent] generally should not be allowed because it authorizes the custodial parent to deny visitation altogether, which would not be in the best interests of the children" (internal quotation marks omitted)); *Brooks* v. *Shepherd*, Docket No. CA 98-1526, 1999 WL 1031263, *6 (Ark. App. November 10, 1999) (The trial court improperly delegated judicial authority when it gave the mother authority over all of the father's out-of-town visitation because "[the mother] has been injured by the [father's] actions as has [the child]. She is likely to be influenced by her own anger, frustration, and pain when she should be making a determination regarding the best interests of [the child] in her relationship with her father. . . . [W]e believe [the child's] interests would be better served in this matter if the chancellor retains direct control over the visitation rights of [the father] rather than vesting that discretion with [the mother]."); *In re T.H.*, 190 Cal. App. 4th 1119, 1123–24, 119 Cal. Rptr. 3d 1 (2010) (court's order improperly delegated authority where mother had discretion as to whether father's visitation would occur); *People ex rel. D.G.*, 140 P.3d 299, 302 (Colo. App.) ("the trial court may not delegate the determination of entitlement to visitation to caseworkers, therapists, *and others*" (emphasis added)), cert. denied, Docket No. 06SC373, 2006 WL 2204790 (Colo. July 31, 2006); *Cheek* v. *Edwards*, 215 A.3d 209, 216 n.11 (D.C. 2019) ("[w]hether to grant a noncustodial parent visitation is a decision committed to the trial court's discretion and the court abuses this discretion when it delegates this decision to anyone else"); *In re Marriage of Jenkins*, Docket No. 22-

find particularly persuasive the decision of the Virginia Court of Appeals in *Rainey* v. *Rainey*, 74 Va. App. 359, 386, 869 S.E.2d 66 (2022). There, following the dissolution of the parties' marriage, the mother had primary physical custody of the children and the father had visitation, but his relationship with the children had deteriorated and visitation was not going well. Id., 369–70. The mother consented to the father assuming temporary physical custody of the children to help repair the father's relationship with them. Id., 370. The father, in tandem with the children's mental health providers, then severely limited the mother's access to the children, and she was allowed to communicate with them only via letter. Id., 371–72. Subsequently, the juvenile and domestic relations district court ordered that the father would have sole physical custody and forbade the mother from contacting the children outside of therapeutic letter writing; id., 372–73; and granted "[the] father 'sole discretion to consent to supervised visitation between the [m]other and [the] children with a supervisor of [the] [f]ather's choice' if '[he] believes that [the] [m]other is appropriate and will not cause

0656, 2023 WL 382301, *3 (Iowa App. January 25, 2023) (finding trial court improperly delegated authority to mother and to children to determine whether visitation with father would occur); *Sanchez* v. *Sanchez*, Docket No. 1689, 2022 WL 2354989, *7 (Md. Spec. App. June 30, 2022) (court improperly delegated to mother and therapist power to determine father's right to contact and visitation with minor sons); *State ex rel. Ryley G.* v. *Ryan G.*, 306 Neb. 63, 78, 943 N.W.2d 709 (2020) ("because the authority to determine custody and visitation is a judicial function, it cannot be delegated to [a custodial parent]"); *In re Izrael J.*, 149 App. Div. 3d 630, 630, 51 N.Y.S.3d 88 (2017) ("[a] court may not delegate its authority to determine visitation to either a parent or a child" (internal quotation marks omitted)); *In re A.P.*, 281 N.C. App. 347, 361, 868 S.E.2d 692 (2022) (finding trial court improperly gave father substantial discretion over mother's visitation where father testified he was not willing to facilitate or supervise mother's visits and did not want mother to be part of child's life); *Rainey* v. *Rainey*, 74 Va. App. 359, 387, 869 S.E.2d 66 (2022) ("[w]here the governing statutes squarely place the obligation to make contested visitation decisions on the judiciary, delegation of this responsibility to third parties or parents is unauthorized").

harm to the children' . . . ." Id., 383. The mother appealed to the Virginia Circuit Court, and that court held an evidentiary hearing on the matter. Id., 373. The Circuit Court ultimately adopted the trial court's order, and the mother appealed that decision to the Virginia Court of Appeals. Id., 375–76.

On appeal, the mother argued that both the trial court and the Circuit Court erred in allowing the father sole discretion over her visitation with the children, and the Court of Appeals agreed. Id., 382. The court concluded that the trial court "abdicated its statutory power, and duty, to determine visitation under [Virginia] Code § 20-124.2 (A)";[12] id., 383; and reasoned that, "[w]here the governing statutes squarely place the obligation to make contested visitation decisions on the judiciary, delegation of this responsibility to third parties or parents is unauthorized." Id., 387. The court also noted that, "from a practical standpoint, there are obvious problems inherent in delegating judicial decision-making functions to a party. First, particularly in child custody and visitation cases, parties are likely to have difficulty communicating and seeing past their inherent biases. Leaving the sole power of increased visitation with such a party invites abuse and inequity." Id. Accordingly, the Virginia Court of Appeals reversed the trial court's ruling on visitation and remanded the case with instructions for the trial court to make the ultimate visitation determinations itself. Id., 389.

In the present case, the dissent takes the position that, although a court may not delegate its decision-making authority over a parent's visitation rights to

[12] Section 20-124.2 (A) of the Virginia Code Annotated (Cum. Supp. 2020) provides in relevant part: "In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. . . ."

a third party, a court may nevertheless delegate that authority to a custodial parent. The dissent focuses in large part on the language in § 46b-56 (a) that provides in relevant part that "the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . ." In the dissent's view, this language affords Connecticut courts more discretion in issuing an order regarding custody and visitation than Virginia courts and the courts of many other states that have found this type of delegation improper. As a result, it contends that, "under the [trial] court's order as to R, the plaintiff is permitted to exercise limited discretion over the defendant's visitation." We disagree.

First, if the dissent's interpretation were correct, there would be no logical basis for interpreting the statute to prohibit delegations to third parties other than custodial parents. That same language could only be interpreted as also permitting a court to delegate its authority over visitation orders to other third parties, such as a therapist or guardian ad litem. Such an interpretation, therefore, is contrary to this court's well established nondelegation jurisprudence. We interpret the language on which the dissent relies to mean precisely what it says: that a court may impose certain conditions and limitations on a parent's right to visitation, not that a court may delegate to a custodial parent—but not to any other parties—the authority to grant, deny, suspend or terminate a noncustodial parent's visitation rights.

Second, there can be little dispute that Connecticut's laws governing custody and visitation orders are substantially similar to the laws of many other states that have concluded that this type of delegation is impermissible. Although the dissent contends, for instance, that

"our statute affords a court more discretion in issuing an order regarding custody and visitation than that afforded to a court in Virginia," it focuses only on Virginia Code § 20-124.2 (A) and overlooks other provisions of § 20-124.2 and other Virginia laws governing custody and visitation. Like § 46b-56 (c), Virginia Code § 20-124.2 (B) provides: "In determining custody, the court shall give primary consideration to the best interests of the child. The court shall consider and may award joint legal, joint physical, or sole custody, and there shall be no presumption in favor of any form of custody. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." We do not find such language to be materially different from § 46b-56 for purposes of our analysis.

The dissent also notes that a few of the out-of-state jurisdictions that we cite as examples of jurisdictions that prohibit a delegation like the one at issue in this case also have held that a court may not delegate to a child its authority over visitation. The dissent argues that this court's decision in *Zilkha* interpreted § 46b-56 to effectively permit such delegations.[13] It further

[13] We do not agree with the dissent's interpretation of *Zilkha*. In *Zilkha*, this court held that the trial court did not improperly delegate its authority because the court plainly decided that the defendant had *no right* to visitation. *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 172 ("Simply put, rather than delegating its responsibility, the court exercised its authority and met its obligation to decide issues of custody and visitation by denying the defendant's motions. This adjudication by the court was the antithesis of a delegation because it plainly decided that the defendant should not have any *right*

contends that this distinction demonstrates that our statute is less restrictive than the statutes in some of the jurisdictions that prohibit delegations over visitation to a custodial parent. But, even if we were to accept the dissent's reading of this court's holding in *Zilkha* as standing for the broad proposition that § 46b-56 authorizes a court to delegate to a child its authority over a noncustodial parent's right to visitation, the fact that a few of the jurisdictions that prohibit delegations to a custodial parent also interpret their statutes to prohibit delegations to a child does not explain how the clear language of § 46b-56 (a), which gives courts—and courts only—the power and responsibility to make rulings in contested custody and visitation matters, can be reconciled with the notion that a court may delegate to one parent the authority to determine the visitation rights of the other.

Although the dissent also contends that Alabama and Arkansas do not categorically ban courts from affording some discretion over visitation to a custodial parent, those states make it abundantly clear that this sort of delegation "generally should not be allowed . . . ." *Pratt* v. *Pratt*, 56 So. 3d 638, 643 (Ala. Civ. App. 2010). Similarly, although the dissent argues that the North Dakota Supreme Court has "recognize[d] the propriety of such orders under certain circumstances" in *Wigginton* v. *Wigginton*, 692 N.W.2d 108, 112–13 (N.D. 2005), that decision and more recent North Dakota cases include no discussion of the statutory framework governing visitation orders in that state or how orders delegating authority in such a fashion can be reconciled with that framework. See, e.g., *Taylor* v. *Taylor*, 970 N.W.2d 209, 216–17 (N.D. 2022). Moreover, the North

to custody or visitation." (Emphasis in original.)). This court's decision made clear that the father's right to visitation was not left up to the children. Rather, the court simply noted that, should the teenage children want to voluntarily visit their father, they were free to do so. Id.

Dakota Supreme Court itself has recognized the potential problems with such orders and, consequently, has significantly limited the use of such orders to "exceptional circumstances" when visitation with a noncustodial parent is "likely to endanger the child's physical or emotional health"; id., citing *Paulson* v. *Paulson*, 694 N.W.2d 681, 690–91 (N.D. 2005); and "when the custodial parent demonstrates a willingness to foster the parent-child relationship between the child and the other parent . . . ." *Taylor* v. *Taylor*, supra, 217, citing *Marquette* v. *Marquette*, 719 N.W.2d 321, 325 (N.D. 2006). We are not persuaded that such a rule is permissible under our statutory framework. Nor are we persuaded that such a rule provides sufficient guidance over its application to courts or adequate assurance to noncustodial parents and the children that visitation orders will be issued according to a child's best interests.[14]

Lastly, and as the Virginia Court of Appeals noted in *Rainey*; see *Rainey* v. *Rainey*, supra, 74 Va. App. 387; a statute prohibiting third parties, including custodial parents, from deciding a noncustodial parent's right to access his or her child is neither arbitrary nor irrational. On the contrary, the legislature's decision to prohibit such delegations serves important public policy goals. Indeed, given the often contentious nature of postdissolution relationships, permitting a custodial parent to

[14] We note that, unlike the courts in Alabama, Arkansas, and North Dakota, the dissent's interpretation of § 46b-56 would place no significant limits on the use of orders delegating the authority to suspend or terminate a noncustodial parent's visitation to custodial parents. Although the dissent states that it does not posit "that an order that affords the custodial parent unfettered discretion as to the noncustodial parent's visitation should be the usual practice of a trial court considering a custody and visitation dispute," it also makes clear that, under its interpretation of § 46b-56, such an order could be made upon a showing that it would be in a child's best interests and would be reviewed on appeal under the ordinary abuse of discretion standard that applies to all other custody and visitation orders.

decide visitation arguably poses even more significant concerns than a rule permitting objective third parties, such as guardians ad litem or therapists, to decide the issue. See id. ("[l]eaving the sole power of increased visitation with . . . a party [in a child custody and visitation case] invites abuse and inequity"); see generally *Berglass* v. *Berglass*, 71 Conn. App. 771, 778, 804 A.2d 889 (2002) ("It was necessary here for the court, and not the plaintiff, to interpret the parties' [parenting plan] agreement to determine whether the defendant had satisfied the [condition precedent to overnight visitation]. That is essential in classic high conflict, custody, postjudgment litigation. It is inappropriate for the custodial parent in a high conflict case to be given decision-making control over the noncustodial parent's access to minor children.").

In sum, our nondelegation jurisprudence compels us to conclude that, where a governing statute squarely places the obligation on the trial court to decide custody and visitation in contested disputes, delegation of this responsibility to a nonjudicial entity, whether it be a parent or some other third party, is impermissible.[15] Because the order in this case impermissibly delegated the court's judicial authority under § 46b-56, we reverse the trial court's judgment as it relates to the defendant's visitation with R.

III

The defendant's last argument on appeal is that the court's handling of her confidential medical information

[15] We recognize that this is the first time this court has had the opportunity to directly apply our prior precedents to an order delegating authority over a noncustodial parent's visitation to a custodial parent. We also recognize that our decision may require courts to entertain more frequent motions concerning visitation than they might otherwise be required to decide if custodial parents were permitted to decide a noncustodial parent's right to visitation. We are confident, however, that Superior Court judges, like their counterparts in nearly every other state that has decided this issue, will continue to carry out their statutory duty under § 46b-56 to issue visitation

violated her privacy rights pursuant to 42 C.F.R. § 2.64 and General Statutes § 17a-688. Specifically, the defendant argues that her privacy rights were violated when the court (1) permitted two witnesses to testify about the details of her medical history and (2) referenced that medical history in its publicly available November 18, 2021 memorandum of decision. For the reasons that follow, we decline to review these claims.

A

The defendant first argues that allowing the guardian ad litem and Dr. Roeder to testify about her medical records violated her individual privacy rights. It is well known, however, that, "[i]n order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Citations omitted; internal quotation marks omitted.) *State* v. *Qayyum*, 344 Conn. 302, 310–11, 279 A.3d 172 (2022).

In the present case, the defendant never raised this objection to the testimony of Dr. Roeder or the guardian ad litem at trial, which was the appropriate time to resolve any claimed violation of the defendant's individual privacy rights. Thus, the trial court was never presented with—and never ruled on—the claim that certain testimony infringed on her privacy rights. As a result, we conclude that the defendant failed to preserve this evidentiary claim, and, therefore, we do not review it.

B

The defendant also argues that the court violated her privacy rights by including her personal medical history in its November 18, 2021 decision and publishing that decision without sealing it or removing identifying information.

orders that take into consideration the rights of all parties and are in the best interests of the child.

The following procedural history is relevant to our consideration of this argument. The defendant appealed from the November 18, 2021 decision on December 20, 2021. On February 3, 2022, while this appeal was pending, the defendant filed a request seeking, inter alia, removal of her personal identifying information from the November 18, 2021 memorandum of decision. That was the first time the defendant alerted the court to this concern. On March 15, 2022, the court denied the request, stating that it found "no legal basis on which to grant the . . . relief requested, seeking . . . the removal of pleadings, testimony, and factual findings from the court file."

Practice Book § 61-9 provides in relevant part: "Should the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of the notice of the decision as provided for in Section 63-1. . . ." Thus, if the defendant wanted this court to review the court's ruling on her February 3, 2022 request, she should have filed an appeal form indicating such intention or amended her appeal pursuant to Practice Book § 61-9. Because she failed to do so, we decline to review this claim. See *Jewett* v. *Jewett*, 265 Conn. 669, 673 n.4, 830 A.2d 193 (2003); *Juliano* v. *Juliano*, 96 Conn. App. 381, 386, 900 A.2d 557, cert. denied, 280 Conn. 921, 908 A.2d 544 (2006).

The judgment is reversed only as to the order providing that a nonjudicial entity may suspend the defendant's visitation rights with R, and the case is remanded for further proceedings solely as to that issue; the judgment is affirmed in all other respects.

In this opinion SEELEY, J., concurred.

BRIGHT, C. J., concurring in part and dissenting in part. I fully concur with parts I and III of the well reasoned majority opinion. I disagree, however, with the majority's conclusion in part II of the opinion that the court's November 18, 2021 visitation order as to the parties' son, R, constituted an impermissible delegation of the court's authority to the plaintiff father, R. H. To the contrary, I believe that the court, after awarding sole legal custody of both minor children to the plaintiff—which award the defendant mother, M. H., does not challenge on appeal—properly exercised its authority pursuant to General Statutes § 46b-56 by crafting a visitation order that gave the defendant the opportunity to maintain and improve her relationship with R while protecting R's best interests. In my view, the impermissible delegation of authority cases on which the majority relies are inapplicable to a visitation order affording a sole legal and custodial parent discretion over the noncustodial parent's visitation with the child. Instead, because § 46b-56 authorizes the court to issue such an order, the relevant inquiry is whether the court abused its discretion in doing so. In addition, I am concerned that the majority's holding, by reading a limitation into § 46b-56 that I do not believe exists, will discourage judges from exercising the broad discretion our legislature afforded them in settling disputed custody issues in the best interests of the child. Accordingly, I would affirm the court's judgment as to the visitation order regarding R and, therefore, respectfully dissent from part II of the majority opinion.[1]

[1] I also disagree with the conclusion in footnote 10 of the majority opinion that the defendant's claim that the court improperly delegated its judicial authority in the October 30, 2019 ex parte order is moot. I agree with the majority's conclusion in footnote 7 of its opinion that we are bound by this court's decision in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 365, 190 A.3d 68 (2018), in which we held that "a [General Statutes] § 46b-56f order is not subject to dismissal pursuant to the mootness doctrine." Because the only topics such an order addresses are custody and visitation rights, I am not persuaded by the majority's reasoning that the "portion of the § 46b-56f order pertaining to visitation" is somehow distinct from the court's October

The majority opinion comprehensively sets forth the relevant facts and procedural history, so I will not repeat them here. It is particularly unnecessary to do so because my disagreement with the analysis in part II of the majority opinion is as to the application of law. Consequently, I begin with the well established law regarding custody and visitation decisions. Subsection (a) of § 46b-56 authorizes the Superior Court in any action involving the custody or care of minor children, including a divorce action brought under General Statutes § 46b-45, to "make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . ." "In making or modifying any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. Such orders may include, but shall not be limited to . . . (3) the award of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child; or (4) any other custody arrangements as the court may determine to be in the best interests of the child." General Statutes § 46b-56 (b). Section 46b-56 (c) sets forth a nonexhaustive list of seventeen factors that the court may consider in

30, 2019 ex parte order and, therefore, does not implicate "any potential collateral consequences of the ex parte order that was issued in this case." See footnote 10 of the majority opinion. Given this court's holding in *Kyle S.*, I believe that the defendant's improper delegation claim as to the October 30, 2019 ex parte order should be addressed on the merits. Therefore, I simply note that I would reject the defendant's improper delegation claim as to the ex parte order on the merits for the same reasons that I would affirm the court's November 18, 2021 visitation order as to R.

determining what custody and/or visitation order is in the child's best interests.

Accordingly, pursuant to § 46b-56, a trial court has broad discretion to award either parent sole physical and legal custody of a child and to place parameters on a noncustodial parent's visitation with the child, including limiting the amount of visitation, determining that visitation will be supervised, and conditioning visitation on compliance with certain requirements, including participation in therapy or counseling and alcohol or drug testing. See, e.g., *Dempsey* v. *Cappuccino*, 200 Conn. App. 653, 656, 240 A.3d 1072 (2020) (court's visitation order required that defendant's visitation with minor child be supervised at home of defendant's parents and that he submit to periodic hair follicle drug testing and to blood alcohol tests before and during parenting time). The court also may deny the noncustodial parent any visitation. See, e.g., *Franklin* v. *Dunham*, 8 Conn. App. 30, 32, 510 A.2d 1007 (1986) (court granted custody to father with no visitation rights for mother).

Given that the court can deny visitation completely, effectively leaving the custodial parent with complete control over the noncustodial parent's access to the child, logic dictates that the court has the authority to craft a visitation order that, under the facts and circumstances, places limits on such control. As our Supreme Court has stated regarding custody issues, "decision-making in family disputes requires flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines." (Internal quotation marks omitted.) *Yontef* v. *Yontef*, 185 Conn. 275, 278, 440 A.2d 899 (1981). The flexibility that our trial courts have on issues of custody and visitation is not judicially created but is expressly set forth in § 46b-56 (a), which provides that the court

should make such decisions "according to its best judgment upon the facts of the case *and subject to such conditions and limitations as it deems equitable.*"[2] (Emphasis added.)

Given the many factors the court may consider and weigh and the wide range of orders it is authorized to issue, we afford great deference to a court's custody and visitation determinations. "Our standard of review of a trial court's decision regarding custody [and] visitation . . . orders is one of abuse of discretion. . . . [T]he trial court's decision on the matter of custody is committed to the exercise of its sound discretion and its decision cannot be overridden unless an abuse of that discretion is clear. . . . The controlling principle in a determination respecting custody is that the court shall be guided by the best interests of the child. . . . In determining what is in the best interests of the child, the court is vested with a broad discretion. . . . [T]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"The trial court has the opportunity to view the parties [firsthand] and is therefore in the best position

[2] The majority posits that, "if [my] interpretation were correct, there would be no logical basis for interpreting the statute to prohibit delegations to third parties other than custodial parents. That same language could only be interpreted as also permitting a court to delegate its authority over visitation orders to other third parties, such as a therapist or guardian ad litem. Such an interpretation, therefore, is contrary to this court's well established nondelegation jurisprudence." As I explain further in addressing the majority's reliance on our nondelegation cases, our precedent reflects—but the majority does not recognize—that delegation of discretion to a parent is materially different than delegation of authority to a third party.

to assess the circumstances surrounding a dissolution action, in which such personal factors as the demeanor and attitude of the parties are so significant. . . . [E]very reasonable presumption should be given in favor of the correctness of [the trial court's] action. . . . We are limited in our review to determining whether the trial court abused its broad discretion to award custody based upon the best interests of the child as reasonably supported by the evidence. . . . We further note that a trial court's factual findings may be reversed on appeal only if they are clearly erroneous. To the extent that [a party] claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court." (Citation omitted; internal quotation marks omitted.) *Weaver* v. *Sena*, 199 Conn. App. 852, 859–60, 238 A.3d 103 (2020).

In the present case, the court, after considering the evidence before it and applying the factors in § 46b-56 (c), ordered that the plaintiff have sole legal and physical custody of the parties' children. The defendant does not challenge that order in this appeal. Thus, the court vested the plaintiff with full decision-making authority for his children, complemented with providing the defendant an avenue by which she could incrementally increase her visitation with R. It is only this part of the court's comprehensive custody and visitation order that is at issue in this appeal. The defendant does not argue, and the majority does not hold, that the visitation order constitutes an abuse of discretion because it is not in R's best interests or because it does not reflect that the court properly considered the evidence and properly applied the statutory factors. Instead, the sole infirmity the majority identifies with the order is that it constitutes an impermissible delegation of the court's authority. I disagree.[3]

[3] I agree with the majority that whether the court has impermissibly delegated its authority is a question of law over which we exercise plenary

The court's November 18, 2021 order provides in relevant part that the defendant would have supervised visits with R, but only "[a]fter the [defendant] has engaged in at least four sessions with her mental health professional and the same has been confirmed in writing to the [plaintiff] by the mental health professional . . . . The first three in-person visits shall occur within sixty days after [the plaintiff] has received such confirmation, shall be no longer than one hour each, and shall be supervised by a professional supervisor selected and paid for by the [plaintiff]." The order further provides that, "[u]nless the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the supervised visits are causing negative behavioral or emotional consequences for [R], then the [defendant] shall thereafter be entitled to reasonable, incrementally increased, unsupervised visitation with [R] on a schedule approved by the [plaintiff] from time to time. If at any time the [plaintiff] reasonably determines, after consultation with [R's] therapist, that the unsupervised visits are causing negative behavioral or emotional consequences for [R], then the [plaintiff] may either suspend the [defendant's] visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with [the plaintiff] responsible for the cost of supervision, if any . . . ."[4]

review. See *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64 ("whether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review"), cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018).

[4] It is notable that neither our Supreme Court nor this court has ever held that an order giving a custodial parent discretion over a noncustodial parent's visitation rights constitutes an impermissible delegation of authority, and a rudimentary Internet search identified several decisions over the last thirty years in which Superior Court judges have issued such orders. See *Young-Dwyer* v. *Dwyer*, Superior Court, judicial district of Hartford, Docket No. FA-17-5044357-S (March 19, 2018) ("The plaintiff [mother] shall have sole legal and physical custody of [the minor child]. The defendant may have visitation with [the child] at the plaintiff's discretion."); *Manis* v. *Newman*, Superior Court, judicial district of Waterbury, Docket No. FA-17-5018286-S (January 31, 2018) ("The plaintiff father is granted sole legal and physical

The majority concludes that this part of the court's order constitutes an impermissible delegation of the court's authority "because the court effectively delegated to the plaintiff, in consultation with the child's therapist, the authority to suspend or terminate the defendant's visitation with R and its attendant obligation to consider the best interests of R pursuant to § 46b-56 (c) . . . ." The majority then attempts to distinguish the order in the present case from the visitation provision that this court affirmed in *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 171–73, 183 A.3d 64, cert. denied,

custody of the minor child and [the defendant] mother shall continue to enjoy daily telephone or video conferencing with the minor child. The defendant's visitation shall be at the plaintiff's discretion."); *Brunson* v. *Yrayta*, Superior Court, judicial district of New Haven, Docket No. FA-14-4019781-S (August 21, 2015) ("The court grants sole legal and physical custody of the minor children . . . to the plaintiff [father]. . . . The defendant mother's visitation is at father's discretion."); *Boyne* v. *Boyne*, Superior Court, judicial district of Hartford, Docket No. FA-05-4018463 (June 25, 2007) ("[t]he defendant's relationship with his children has deteriorated to the extent that by agreement and court order the plaintiff [mother] has sole custody of the children and the defendant has visitation only at the discretion of the plaintiff"), rev'd in part on other grounds, 112 Conn. App. 279, 962 A.2d 818 (2009); *Abogunde* v. *Abogunde*, Superior Court, judicial district of Tolland, Docket No. FA-04-0083875-S (June 29, 2004) ("The plaintiff [mother] shall have sole custody of the minor children. Any visitation shall be at the discretion of the plaintiff and only as permitted by her, until further order of the court."); *Zavitsanos* v. *Zavitsanos*, Superior Court, judicial district of New Haven, Docket No. FA-98-0410795 (June 21, 1999) (court ordered father would have supervised visitation for one year before unsupervised visitation began and noted that, "[i]f no supervised visitation occurs, then the mother may decide to preclude the father's unsupervised visitation and summer vacation"); *Kasowitz* v. *Kasowitz*, Superior Court, judicial district of New Haven, Docket No. FA-97-0403819 (January 26, 1999) (The court ordered that "[b]oth parents shall actively participate and encourage the children to participate in the program as deemed appropriate by the therapist. If recommended [by] the therapist, the husband shall participate in substance evaluation and treatment, and visitation may be modified or terminated in the reasonable exercise of the mother's discretion for his failure to so participate."); *Lavorgna* v. *Lavorgna*, Superior Court, judicial district of Waterbury, Docket No. 106399 (March 30, 1993) ("[v]isitation for [the minor child] with the plaintiff [mother] shall be in the discretion of the defendant [father], custodian of [the minor child]"). I am certain that there are more.

328 Conn. 937, 183 A.3d 1175 (2018), which afforded the father no right to visitation but left to the children the discretion to engage in visitation. In *Zilkha*, "[w]ith respect to future access by the defendant to the children, the [trial] court stated that '[s]uch access as may evolve between [the defendant], his extended family and [his two children] during the less than three years remaining before [the children] are eighteen shall be voluntary and at [the children's] choosing and direction. Minimally, it shall be by quarterly written reports provided by the children about their lives to their father. Hopefully, it will progress to more access and, ultimately, personal contact on a regular basis. Should the children wish to progress at some point in the future to normal access, [the plaintiff] must permit alternate weekend overnight access from Friday through Sunday, some hours during the week after school, as well as uninterrupted vacation time in the summer for up to three weeks. All such access is to be unsupervised. . . .

" 'The court cautions [the defendant] not to read any legal entitlement to direct access in any fashion to his children through these orders. Visitation is always for the children's benefit. *In this unusual high conflict family and, given* [*the children's*] *age, the court has made it exclusively the minor children's legal entitlement.*' " (Emphasis in original.) Id., 165–66.[5]

The majority reasons that, unlike the court in *Zilkha*, the court in the present case determined that the defendant was " 'entitled to reasonable, incrementally increased, unsupervised visitation with R . . . .' "

[5] Given the clear language of the visitation order in *Zilkha*, I disagree with the majority's statement that "[t]his court's decision [in *Zilkha*] made clear that the father's right to visitation was not left up to the children." I simply do not see how the order can be interpreted in any way other than leaving the father's right to visitation up to the children. In fact, the court in *Zilkha* used the same entitlement language on which the majority places so much emphasis in the present case.

According to the majority, once the court granted the defendant this incremental entitlement, only the court—not the plaintiff after consultation with R's therapist—could take it away. In reaching this conclusion, the majority relies on cases in which this court has held that a court may not delegate custody or visitation decisions to nonjudicial entities such as a therapist or an attorney for the minor child. It also relies on this court's discussion of a claim of impermissible delegation to a parent of authority over visitation in a case in which we were not asked to decide and did not decide whether the prohibition on delegation applied to discretion over visitation given to the custodial parent. I disagree both with the majority's interpretation of the court's visitation order as to R and with its application of our nondelegation cases to the order in this case.

I begin with the interpretation of the court's order, which is a question of law. See *Lawrence* v. *Cords*, 165 Conn. App. 473, 484, 139 A.3d 778 (construction of order or judgment is question of law), cert. denied, 322 Conn. 907, 140 A.3d 221 (2016). First, it is important to note that the order did not delegate any authority over the defendant's visitation to R's therapist. The order unambiguously gives the plaintiff, not R's therapist, discretion to suspend the defendant's visitation. The requirement that the plaintiff consult with R's therapist before suspending visitation is merely a limit the court placed on the plaintiff's discretion to suspend the defendant's visitation with R. Given that the court had the authority, pursuant to § 46b-56 (a), to order no visitation for the defendant and thereby give the plaintiff complete discretion over the defendant's visitation with R, I do not view its order restricting that discretion by requiring consultation with R's therapist as an impermissible delegation of the court's authority.

Second, I disagree with the majority's reliance on the defendant's " 'entitle[ment]' " to visitation. The court's

statement that "the [defendant] shall thereafter be *entitled* to reasonable, incrementally increased, unsupervised visitation with [R]" must be read in context of the entire order. (Emphasis added; internal quotation marks omitted.) See *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 424–25, 3 A.3d 919 (2010) ("an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding"); see also *Fisher* v. *Fisher*, 4 Conn. App. 97, 100, 492 A.2d 525 (1985) ("[w]e must read the language of a trial court in the context of its entire memorandum of decision, declining to find reversible error solely because of what may be an inappropriate choice of words"). As an initial matter, the court never determined that the defendant was unconditionally entitled to unsupervised visits with R. The " 'entitled to' " language on which the majority relies is conditioned on the plaintiff reasonably concluding, in consultation with R's therapist, that the limited supervised visitation ordered by the court is not " 'causing negative behavioral or emotional consequences for [R] . . . .' " Otherwise, there is no "entitlement" to unsupervised visits.

Similarly, the court's order gives the plaintiff the discretion to suspend unsupervised visits once they start for the same reason that the plaintiff is permitted to not allow the visits in the first place. Alternatively, given the evidence the court heard regarding the defendant's behavior, mental health issues, and struggles with alcohol, as discussed at length in the majority opinion, the order gives the plaintiff the discretion to reinstate the requirement of supervision. At the same time, the court recognized the importance of the defendant maintaining a relationship with R and sought to allow her to do so. The court balanced these competing interests by creating an avenue for the defendant to visit with R, giving the plaintiff discretion to stop or restrict visits if they were negatively affecting R, and placing limits

on the plaintiff's discretion to do so. Accordingly, read in the proper context, the order is nothing more than the court's effort to limit the discretion the plaintiff has over the defendant's visitation with R. Thus, under the court's order as to R, the plaintiff is permitted to exercise limited discretion over the defendant's visitation.

Finally, I disagree with the majority's attempt to distinguish this court's decision in *Zilkha* because in *Zilkha* " 'the court likewise decided that the defendant should not have any right to visitation.' The court's order [in the present case] makes clear on its face, however, that the defendant was granted a specific right to visitation." In footnote 13 of the majority opinion, the majority reasons that, "[i]n *Zilkha*, this court held that the trial court did not improperly delegate its authority because the court plainly decided that the defendant had *no right* to visitation. . . . This [court] made clear that the father's right to visitation was not left up to the children. Rather, the court simply noted that, should the teenage children want to voluntarily visit their father, they were free to do so."[6] (Citation omitted; emphasis in original.)

In my view, the majority elevates form over substance. Applying the majority's reasoning, a court's order that "the noncustodial parent has no right to visitation, unless permitted by the custodial parent" is permissible because it starts by ordering that there is no right to visitation. On the other hand, a court's order that "the noncustodial parent has the right to visitation as permitted by the noncustodial parent" is an impermissible delegation of authority because it begins by acknowledging the noncustodial parent's right to visitation. This is a distinction without a difference, as there can be no question that both orders have the exact same substantive effect—the noncustodial parent may

[6] See footnote 5 of this concurring and dissenting opinion.

visit with the children only if the custodial parent allows it. I do not believe that our legislature intended to have the question of the court's authority to issue equitable custody and visitation orders turn on the grammatical structure of the court's order.

I also disagree with the majority's application of the decisions proscribing the delegation of judicial authority to nonjudicial entities in the present case. The majority cites *Valante* v. *Valante*, 180 Conn. 528, 532–33, 429 A.2d 964 (1980), *Nashid* v. *Andrawis*, 83 Conn. App. 115, 119, 847 A.2d 1098, cert. denied, 270 Conn. 912, 853 A.2d 528 (2004), and *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 628–29, 561 A.2d 443 (1989), as examples of cases in which "our appellate courts have made clear that a court may not delegate its statutory decision-making authority to a nonjudicial entity." In *Zilkha*, this court specifically rejected the defendant's reliance on those three historical cases in support of his argument that the visitation order in that case constituted an impermissible delegation of judicial authority: "The present case is wholly inapposite to those cited by the defendant. In each of the cases cited by the defendant, the court removed itself entirely from the decision-making process by permitting legal issues to be resolved through binding arbitration that was subject to limited judicial review; see *Nashid* v. *Andrawis*, supra, 120–21; or by delegating the court's authority and obligation to render a binding decision to a family relations officer; see *Valante* v. *Valante*, supra, 532–33; or to a guardian ad litem. See *Weinstein* v. *Weinstein*, supra, 628–29. Unlike in those cases, the court in [*Zilkha*] properly considered and fully resolved the custody and visitation issues before it by rendering a decision on the defendant's motions and the relief requested therein." *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 171–72.

In my view, the same is true in the present case. The court did not remove itself entirely from the decision-making process; it heard the plaintiff's motion and the

defendant's opposition and crafted a visitation order that gave the defendant the opportunity to maintain and improve her relationship with R while protecting R's best interests. In this way, the court properly exercised its authority pursuant to § 46b-56 based on the best interests of the child.

The majority also likens the court's order in the present case to the trial court's order in *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 190 A.3d 68 (2018), which this court determined to be an impermissible delegation of judicial authority. Id., 372–73. I believe that the orders in the two cases are materially different. In *Kyle S.*, "[t]he court stated that it would rely on [the therapist of the parties' minor child, T] to dictate the scope of Kyle S.'s [contact] with T in a therapeutic setting. The court specifically noted . . . *I am restricting that contact so that the mental health professional can be in charge*." (Emphasis in original; internal quotation marks omitted.) Id., 361. This court concluded that the trial court's order constituted an impermissible delegation of authority because "[T's therapist] was to 'dictate' the scope of the contact between Kyle S. and T, and [T's therapist] was authorized to increase or decrease said contact as he saw fit. The court also noted that [T's therapist] was 'in charge.' . . . Put another way, the court in [*Kyle S.*] improperly removed itself from the decision-making process by permitting [T's therapist] to decide the nature and scope of Kyle S.'s contact with T." (Citations omitted.) Id., 372–73.

For the reasons I previously have discussed, the order in the present case does not delegate any authority to R's therapist, who cannot dictate the scope of the defendant's contact with R, and the court certainly did not put the therapist in charge, as the trial court did in *Kyle S.* Again, in the present case, all the court did when determining what was in R's best interests was give the plaintiff limited discretion over the defendant's

visitation. Consequently, this case is readily distinguishable from *Kyle S.*, in which the therapist was given sole discretion over the nature of the party's visitation.

Finally, the majority's reliance on this court's recent decision in *Lehane* v. *Murray*, 215 Conn. App. 305, 283 A.3d 62 (2022), is misplaced, as that case did not resolve the question presented here. In *Lehane*, the trial court, after hearing several postdissolution motions regarding custody and visitation, issued an order granting the defendant sole physical custody of the parties' child, J. Id., 308. The court also ordered "that the plaintiff shall have parental access to the minor child every other weekend and every Wednesday overnight, and that the defendant may alter, change or modify [that] schedule, along with the location, date and time of the exchanges." (Internal quotation marks omitted.) Id. On appeal, the plaintiff argued that the visitation order constituted an impermissible delegation of the court's authority to the defendant to " 'decide the nature and scope' " of the plaintiff's access to her son. Id., 316.

Significantly, the defendant in *Lehane* did not argue that the court had the authority to give him the discretion to alter the nature and scope of the plaintiff's visitation. Instead, he denied that he had been granted such authority, arguing that he was "not 'in charge' of determining [the plaintiff's] contact with J. . . . Unlike [in] *Kyle S.*, the court did not delegate the decision of what contact [the plaintiff] would have with J to [the defendant]. The trial court ordered the access to which the [p]laintiff was entitled and did not order any mechanism by which [the defendant] could terminate that access." (Citations omitted.) *Lehane* v. *Murray*, Conn. Appellate Court Briefs & Appendices, May Term, 2022, Appellee's Brief p. 9. Consequently, in *Lehane*, we were not asked to address the issue that is before us in the present case. We instead addressed the issue as presented to us—whether the court's order permitted the

defendant to limit the nature and scope of the plaintiff's visitation. See *Lehane* v. *Murray*, supra, 215 Conn. App. 316–18. Because we concluded that it did not, we never had to decide whether it would have been proper for the court to permit the defendant to do so. See id. The court in *Lehane*, like the defendant in his appellate brief, thus distinguished our earlier decision in *Kyle S.* "because, [in *Lehane*], the court's order allowing the defendant to 'alter, modify or change' the plaintiff's visitation schedule does not give him the authority to 'decide the nature and scope' of her relationship with their son. Rather, after fully and carefully considering the evidence presented by the parties, as well as making the requisite findings regarding the best interest of the minor child, the court exercised its judicial decision-making authority in determining the nature and scope of the plaintiff's parenting access and affording the defendant only a limited amount of discretion to modify the visitation schedule." (Footnote omitted.) Id., 316–17.

In reaching this conclusion, we noted that *Lehane* was "also distinguishable from other cases in which this court or our Supreme Court has reversed a family court's order on the ground that the court had improperly delegated its core decision-making function to another party, such as, for instance, *Nashid* v. *Andrawis*, [supra, 83 Conn. App. 120–22], in which the court removed itself entirely from the decision-making process by permitting legal issues to be resolved through binding arbitration that was subject to limited judicial review, or *Valante* v. *Valante*, [supra, 180 Conn. 532–33], in which the court delegated its authority to render a binding decision to a family relations officer." *Lehane* v. *Murray*, supra, 215 Conn. App. 316–17 n.6. We further noted that "the court did not give decision-making authority to a third-party therapist or a mediator but, rather, afforded the father of the child, as the sole

legal and physical custodian, the latitude to adjust the mother's visitation schedule in accordance with the child's needs. The court's order is consistent with the well established principle that the care of children resides first with their parents in order to fulfill a function the state can neither supply nor impede. See *Prince* v. *Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Indeed, 'the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court.' *Troxel* v. *Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Roth* v. *Weston*, 259 Conn. 202, 216, 789 A.2d 431 (2002) (same). In affording the defendant the limited discretion to adjust the plaintiff's visitation schedule, the court recognized the need for the parties to prioritize their roles as mother and father, rather than plaintiff and defendant." *Lehane* v. *Murray*, supra, 317 n.7.

Thus, I view the holding in *Lehane* to be much narrower than does the majority. We did not hold that a court impermissibly delegates its authority when it gives the custodial parent the discretion to limit, modify, or suspend visitation. In fact, we clearly indicated that delegation of such discretion to a parent is materially different than delegation of authority to a third party. See id. The majority, however, does not recognize any difference between those two situations and notes that "the overwhelming majority of jurisdictions" agree that a court improperly delegates its authority to a custodial parent when it allows the custodial parent to control the noncustodial parent's right to visitation. See footnote 11 of the majority opinion.

I believe that any reliance on those decisions is misplaced. First, in several of those jurisdictions, a court improperly delegates its judicial authority when it allows the children to determine whether visitation with

a parent will occur. See, e.g., *In re S.H.*, 111 Cal. App. 4th 310, 318, 3 Cal. Rptr. 3d 465 (2003) ("[t]he discretion to determine whether any visitation occurs at all must remain with the court, not social workers and therapists, and certainly not with the children" (internal quotation marks omitted)); *In re Marriage of Jenkins*, Docket No. 22-0656, 2023 WL 382301, *3 (Iowa App. January 25, 2023) (court improperly delegated authority to mother and *children* to determine whether visitation with father would occur); *In re Izrael J.*, 149 App. Div. 3d 630, 630, 51 N.Y.S.3d 88 (2017) ("court may not delegate its authority to determine visitation to either a parent or *a child*" (emphasis added; internal quotation marks omitted)). Thus, those cases are contrary to our holding in *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 172, expressly rejecting an improper delegation claim as to teenage children.

Second, the Alabama and Arkansas decisions cited by the majority recognize that there is no categorical bar to affording discretion to the custodial parent over visitation. See *Pratt* v. *Pratt*, 56 So. 3d 638, 643 (Ala. Civ. App. 2010) ("a visitation order awarding " 'reasonable visitation with the minor children at the discretion of the [custodial parent]' " *generally should not be allowed*" (emphasis added)); *Brooks* v. *Shepherd*, Docket No. CA 98-1526, 1999 WL 1031263, *6 (Ark. App. November 10, 1999) (The court noted that "[a]n unlawful delegation of judicial authority does not occur where the court retains the ultimate decision making responsibility. . . . *Nor is it an unlawful delegation of judicial authority when the trial court grants discretion to those individuals charged with the psychological well-being to determine when visitation with a non-custodial parent is appropriate.*" (Citation omitted; emphasis added.)).

North Dakota also recognizes the propriety of such orders under certain circumstances: "Giving the custodial parent such complete discretionary authority over

the manner and timing of visitation should be used only when there is a demonstrated need to protect the children from the potential for physical or emotional harm *and* where . . . the custodial parent has demonstrated that he or she is deeply concerned that the children, for the children's benefit, maintain a relationship with the noncustodial parent." (Emphasis in original; internal quotation marks omitted.) *Wigginton* v. *Wigginton*, 692 N.W.2d 108, 112–13 (N.D. 2005).[7]

The majority places particular emphasis on the reasoning of the Virginia Court of Appeals in *Rainey* v. *Rainey*, 74 Va. App. 359, 387, 869 S.E.2d 66 (2022), in which the court held that, because "the governing statutes squarely place the obligation to make contested visitation decisions on the judiciary, delegation of this responsibility to third parties or parents is unauthorized." In my view, however, our statute affords a court more discretion in issuing an order regarding custody and visitation than that afforded to a court in Virginia.

For example, although § 46b-56 (a) provides that "the court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such

[7] The majority suggests that anything short of a categorical ban on delegation to a custodial parent does not "[provide] sufficient guidance . . . to courts or adequate assurance to noncustodial parents and the children that visitation orders will be issued according to a child's best interests." I disagree. Trial courts regularly use their discretion in crafting custody and visitation orders. As noted previously in this opinion, they are in the best position to make such determinations and we regularly review custody and visitation orders under the abuse of discretion standard. Furthermore, given that we review orders providing for no visitation under an abuse of discretion standard, I see nothing novel about reviewing a visitation order such as the one at issue in this case under such a standard. Finally, I am in no way suggesting that an order like that issued in this case should be commonplace. I agree with those courts that have held that such orders should be the exception and that the use of such an order, in the absence of circumstances justifying it, would constitute an abuse of discretion.

conditions and limitations as it deems equitable," § 20-124.2 (A) of the Virginia Code does not provide a similar directive. See Va. Code Ann. § 20-124.2 (A) (Cum. Supp. 2020). Moreover, although both statutes require a court to consider the best interests of the child in issuing or modifying a custody or visitation order, Virginia law provides that a court "shall" consider nine factors and "shall" set forth its findings regarding "the relevant factors . . . ." Va. Code Ann. § 20-124.3 (Cum. Supp. 2020). Section 46b-56 (c), in contrast, provides that a court "may consider, but shall not be limited to, one or more of" seventeen factors and "is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision." These distinctions indicate that greater discretion is afforded to courts deciding custody and visitation issues in Connecticut than in Virginia.

Moreover, although the Virginia Court of Appeals reached its conclusion as a matter of statutory interpretation, the court also delved into certain policy considerations, as does the majority in the present case. Specifically, the majority explains that, "given the often contentious nature of postdissolution relationships, permitting a custodial parent to decide visitation arguably poses even more significant concerns than a rule permitting objective third parties, such as guardians ad litem or therapists, to decide the issue." Although that consideration is relevant to whether a court abuses its discretion in issuing a visitation order that affords the custodial parent discretion as to the noncustodial parent's visitation in certain circumstances, it should have no bearing on whether the court's visitation order constitutes an impermissible delegation of the court's authority. Had the legislature decided, as a matter of policy, that a custodial parent is precluded from having discretion as to the noncustodial parent's visitation, it

could have stated so expressly. The statute, however, contains no such restriction.[8]

Accordingly, because § 46b-56 authorizes the court's order in the present case, I am not persuaded by the reasoning of the Virginia Court of Appeals that a court improperly delegates its authority to determine visitation when it affords the custodial parent discretion over the noncustodial parent's access to a child. Such reasoning "ignores the presumption that parents act in the best interests of their children." *Roth* v. *Weston*, supra, 259 Conn. 222.

I want to reiterate that I appreciate the appellate jurisprudence applying the nondelegation doctrine to nonjudicial entities, e.g., attorneys for the minor children, therapists, guardians ad litem, family relations officers, as our legislature has made clear that if parents cannot decide what is in the best interests of their child, then it is the court's responsibility to do so. See General Statutes § 46b-56 (b). In my view, the court in the present case performed its responsibility and did not run afoul of the nondelegation doctrine. It first granted sole legal custody of the parties' children to the plaintiff, which the defendant does not challenge on appeal. See *Ireland* v. *Ireland*, 246 Conn. 413, 426, 717 A.2d 676 (1998) ("it should be presumed that when primary physical custody was entrusted to the custodial parent, the court making that determination considered that parent to be the proper parent to make the day-to-day decisions affecting the welfare of the child"). It then properly ordered that the plaintiff, R's custodial parent, would have discretion over the defendant's access to R. Furthermore, the court did so in a way that provided clear guidelines on how the plaintiff may exercise that discretion.

[8] The majority apparently reads such a restriction into § 46b-56, explaining that "a statute prohibiting third parties, including custodial parents, from deciding a noncustodial parent's right to access his or her child is neither arbitrary nor irrational. On the contrary, *the legislature's decision to prohibit such delegations serves important public policy goals*." (Emphasis added.)

The court, instead, could have ordered that the defendant have no visitation with R except as agreed to by the plaintiff. Such an order would have lacked the thoughtful limits the court placed on the plaintiff's discretion, but, under the majority's rationale, it would not have constituted an impermissible delegation of authority. In effect, the majority is saying that the court erred in crafting a more nuanced order that gives the defendant a better chance of maintaining and building a relationship with R than if it had used the blunter instrument of no visitation, which § 46b-56 undoubtedly authorizes the court to do. Given that the court has the statutory authority to grant the custodial parent such discretion by ordering no visitation, which order would be reviewed for an abuse of discretion, it makes little sense to me that a visitation order affording the custodial parent *less* discretion is improper *as a matter of law*. In short, I do not believe that the legislature intended § 46b-56 to be applied in such a manner.

To be clear, I am not positing that an order that affords the custodial parent unfettered discretion as to the noncustodial parent's visitation should be the usual practice of a trial court considering a custody and visitation dispute nor that such an order never would constitute an abuse of discretion. Rather, I simply note that the legislature expressly has granted Superior Court judges the authority to issue such an order if it is in the best interests of the child or children and, therefore, the determinative question is not a legal one but, rather, a discretionary one.

This brings me to my final point. I am concerned that the majority's holding in part II will result in trial judges denying visitation rather than ordering a gradual visitation schedule that could be paused in the discretion of the custodial parent on that parent's reasonable determination that the visits are negatively affecting the child. Such a result would be unfortunate for both the

noncustodial parent who is denied any visitation and the child. In my view, § 46b-56 is drafted broadly to encourage, rather than discourage, the thoughtful consideration exemplified by the trial court in this case.[9] Therefore, because the defendant has not claimed that the court's order constituted an abuse of its discretion, I would affirm the court's judgment as to the visitation order with R because the court did not improperly delegate its judicial authority to the plaintiff.

Accordingly, I respectfully dissent from part II of the majority opinion and concur in parts I and III of the opinion.

CODY REAL ESTATE, LLC *v.* G & H CATERING, INC., ET AL.
(AC 44909)

Alvord, Clark and Palmer, Js.

Syllabus

The plaintiff landlord brought this action against the defendant tenant, T Co., and the defendant corporate guarantors, G Co. and H Co., for nonpayment of rent and breach of a guarantee agreement. The plaintiff owns certain real property located in New Canaan. T Co. and C Co., the predecessor in interest to the plaintiff, entered into a commercial lease for a portion of the premises. After the initial term of the lease ended in 2008, the lease provided T Co. with an option to renew for a

[9] In footnote 15 of the majority opinion, the majority recognizes that its decision "may require courts to entertain more frequent motions concerning visitation than they might otherwise be required to decide if custodial parents were permitted to decide a noncustodial parent's right to visitation." In my view, the majority minimizes the financial and emotional burdens placed on parents and their children by repeated court hearings to adjust custody and visitation parameters. What our Supreme Court recognized more than forty years ago remains a compelling consideration today: "It is true that the parties themselves may present postjudgment motions to continue or to shift custody . . . but time is required for such motions to be calendared and heard. In the meantime, when anxieties and disappointments are likely to be great, the temptation for disruptive self-help is large." *Yontef* v. *Yontef*, supra, 185 Conn. 292.

term of five years, to conclude on May 31, 2014. T's obligations were guaranteed by G Co. and H Co., affiliates of T Co., pursuant to a guarantee agreement executed simultaneously with the lease. The guarantee was signed by J on behalf of G Co. and H Co. J also provided the plaintiff with a corporate resolution from G Co., in which J represented that G Co. was authorized to execute the guarantee. The guarantee provides that the obligations of G Co. and H Co. are unconditional and shall not be affected by the renewal of the lease. T Co. exercised its option to renew the lease, and thereafter the plaintiff and T Co. entered into a first lease extension agreement, pursuant to which the lease term was extended to May 31, 2017. The first lease extension included an option to renew for three years and was signed by J and P on the guarantor lines, without a designation that J or P had signed in a representative capacity or an accompanying corporate resolution. The parties executed a second lease extension agreement to extend the lease term until May 31, 2020. Subsequently, T Co. made only partial rent payments and the plaintiff commenced this action. Following a trial, the trial court concluded that the plaintiff established its claim for nonpayment of rent by T Co. and that G Co. and H Co. were liable under the guarantee for T Co.'s obligations under the second lease extension. *Held*:

1. The trial court properly determined that the guarantee agreement applied to any renewal of the lease: although there was an arguable ambiguity in the guarantee concerning the phrase "the renewal of the lease" when that language is considered in light of the provision of the initial lease affording only one renewal option as of right, the parties presented no extrinsic evidence to clarify that ambiguity and, consequently, the trial court properly interpreted the guarantee based solely on its language; moreover, although G Co. and H Co. argued that the language of the guarantee providing that the obligations thereunder remain in full force referred only to the "single option to renew" referenced in the initial lease, the more reasonable interpretation of that language did not read a limitation into the guarantee not contained therein, as the parties referred to a "single option to renew" in the initial lease but did not use that same or similar language in the guarantee, which referred simply to the "renewal" of the lease; furthermore, the guarantee underscored the unconditional nature of the obligations of G Co. and H Co. and, therefore, the court correctly construed the guarantee as applying to the two additional renewals of the lease.
2. G Co. and H Co. could not prevail on their claim that the trial court improperly concluded that they were liable under the second lease extension even though they were not signatories to that agreement: because the guarantee contemplated renewals of the lease, it was not necessary for the parties to execute a new guarantee with each renewal, as, under the express terms of the guarantee, G Co. and H Co. remained liable on renewal of the lease without notice to or the further consent of G Co. and H Co.; moreover, the fact that J and P signed on the

guarantor lines of the extension agreements without indicating that they were doing so on behalf of G Co. and H Co. had no bearing on the court's determination of the parties' intent when they entered into the initial lease and guarantee agreements.

3. This court declined to review G Co. and H. Co.'s claim that the guarantee agreement could not have applied after May 31, 2017, when the first lease extension expired, because that claim was not properly preserved: G Co. and H Co. never claimed before the trial court that the guarantee expired before the execution of the second lease extension and, therefore, that the second extension could not be considered a lease renewal under the guarantee; moreover, the resolution of this issue raised at least one significant factual question, specifically, the issue of whether the guarantee expired on May 31, 2017, because the second lease extension was not signed by T Co. and the plaintiff until June 6, 2017, and June 14, 2017, respectively, although it purported to be effective as of June 1, 2017, and, thus, the parties may have treated the second lease extension as a renewal of the lease, but the court never had the opportunity to consider that issue.

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

Procedural History

Action to recover damages for, inter alia, breach of a guarantee agreement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session, where the defendants filed a counterclaim; thereafter, the case was tried to the court, *Spader*, *J.*; judgment for the plaintiff, from which the defendant Garelick & Herbs of Greenwich, Inc., et al., appealed to this court. *Affirmed.*

Liam S. Burke, for the appellee (plaintiff).

Sabato P. Fiano, with whom, on the brief, was *Lori A. DaSilva-Fiano*, for the appellants (defendant Garelick & Herbs of Greenwich, Inc., et al.)

Opinion

PALMER, J. In this action brought by the plaintiff landlord, Cody Real Estate, LLC, against the defendant tenant, G & H Catering, Inc., now known as Garelick & Herbs of New Canaan, Inc. (tenant), for nonpayment of rent due under a commercial lease agreement, and

against the defendant guarantors of the lease, Garelick & Herbs of Greenwich, Inc., and Garelick & Herbs, Inc., now known as Garelick & Herbs of Westport, Inc. (corporate guarantors),[1] the corporate guarantors appeal from the judgment of the trial court rendered against them, following a trial to the court, in the amount of $362,948.61 for unpaid rent and other charges stemming from the tenant's breach of the lease.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The plaintiff, a small, family owned business, owns certain real property located at 97 Main Street in New Canaan (premises). On September 4, 1998, Cody Real Estate, the predecessor in interest to the plaintiff, Cody Real Estate, LLC, and the tenant, which operates a food service and catering business, entered into a written commercial lease for a portion of the ground floor of the premises.[3] The lease provided that it was for a term of ten years, commencing on December 1, 1998, and continuing through the last day of September, 2008.[4] The lease also provided the tenant with an option to renew, which provided in relevant part: "The [l]andlord hereby grants to the [t]enant one (1) single option to renew the term of this [l]ease upon all of its covenants, with the exception of the covenant of basic rent, and the covenant of renewal [is] for a further term of five (5) years to . . . conclude on the

[1] In this opinion, we refer to the tenant and the corporate guarantors collectively as the defendants.

[2] As we explain more fully hereinafter, the trial court also rendered judgment against the tenant in the same amount for unpaid rent and other charges due to its breach of the lease. The tenant, however, has not appealed from that judgment.

[3] On or about July 2, 2002, the plaintiff succeeded to the interest in the lease held by Cody Real Estate.

[4] Although the lease expressly provided that it was for a term of ten years, the dates of the lease reflect a term of nine years and eleven months. This discrepancy in the stated term and dates of the lease is not material to any issue in this appeal.

last day of May, 2014. The right to elect said option is expressly contingent upon and subject to the [t]enant giving a written notice to the [l]andlord of its intent to exercise such option at least six (6) calendar months next prior to the expiration date of the original term of this [l]ease . . . .''[5] The lease was signed by Therese Marie Spring, an authorized agent of Cody Real Estate, and by Paola V. Garelick, as president of the tenant.

The tenant's obligations under the lease were guaranteed by the two corporate guarantors, which are affiliates of the tenant, pursuant to a separate, written guarantee agreement (guarantee agreement) that was executed simultaneously with the lease.[6] The guarantee agreement was signed twice by Jason Garelick on behalf of the corporate guarantors, first as president of Garelick & Herbs of Greenwich, Inc., and second as president of Garelick & Herbs, Inc. On the same day that the lease and guarantee agreement were executed, Jason Garelick provided Cody Real Estate with a corporate resolution from Garelick & Herbs of Greenwich, Inc. In the resolution, which was signed by Jason Garelick in his capacity as president, he represented that, pursuant to a unanimous vote of the directors, Garelick & Herbs of Greenwich, Inc., was authorized to execute the guarantee of the lease ''between [the tenant] and Cody Real Estate for a period of ten (10) years, with an option period of five (5) years for certain demised premises located at 97 Main Street, New Canaan . . . .''[7]

[5] As previously noted, by its terms, the expiration date of the initial lease was September 30, 2008. The option to renew the lease, however, stated that the renewal would be for a term of five years commencing on June 1, 2009. Any apparent discrepancy between the date that the initial lease expired and the renewal date is not relevant to our resolution of this appeal.

[6] The guarantee agreement provides that the tenant ''is an affiliate by one-hundred percent (100%) equity of [the] [g]uarantor[s] . . . .''

[7] The evidence adduced at trial established that all three corporate defendants are wholly owned by Jason Garelick and Paola Garelick.

The first paragraph of the guarantee agreement provides in relevant part: "Guarantors each unconditionally and irrevocably jointly and severally guarantee that all sums stated in the [l]ease to be payable by [t]enant will be promptly paid in full when due in accordance with the provisions thereof, and that [t]enant will perform and observe each and every covenant, agreement, term and condition in the [l]ease to be performed or observed by [t]enant. This [g]uarant[ee] is irrevocable, unconditional and absolute and, if for any reason any such sums, or any part thereof, shall not be paid promptly when due, [g]uarantors will immediately pay the same to the person entitled thereto pursuant to the provisions of the lease, regardless of any defenses or rights of setoff or counterclaim which [t]enant may have or assert and regardless of whether [l]andlord shall have taken any steps to enforce any rights against [t]enant to collect such sum or any part thereof and regardless of any other condition of contingency." The guarantee agreement stated further that it "shall be binding upon and inure to the benefit of the parties thereto and their respective successors and assigns."

In addition, and of particular significance to this appeal, the second paragraph of the guarantee agreement lists the circumstances and events under which the corporate guarantors would continue to be obligated pursuant to that agreement, without notice or their further consent. The pertinent part of that second paragraph provides as follows: "*The obligations, covenants, agreement and duties of* [*g*]*uarantors under this* [*g*]*uarant*[*ee*] *are unconditional and shall in no way be affected or impaired by reason of* the happening from time to time of any of the following, although without notice to or the further consent of [g]uarantors: (a) the waiver by [l]andlord of the performance or observation by [t]enant of any of the agreements, covenants, terms or conditions contained in the [l]ease or

this [g]uarant[ee]; (b) the extension, in whole or in part, of the time for payment by [t]enant or [g]uarantor of any sums owing or payable under the [l]ease or this [g]uarant[ee], or of any other sums or obligations under or arising out of or on account of the [l]ease or this [g]uarant[ee], or *the renewal of the* [*l*]*ease* or this [g]uarant[ee] . . . .'' (Emphasis added.)

Upon the expiration of the initial lease term, the tenant exercised its option to renew the lease. Following the renewal and extension, the lease was set to expire on May 31, 2014. Prior to that expiration date, the plaintiff and the tenant entered into a ''First Lease Modification and Extension Agreement'' (first lease extension), pursuant to which the lease term was extended to May 31, 2017. The first lease extension also included an option to renew, which provided in relevant part: ''Upon the expiration of the original term of this [l]ease, and provided that the [tenant] shall not be in default hereof beyond the expiration of applicable grace, cure and notice periods, the [tenant] shall have the option to renew this [l]ease upon the same terms and conditions excepting the provisions for minimum base rent and excepting this renewal provision, for an extended term of three (3) years.'' The first lease extension was signed by Spring, an authorized representative of the plaintiff, and by Jason Garelick on behalf of the tenant. The signature page of the first lease extension contains two lines below the signatures of the landlord and tenant for signatures of the guarantors. Those lines were signed by Jason Garelick and Paola Garelick but, in contrast to the guarantee agreement accompanying the initial lease, with no designation that either one was signing in a representative capacity and with no accompanying corporate resolution from either Garelick & Herbs of Greenwich, Inc., or Garelick & Herbs, Inc.

On or about June 6, 2017, the parties executed a ''Second Lease Modification and Extension Agreement''

(second lease extension), which extended the lease term from June 1, 2017, to May 31, 2020. The second lease extension was signed by Spring on behalf of the plaintiff, and by Jason Garelick on behalf of the tenant as its president. As was the case with respect to the first lease extension, the signature lines designated for the guarantors in the second lease extension were signed by Jason Garelick and Paola Garelick without any designation that they were signing in a representative capacity and without any accompanying corporate resolutions.

Beginning in October, 2017, the tenant made only partial rent payments. The plaintiff thereafter served the tenant with notice of its default for failing to pay base rent and certain additional rent as required under the lease. The plaintiff commenced this action on or about May 31, 2018, with an application for a prejudgment remedy. The tenant continued to make partial payments until July, 2018, when it ceased paying rent altogether. Despite its default under the lease, the tenant continued to occupy the premises through the end of the lease term on May 31, 2020.

The first count of the plaintiff's two count complaint is against the tenant for nonpayment of rent, and the second count is against the corporate guarantors for breach of the guarantee agreement. The tenant and the corporate guarantors jointly filed an amended answer to the complaint, ten special defenses and a right of recoupment. They alleged the following special defenses: (1) the plaintiff failed to perform its obligations under the lease; (2) the plaintiff breached the lease prior to the defendants' alleged breach; (3) equitable estoppel and/or promissory estoppel; (4) waiver; (5) laches; (6) unclean hands; (7) comparative negligence; (8) failure to mitigate damages; (9) accord and satisfaction; and (10) fraudulent, negligent or innocent misrepresentations by the plaintiff. In addition, the tenant filed

a counterclaim seeking to recover for business losses allegedly sustained as a result of damage to the leased premises due to a major rainstorm on June 29, 2018.

Following a bench trial, the court issued a memorandum of decision dated August 3, 2021, in which it concluded that the plaintiff established its claim for nonpayment of rent by the tenant. In support of its determination, the court found that "any and all of the reasons" advanced by the tenant for its refusal to pay rent—primarily, the plaintiff's purported failure to adequately repair the premises following the rainstorm—"were either negotiation tactics or pretextual" and, therefore, wholly unpersuasive. The court further found that, when the tenant stopped making payments under the lease, it merely "was looking for a way 'out' of [the] lease" because of its desire "to move its operations to . . . Southport," and that its breach of the lease was "an ill-fated, bad faith maneuver . . . to squeeze concessions from the plaintiff" to that end. Indeed, the court explained that the tenant "actively interfered with the plaintiff's ability to mitigate" any damages. Consistent with these findings, the trial court rejected the tenant's special defenses and other claims as unsupported by any credible evidence.

The court also found the corporate guarantors liable under the guarantee agreement. In addressing that issue in its memorandum of decision, the court explained: "In their briefs, the defendants claim that, even if judgment enters against the tenant, the [corporate] guarantors should escape liability as the guarantee [had] expired. The court disagrees. The initial guarantee agreement . . . provides, in [the second paragraph], that the obligations of the guarantors are unconditional and are in no way affected or impaired by . . . the renewal of the [l]ease or this [g]uarant[ee]. . . . The lease was renewed by a modification and extension twice. The guarantors signed both extensions, which provided

them actual knowledge of the extensions. There was no need for a new guarantee with each extension as any such renewals were anticipated and proactively acknowledged as possible by the guarantee, which is still in full force and effect." (Citation omitted; emphasis omitted; internal quotation marks omitted.)

In accordance with its findings and construction of the guarantee agreement, the trial court rendered judgment in favor of the plaintiff as to both counts of the complaint in the amount of $362,948.61. This appeal by the corporate guarantors followed. On appeal, they claim that the court improperly found them liable as guarantors for the tenant's obligations under the second lease extension. In support of this claim, they make three arguments, which we consider in turn.

I

The corporate guarantors first contend that the trial court improperly determined that the guarantee agreement applied to *any* renewal of the initial lease. Relying on the provision of the initial lease that the tenant had "one (1) single option to renew," as well as the language of the guarantee agreement providing that it would not be affected or impaired by the occurrence of certain events, including "*the* renewal of the [l]ease," the corporate guarantors argue that the renewal language of that agreement applies only to the single renewal of the initial lease, which extended the initial lease term to the last day of May, 2014. (Emphasis added.) Under this construction, the corporate guarantors argue that the guarantee agreement expired on May 31, 2014, and that the court, by interpreting that language as applying to any renewal—including the second lease extension—expanded the scope of the guarantee beyond the intent of the parties as reflected in the agreement. For its part,

the plaintiff maintains that the court properly determined that the guarantee agreement contains no language that limits its duration and, therefore, it is continuing in nature. Under this view, the agreement remained in full force and effect at the time of the second lease extension and, as a consequence, the corporate guarantors are liable for the tenant's obligations under the initial lease *and* both lease extensions.

We note, as well, that the parties disagree about the proper standard of review for purposes of this claim. According to the corporate guarantors, the correct standard is plenary review, whereas the plaintiff contends that the trial court's determination concerning the applicability of the guarantee agreement to the second lease extension implicates the intent of the parties and, therefore, involves a question of fact subject to the clearly erroneous standard of review.

Because the issues on appeal involve the interpretation of the language of the lease, the lease extensions, and the guarantee agreement,[8] all of which are contracts, we employ the standard of review applicable to contract interpretation. See, e.g., *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007); *Meeker* v. *Mahon*, 167 Conn. App. 627, 632, 143 A.3d 1193 (2016). "Although ordinarily the question of contract interpretation, being a question of the

[8] "A guarant[ee] is a promise to answer for another's debt, default, or failure to perform a contractual obligation. . . . [A] guarant[ee] agreement is a separate and distinct obligation from that of the note or other obligation. . . . [Guarantees] are . . . distinct and essentially different contracts; they are between different parties, they may be executed at different times and by separate instruments, and the nature of the promises and the liability of the promisors differ substantially . . . . The contract of the guarantor is his own separate undertaking in which the principal does not join. . . . The independence of these contracts is not affected by the fact that they are executed contemporaneously or in the same document." (Citations omitted; internal quotation marks omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 633–34, 143 A.3d 1193 (2016).

parties' intent, is a question of fact . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . Where the language of an agreement is susceptible to more than one reasonable interpretation, however, it is ambiguous. . . . Ordinarily, such ambiguity requires the use of extrinsic evidence by a trial court to determine the intent of the parties, and, because such a determination is factual, it is subject to reversal on appeal only if it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Meeker* v. *Mahon*, supra, 632–33.

Furthermore, "[w]hen two agreements . . . are connected by reference and subject matter, both are to be considered in determining the real intent of the parties. . . . Where . . . the signatories execute a contract which refers to another instrument in such a manner as to establish that they intended to make the terms and conditions of that other instrument a part of their understanding, the two may be interpreted together as the agreement of the parties." (Internal quotation marks omitted.) Id., 634. Therefore, because the guarantee agreement references the initial lease, and because the two agreements are connected by both reference and subject matter, we read them together to ascertain the parties' intent. See *Regency Savings Bank* v. *Westmark Partners*, 59 Conn. App. 160, 164–65, 756 A.2d 299 (2000).

In the present case, there is an arguable ambiguity in the guarantee agreement as reflected in the parties' conflicting interpretations of the provision of that agreement concerning "the renewal of the [l]ease," an ambiguity that arises when that language is considered in light of the provision of the initial lease that affords only one renewal option as of right. The parties, however, presented no extrinsic evidence at trial to clarify that

ambiguity. Consequently, the trial court's interpretation of the guarantee agreement was based solely on the language of that agreement and the lease and "did not involve the resolution of any evidentiary issues of credibility." *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, supra, 284 Conn. 7–8. For that reason, our review of the trial court's determination with respect to the parties' intent is predicated entirely on the four corners of those agreements and, therefore, involves a question of law over which we exercise plenary review.[9] See, e.g., id., 8; *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 265–66, 186 A.3d 708 (2018).

The portion of the trial court's memorandum of decision that addresses the guarantee agreement is brief, comprising three short paragraphs. The brevity of the court's decision on that issue is undoubtedly due to the fact that the issue of the corporate guarantors' liability essentially went unaddressed at trial, which concerned almost exclusively the tenant's contention that, in effect, it had been constructively evicted from the premises by virtue of the plaintiff's failure to adequately repair the damage caused to the roof by the rainstorm on June 29, 2018.

As stated previously in this opinion, no extrinsic evidence was presented concerning the intent of the parties with respect to the guarantee agreement. Our Supreme Court was presented with a similar circumstance in *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, supra, 284 Conn. 7–10. In *Bristol*, which involved, inter alia, a dispute over the meaning of a

[9] It bears noting that the evidence adduced at trial does not reflect whether Cody Real Estate or the corporate guarantors drafted the guarantee agreement. Consequently, the rule of contract construction that, in the absence of other evidence of the parties' intent, ambiguities in a contract are to be construed against the drafter; see, e.g., *Johnson* v. *Vita Built, LLC*, 217 Conn. App. 71, 85, 287 A.3d 197 (2022); is not applicable to the present case, and no party claims otherwise.

lease, the parties did not offer any extrinsic evidence at trial with respect to an ambiguity in that lease and, accordingly, the trial court's determination of the parties' intent was based solely on the language of the lease. Id., 7–8. Our Supreme Court, after affording plenary review to the trial court's construction of the lease provision at issue, determined that, although the defendant had advanced a plausible construction of the provision, that construction resulted in an internal redundancy in the language of the lease. Id., 9. The court therefore concluded that "the better, and more plausible, construction of the language" was one that eliminated that redundancy; id.; and, "[i]n the absence of any other evidence of the intent of the parties to the lease agreement," held that the trial court's construction of the lease was correct. Id., 10.

In the present case, the corporate guarantors have urged a plausible construction of the guarantee agreement, arguing that the language of that agreement providing that the obligations thereunder remain in full force and effect "without notice to or the further consent of" the corporate guarantors in the event of "the renewal of the [l]ease" refers only to the "single option to renew" referenced in the initial lease. We are persuaded, however, that the more reasonable interpretation of that language is one that does not read a limitation into the guarantee agreement that is not contained therein. Our conclusion is based largely on the fact that the parties specifically referred to a "single option to renew" in the initial lease but did not use that same or similar language in the guarantee agreement, which was executed simultaneously with the initial lease and refers simply, and without restriction, to "the renewal" of the lease. To afford the guarantee agreement the narrow construction advocated by the corporate guarantors would require us to add limiting language to the guarantee agreement that the parties themselves did not

include, an approach contrary to established principles of contract interpretation. See, e.g., *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 370, 216 A.3d 629 (2019). Our determination in this regard is buttressed by the fact that the language in dispute appears in the section of the guarantee agreement that, in broad and encompassing terms, underscores the "unconditional" nature of the corporate guarantors' "obligations, covenants, agreement and duties" pursuant to the agreement.

It is entirely reasonable, moreover, for the parties to have agreed in the initial lease that the tenant would have a single option to renew as a matter of right and, at the same time, structure the guarantee as a continuing one, such that it would apply if and when the lease was renewed, whether under the option or thereafter. In addition, although the initial lease speaks in terms of a single option to renew, neither that initial lease nor the accompanying guarantee agreement contained any suggestion that future lease renewals were precluded or otherwise unanticipated.

In construing any contract, "[w]e accord the language employed [therein] a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358, 166 A.3d 800 (2017). Applying that bedrock rule of construction to the present case, we believe that the trial court adopted the better and more reasonable construction of the language at issue in concluding that renewals of the lease were expressly "anticipated and proactively acknowledged as possible by the guarantee" agreement. Because the language of the guarantee agreement fully supports that determination, and because the parties easily could have provided for a more restrictive application of the agreement if they had so intended, we

conclude that the trial court correctly construed the guarantee agreement as applying to the two additional renewals of the lease.

II

The corporate guarantors next claim that the trial court improperly concluded that they were liable for the tenant's obligations under the second lease extension even though they were not signatories to either of the lease extensions. In support of this contention, they highlight the fact that the guarantor lines of the lease extension agreements were signed by Jason Garelick and Paola Garelick without any reference to the corporate guarantors, which, they argue, demonstrates the intent of the parties that the individual signatories, and not the corporate guarantors, were to serve as guarantors of the tenant's obligations under the lease extensions.

Because we agree with the trial court's determination that the guarantee agreement contemplated renewals of the lease, we also agree with the court that it was not necessary for the parties to execute a new guarantee agreement with each renewal. As we explained in part I of this opinion, under the express terms of the guarantee agreement, the corporate guarantors remained liable upon the renewal of the lease "without notice to or the further consent of [the] [g]uarantors," such that the renewal itself, without anything more, triggered the continuing guarantee. Thus, it is of no consequence that the lease extension agreements did not refer to the corporate guarantors. Furthermore, the fact that Jason Garelick and Paola Garelick signed on the guarantor lines of the first and second lease extensions in 2014 and 2017, respectively, with no indication that they were doing so on behalf of the corporate guarantors, had no bearing on the trial court's determination of the intent of the parties in 1998, when they entered into the initial

lease and the guarantee agreement.[10] We therefore reject the corporate guarantors' argument that the signatures of Jason Garelick and Paola Garelick on the guarantor lines of the lease extension agreements demonstrate the parties' understanding that the corporate guarantors were not liable under those agreements.[11]

III

The final claim of the corporate guarantors is that "[t]he initial guarant[ee] could not . . . possibly [have] applied to obligations [of the tenant] incurred after May 31, 2017, because the lease itself expired on that date." This argument is based on the corporate guarantors' assertion that, because the first lease modification had expired on May 31, 2017, prior to the execution of the second lease modification on June 6, 2017,[12] the second lease modification was, in effect, a new lease and could not have modified, extended or renewed an expired

[10] Of course, we do not suggest that conduct occurring after the execution of an arguably ambiguous contract can never bear upon the intent of the contracting parties. In the present case, however, because no extrinsic evidence was adduced regarding that intent, the trial court was required to ascertain the parties' intent from the four corners of the agreements. In the absence of any evidence bearing on the intent of the parties with respect to the signatures of Jason Garelick and Paola Garelick on the guarantor lines of the lease extension agreements, the trial court correctly resolved the issue on the basis of the language of the initial lease and the guarantee agreement.

[11] The corporate guarantors direct our attention to the trial court's purported misstatement in its memorandum of decision that "[t]he guarantors signed both extensions, which provided them actual knowledge of the extensions." Although Jason Garelick and Paola Garelick, and not the corporate guarantors, signed the guarantor lines of the lease extensions, the trial court merely was making the point that the corporate guarantors necessarily had notice of the extensions because they are wholly owned by Jason Garelick and Paola Garelick. The court made no suggestion that their individual signatures on the extensions somehow rendered the corporate guarantors liable. As the court made clear, rather, the corporate guarantors are liable under the terms of the guarantee agreement, not by virtue of the signatures of Jason Garelick and Paola Garelick on the lease extension agreements.

[12] The record indicates that the second lease extension was signed by the tenant on June 6, 2017, and by the plaintiff on June 14, 2017.

lease. For that reason, they contend, their obligations under the guarantee agreement ceased when the underlying lease expired. We decline to review this claim because it is not properly preserved.

The principles that govern appellate review of unpreserved claims of a nonconstitutional nature are well established. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . [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. . . . The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties. . . . These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018); see also *J. M.* v. *E. M.*, 216 Conn. App. 814, 823, 286 A.3d 929 (2022) ("[t]he theory upon which a case is tried in the trial court cannot be changed on review, and an issue not presented to or considered by the trial court cannot be raised for the first time on review" (internal quotation marks omitted)); Practice Book § 60-5 (appellate court is not bound to consider claim not distinctly raised at trial).

Our examination of the trial court record reveals that the corporate guarantors never claimed that the guarantee agreement had expired prior to the execution of the second lease extension and, therefore, that the

second extension cannot be considered a lease renewal within the meaning of the guarantee agreement.[13] Instead, the corporate guarantors raised two primary claims in their posttrial brief with respect to the guarantee agreement, namely, that it had expired when the *initial* lease expired on May 31, 2014, because it "contain[ed] no indication that it was intended to continue beyond the [initial] lease term and single option renewal of five . . . years," and that the guarantor lines of the lease extension agreements made no reference to the corporate guarantors and were signed by Jason Garelick and Paola Garelick in an individual, rather than a representative, capacity. The corporate guarantors' posttrial brief, however, is devoid of any claim that, because the guarantee agreement expired on May 31, 2017, when the first lease extension expired, the second lease extension could not constitute a renewal of the lease. Indeed, in setting forth the relevant lease agreements between the parties in their posttrial brief, the defendants specifically stated that "the parties entered into a second lease modification and extension agreement . . . *which modified and extended the lease terms* and conditions for a term of three (3) years through May 31, 2020." (Emphasis added.) The trial court, therefore, was never asked to consider the issue of whether the guarantee agreement expired on May 31, 2017, the date the first lease extension was set to expire, because the second lease extension was not signed by the tenant until June 6, 2017.

We are particularly unwilling to review this unpreserved claim because its resolution appears to raise at least one significant factual question. More specifically,

[13] We note that, although the plaintiff did not raise the preservation issue in its brief to this court, we are not precluded from doing so. See, e.g., *State* v. *Qayyum*, 201 Conn. App. 864, 872 n.2, 879 n.3, 242 A.3d 500 (2020) (observing that defendant failed to properly preserve claims on appeal even though state had not raised preservation issue), aff'd, 344 Conn. 302, 279 A.3d 172 (2022).

as we previously noted, the second lease extension provides that it is "for a term of three . . . years commencing on the *first . . . day of June, 2017* and continuing through the thirty-first . . . day of May, 2020." (Emphasis added; internal quotation marks omitted.) Thus, although the second lease extension was not signed by the tenant and the plaintiff until June 6, 2017, and June 14, 2017, respectively, it purported to be *effective* as of June 1, 2017. It may well be, therefore, that the parties treated the second lease extension as a renewal of the lease. The trial court, however, never had the opportunity to consider that issue—and the plaintiff never had occasion to present evidence on the issue—because the corporate guarantors have claimed for the first time on appeal that the guarantee agreement expired upon the expiration of the first lease extension. It is axiomatic, moreover, that, "[a]s an appellate court, it is not within our province to make factual findings." *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 201 n.11, 75 A.3d 68 (2013). Accordingly, we do not review this claim.

The judgment is affirmed.

In this opinion the other judges concurred.