CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE DEBORAS S. ET AL.*
(AC 45501)
(AC 45552)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her three children, J, D and B. The maternal grandmother filed a separate appeal challenging the judgments terminating the mother's parental rights and the trial court's denial of her motion to transfer guardianship. The mother, who has cognitive limitations and mental health needs, relied on the grandmother, who had been appointed her plenary guardian by the Probate Court, to make major decisions for her and to take care of the children since their birth. Two of the children have significant needs and require special services and treatment. The Department of Children and Families first became involved with the family when concerns arose as to J and D, and an allegation of physical neglect was thereafter

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

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

substantiated as the mother and the grandmother were homeless, transient and not following through with treatment for the children. The family then moved to Puerto Rico, where B was born, and the department had no contact with the family. Two years later, the department was contacted by school officials in Connecticut who reported that the children had hygiene issues and that the children needed services. The petitioner, the Commissioner of Children and Families, secured orders of temporary custody for all three children and filed neglect petitions on behalf of the children. When the department reached out to the mother regarding her children, she was in Puerto Rico, and she directed the department to follow up with the grandmother regarding the children's needs. The department attempted to engage the grandmother to receive services, but the grandmother often refused or failed to sign releases to authorize services. The grandmother also instructed the mother not to sign releases to authorize treatment for herself or the children. A guardian ad litem was appointed for the mother, and the grandmother filed a motion to intervene in the neglect proceedings. The children were adjudicated neglected and committed to the custody of the petitioner. The grandmother filed a motion to transfer guardianship of the minor children to herself. The petitioner then filed petitions to terminate the respondent's parental rights. During the termination proceedings, an ex parte restraining order was issued against the grandmother to protect the mother. Thereafter, the trial court bifurcated the termination trial from the proceeding on the grandmother's motion to transfer guardianship. *Held*:

1. The respondent mother could not prevail on her claims that the trial court improperly concluded that the department made reasonable efforts to reunify her with the children, that she failed to achieve a sufficient degree of personal rehabilitation, and that termination of her parental rights were in the best interests of the children:

a. The trial court properly concluded, on the evidence before it, that the department had satisfied its statutory (§ 17a-112 (j) (1)) burden to make reasonable efforts to reunify the mother with the children: because the trial court did not make a finding that the mother was unable or unwilling to benefit from reunification efforts and addressed only the reasonableness of the reunification efforts made by the department, the mother's claim that there was insufficient evidence to support the court's finding that she was unwilling to benefit from reunification efforts, premised on the court's finding that she had an intellectual disability that would make it difficult for her to be the primary caregiver, and the department's failure to offer wraparound services that would have engaged both the mother and the grandmother, improperly conflated the ground of unable or unwilling to benefit from reunification with the failure to rehabilitate language of § 17a-112 (j) (3) (b) (i), and the claim that the department had a duty or legal obligation to offer wraparound services to engage both the mother and the grandmother was without merit, as there was

no authority cited by the mother suggesting that the department's burden in establishing the reasonable efforts ground extended or applied jointly to a person whose parental rights were not the subject of the petition; moreover, even if there was a legal duty such that the court would be precluded from finding reasonable efforts, the record demonstrated that the grandmother was not a supportive parenting figure with whom the mother could responsibly partner in the raising of her children, as the grandmother was actively hostile to the mother's ability to engage in services, was the subject of a protective order in which the mother was the protected party, a guardian ad litem was appointed for the mother as a result of conflicts with the mother over visitation, and the grandmother frustrated the department's efforts to work with her and the mother, particularly in instructing the mother not to sign any releases from the department, which prevented and delayed services from being provided; furthermore, there was sufficient evidence in the record to support the court's reasonable efforts determination because, although the mother failed to sign releases required by the department to provide services to her and the children, the department nevertheless attempted to reunify her with the children by providing psychological and psychiatric services in an attempt to determine her competency, providing weekly supervised visitation services, transportation and case management services, facilitating counseling and therapy for the children, which included observation with the mother with respect to the children, involving the mother in the children's medical appointments, and referring her to parenting services.

b. The trial court properly concluded that the respondent mother failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) as would encourage the belief that within a reasonable time, considering the ages and needs of the children, she could assume a responsible position in their lives, as the evidence credited by the court supported its conclusion that the mother failed to comply with the specific steps assigned to her to facilitate reunification with her children: the mother failed to sign releases in a timely manner to allow the department to communicate with service providers, which hampered its ability to procure rehabilitative services for her, and, although she engaged in some services, she was unsuccessfully discharged due to her failure to attend telehealth appointments, she failed to attend an intake appointment for counseling services, and she made little progress during the weekly supervised visitation sessions by failing to engage with her children; moreover, the mother conceded that, at no time since the children's births, had she ever served as their caregiver, and, due to her cognitive limitations and mental health challenges, she was largely unable to care for herself and could not meet the needs of her children.

c. The respondent mother could not prevail on her claim that the trial court erroneously found that the termination of her parental rights was in the best interests of the children: the children were thriving in their

foster placement where they were provided needed consistency and stability that the mother could not provide, and, contrary to the mother's assertion, the trial court did acknowledge the bond that she shared with her children; moreover, the trial court found that the mother did not have the skills to care for the children and would not be able to assume a responsible role in their lives in a reasonable time period, which was supported by the expert testimony of a court-appointed psychologist and department social workers, as well as a written report; furthermore, the mother did not aver that she was capable of caring for her children, rather, she requested a transfer of legal guardianship to the children's grandmother, and the record contained sufficient evidence to provide a proper basis for the court to reject the mother's claim that the best interests of the children would be served by transferring guardianship to the grandmother, as the conditions that gave rise to department's intervention and the children's subsequent removal occurred while the mother was in Puerto Rico and the children were in the grandmother's care, the record indicated that the mother had a restraining order against the grandmother, and the mother indicated that the grandmother controlled her life.

2. In the second appeal, the maternal grandmother could not prevail on her claims that the trial court lacked subject matter jurisdiction to terminate the respondent mother's parental rights due to its failure to join her as a necessary party, that the court applied an incorrect legal standard in adjudicating her motion to transfer guardianship, and that the court violated her right to equal protection:

a. The grandmother's claim that the trial court lacked subject matter jurisdiction over the termination proceedings because she was a necessary party that was excluded from the action was contrary to established precedent, and, even, if this court construed the grandmother's claim as one challenging the propriety of the trial court's decision to preclude her from participating as a party in the termination trial, she would not have prevailed, as the grandmother's counsel at the termination trial confirmed that, although the grandmother had been granted intervenor status in the prior neglect proceedings, she had not sought to intervene in the termination proceedings and was therefore not a party to the termination proceedings; moreover, because termination of parental rights proceedings concern only the rights of the respondent parent, the grandmother's claim that the court improperly precluded her in light of her status as the plenary guardian of the mother and was the only party appropriate to speak on the mother's behalf was unavailing, as the trial court appointed a guardian ad litem in place of the grandmother to assist the mother in making informed decisions because of conflicts that arose between the grandmother and the mother, and the grandmother did not allege that the court-appointed guardian ad litem could not fulfill her role; furthermore, the record indicated that the grandmother maintained that the mother was not capable of serving as a parent and was unable

to meet the needs of the children, which undermined the grandmother's claim that she was the proper party to advocate on the mother's behalf at the termination trial.

b. The trial court applied the proper legal standard when it adjudicated the grandmother's motion to transfer guardianship: the grandmother could not prevail on her claim that she was entitled to a presumption that she was a suitable and worthy guardian and that a transfer of guardianship to her was in the best interests of the children, as neither the applicable statute (§ 46b-129) nor the relevant rule of practice (§ 34a-12A) provided a presumption of fitness for a parent or former guardian, rather, the rebuttable presumption applied to a relative of a child who either was licensed as a foster parent for the child or was the court-ordered temporary custodian of the child at the time of the revocation or termination, and neither condition applied to the grandmother at the time of the revocation or termination; moreover, the children were committed to the petitioner and thus, as a matter of law, they were in the custody and guardianship of the petitioner, and, accordingly, the grandmother was not entitled to the rebuttable presumption set forth in either § 46b-129 or Practice Book § 34a-12A.

c. The grandmother's claim that the trial court violated her right to equal protection under title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), by discriminating against her as a person of Puerto Rican descent with limited English language proficiency was without merit, as nothing in the record or in the court's memorandum of decision evinced a discriminatory intent: the court had provided the grandmother with a Spanish speaking interpreter since the first hearing following the removal of the children, advised her of all her rights through an interpreter, to which she responded affirmatively, was provided an interpreter at all subsequent proceedings, and the grandmother affirmed through the interpreter that she had reviewed and understood the specific steps issued to her; moreover, all department social workers assigned to the case, as well as the court-ordered psychologist, spoke in Spanish to the grandmother and provided her with written materials in Spanish, and she had been appointed legal counsel, who represented her at every court hearing until she was no longer a party to the juvenile proceedings.

Argued January 31—officially released June 14, 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

** June 14, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Court in the judicial district of Waterbury, Juvenile Matters, and tried to the court, *Hon. William T. Cremins*, judge trial referee; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court; thereafter, the court denied the maternal grandmother's motion to transfer guardianship of the minor children to herself, and the maternal grandmother appealed to this court. *Affirmed.*

Lisa Vincent, assigned counsel, with whom was *Ani A. Desilets*, for the appellant in Docket No. AC 45501 (maternal grandmother).

David B. Rozwaski, assigned counsel, for the appellant in Docket No. AC 45552 (respondent mother).

Evan O'Roark, assistant attorney general, with whom were *Emily Nastri*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee in Docket Nos. AC 45501 and 45552 (petitioner).

Opinion

ELGO, J. These related appeals concern the parental rights and guardianship of Deboras S., Dorkas S., and Joe S., the minor children. In Docket No. AC 45552, 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 the minor children.[1] The respondent claims that the court improperly concluded that (1) the Department of Children and Families (department)

[1] The court also terminated the parental rights of Arsenio R., the father of Dorkas and Joe, and John Doe, the father of Deboras. Because they have not appealed, we refer to the respondent mother as the respondent. We refer to Deboras, Dorkas, and Joe collectively as the children or the minor children.

In addition, we note that, although Attorney Anissa M. Klapproth was appointed as the attorney for the minor children, she did not file any briefs or statements on their behalf in these appeals, as required under our rules of practice. See Practice Book §§ 67-13 and 79a-6 (c).

made reasonable efforts to reunify her with the minor children pursuant to General Statutes § 17a-112 (j) (1); (2) she failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112 (j) (3) (B); and (3) termination of her parental rights was in the best interests of the children. In Docket No. AC 45501, the maternal grandmother of the minor children, Ana R. (intervenor), who intervened in the underlying neglect action, appeals from the judgments of the trial court terminating the respondent's parental rights and denying her motion to transfer the guardianship of the minor children to herself. The intervenor claims that the court (1) lacked subject matter jurisdiction to terminate the respondent's parental rights due to its failure to join the intervenor as a necessary party, (2) applied an incorrect legal standard when adjudicating her motion to transfer guardianship, and (3) violated her right to equal protection under title VI of the Civil Rights Act of 1964 (title VI), 42 U.S.C. § 2000d et seq.[2] We affirm the judgments of the trial court.

The following facts and procedural history are relevant to our resolution of these appeals.[3] The respondent was born in Puerto Rico in 1983 and attended school there through the ninth grade. The respondent suffers from mental health issues, as she is cognitively limited and has been diagnosed with schizophrenia and a major depressive disorder. She lives with her mother, the

[2] Title VI provides in relevant part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2018).

[3] In addition to setting forth detailed findings of fact in its memorandum of decision, the court took judicial notice of "the entire court record including the chronology of the proceedings, the filings or submissions of pleadings, petitions, social studies, statements of facts, affidavits, status reports, court hearing memoranda, and the court's findings, orders, rulings, and judgments."

intervenor, in a four bedroom apartment in Waterbury. The intervenor provides financial support to the respondent and, in 2007, was appointed as her plenary guardian by the Probate Court of New Haven. See General Statutes § 45a-677.

The respondent began an intermittent relationship with Arsenio R. in 2009 that lasted several years. They have two children together—Joe, who was born in 2010, and Dorkas, who was born in 2014.

The respondent met John Doe at a party in Puerto Rico in 2017, where they engaged in a "one-night stand" that resulted in the respondent's pregnancy. Deboras subsequently was born in early 2018. The respondent does not know the identity of John Doe and the department was unable to identify or locate him. All three minor children have been raised by the intervenor since birth.

The family's history with the department dates back to April, 2014, when concerns first arose as to the care of Joe and Dorkas. In 2016, an allegation of physical neglect was substantiated due to the respondent and the intervenor being homeless, transient, and not following through with treatment recommendations for the children. On November 29, 2016, the department filed neglect petitions on behalf of Joe and Dorkas in the Superior Court. Shortly thereafter, the intervenor informed school officials that the family was moving to Puerto Rico. When the department was able to contact the intervenor in February, 2017, she refused to disclose the family's address and hung up the telephone. For the next nineteen months, the department had no contact with the family.[4]

[4] At a psychological consultation conducted by Dr. Inés M. Schroeder, a forensic psychologist, on January 7, 2020, the intervenor explained that, after the family relocated to Puerto Rico, her home was destroyed by Hurricane Maria in 2017. She therefore returned to Connecticut with the minor children in July, 2018, but did not have enough funds at that time to bring the respondent. A copy of Dr. Schroeder's written report memorializing

On September 19, 2018, the department received a report from an official at Walsh Elementary School (school) regarding the care of the minor children. The official reported that the intervenor had provided the school with a notarized paper, bearing only her signature, stating that the minor children were left in her care by the respondent. The official also reported that there were limited educational records for Joe, who previously had been identified as autistic, and that the minor children appeared dirty and had an odor. In addition, the official noted that the intervenor had informed the school that "she had nothing for the children and needed help."

Yocastra Del Rosario, an investigative social worker with the department, contacted the school the next day and spoke with its vice principal, who informed Del Rosario that she had referred the intervenor to the Hispanic Coalition, but the intervenor did not follow through with those services. She also reported that the children arrived at school with a strong odor of urine and opined that Joe needed another educational setting due to his "high autism." The vice principal further advised Del Rosario that the school, at that time, was unable to provide additional services to Joe because it did not have any signed authorizations on his behalf.

When Del Rosario visited the intervenor's home later that day, she observed a strong odor of urine and bleach. Dorkas, who then was four years old, was wearing a diaper and acting younger than her age. Joe, who then was eight years old, was drinking milk out of a baby bottle, while Deboras was in a car seat on top of a bed. Del Rosario attempted to discuss her concerns with the intervenor and offered services for the family. Although the intervenor held herself out to be the legal guardian

those statements was admitted into evidence at both the termination trial and at the hearing on the intervenor's motion to transfer guardianship.

of the children, she refused to provide proof of guardianship,[5] refused all services being offered, and refused to sign any releases. The intervenor then asked Del Rosario to leave.

On September 25, 2018, department workers visited the school to meet with school officials, who explained that Joe was nonverbal and in need of constant supervision. During that visit, department workers observed Joe and confirmed his prior diagnosis as autistic. When the intervenor arrived to pick up Joe from school that day, department workers again offered to meet with her to discuss possible services, but the intervenor stated that she was busy and did not have time to do so.

Department workers returned to the intervenor's home on October 4, 2018, to offer assistance and obtain information about the children's medical providers. The intervenor informed them that she did not have time to speak with them and stated that the department was wasting her time. When Del Rosario once again observed Deboras sleeping in a car seat on top of a bed, she advised the intervenor that this practice was unsafe. In response, the intervenor stated that she had raised plenty of children and that the department was not going to tell her how to care for a baby. The intervenor then asked them to leave. Department workers thereafter attempted unannounced visits to the home on October 15, October 29, October 31 and November 1, 2018, but the intervenor did not answer the door.[6]

[5] The department never was able to corroborate the intervenor's purported status as legal guardian of the minor children. As part of its efforts, department workers contacted the courts in Puerto Rico seeking confirmation of that status, but "[t]here was no documentation stating that [the intervenor] was [the] legal guardian of the children."

[6] At the termination trial, Del Rosario testified that "[o]n several occasions, when we knocked outside the door, we would see movement inside the home, but [the intervenor] would close the [blinds], the window, so we wouldn't be able to see."

On November 8, 2018, school officials made another referral to the department regarding an altercation involving the intervenor that had transpired that day. They reported that, when the intervenor came to pick up Joe, she left Deboras, who, at that time, was eight months old, unattended in her vehicle. When the principal of the school confronted the intervenor, she denied that Deboras was alone in the car. The principal then walked to the vehicle, where Deboras remained, and began to photograph her. In response, the intervenor grabbed the principal and shoved her in the presence of Joe; she then left the school with Joe and Deboras. School officials subsequently notified the police of this altercation.

Later that day, Del Rosario and Jenny Johnson, a department supervisor, visited the intervenor's home to discuss the altercation and offer supportive services. At that time, the intervenor denied assaulting the school principal. The intervenor also expressed a willingness to engage in services for the minor children and agreed to meet with department workers the next day to sign releases on their behalf. In response to concerns about medical care, the intervenor stated that the minor children had upcoming medical appointments at St. Mary's Hospital Children's Clinic. Department workers subsequently contacted that clinic and were informed that the children did not have any medical appointments. Department workers also learned that Joe had not attended school since the November 8, 2018 altercation between the intervenor and the school principal.

On November 13, 2018, department workers asked the intervenor to attend a considered removal meeting; see *In re Riley B.*, 203 Conn. App. 627, 629, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021); to discuss continuing concerns regarding the needs and care of the minor children. The intervenor informed them that she was too busy to do so and asked them

to postpone that meeting because she was returning to Puerto Rico with the minor children in the coming days.

The petitioner applied for and secured orders of temporary custody for all three minor children on November 14, 2018. On that date, the petitioner also filed neglect petitions on behalf of the minor children.[7] When the intervenor visited the department following the removal of the children, she placed a telephone call to the respondent, who was in Puerto Rico.[8] Del Rosario attempted to speak with the respondent, but the respondent rushed her off the phone and informed Del Rosario that she needed to continue shopping. The respondent then asked Del Rosario to speak with the intervenor regarding "what was going on" with the minor children and hung up the phone.

The respondent nonetheless returned to Connecticut and attended a hearing held on November 23, 2018,[9] at which the orders of temporary custody were sustained. The court at that time issued specific steps for the respondent to take to facilitate her reunification with the children, which the respondent signed.[10] On that date, the respondent also filed an application for the

[7] The petitions for neglect alleged that the minor children were being (1) denied proper care and attention physically, educationally, emotionally or morally and (2) permitted to live under conditions, circumstances or associations injurious to their well-being.

[8] At the termination trial, the respondent testified that she was in Puerto Rico at the time of removal.

[9] At that hearing, the respondent was represented by legal counsel, provided a Spanish speaking interpreter, and advised of her rights. The court also provided the intervenor with an interpreter and the assistance of legal counsel and advised the intervenor of her rights.

[10] The specific steps issued on November 23, 2018, required, among other things, the respondent (1) to "[s]ign releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress toward identified goals," (2) to "[t]ake part in counseling and make progress toward the identified treatment goals," (3) to "[c]ooperate with service providers recommended for parent/individual/family counseling," and (4) to "[g]et and/or maintain adequate housing and a legal income."

appointment of counsel and waiver of fees. That filing was accompanied by a sworn affidavit, in which the respondent stated: "I have mental health issues and [the intervenor] is my legal guardian."[11]

The respondent and the intervenor participated in one hour visits with the minor children on a weekly basis that began on November 19, 2018. In December, 2018, the attorney for the minor children filed a motion to suspend visitation due to "serious concerns" about Joe's behavior following those visits.[12] The court held a hearing on that motion on January 15, 2019, at which the respondent's counsel requested the appointment of a guardian ad litem for her in place of the intervenor, who previously was appointed as the respondent's plenary guardian in 2007.[13] As counsel explained, a separate legal guardian was necessary due to conflicts between the respondent and the intervenor regarding visitation with the minor children. The court granted that request and appointed a guardian ad litem for the respondent. Following that appointment, counsel for the minor children withdrew the motion to suspend visitation.

On February 11, 2019, the petitioner filed a motion for a competency evaluation of the respondent, which the court granted. The court held a competency hearing on June 17, 2019, at which Elizabeth Burch, a forensic

[11] On November 23, 2018, the court also issued specific steps for the intervenor, who, at that time, had been identified as the "guardian" of the minor children.

[12] The department documented self-injurious behaviors by Joe after visits, such as hitting himself in the face, kicking things, throwing himself on the ground and crying, as well as scratching his thighs until he bled, difficulty sleeping and being aggressive and uncooperative at school.

[13] That request also was memorialized in a written motion to appoint a guardian ad litem that counsel for the respondent filed on January 22, 2019. That motion alleged in relevant part that the respondent "requires assistance in making informed decisions in all major decisions. Therefore, [the respondent] is unable to assist counsel in her defense." At the January 15, 2019 hearing, counsel for the petitioner informed the court that "the department supports this motion" to appoint a guardian ad litem for the respondent.

psychiatry fellow at the Yale University School of Medicine, testified as to her examination of the respondent. In both her written report, which was admitted into evidence at the competency hearing, and in her testimony, Dr. Burch opined that the respondent was not competent and not restorable due to her "long-standing intellectual deficits."[14] Dr. Burch further opined that the respondent was not able to understand the proceedings against her and was not able to assist her attorney in her case. For that reason, Dr. Burch concluded that the respondent would not be able to participate fully in those proceedings "without the support of a guardian ad litem." At the conclusion of that hearing, the court found that the respondent "lacked the capacity to understand" the pending child protection proceedings and clarified that the role of the guardian ad litem moving forward was "to assist [the respondent] with these proceedings."

Following the appointment of a guardian ad litem for the respondent, the intervenor filed a motion to intervene in the juvenile proceeding as a person related to the minor children. Although the petitioner initially objected to that motion, the court granted that motion "by agreement of all parties for dispositional purposes only" on September 10, 2019. On that date, the minor children were adjudicated neglected and committed to the care of the petitioner.

On September 18, 2019, the petitioner filed a motion for a psychological evaluation of the respondent, which the court granted on October 8, 2019. The respondent thereafter participated in that evaluation conducted by

[14] In her report, Dr. Burch noted that, during her evaluation, the respondent explained that she "did not attend school in Puerto Rico but went to a 'special group' for children who did not know how to read or write," that she never attended school in the United States, and that she never has held a job. The respondent also informed Dr. Burch that she "has received disability benefits since she was 'a little girl.' "

Inés M. Schroeder, a forensic psychologist, in January, 2020. As part of that court-ordered evaluation, Dr. Schroeder also examined the intervenor and the minor children.

On October 16, 2019, the intervenor filed a motion to transfer guardianship of the minor children to herself. In that motion, the intervenor alleged in relevant part that she was their "former custodian," that she would be "a suitable and worthy guardian," and that transferring guardianship to her would be in the best interest of the minor children. The petitioner filed an objection to that motion, alleging that the department was "still assessing" the intervenor and that it was not in the best interests of the minor children to transfer guardianship to her at that time.

The petitioner filed petitions to terminate the respondent's parental rights on November 29, 2019, which were predicated on her failure to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B). In those petitions, the petitioner alleged both that the department had made reasonable efforts at reunification and that the respondent was unable or unwilling to benefit from reunification efforts.

On February 4, 2020, Dr. Schroeder issued her report on the psychological evaluation of the respondent. In that report, Dr. Schroeder noted that she had performed a Kaufman Brief Intelligence Test on the respondent, which resulted in a "[n]on-[v]erbal IQ score of 42." Dr. Schroeder further explained that "[t]here is a 90 [percent] probability that her true score would fall within 37-53. This score is in the less than [0.1] percentile; which falls in the [l]ower [e]xtreme category." With respect to the respondent's current psychological functioning, Dr. Schroeder opined that, "[a]s a parent, [the respondent] would have great difficulty meeting the needs of those around her" and emphasized that she

struggles "to identify and accurately respond to her own needs." She also noted that, although the respondent "loves her children and desires to care for them, she has difficulty knowing what they need and being able to locate and implement supports to help them." For those reasons, Dr. Schroeder opined that "[a]ssessing a child's needs, knowing what a child requires, and accurately and adequately addressing them would be very difficult for her."

In July, 2020, an ex parte restraining order was issued in family court against the intervenor that instructed her not to "assault, threaten, abuse, harass, follow, interfere with, or stalk" the respondent. A copy of that protective order was admitted into evidence at the termination trial and at the hearing on the intervenor's motion to transfer guardianship. Appended to that order was a copy of a protective order that had been issued in criminal court in November, 2008, against the intervenor to protect the respondent. That document indicates that the intervenor, at that time, was charged with assault in the third degree in violation of General Statutes § 53a-61.

On August 11, 2020, the petitioner filed a motion for review of the permanency plan, in which she sought approval of the proposed plan of termination and adoption of the minor children and a finding that the department made reasonable efforts to achieve that plan.[15] The respondent filed an objection, in which she proposed

[15] "A 'permanency plan' is the proposal for what the long-term, permanent solution for the placement of the child should be. . . . Our statutory scheme provides five permanency options: (1) reunification with a parent; (2) long-term foster care; (3) permanent guardianship; (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption." (Citations omitted; footnote omitted.) *In re Adelina A.*, 169 Conn. App. 111, 121, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016). The initial permanency plan for the minor children was submitted by the petitioner on July 1, 2019. The respondent did not file an objection to that plan, which the court approved on August 7, 2019.

"a permanency plan of transfer of guardianship to [the intervenor] or another suitable and worthy maternal relative." On October 16, 2020, the court approved the permanency plan submitted by the petitioner and found that the department had made reasonable efforts to achieve that plan.

On March 5, 2021, the intervenor filed a motion to consolidate her motion to transfer guardianship with the termination trial, which the court initially granted. On the first day of trial, however, the court revisited the issue. At the outset of that proceeding, the court inquired as to whether the intervenor's motion to intervene had been granted with respect to the underlying neglect petitions and counsel for the intervenor answered affirmatively. Counsel further confirmed that the motion to intervene had been granted prior to the filing of the termination petitions and that the intervenor "did not directly intervene in the [termination proceeding] itself." For that reason, the court concluded that the intervenor lacked standing to participate in the termination proceeding. It thus bifurcated the termination trial from the intervenor's motion to transfer guardianship.[16]

A trial on the termination petitions was held over the course of five days, which was followed by a four day evidentiary hearing on the intervenor's motion to transfer guardianship. On April 7, 2022, the court issued its memorandum of decision, in which it granted the petitions to terminate the respondent's parental rights.

[16] In bifurcating those proceedings, the court stated: "I want to clarify how we're going to proceed with respect to this consolidation that was done so we don't have any issues here. I'm going to hear the [termination trial] through all evidence. I will then separately hear the motion to transfer guardianship. So, with respect to the [termination trial], the [intervenor's] counsel can be here, [the intervenor] can be here, you [both] can listen, but no participation until after the [termination trial] is concluded, and then we'll separately hear the motion to transfer guardianship."

In so doing, the court made extensive findings of fact and concluded that the department had made reasonable efforts to reunify the minor children with the respondent. The court further concluded that the petitioner had established that the adjudicatory grounds for termination existed and that termination was in the best interests of the minor children. In addition, the court determined that the intervenor had failed to meet her burden of establishing that it was in the minor children's best interests to transfer guardianship to her or that she was a suitable and worthy guardian. The court thus denied the motion to transfer guardianship, and these appeals followed.

I

AC 45552

We begin with the respondent's appeal from the judgments of the trial court terminating her parental rights as to the minor children. The respondent claims that the court improperly concluded that (1) the department made reasonable reunification efforts, (2) she failed to achieve a sufficient degree of personal rehabilitation, and (3) termination of her parental rights was in the best interests of the minor children. We address each claim in turn.

A

The respondent first contends that the court improperly concluded that the department made reasonable efforts to reunify her with the minor children pursuant to § 17a-112 (j) (1).[17] On our careful consideration of the particular circumstances of this case, we disagree.

[17] Although the respondent also alleges in her principal appellate brief that the court improperly determined that she was unwilling or unable to benefit from reunification efforts, the record before us plainly indicates that the court did not address that issue in its memorandum of decision, a point underscored by the petitioner in her appellate brief. In her appellate reply brief, the respondent confines her claim in this regard to whether the department made reasonable efforts at reunification.

Proceedings to terminate parental rights are governed by § 17a-112 (j), which provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition . . . if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . ." In the present case, the petitioner alleged in the petitions to terminate the respondent's parental rights both that the department had made reasonable efforts at reunification and that the respondent was unable or unwilling to benefit from reunification efforts. In its memorandum of decision, the court concluded that the department had made reasonable efforts at reunification; it did not make any determination as to whether the respondent was unable or unwilling to benefit from reunification efforts. Accordingly, our review is confined to the reasonable efforts prong of § 17a-112 (j).

Section 17a-112 (j) "imposes on the department the duty, inter alia, to make reasonable efforts to reunite the child or children with the parents. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [O]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual

case in deciding whether reasonable efforts have been made." (Citations omitted; internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 810–11, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

Appellate review of a trial court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review; see *In re Oreoluwa O.*, 321 Conn. 523, 533, 139 A.3d 674 (2016); pursuant to which "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]." (Internal quotation marks omitted.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016). As our Supreme Court has cautioned, "[i]t is not the function of [an appellate 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." (Internal quotation marks omitted.) Id.

With that standard in mind, we address the respondent's primary claim, which is premised on the court's finding that she "had a moderate severity in intellectual disability that would make it difficult for her to be the primary caregiver," and because "the grandmother had been the primary caretaker for each of the children since their birth . . . [t]he trial court's decision cannot be said to be logically correct" given those limitations

and the lack of services offered to assist "her, the [intervenor] and the family." The respondent argues that "there was more than sufficient evidence to make a determination that the respondent, with appropriate services which would have included a wraparound with her [and] the [intervenor], could have within a reasonable period of time, made sufficient progress to reunify with her children." The respondent therefore contends that there was insufficient evidence to support the court's finding that she was unable to benefit from reunification efforts.

The respondent's claim suffers from several defects. First, she has improperly conflated the alternative ground of "unable or unwilling to benefit from reunification" under § 17a-112 (j) (1) with the failure to rehabilitate language from § 17a-112 (j) (3) (b) (i), which requires the court to determine whether the petitioner has established that the respondent has failed to rehabilitate "within a reasonable period of time" given the age and needs of the child. While it is true that the underlying factual considerations may be similar, we reiterate that the court did not make a finding that she was unable or unwilling to benefit from reunification efforts and addressed only the reasonableness of the reunification efforts made by the department.

Second, the respondent's substantive argument that the department failed to offer "wraparound" services that would have engaged both the respondent and the intervenor has no merit. The respondent has provided no authority, and we are aware of none, that suggests that the department's burden in establishing the reasonable efforts ground extends or applies jointly to a person whose parental rights are not the subject of the petition. By contrast, supportive services to advance the public policy of prioritizing placement with relatives under relative foster care, or to seek and/or consider family members as permanent resources for guardianship or

adoption is well established. Moreover, the absence of a duty to provide services to a nonparty who is nevertheless part of a family unit, does not preclude the court from concluding that it would not be in the best interest of the child to terminate parental rights if, under all of the circumstances, preservation of the family unit outweighed another permanent plan. Indeed, we can easily imagine how a spouse, who was not a biological parent, or another functioning and competent grandparent, could obviate the need for the department to even consider termination of the parental rights because of their willingness to accept voluntary services in the first instance. In this case, the study in support of the department's permanency plan, filed on June 1, 2020, noted that the concurrent plan to the recommended plan of termination of parental rights and adoption was for transfer of guardianship to a family member. The plan noted, however, that, "although [the intervenor] was identified as a possible resource, the department and providers have noted concerns regarding her exerting control over [the respondent], [the respondent] having voiced fear of [the intervenor], and [the intervenor] not having made any progress towards parenting education with Evelyn Rodriguez or Naugatuck Valley Counseling."

Moreover, even if there was a legal duty such that the court would be precluded from finding reasonable efforts, nothing in the record supports a finding that the intervenor was a supportive parenting figure with whom the respondent could responsibly partner in the raising of her children. On the contrary, the intervenor has been actively hostile to the respondent's ability to engage in services. At trial, the court was presented with uncontroverted testimony that the intervenor instructed the respondent not to sign releases, which delayed the respondent's ability to get referred for

appropriate services. When the intervenor finally provided confirmation of her appointment as guardian for the respondent at the January 15, 2019 hearing, counsel for the respondent then sought the appointment of a guardian ad litem for the respondent due to conflicts with the intervenor and the respondent over visitation. Ironically, the attorney for the children, who had moved to suspend visitation between Joe and the respondent and the intervenor because of Joe's self-injurious behavior, represented that she would not object to visitation if the respondent could see the children separately.

The respondent's attempt to tether herself to the intervenor for purposes of the court's reasonable efforts determination is not only legally untenable, but, based on the undisputed record, would arguably operate to undermine her own prospects for reunification. First, the court specifically found that the intervenor was the subject of a protective order in which the respondent was the protected party. The intervenor's documented inability to work with the department has only compounded the respondent's difficulties and limitations in receiving and benefitting from services intended to help her meet her own needs and especially those of her children.[18] For instance, whether due to her acquiescence to the intervenor's insistence that she not sign

[18] The evidence also demonstrates that, in 2016, the department substantiated neglect and, given the failure to follow through with treatment recommendations while the children were in the care of the respondent and the intervenor, the petitioner filed neglect petitions on behalf of Dorkas and Joe. The intervenor subsequently informed school officials that she was leaving for Puerto Rico and, when the department was able to contact the intervenor in 2017, she refused to disclose the family's whereabouts. As a result, the treatment recommendations and conditions leading up to the initial neglect petitions were unaddressed for the next nineteen months during which the department lost contact with the family. The respondent also acknowledges in her brief that there was evidence that the department was not seeking removal of the children in 2018 because they wanted to give the intervenor an opportunity to follow up with services, but that they could not engage her because she would not sign releases for referrals for services.

releases, or, when effectively relieved of the intervenor's constraints on her decision-making following the court's determination of incompetency and her counsel and guardian ad litem's decision to sign releases on her behalf, the undisputed evidence establishes that the department made numerous efforts to get releases signed in order to make referrals and secure appropriate services for the respondent.

Moreover, as this court noted in *In re Destiny D.*, 86 Conn. App. 77, 84, 859 A.2d 973, cert. denied, 272 Conn. 911, 863 A.2d 702 (2004), a respondent's failure "to sign releases authorizing the department to give or to receive information about her treatment [makes] it impossible" for the department to procure rehabilitative services. See also *In re Isaiah J.*, 140 Conn. App. 626, 630, 59 A.3d 892 ("[t]he respondent revoked all of the confidentiality releases that she had given, preventing the department from speaking to the service providers to which she had been referred"), cert. denied, 308 Conn. 926, 64 A.3d 333, cert. denied sub nom. *Megan J.* v. *Katz*, 571 U.S. 924, 134 S. Ct. 317, 187 L. Ed. 2d 224 (2013); *In re Amanda L.*, Superior Court, judicial district of Middlesex, Docket No. CP-16-011877-A (January 11, 2021) (because respondents "steadfastly refused to sign any releases," department was "unable to make the appropriate referrals for them"), aff'd, 209 Conn. App. 1, 267 A.3d 362 (2021). Like the respondent in *In re Destiny D.*, the respondent's failure to sign releases in accordance with the specific steps issued to her in the present case impaired the department's ability to make referrals and secure services for more than six months.[19] As

[19] The decisional law of our Superior Court is replete with instances in which the court has concluded that the department made reasonable efforts in the face of a respondent's refusal to sign necessary releases. In those cases, the court has recognized that releases not only assist the department in monitoring progress and compliance, but are critical to ensuring that services are relevant, appropriate, and tailored to both the respondent and the needs of the children. See, e.g., *In re Samuel V.*, Docket No. 09-CP-14013826-A, 2016 WL 4150583, *5 (Conn. Super. June 27, 2016) (respondent

one Superior Court judge has observed, "[r]eunification efforts generally consist of visitation and, where appropriate, other rehabilitative services such as evaluations, testing, counseling, therapy, education, medical care, parenting classes and housing assistance. . . . In accomplishing the goals set out in the specific steps, time is of the essence. [The department] is expected to make all necessary referrals immediately, and the respondent parents are expected to cooperate promptly with the referral process and engage in services as soon as possible." (Citation omitted; internal quotation marks omitted.) *In re MaKenna S.*, Docket No. 14-CP-10010201A, 2011 WL 4447225, *25 (Conn. Super. August 31, 2011). Moreover, releases not only permit the department in the referral process to share confidential information to service providers appropriate to the parenting needs of the respondents, the ongoing communication that releases permit between the department and providers allows the department not only to monitor progress but to assess and adjust services as circumstances require. See *In re Melissa D.*, 1998 WL 811542, *2 (Conn. Super. November 9, 1998) (reasonable efforts found where, despite court-ordered expectations to sign releases for department to confirm attendance, monitor progress, and initiate further referrals as indicated by providers, respondent never signed required releases); cf. *In re Joseph W.*, 53 Conn. Supp. 1, 76, 145, 79 A.3d 155 (March 11, 2013) (redacted releases prevented department from sharing relevant information necessary for referral and allowed respondent to provide inaccurate history to provider), aff'd, 146 Conn. App. 468, 78 A.3d 276, cert. denied, 310 Conn. 950, 80 A.3d 909 (2013), and cert. denied, 310 Conn. 950, 81 A.3d 1179 (2013).

In that vein, we note that the court found, and the record confirms, that the department endeavored to

"did not sign releases to allow the department to provide referrals and to confirm her attendance, progress and cooperation").

provide various rehabilitative services to the respondent which required, as a preliminary step, the need for the respondent to sign releases as part of the referral process. As part of the specific steps that she signed on November 23, 2018, the respondent was required to sign releases within thirty days. She nevertheless did not do so for more than one-half year. At trial, Acevedo testified that, although the department offered many rehabilitative services to the respondent, including "parenting services, mental health services, and . . . therapeutic family time," it had "issues getting releases signed" by the respondent "because [the intervenor] would instruct her not to sign any releases." The record thus substantiates the court's factual finding that the respondent "refused to sign releases of information for services to be referred."

Acevedo further testified that, after the guardian ad litem was appointed for the respondent, the department sent releases to the guardian ad litem and the respondent's attorney. Following the results of the competency hearing on June 17, 2019, the guardian ad litem for the respondent subsequently signed the necessary releases on behalf of the respondent, who then was referred to multiple outside services.

When the department finally obtained releases from the respondent, they referred her to a parenting support service with Community Mental Health Affiliates on July 1, 2019. When the department was advised that that provider was unable to work with the respondent due to the lack of a Spanish speaking clinician, the department then referred the respondent to a parent coaching service with All Pointe Care, LLC, which had a Spanish speaking clinician. That clinician, however, opined that the respondent needed to work with an applied behavior analysis therapist. The department then worked to secure a Spanish speaking therapist who could meet the respondent's needs and ultimately referred her to Evelyn Rodriguez,

a licensed clinical social worker trained in child-parent psychotherapy. That referral came weeks after the petitioner filed the petitions to terminate the respondent's parental rights on November 29, 2019.[20] Nevertheless, the department continued to provide services well past the adjudicatory date by which reasonable efforts is determined.

In addition to its attempt to secure releases and ongoing efforts to make appropriate referrals based on input from service providers, the department procured psychological and psychiatric evaluations of the respondent in an attempt to determine her competency, as well as "what the respondent's mental health issues were and how best to address her problems." *In re Ashley S.*, 61 Conn. App. 658, 660, 769 A.2d 718, cert. denied, 255 Conn. 950, 769 A.2d 61 (2001); see also *In re Anna B.*, 50 Conn. App. 298, 303 n.9, 717 A.2d 289 (1998) (services offered to respondent by petitioner included "psychological and psychiatric services"); *In re Joseph W.*, supra, 53 Conn. Supp. 145 (services offered to respondent by department included "psychological and neuropsychological evaluations").

The department also provided supervised visitation services on a weekly basis to the respondent and the minor children that began on November 19, 2018, mere days after their removal. Department staff testified as to the nature of those visitation services and the attempts to engage the respondent in improved interactions with her

[20] "[I]n determining whether the department has made reasonable efforts to reunify a parent and a child . . . the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . This court has consistently held that the court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . ." (Emphasis omitted; internal quotation marks omitted.) *In re Cameron W.*, 194 Conn. App. 633, 660, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020).

children. Department social worker Luis D. Rijos testified that he supervised visits between the respondent and the minor children from February, 2019, to March, 2020. Department social worker Malenis Acevedo testified that, during visits that she supervised, she needed to encourage the respondent to have more interaction with the children and to "reengage" with them. At oral argument before this court, the respondent conceded that visitation was a "legitimate, substantive, meaningful service" provided by the department. See, e.g., *In re Lillyanne D.*, 215 Conn. App. 61, 96, 281 A.3d 521 (reasonable efforts by department included "providing substantial supervised visitation" between respondent and minor children), cert. denied, 345 Conn. 913, 283 A.3d 981 (2022); *In re Jessica B.*, 50 Conn. App. 554, 569, 718 A.2d 997 (1998) (reasonable efforts included coordinating visitation between respondent and minor child).

The record before us also indicates that the department provided case management services to the respondent, offered transportation assistance to her, and transported the children to visits with her. See *In re Ryder M.*, supra, 211 Conn. App. 819 (reasonable efforts by department included providing case management services to respondent); *In re Jah'za G.*, 141 Conn. App. 15, 31, 60 A.3d 392 (same), cert. denied, 308 Conn. 926, 64 A.3d 329 (2013); *In re Sarah S.*, 110 Conn. App. 576, 585, 955 A.2d 657 (2008) (reasonable efforts by department included providing "transportation services" to respondent); *In re Galen F.*, 54 Conn. App. 590, 597, 737 A.2d 499 (1999) (reasonable efforts included offering "transportation assistance" to respondent). The petitioner also ensured that all department social workers assigned to her case communicated with the respondent in Spanish, including Acevedo and Rijos.

As part of its reunification efforts, the department facilitated counseling and therapy for the minor children, which included, with respect to Joe and his special needs,

observation with the respondent. See *In re Destiny D.*, supra, 86 Conn. App. 83–84 (reasonable efforts included arranging counseling and therapy services for respondent's children). The procurement of such services enables the department to better understand the particular needs of the children in question and to tailor its efforts to facilitate reunification between parent and child. See, e.g., *In re Corey C.*, 198 Conn. App. 41, 65, 232 A.3d 1237 ("the department tailored its reunification efforts to help the respondent overcome the specific impediments to reunification"), cert. denied, 335 Conn. 930, 236 A.3d 217 (2020); *In re Domenic M.*, Superior Court, judicial district of Middlesex, Docket No. CP-10-007310-A (May 29, 2014) (department referred respondent to parent education service that "tailors parent training to the needs of the individuals involved" and taught respondent how to "anticipat[e] her young son's needs"). In addition, the department invited the respondent to attend the children's medical appointments. At trial, Acevedo testified that the respondent attended "some appointments" with her children, but then ceased doing so.

Under Connecticut law, "[t]he reasonableness of the department's efforts must be assessed in the context of each case. . . . [W]hether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case." (Internal quotation marks omitted.) *In re Kyara H.*, 147 Conn. App. 855, 872–73, 83 A.3d 1264, cert. denied, 311 Conn. 923, 86 A.3d 468 (2014). The present case involves the particular scenario in which a respondent declined to sign releases requested by the department, as required by the specific steps, for more than one-half year. The department nevertheless attempted to reunify her with the minor children by providing psychological and psychiatric services, supervised visitation on a weekly basis, transportation and case management services, counseling and therapy for the minor children, by involving the respondent in the

children's medical appointments, and by referring her to parenting services. On our careful consideration of the circumstances of this case, we conclude that the record contains sufficient evidence to support the court's reasonable efforts determination. The court properly could conclude, on the evidence before it, that the department had satisfied its statutory burden under § 17a-112 (j) (1).

B

The respondent next claims that the court improperly concluded that she failed to achieve a sufficient degree of personal rehabilitation. 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, and review its finding that the respondent failed to rehabilitate for evidentiary sufficiency. . . . In reviewing that ultimate finding for evidentiary sufficiency, we inquire whether the trial court could have reasonably

concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . [I]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citations omitted; internal quotation marks omitted.) *In re Jayce O.*, supra, 323 Conn. 715–16. 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.

"When a child is taken into the [petitioner's] custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights. . . . Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of [parental] rights." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 578–79, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). 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. 308, 329, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015); see also *In re Brian T.*, 134 Conn.

App. 1, 25, 38 A.3d 114 (2012) (*Robinson*, *J.*, concurring) ("specific steps are intricately intertwined with the failure to rehabilitate"). 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).

On November 23, 2018, the court held a hearing on the orders of temporary custody, at which the respondent was provided legal counsel and the assistance of an interpreter. See footnote 9 of this opinion. The court at that time issued specific steps for the respondent to take to facilitate her reunification with the children, which she signed. Those steps required, inter alia, the respondent (1) to "[s]ign releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress toward identified goals," (2) to "[t]ake part in counseling and make progress toward the identified treatment goals," (3) to "[c]ooperate with service providers recommended for parent/individual/family counseling," and (4) to "[g]et and/or maintain adequate housing and a legal income."

As we already have noted, the respondent did not sign releases in a timely manner to allow the department to communicate with service providers, which hampered its ability to procure rehabilitative services for her. See part I A of this opinion. The record also indicates that, although the respondent engaged in services with Rodriguez in January, 2020, she was unsuccessfully discharged in April, 2020, due to her failure to attend telehealth appointments following the outbreak of the COVID-19 pandemic. In addition, the record indicates that the department subsequently referred the respondent to Naugatuck Valley Counseling with an intake scheduled on May 18, 2020. The respondent did not attend that intake appointment. That evidence supports the court's factual finding that the respondent did not comply with the specific steps

requiring her to cooperate with service providers and to take part in counseling.

The evidence also indicates that the respondent made little progress during the weekly visitation sessions that the department supervised. As Rijos testified, during most visits "there was very little interaction between [the respondent] and the children and that "[f]or the most part [the respondent] would just sit and observe" the children. Rijos was asked if he was able to observe any improvement in the interactions between the respondent and the children. He replied: "No, ma'am. There [was] no improvement that I was able to observe. How I started the visits in February of 2019 was the same in March of 2020. Very little interaction."

Although the record supports the court's findings that the respondent did not comply with the specific steps issued by the court in multiple respects, it also reveals a more basic shortcoming as to her ability to care for the minor children. As the respondent concedes, at no time since their births has the respondent served as their caregiver. The record reflects the sad reality that the respondent, due to cognitive limitations and mental health challenges, is largely unable to care for herself.[21] In her expert report, which was admitted into evidence at the termination trial, Dr. Schroeder opined that the respondent struggles "to identify and accurately respond to her own needs" and "[a]s a parent [she] would have great difficulty meeting the needs of those around her." In this regard, we note that both Joe and Dorkas have significant specialized needs—Joe is autistic and Dorkas suffers from an attention disorder that requires medication and qualifies her for special education services. Although Joe and Dorkas have made significant improvements while in foster care,

[21] In her principal appellate brief, the respondent states that the intervenor "had raised the [minor children] since their births until their removal . . . and the respondent still resided with [the intervenor] and was dependent upon her . . . ."

Joe, who was nearly eleven years old as of March 24, 2021, was reported to be displaying an increase in hand ticks, flapping, rocking and vocalizations, was stealing in school and having ongoing problems with nighttime enuresis. Dorkas, who could not speak when she was first placed in foster care old at four and one-half years old, has progressed in her speech and presented healthy in weight and height when evaluated by Dr. Schroeder. Nevertheless, Dr. Schroeder recommended ongoing services, including an assessment for trauma, based on concerns reported in the foster home.[22] In her report, Dr. Schroeder stated that, although the respondent "loves her children and desires to care for them, she has difficulty knowing what they need and being able to locate and implement supports to help them." For those reasons, Dr. Schroeder opined that "[a]ssessing a child's needs, knowing what a child requires, and accurately and adequately addressing them [is] very difficult for her."

The critical inquiry in evaluating personal rehabilitation under § 17a-112 (j) (3) (B) is whether a person "has gained the ability to care for the particular needs of the [children] at issue." (Internal quotation marks omitted.) *In re Omar I.*, supra, 197 Conn. App. 579. 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 evidence credited by the court supports its conclusion that the respondent failed to achieve a sufficient degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B).

C

The respondent also claims that the court erroneously found that the termination of her parental rights was in the best interests of the minor children. We disagree.

[22] Dr. Schroeder noted signs of possible trauma even after one year in foster care, in that Dorkas "will not share her opinion or inform if she is uncomfortable," such as refusing to say she is cold even if she is shivering in a bath of cool water or sleeping on the floor even after checking under her bed.

Connecticut's appellate courts will not disturb a trial court's best interests finding unless it is clearly erroneous. See *In re Brayden E.-H.*, 309 Conn. 642, 657, 72 A.3d 1083 (2013). "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so . . . [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008).

The evidence adduced at the termination trial indicates that the minor children were "thriving" in their foster home placements. The court also was presented with evidence regarding the children's need for stability and the respondent's inability to provide it. In her testimony, Dr. Schroeder[23] testified that Joe's "difficulties [due to his] autism spectrum disorder require him to have as much consistency, stability, and routine as possible. . . . When [his] routine is disrupted, it can be very traumatic for him."[24] Dr. Schroeder also stated that Joe and Dorkas "require stability, and safety, and nurturance, to be able to process the trauma that they suffered from the many losses that they experienced." When asked if the respondent is "able to provide that stability for them," Dr.

[23] Dr. Schroeder conducted a court-ordered psychological evaluation of the respondent in January, 2020. As part of that evaluation, Dr. Schroeder also examined the minor children and the intervenor.

[24] Joe's foster mother similarly testified at the termination trial that he required consistency and stability, without which he would regress.

Schroeder answered, "No." That evidence substantiates the court's finding that the respondent was unable to provide the "consistency and stability [that] are crucial" for the minor children.

In her principal appellate brief, the respondent alleges that the court did not "take into consideration the bond" that she shared with the children. The record belies that contention. In its memorandum of decision, the court specifically acknowledged that the children have "emotional ties" to the respondent. It nevertheless found that any such bond "is secondary to the long-term permanency, safety, and security needs of [the minor] children." As this court has observed, the appellate courts of this state "consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights." *In re Rachel J.*, 97 Conn. App. 748, 761, 905 A.2d 1271, cert. denied, 280 Conn. 941, 912 A.2d 476 (2006); see also *In re Melody L.*, 290 Conn. 131, 164, 962 A.2d 81 (2009) (same), overruled in part on other grounds by *State v. Elson*, 311 Conn. 726, 91 A.3d 862 (2014); *In re Kiara Liz V.*, 203 Conn. App. 613, 626, 248 A.3d 813 ("the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination"), cert. denied, 337 Conn. 904, 252 A.3d 364 (2021).

In addition, the court found that the respondent "does not have the skills to care for" the minor children and would "not be able to assume a responsible role in [their] lives in a reasonable time period." That finding is supported by Dr. Schroeder's expert testimony and written report, as well as the testimony of department social workers. More importantly, that finding is not contested by the respondent. In this regard, it bears emphasis that, in her objection to the permanency plan submitted by the petitioner, the respondent did *not* aver that she was capable of caring for the minor children; rather, she requested a transfer of legal guardianship of the children

to the intervenor "or another suitable and worthy maternal relative." In this appeal, the respondent likewise submits that she "supports the [intervenor] as the primary caretaker for the children and maintains that the integrity of the family can be best maintained with a transfer of guardianship to the [intervenor]."

Although the propriety of the court's decision to deny the intervenor's motion to transfer guardianship is discussed in part II of this opinion, we note that the evidence before the court at the termination trial undermines the respondent's contention. The conditions that gave rise to department intervention and the removal of the minor children all occurred while the respondent was in Puerto Rico and the children were in the care of the intervenor. Moreover, at the termination trial, Rodriguez testified that she initially encountered difficulty in working with the respondent because the intervenor "would not allow [the respondent] to answer freely." As a result, Rodriguez worked with department staff "to find a new location to meet" where she could meet privately with the respondent. During subsequent meetings, the respondent stated that the intervenor had "authority over" her and that she "controls [the respondent's] life." The respondent also confided in Rodriguez that she was subject to corporal punishment as an adult and that the intervenor had "pushed her, hit her, [and] locked her out of the house." Also admitted into evidence at the termination trial was a copy of the protective order that was issued against the intervenor in July, 2020, which instructed her not to "assault, threaten, abuse, harass, follow, interfere with, or stalk" the respondent.[25] That evidence provides a proper basis for the court to reject the respondent's claim that the best interests of the minor children would be served by transferring guardianship to the intervenor.

[25] Appended to that order was a copy of another protective order that was issued against the intervenor to protect the respondent in November, 2008.

In its memorandum of decision, the court found that termination of the respondent's parental rights was in the best interests of the minor children, who needed stability, continuity, and permanency in their lives. Mindful that we must make every reasonable presumption in favor of the court's ruling; see *In re Davonta V.*, supra, 285 Conn. 488; we conclude that the evidence in the record supports the court's determination. That finding, therefore, is not clearly erroneous.

II

AC 45501

We now turn our attention to the intervenor's appeal from the judgments of the trial court terminating the respondent's parental rights and denying her motion to transfer guardianship of the minor children. On appeal, the intervenor claims that the court lacked subject matter jurisdiction to terminate the respondent's parental rights due to its failure to join the intervenor as a necessary party. She further contends that the court applied an incorrect legal standard in adjudicating her motion to transfer guardianship and that it violated her right to equal protection.

A

We begin, as we must, with the intervenor's jurisdictional claim.[26] In her appellate brief, the intervenor contends that "the trial court lacked subject matter jurisdiction to terminate [the respondent's] parental rights because [she] was a necessary party and she was excluded from the action." That contention is contrary to established precedent. As our Supreme Court repeatedly has held, "the failure . . . to join an indispensable

[26] "[A] possible absence of subject matter jurisdiction must be addressed and decided whenever the issue is raised . . . . A determination regarding a trial court's subject matter jurisdiction presents a question of law, and . . . we exercise plenary review." (Internal quotation marks omitted.) *In re Ava W.*, 336 Conn. 545, 553, 248 A.3d 675 (2020).

party does not impact the court's subject matter jurisdiction." (Internal quotation marks omitted.) *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 275, 253 A.3d 13 (2020); see also *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 288, 914 A.2d 996 (2007); *Bauer* v. *Souto*, 277 Conn. 829, 838, 896 A.2d 90 (2006); *Eder Bros., Inc.* v. *Wine Merchants of Connecticut, Inc.*, 275 Conn. 363, 382 n.10, 880 A.2d 138 (2005). We thus reject the intervenor's claim that the court lacked subject matter jurisdiction in the termination proceeding.

Even if we construe the intervenor's claim as one challenging the propriety of the court's decision to preclude her from participating as a party in the termination trial; see footnote 17 of this opinion; the intervenor could not prevail, as she never sought to intervene in that proceeding. The record indicates that, at the outset of the termination trial, the court noted that the intervenor had been granted intervenor status in the prior neglect proceeding but had not sought to intervene in the termination proceeding. Her counsel at that time confirmed to the court that the intervenor "did not directly intervene in the [termination proceeding] itself" and that the intervenor "is not a party to the [termination proceeding]." The termination trial then proceeded to its ultimate conclusion and at no point did the intervenor move to intervene in that proceeding.

Moreover, it bears emphasis that "termination of parental rights proceedings concern *only* the rights of the *respondent parent*." (Emphasis altered.) *In re Santiago G.*, 325 Conn. 221, 234, 157 A.3d 60 (2017); see also *In re Brian P.*, 195 Conn. App. 582, 593, 226 A.3d 152 (2020) (dismissing grandmother's appeal from denial of motion to intervene for lack of standing). As our Supreme Court has explained, it is well established that "there is no right to intervene in the adjudicatory phase of a termination of parental rights action"; *In re Santiago G.*, supra, 234; particularly when intervention is sought to obtain custody

of the minor children in question. See *In re Denzel A.*, 53 Conn. App. 827, 835, 733 A.2d 298 (1999) ("[t]he purpose of the intervention . . . in a termination of parental rights case does not include the right to effect an adoption or to obtain custody . . . but is solely for the purpose of affecting the termination itself").

The intervenor alternatively argues that the court improperly precluded her participation in the termination trial in light of her status as the plenary guardian of the respondent and claims that she "was the only appropriate party to speak on behalf of the respondent" in the termination proceeding. She overlooks the undisputed fact that, when conflicts arose between the intervenor and the respondent shortly after the orders of temporary custody were sustained, the respondent's counsel requested the appointment of a guardian ad litem in place of the intervenor, averring that the respondent "requires assistance in making informed decisions in all major decisions." See footnote 13 of this opinion. The court granted that request and appointed a guardian ad litem for the respondent on January 15, 2019. Furthermore, following a competency hearing on June 17, 2019, the court found that the respondent "lacked [the] capacity to understand" the pending juvenile proceedings and clarified that the role of the guardian ad litem moving forward was "to assist [the respondent] with these proceedings." Attorney Deborah Dombek thereafter participated in these juvenile proceedings as the guardian ad litem for the respondent in accordance with General Statutes § 45a-132.[27]

[27] General Statutes § 45a-132 provides in relevant part: "(a) (1) . . . in any proceeding before a court of probate or the Superior Court . . . the judge or magistrate may appoint a guardian ad litem for any minor or incompetent . . . person . . . .

"(b) The appointment of a guardian ad litem shall not be mandatory, but shall be within the discretion of the judge or magistrate. . . ."

In these appeals, neither the respondent nor the intervenor has claimed that the court abused its discretion in appointing a guardian ad litem for the respondent.

In *In re Tayquon H.*, 76 Conn. App. 693, 821 A.2d 796 (2003), this court addressed a claim by a maternal grandmother that, as the natural guardian of the child in question, she was the proper person to advocate for that child, rather than the court-appointed guardian ad litem. In rejecting that claim, this court explained that, "[i]n contrast to a guardian of a person who has physical control of the minor or a guardian of an estate who has legal control over the minor's financial affairs, the guardian ad litem is appointed by a court and granted limited powers to represent the interest of the child in a particular court proceeding." Id., 708–709. Noting "the fundamental role of a guardian ad litem," the court continued: "[W]e believe that as between a guardian ad litem and a natural guardian, the presumption should be that the court-appointed guardian ad litem is the proper person to speak for the child for the purposes of the litigation, barring a showing that he or she cannot properly fulfill the guardian ad litem role and that another is better suited to the role. The maternal grandmother has made no showing that the court-appointed guardian ad litem could not fulfill her role, nor has the grandmother alleged that the guardian ad litem has misspoken or that the grandmother was more properly suited to speak on behalf of [the child's] best interest." Id., 710–11. In the absence of such a showing, the court concluded that "the guardian ad litem supersedes the role of the natural guardian to speak for the child's best interest in the present litigation."[28] Id., 708.

In the present case, the intervenor has not alleged, never mind established, that the court-appointed guardian

[28] We recognize that *In re Tayquon H.*, supra, 76 Conn. App. 695, arose in the context of a guardian ad litem appointed to represent the interests of a minor child. Because the Superior Court is statutorily authorized to appoint a guardian ad litem for "any minor or incompetent . . . person"; General Statutes § 45a-132 (a) (1); the principles articulated in *In re Tayquon H.* apply equally to juvenile proceedings in which a guardian ad litem is appointed to represent the interests of an incompetent person.

ad litem could not fulfill her role in assisting the respondent in the juvenile proceedings.[29] For that reason, we conclude that the presumption articulated in *In re Tayquon H.* applies in the present case involving a court-appointed guardian ad litem for an incompetent respondent.

Lastly, we note that the intervenor's purported interest in advocating on behalf of the respondent's interests rings hollow in light of the record before us. The record indicates that the intervenor steadfastly has maintained that the respondent was not capable of serving as a parent and meeting the needs of the minor children. In the "Position Statement" that she filed with the trial court during the termination trial, the intervenor averred in relevant part that the respondent "is incompetent" and that "her intellectual disability precludes her from being a parent." At oral argument before this court, the intervenor stated that the respondent "was never the parent to [the minor] children [except] in biology only" and that the respondent was not competent to serve as their parent. In her appellate brief, the intervenor claims that she "was the actual and psychological parent of these children" and asserts that the respondent mother "was the improper party" in the termination proceeding.[30] That contention reflects a fundamental misunderstanding of a termination of parental rights proceeding, which, we reiterate, concerns "*only* the rights of the respondent parent." (Emphasis in original.) *In re Santiago G.*, supra, 325 Conn. 234. More significantly, the intervenor's stated position throughout these proceedings that the respondent was unable to parent

[29] In her principal appellate brief, the intervenor does not acknowledge the existence of the court-appointed guardian ad litem. Although the petitioner devoted significant discussion to the role of the guardian ad litem in her appellate brief, the intervenor did not file a reply brief with this court.

[30] For that reason, the intervenor opined at oral argument before this court that the petitioner was obligated to bring petitions to terminate parental rights against the intervenor. She has provided no legal authority to support that bald assertion.

and to meet the needs of the minor children undermines the intervenor's claim that she was the proper party to advocate on the respondent's *behalf* at the termination trial. In light of the foregoing, we conclude that the court did not improperly preclude the intervenor from participating as a party in the termination trial.

B

The intervenor next claims that the court applied an incorrect legal standard when adjudicating her motion to transfer guardianship of the minor children. We disagree.

At the outset, we note that "whether the [trial] court applied the correct legal standard is a question of law subject to plenary review." (Internal quotation marks omitted.) *Nationwide Mutual Ins. Co.* v. *Pasiak*, 346 Conn. 216, 227, 288 A.3d 615 (2023); see also *In re Mariana A.*, 181 Conn. App. 415, 437, 186 A.3d 83 (2018).

General Statutes § 46b-129 (j) and Practice Book § 35a-12A govern motions to transfer guardianship in juvenile proceedings. As this court has explained, "to properly grant a motion to transfer guardianship under ubsection (j) of § 46b-129, the [trial] court must first determine whether it would be in the best interest of the child for guardianship to be transferred from the petitioner to the proposed guardian. . . . The court must then find that the third party is a suitable and worthy guardian." (Citations omitted.) *In re Avirex R.*, 151 Conn. App. 820, 834, 96 A.3d 662 (2014). The moving party bears the burden of proving that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interest of the child. See id.; see also General Statutes § 46b-129 (j); Practice Book § 35a-12A.

In the present case, the court conducted a four day hearing on the motion to transfer guardianship, at which testimonial and documentary evidence was presented by the parties. In its subsequent memorandum of decision,

the court found that the intervenor had failed to meet her burden of establishing by a preponderance of the evidence that she was a suitable and worthy guardian or that it was in the best interests of the minor children to transfer guardianship to her. In this appeal, the intervenor has not challenged the propriety of either determination. Moreover, the record before us contains ample evidence to support those determinations, including Dr. Schroeder's expert opinion that the minor children "should remain in their present foster homes" because the intervenor "would not be able to meet all of their needs." The court, as the arbiter of credibility, was entitled to credit that evidence. See *De La Concha of Hartford, Inc.* v. *Aetna Life Ins. Co.*, 269 Conn. 424, 431–32, 849 A.2d 382 (2004); *In re Leo L.*, 191 Conn. App. 134, 142, 214 A.3d 430 (2019); see also *In re Nicolina T.*, 9 Conn. App. 598, 605, 520 A.2d 639 ("psychological testimony from professionals is rightly accorded great weight in [juvenile] proceedings"), cert. denied, 203 Conn. 804, 525 A.2d 519 (1987).

The intervenor nevertheless claims that the court applied an incorrect legal standard because she was entitled to a presumption that she was a suitable and worthy guardian and that a transfer of guardianship to her was in the best interests of the minor children. She is mistaken.

As this court has observed, "neither subsection (j) of § 46b-129 nor Practice Book § 35a-12A provides a presumption of fitness for a parent or former guardian . . . ." *In re Avirex R.*, supra, 151 Conn. App. 835. Rather, Connecticut law recognizes a rebuttable presumption that both prongs of the relevant analysis are met in limited circumstances. Section 46b-129 (j) (3) provides in relevant part: "If the court determines that the commitment should be revoked and the child's . . . legal guardianship . . . should vest in someone other than the respondent parent, parents or former guardian, or if parental rights are terminated at any time, there shall be a rebuttable presumption that an award of legal guardianship . . . upon revocation

to . . . the temporary custodian of the child . . . at the time of the revocation or termination, shall be in the best interests of the child . . . and that such caregiver is a suitable and worthy person to assume legal guardianship . . . .'' Practice Book § 35a-12A provides in relevant part: ''(b) In cases in which a motion for transfer of guardianship seeks to vest guardianship of a child . . . in any relative who is the licensed foster parent for such child . . . or who is, pursuant to an order of the court, the temporary custodian of the child . . . at the time of the motion, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. In such cases, there shall be a rebuttable presumption that the award of legal guardianship to that relative shall be in the best interests of the child . . . and that such relative is a suitable and worthy person to assume legal guardianship. . . .'' Accordingly, the rebuttable presumption mandated by § 46b-129 (j) (3) and Practice Book § 35a-12A applies to a relative of the child in question who either (1) is licensed as a foster parent for the child, or (2) is the court-ordered temporary custodian of the child at the time of the revocation or termination. See also *In re Avirex R.*, supra, 834–35.

In the present case, the intervenor was not licensed as a foster parent for the minor children. She also was not the temporary custodian of the minor children at the time of the revocation or termination pursuant to a court order. Because they were committed to the petitioner at the time of the termination, the children were, as a matter of law, in the custody and guardianship of the petitioner. Accordingly, the intervenor was not entitled to the rebuttable presumption set forth in § 46b-129 (j) (3) and Practice Book § 35a-12A. We, therefore, conclude that the court did not apply an incorrect legal standard when adjudicating her motion to transfer guardianship.[31]

[31] We also reject the intervenor's ancillary contention that the petitioner bore the burden of proving that the department made reasonable efforts to

C

As a final matter, the intervenor claims that the court violated her right to equal protection under title VI.[32] More specifically, she alleges that the court discriminated against her as a person of Puerto Rican descent with limited English language proficiency. We disagree.

As the United States Supreme Court has explained, title VI prohibits only intentional discrimination. See *Alexander* v. *Sandoval*, 532 U.S. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Discrimination claims brought pursuant to title VI are "analyzed under the shifting burden of proof scheme applied in [t]itle VII cases"; *Woods* v. *Wright Institute*, Docket No. 96-16811, 1998 WL 133035, *1 (9th Cir. March 24, 1998) (decision without published opinion, 141 F.3d 1183); wherein "[t]he complainant [bears] the initial burden . . . of establishing a prima facie case of . . . discrimination." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973) (*McDonnell Douglas*); see also *Lin* v. *District of Columbia*, Docket No. 20-7111, 2022 WL 4007900, *14 (D.C. Cir. 2022) (applying "the *McDonnell Douglas* framework" to title VI claim); *Rashdan* v. *Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) ("[w]e now join the other circuits in concluding that *McDonnell Douglas* also applies to [t]itle VI disparate treatment claims"); *Brewer* v. *Board of Trustees of University of Illinois*, 479 F.3d 908, 921 (7th Cir.) (initial burden rests with complainant in title VI case), cert. denied, 552 U.S. 825, 128 S. Ct. 357, 169 L. Ed. 2d 36 (2007); *Jackson* v. *University of New Haven*, 228 F. Supp. 2d 156, 159 (D. Conn. 2002)

reunify her with the minor children. Section 46b-129 (j) contains no such requirement. Although reasonable efforts is a statutory prerequisite to the granting of a petition to terminate the rights of a parent; see General Statutes § 17a-112 (j) (1); the intervenor has provided this court with no authority, nor are we aware of any, indicating that it is relevant to the adjudication of a motion to transfer guardianship.

[32] See footnote 2 of this opinion.

("[c]ourts have . . . applied the same burden-shifting framework articulated in *McDonnell Douglas* to disparate treatment claims arising under [title VI]." The intervenor has not met that burden.

It would serve no useful purpose to recite the litany of complaints lodged by the intervenor with respect to this claim. It suffices to say that the record before us belies her claim of discrimination in all respects. At the very first hearing following the removal of the minor children in November, 2018, the court provided the intervenor with the assistance of a Spanish speaking interpreter and advised her of her legal rights. The court thereafter provided an interpreter at all subsequent proceedings. Moreover, when the intervenor was provided with specific steps at the September 10, 2019 hearing, the court, through that interpreter, asked the intervenor if she had reviewed those steps and understood them, to which she responded affirmatively. The record also indicates that all department social workers assigned to the case communicated with the intervenor in Spanish, including Acevedo and Rijos. Dr. Schroeder, who examined the intervenor as part of a court-ordered psychological evaluation of the respondent, likewise spoke with the intervenor in Spanish and provided her with written evaluation materials in Spanish. In addition, the court appointed legal counsel for the intervenor at the November 23, 2018 temporary custody hearing, who represented her at every court hearing until the intervenor no longer was a party to these juvenile proceedings.[33] In short, nothing in the record before us or in the memorandum of decision issued by the court evinces

[33] Also unavailing is the intervenor's contention that she was "denied her right to defend herself in the adjudication portion of the underlying neglect case." To the contrary, the record reflects that the intervenor sought to intervene in the neglect proceeding for dispositional purposes only and did not request to participate in its adjudicatory phase.

a discriminatory intent. We therefore conclude that the intervenor's equal protection claim is without merit.[34]

The judgments are affirmed.

In this opinion the other judges concurred.

MARISSA LOWTHERT *v.* FREEDOM OF INFORMATION COMMISSION (AC 44972)

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

Syllabus

The plaintiff appealed to this court from the judgment of the trial court denying her application filed pursuant to statute (§ 1-206 (b) (2)) for an order requiring the defendant Freedom of Information Commission to hold a hearing on a complaint she filed with the commission. The plaintiff alleged that the commission and/or its staff held one or more unnoticed or secret meetings in violation of the open meeting requirements of a provision (§ 1-225 (a)) of the Freedom of Information Act (§ 1-200 et seq.). The commission declined to schedule a hearing on the plaintiff's complaint on the ground that scheduling a hearing on the plaintiff's complaint would constitute an abuse of the commission's administrative process under § 1-206 (b) (2) (C), and the plaintiff appealed to the trial court, which rendered judgment denying her application. *Held* that this court declined to review the plaintiff's sole claim on appeal that the trial court erred in denying her application because the commission and its executive director had a conflict of interest in violation of statute (§ 1-85) when it declined to schedule a hearing on her complaint, the plaintiff having failed to preserve her claim by raising it before the trial court: in her application, the plaintiff twice made a generalized reference to a conflict of interest on the part of the commission's executive director but she did not cite § 1-85 in support of that allegation, the plaintiff made a single reference to § 1-85 in her briefs to the court, and mentioned § 1-85 only once at oral argument before the court; moreover, the plaintiff failed to explain to the court how the commission and its executive

[34] Even if we were to assume, arguendo, that the intervenor had met her burden of establishing a prima facie case of discrimination, she has provided no legal authority to support her contention that such a discrimination claim properly is invoked in a juvenile proceeding or that it provides a proper basis to overturn the court's determinations that she was not a suitable and worthy guardian or that transferring guardianship of the minor children to her was not in the best interests of the minor children.

director had reason to believe that they would derive a direct monetary gain or suffer a direct monetary loss by reason of their official activity, as the plaintiff's claim that the commission and its executive director faced a possible financial penalty pursuant to § 1-206 (b) (2) was raised for the first time on appeal to this court in her reply brief, and, because the plaintiff failed to adequately raise her claim, the court and the commission did not have sufficient notice of it, the court did not make any findings as to whether the commission or its executive director violated § 1-85, and the court did not have an opportunity to consider whether a violation of § 1-85 could serve as the basis for granting the plaintiff's application or whether, instead, the plaintiff's exclusive remedy was to file a complaint with the Office of State Ethics pursuant to statute (§ 1-82).

Argued November 14, 2022—officially released June 20, 2023

Procedural History

Administrative appeal from the decision of the defendant declining to schedule a hearing on the plaintiff's complaint, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Wiese, J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Marissa Lowthert, self-represented, the appellant (plaintiff).

Valicia Dee Harmon, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, general counsel, for the appellee (defendant).

Opinion

SEELEY, J. The self-represented plaintiff, Marissa Lowthert, appeals from the judgment of the Superior Court denying her application, pursuant to General Statutes § 1-206 (b) (2), for an order requiring the defendant, the Freedom of Information Commission (commission), to hold a hearing on a complaint she filed with the commission. On appeal, she claims that the court erred in denying her application because the commission and its executive director had a conflict of interest in violation of General Statutes § 1-85 when they

decided not to schedule a hearing on her complaint. We affirm the judgment of the court.

The record reflects the following relevant procedural history. On September 5, 2017, the plaintiff filed a complaint with the commission alleging, in relevant part, that "[the commission] and or [the commission's] staff held one or more secret meeting(s), failed to post notice(s), failed to post minute(s)/vote(s) and took action(s) tantamount to a vote," in violation of the open meeting requirements of the Freedom of Information Act (act), set forth in General Statutes § 1-225 (a).[1]

The allegations set forth in the plaintiff's complaint stemmed from decisions regarding two other complaints that the plaintiff previously had filed with the commission: *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-15-6030425-S (January 17, 2017) (63 Conn. L. Rptr. 820) (*Lowthert I*), and *Lowthert* v. *Chairman, Board of Education*, Freedom of Information Commission, Docket No. FIC 2015-147 (August 23, 2017) (*Lowthert II*).

In *Lowthert I*, the plaintiff filed a complaint with the commission alleging that the Miller Driscoll Building Committee, a school building committee for the town of Wilton, failed to comply with the open meeting requirements of § 1-225 (a). *Lowthert* v. *Freedom of*

[1] General Statutes § 1-225 (a) provides: "The meetings of all public agencies, except executive sessions, as defined in subdivision (6) of section 1-200, shall be open to the public. The votes of each member of any such public agency upon any issue before such public agency shall be reduced to writing and made available for public inspection within forty-eight hours and shall also be recorded in the minutes of the session at which taken. Not later than seven days after the date of the session to which such minutes refer, such minutes shall be available for public inspection and posted on such public agency's Internet web site, if available, except that no public agency of a political subdivision of the state shall be required to post such minutes on an Internet web site. Each public agency shall make, keep and maintain a record of the proceedings of its meetings."

Information Commission, supra, 63 Conn. L. Rptr. 821, 824. The commission dismissed the plaintiff's complaint as untimely after determining that she failed to file her complaint within thirty days of receiving "notice in fact" that the alleged unnoticed or secret meeting was held, as required by General Statutes (Rev. to 2013) § 1-206 (b) (1).[2] Id., 821. The plaintiff appealed to the Superior Court, which considered, as a matter of first impression, the meaning of the term "notice in fact" as used in that statutory provision. Id. The court concluded that "notice in fact" meant "actual notice" to the person filing the complaint. Id., 825. Because the commission failed to apply that definition to the term and, instead, construed "notice in fact" to include implied notice, the court remanded the case to the commission for further proceedings. Id., 821, 825–26.

In *Lowthert II*, the plaintiff filed a complaint alleging that the Board of Education of the Town of Wilton also held an unnoticed or secret meeting in violation of § 1-225 (a). *Lowthert* v. *Chairman, Board of Education*, supra, Docket No. FIC 2015-147, p. 2. The commission issued a final decision on August 23, 2017,[3] in which it

[2] General Statutes (Rev. to 2013) § 1-206 (b) (1) provides in relevant part: "Any person . . . wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial, except in the case of an unnoticed or secret meeting, in which case the appeal shall be filed not later than thirty days after the person filing the appeal receives notice in fact that such meeting was held. . . ."

[3] The commission initially dismissed the plaintiff's complaint in *Lowthert II* as untimely filed, before the court's decision in *Lowthert I* was released. *Lowthert* v. *Chairman, Board of Education*, Docket No. FIC 2015-147 (November 18, 2015); *Lowthert* v. *Chairman, Board of Education*, Docket No. FIC 2015-147 (January 13, 2016). After the plaintiff filed an appeal in the Superior Court; *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-16-6032522-S; the parties agreed to settle that appeal on the condition that the commission would conduct an evidentiary hearing on all of the issues set forth in the plaintiff's complaint, which led to the commission's decision in *Lowthert*

considered whether the complaint was filed within thirty days of the plaintiff receiving "notice in fact" pursuant to General Statutes (Rev. to 2013) § 1-206 (b) (1) and *Lowthert I*. Id., p. 3. In a footnote, however, the commission recognized: "Following the [c]ourt's decision [in *Lowthert I*], the Connecticut General Assembly passed Senate Bill [No.] 983, [2017 Sess.] ([Number 17-86 of the 2017 Public Acts]), *An Act Concerning Appeals Under the Freedom of Information Act Involving Notice of Meetings*, effective October 1, 2017, which eliminates the term 'notice in fact' and substitutes 'actual or constructive notice' in the context of 'secret or unnoticed' meetings within the meaning of [§ 1-206 (b) (1)] . . . ."[4] Id. The commission ultimately determined that the plaintiff timely filed her complaint but failed to prove that the respondents violated the act, and, accordingly, it dismissed the complaint.[5] Id., pp. 4, 9–10.

In the present case, the plaintiff alleged that she first learned of Senate Bill No. 983 by reading the footnote in the commission's decision in *Lowthert II*. When she subsequently researched Senate Bill No. 983 on the

II. *Lowthert* v. *Chairman, Board of Education*, supra, Docket No. FIC 2015-147, pp. 1–2.

[4] Number 17-86 of the 2017 Public Acts is codified at § 1-206 (b) (1).

[5] The plaintiff appealed from the commission's decision in *Lowthert II* to the Superior Court. The court remanded the case to the commission to hear certain additional evidence; see *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041629-S (May 21, 2019); and, in its final decision on remand, the commission again concluded that the plaintiff failed to prove that the respondents violated the act. *Lowthert* v. *Chairman, Board of Education*, Freedom of Information Commission, Docket No. FIC 2015-147 (July 8, 2020) p. 11. After considering the commission's final decision on remand, the court agreed with the commission and remanded the case to the commission to determine whether another claim made by the plaintiff had been raised before it. *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-17-6041629-S (March 5, 2021). The court denied the plaintiff's subsequent motion for reconsideration, and the plaintiff appealed to this court but later withdrew that appeal.

Connecticut General Assembly's website, she learned that the executive director of the commission had provided written testimony that the commission "strongly support[ed]" the proposed 2017 amendment to § 1-206 (b) (1). The plaintiff alleged that, after reviewing the commission's meeting agendas and minutes, she believed that the commission had violated the open meeting requirements of § 1-225 (a) "because there is no public record that the [commission] met in public at a properly noticed or recorded (i.e. via minutes) public meeting to discuss an amendment to [the act] regarding the appeal period for secret meetings, let alone support [Senate Bill No. 983], or their concern regarding the decision in [the plaintiff's favor in *Lowthert I*]." (Emphasis omitted.)

On July 24, 2018, the executive director of the commission issued a "Notice of Request to Summarily Deny Leave to Schedule a Hearing" (notice) on the ground that scheduling a hearing on the plaintiff's complaint would "constitute an abuse of the [c]ommission's administrative process" under § 1-206 (b) (2) (C).[6] The executive director explained, among other things, that the plaintiff had filed more than forty-four complaints against various public agencies over the previous few years; the commission expended an inordinate amount of time and resources adjudicating and mediating the plaintiff's previous complaints; the commission already ruled that hearings on four of the previous complaints, if scheduled, would constitute an abuse of the administrative process;[7] the commission's resources were diminished due to budget cuts and an increased caseload;

[6] General Statutes § 1-206 (b) (2) provides in relevant part: "If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the commission's administrative process, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. . . ."

[7] As in the present case, the plaintiff filed applications with the Superior Court, pursuant to § 1-206 (b) (2), for orders requiring the commission to

the plaintiff's complaint "barely alleges a prima facie case of a secret or unnoticed meeting, and is more akin to conjecture"; and a hearing on the plaintiff's complaint would present an "administrative quagmire" for the commission, raising ethical or conflict of interest issues, because the commissioners presumably would be both called as witnesses and have to make a decision in the case. At its regular meeting on August 22, 2018, the commission voted unanimously to affirm the executive director's decision not to schedule a hearing on the plaintiff's complaint.

Thereafter, pursuant to § 1-206 (b) (2),[8] the plaintiff applied to the Superior Court for an order requiring the commission to hold a hearing on her complaint. The parties filed briefs and the court, *Wiese*, *J.*, held oral argument on June 8, 2021. The plaintiff argued that scheduling a hearing on her complaint in the present case would not have constituted an abuse of the administrative process, particularly because many of her prior complaints that the executive director pointed to had been settled, withdrawn, or had merit and, therefore, had not been abusive.

On September 1, 2021, the court issued a memorandum of decision in which it denied the plaintiff's application. The court concluded: "Based on (i) the plaintiff's

hold hearings on these four complaints. After a consolidated trial, the court denied the plaintiff's applications; *Lowthert* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket Nos. CV-17-6041080-S, CV-17-6041081-S, CV-17-6041082-S, and CV-17-6041275-S (June 11, 2019); and this court subsequently affirmed those judgments in a memorandum decision. *Lowthert* v. *Freedom of Information Commission*, 205 Conn. App. 904, 251 A.3d 99, cert. denied, 338 Conn. 907, 258 A.3d 1280 (2021).

[8] General Statutes § 1-206 (b) (2) provides in relevant part: "Any party aggrieved by the commission's denial of leave [to schedule a hearing] may apply to the superior court for the judicial district of New Britain, within fifteen days of the commission meeting at which such leave was denied, for an order requiring the commission to hear such appeal."

history of filing more than forty-four complaints with the commission over the past few years, (ii) the plaintiff's history of filing abusive complaints with the commission, (iii) the considerable amount of time and resources that have already been spent adjudicating and mediating the plaintiff's previously filed cases, (iv) the high volume of the commission's current caseload, (v) and the particular administrative difficulty the commission would face in conducting a hearing on the present complaint, this court finds that the commission acted reasonably and within its discretion in denying a hearing to the plaintiff on the ground that scheduling a hearing on the plaintiff's complaint 'would constitute an abuse of the commission's administrative process,' pursuant to § 1-206 (b) (2) (C)."

On appeal to this court, the plaintiff's sole claim is that the court erred in denying her application because the commission and its executive director had a conflict of interest in violation of § 1-85[9] when they decided not to hold a hearing on her complaint. Specifically, the plaintiff contends that the commission and its executive

[9] General Statutes § 1-85, which is part of the Connecticut Code of Ethics for Public Officials, General Statutes § 1-79 et seq., provides: "A public official, including an elected state official, or state employee has an interest which is in substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state, if he has reason to believe or expect that he, his spouse, a dependent child, or a business with which he is associated will derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of his official activity. A public official, including an elected state official, or state employee does not have an interest which is in substantial conflict with the proper discharge of his duties in the public interest and of his responsibilities as prescribed by the laws of this state, if any benefit or detriment accrues to him, his spouse, a dependent child, or a business with which he, his spouse or such dependent child is associated as a member of a profession, occupation or group to no greater extent than any other member of such profession, occupation or group. A public official, including an elected state official or state employee who has a substantial conflict may not take official action on the matter."

director faced a financial penalty of up to $1000 pursuant to § 1-206 (b) (2)[10] if they violated the act as her complaint alleged, and, therefore, they had a "substantial conflict" under § 1-85 such that they should not have taken any action on the matter. We conclude that this claim was not properly preserved, and, thus, we decline to review it.

We begin by setting forth the legal principles relevant to whether a claim was properly preserved for appellate review. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are *distinctly raised* at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . 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." (Emphasis added; internal quotation marks omitted.) *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"). "[T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the

[10] General Statutes § 1-206 (b) (2) provides in relevant part: "[U]pon the finding that a denial of any right created by the Freedom of Information Act was without reasonable grounds and after the custodian or other official directly responsible for the denial has been given an opportunity to be heard at a hearing conducted in accordance with sections 4-176e to 4-184, inclusive, the commission may, in its discretion, impose against the custodian or other official a civil penalty of not less than twenty dollars nor more than one thousand dollars. . . ."

claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 455, 219 A.3d 801 (2019), cert denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

Although "[i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party"; (internal quotation marks omitted) *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487–88, 189 A.3d 1232 (2018); we note that the plaintiff was represented by counsel on both her application and on her initial brief to the Superior Court, and she was self-represented only for her reply brief and at oral argument before the court. Moreover, "[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) Id., 488.

In the present case, a thorough review of the record reveals that the plaintiff did not raise before the Superior Court the distinct claim that she now raises on appeal. As discussed previously in this opinion, the plaintiff argued before the court that her prior complaints were not abusive, and that scheduling a hearing on her complaint in the present case would not have constituted an abuse of the administrative process. In her application to the court, the plaintiff twice made a generalized reference to a "conflict of interest" on the part of the commission's executive director, but she

did not cite § 1-85 in support of that allegation.[11] In her briefs to that court, the plaintiff made a single reference to § 1-85, in arguing that "the executive director should not have involved herself with [the plaintiff's] complaint, which raised concerns about the executive director's own conduct. [Section] 1-85 provides: 'A public official, including an elected state official or state employee who has a substantial conflict may not take official action on the matter.' " Similarly, the plaintiff mentioned § 1-85 only once at oral argument before the court, when she argued: "[G]iven that . . . [§] 1-85 states that no public official can take an action in a matter that they have an interest in, I think there's a threshold issue that when the executive director filed the [notice], this created a conflict of interest because she had a personal interest in this matter."

Moreover, even considering the plaintiff's minimal references to § 1-85, she notably failed to explain to the court how the commission and its executive director had a reason to believe that they would "derive a direct monetary gain or suffer a direct monetary loss . . . by reason of [their] official activity" such that they had a "substantial conflict" under that statutory provision. The plaintiff's claim that the commission and its executive director faced the possibility of a financial penalty pursuant to § 1-206 (b) (2) was raised for the first time on appeal to this court *in her reply brief*, as the plaintiff acknowledged at oral argument before us. See *Benjamin* v. *Corasaniti*, 341 Conn. 463, 476 n.8, 267 A.3d

[11] Specifically, the plaintiff alleged that, (1) "[w]ith regard to [*Lowthert* v. *Freedom of Information Commission*, Freedom of Information Commission, Docket No.] FIC 2017-0518 [August 23, 2018], the executive director, who has a conflict of interest in this matter, again retaliated against [the plaintiff], and denied [the plaintiff] her rights under the act, as well [as] equal protection, and due process under the state and federal constitutions," and (2) "the commission acted illegally, arbitrarily and in abuse of [its] discretion, in that . . . [i]t ignored the personal conflict of interest the executive director and deputy director had in this matter."

108 (2021) ("[i]t is a well established principle that arguments cannot be raised for the first time in a reply brief" (internal quotation marks omitted)).

Accordingly, because the plaintiff failed to adequately raise and develop her claim before the Superior Court, the court and the commission did not have sufficient notice of this claim, and the court did not make any findings as to whether the commission or its executive director violated § 1-85. See, e.g., *A & R Enterprises, LLC* v. *Sentinel Insurance Co., Ltd.*, 202 Conn. App. 224, 230–31, 244 A.3d 660 (plaintiff's reference to case law was insufficient to preserve distinct claim raised on appeal where plaintiff failed to develop argument before trial court), cert. denied, 336 Conn. 921, 246 A.3d 2 (2021); see also *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 193 Conn. App. 455 (claim on appeal must be articulated before trial court with sufficient clarity to place court and opposing party on reasonable notice of "very same claim" (internal quotation marks omitted)). In addition, the court did not have an opportunity to consider whether a violation of § 1-85 could serve as the basis for granting the plaintiff's application, or whether, instead, the plaintiff's exclusive remedy was to file a complaint with the Office of State Ethics.[12] See General Statutes § 1-82 (setting forth process of filing complaint with Office of State Ethics for any alleged violation of Connecticut Code of Ethics for Public Officials, General Statutes § 1-79 et seq.); see also General Statutes §§ 1-88 and 1-89 (providing remedies for such violations). Thus, we decline to review the plaintiff's claim because it was not properly preserved.

The judgment is affirmed.

In this opinion the other judges concurred.

[12] As the plaintiff acknowledges, there is no appellate case law addressing a violation of § 1-85.

ELIYAHU MIRLIS *v.* YESHIVA OF NEW HAVEN, INC.
(AC 45355)

Elgo, Moll and Suarez, Js.

Syllabus

The plaintiff sought to foreclosure a judgment lien on certain real property owned by the defendant in connection with an unsatisfied judgment of more than $20 million from a previous sexual abuse case involving the parties. Following the granting of a motion for summary judgment as to liability only, the defendant filed its first motion to substitute a cash bond for the property in the amount of the fair market value of the property. More than a year later, the defendant filed a second motion to discharge the judgment lien on substitution of bond. Thereafter, the trial court granted the defendant's motion to substitute a cash bond, and, when the defendant did not post the cash bond pursuant to the court's order, the court rendered a judgment of strict foreclosure. The defendant appealed, challenging the trial court's valuation of the property, and this court affirmed the trial court's judgment. The plaintiff thereafter moved to reset the law day, to which the defendant filed an objection, seeking to have the court defer setting a new law day and stay the action, and which, by its title, purported to move, for a third time, to substitute a cash bond. The court rendered a judgment of strict foreclosure and set a new law day. Thereafter, the defendant filed its initial motion to open the judgment for the purpose of extending the law day, and its fourth motion to substitute a cash bond for the judgment lien, which the court denied. The defendant filed a renewed motion to open the judgment, seeking to open the judgment of strict foreclosure, extend the law day, and, for the fifth time, permit substitution of a bond for the judgment lien, which the court again denied. The defendant then appealed to this court and filed a motion to reargue the denial of its renewed motion to open on the same day. The court denied the motion to reargue, and the defendant thereafter amended its appeal. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's renewed motion to open the judgment of strict foreclosure on the basis of the relevant facts and record before it: in its memorandum of decision denying the defendant's initial motion to open, the court stated that it took into consideration the entire record and all relevant facts presented by counsel, and enumerated the specific facts it considered, which included whether the defendant had enough funds to produce the cash bond, the defendant's proposed plan to sell commercial and residential property in order to secure the necessary funds and the defendant's inability to present potential buyers of that property, that the defendant had several months to produce the funds necessary to substitute the

bond but did not present a plan to secure the funds to the court, that the case had been pending for more than four years, and that the defendant had failed to provide any assurances as to when and how the plaintiff would receive the cash bond or any assurances that the debt would be paid, especially in light of the defendant's representation that it was seeking to extend the law day for an additional six months, and, in the court's order denying the defendant's renewed motion to open, the court stated that the defendant's inability to produce the necessary cash bond had not changed since it denied the defendant's initial motion to open; moreover, the defendant provided this court with neither relevant legal authority nor persuasive analysis that the court committed an error of law in denying its renewed motion to open, and, to the extent the defendant argued that, because the court's valuation ruling, which had granted the defendant permission to substitute a cash bond for the value of the property and did not place a time limit on the right to substitute, was upheld on appeal, the defendant had the absolute right as a matter of law to substitute the cash bond and should be given a reasonable amount of time under the law of the case doctrine to obtain the funds needed to post the bond, the court considered the four years that had elapsed since the entry and affirmance of the valuation ruling to its denials of the motions to open, and specifically stated that the defendant had months to come up with a plan to pay the full cash bond but continued to request more time to come up with the funds; furthermore, the defendant misconstrued the court's finding that the defendant did not have cash on hand to secure the bond to mean that, as a matter of law, the defendant could only substitute a bond if it had the funds immediately available, as the court did not expressly make such a pronouncement, nor was the court's decision based on such a legal principle, the record clearly indicating that the court considered the fact that the defendant did not have the cash on hand to substitute the bond as one of many factors it considered in reaching its decision.

2. The trial court did not abuse its discretion in denying the defendant's motion to reargue, the court having considered the relevant facts and evidence when balancing the equities of the case; the court based its decision on the fact that the defendant still did not have the funds available to secure a bond regardless of its asserted factual developments, as well as the same conclusions reached in its denial of the motion to open that had not changed since its denial of that motion.

Argued November 14, 2022—officially released June 20, 2023

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Spader*, *J.*, granted the plain-

tiff's motion for summary judgment as to liability only; thereafter, the court, *Baio*, *J.*, after a hearing, issued a ruling as to valuation and granted the defendant's motion to substitute a cash bond subject to certain conditions; subsequently, the court, *Baio*, *J.*, rendered a judgment of strict foreclosure, from which the defendant appealed to this court, *Alvord*, *Elgo* and *Cradle*, *Js.*, which affirmed the judgment; thereafter, the court, *Cirello*, *J.*, granted the plaintiff's motion to open the judgment, and rendered a judgment of strict foreclosure and set a new law day; subsequently, the court, *Cirello*, *J.*, denied the defendant's motions to open the judgment, and the defendant appealed to this court; thereafter, the court, *Cirello*, *J.*, denied the defendant's motion to reargue, and the defendant amended its appeal. *Affirmed*.

David T. Grudberg, for the appellant (defendant).

John L. Cesaroni, with whom, on the brief, were *Matthew K. Beatman* and *James M. Moriarty*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Yeshiva of New Haven, Inc., appeals from the denial of both (1) its renewed motion to open the judgment of strict foreclosure in favor of the plaintiff, Eliyahu Mirlis, for the purpose of extending the law day and to permit the defendant to substitute a cash bond for the judgment lien against real property located at 765 Elm Street in New Haven (property), and (2) its motion to reargue the denial of its renewed motion to open. On appeal, we construe the defendant's claims to assert that it had a right as a matter of law to substitute a cash bond for the judgment lien in the amount of the court's earlier valuation of the property. The defendant thus argues that the court improperly denied its motions because the court (1) failed to give full force and effect to the earlier findings of valuation

and, relatedly, improperly required the defendant to have immediate cash on hand in that amount, and (2) ignored new evidence presented on the motion to reargue. We disagree and, accordingly, affirm the judgment.

The relevant facts and procedural history are not in dispute. "The defendant is a Connecticut corporation that operated as an orthodox Jewish high school in New Haven [where the plaintiff attended high school]. In 2016, the plaintiff brought an action in federal court against the defendant and Daniel Greer,[1] alleging that Greer, a rabbi and the former chief administrator of [the defendant school], sexually abused [the plaintiff] for several years while he was a student at the high school. . . . Following a trial, the jury returned a verdict in favor of the plaintiff. The United States District Court for the District of Connecticut rendered judgment accordingly and entered a total award of $21,749,041.10, which included punitive damages and offer of compromise interest [2017 final judgment]. The United States Court of Appeals for the Second Circuit subsequently affirmed the propriety of that judgment." (Citation omitted; footnote in original; internal quotation marks omitted.) *Mirlis* v. *Yeshiva of New Haven, Inc.*, 205 Conn. App. 206, 207, 257 A.3d 390, cert. denied, 338 Conn. 903, 258 A.3d 91 (2021).

In July, 2017, the plaintiff recorded a certificate of judgment lien against the property and commenced the underlying foreclosure action in order to secure a portion of the final judgment. On November 8, 2017, the plaintiff filed a motion for summary judgment as to liability only, which the defendant did not oppose. The court granted the motion on January 16, 2018, and, thereafter, the defendant filed its first motion to substitute a cash bond for the property in the amount of the

[1] "Greer is not a party to this foreclosure action." *Mirlis* v. *Yeshiva of New Haven, Inc.*, 205 Conn. App. 206, 207 n.2, 257 A.3d 390, cert. denied, 338 Conn. 903, 258 A.3d 91 (2021).

fair market value of the property. Thereafter, on June 5, 2019, the plaintiff filed a motion for a judgment of strict foreclosure, which included a written appraisal for the fair market value of the property. On June 12, 2019, the defendant filed an omnibus objection to the motion for judgment of strict foreclosure, its second motion to discharge the judgment lien on substitution of bond, and a motion to continue the strict foreclosure hearing. The defendant submitted therewith a written appraisal for a different fair market value of the property.

In October, 2019, the court held an evidentiary hearing on the valuation dispute, at which it found the fair market value of the property to be $620,000 and granted the defendant's motion to substitute a cash bond in the amount of the fair market value of the property.[2] The defendant did not post the cash bond pursuant to the court's order, and, on March 9, 2020, the court rendered a judgment of strict foreclosure, without opposition from the defendant, and set the law day for June 1, 2020. During the period of time between the date on which the court rendered its judgment of strict foreclosure and the law day, the defendant did not substitute a cash bond in the amount of the fair market value of the property; instead, the defendant appealed the valuation ruling, which this court ultimately affirmed in June, 2021.[3] *Mirlis* v. *Yeshiva of New Haven, Inc.*, supra, 205 Conn. App. 212.

[2] The trial court, in its memorandum of decision, specifically stated that "[t]he lien on the property may be discharged by a cash only bond deposited with the court in the amount of $620,000."

[3] Prior to the trial court's valuation ruling, the plaintiff commenced a reverse veil piercing action in the United States District Court for the District of Connecticut in May, 2019. The plaintiff brought this veil piercing action against several nonprofit entities that were controlled by Greer (veil piercing defendants). In that action, the plaintiff sought to enforce the 2017 final judgment against the veil piercing defendants, and the court granted the plaintiff's request for a temporary restraining order (TRO) in order to prevent the veil piercing defendants from transferring and encumbering their property. In October, 2021, after the resolution of the valuation appeal in this

After our Supreme Court had denied the defendant's petition for certification to appeal from this court's decision on the trial court's valuation ruling; *Mirlis* v. *Yeshiva of New Haven, Inc.*, 338 Conn. 903, 258 A.3d 91 (2021); the plaintiff filed a motion to reset the law day, asking the trial court to set a new law day pursuant to Practice Book § 17-10.[4] The plaintiff requested the

court, the veil piercing defendants moved to modify the TRO to permit use of corporate assets to provide the funds necessary to post the bond and substitute collateral for the defendant's property. See *Mirlis* v. *Edgewood Elm Housing, Inc.*, 581 F. Supp. 3d 394, 398 (D. Conn. 2022). On January 21, 2022, the court entered the TRO modification order permitting the veil piercing defendants to provide assets to the defendant to substitute for the judgment lien. Id., 404. The court specifically determined that "[the veil piercing defendants] may make the requested transfer if, but only if: (1) the Connecticut Superior Court rules that the [defendant] has the right to make a substitution in the [f]oreclosure [a]ction; (2) the transfer is made to the [defendant] in accordance with the Connecticut Superior Court's instructions regarding the form and preservation of any such substitution; (3) if [the veil piercing defendants] must transfer assets to obtain the substitution (for example, the sale of property for funds to substitute for the judgment lien), they must do so only to the extent necessary to obtain the substitution; and (4) the effect of a substitution, followed by a final judgment in [the] [p]laintiff's favor in the [f]oreclosure [a]ction, will be immediate partial satisfaction of [the] [p]laintiff's judgment against the [defendant], in the amount determined by the Connecticut Superior Court in the [f]oreclosure [a]ction.

"Finally, if the Connecticut Superior Court authorizes the [defendant] to substitute cash for the judgment lien in the [f]oreclosure [a]ction, [the veil piercing defendants] must transfer funds to the [defendant] only in the precise amount the Connecticut Superior Court authorizes." Id.

Thereafter, the plaintiff filed a motion for reconsideration of the TRO modification order with regard to bond substitution, and the District Court granted reconsideration and added the condition that the "[veil piercing] defendants ultimately retain title to the [defendant's property] to compensate for the reduction in [the veil piercing] defendants' assets resulting from the transfer." (Emphasis omitted.) The defendant and Greer's appeal regarding a second motion for relief to set aside the final judgment was dismissed by the United States Court of Appeals for the Second Circuit in April, 2023. See *Mirlis* v. *Greer*, Docket No. 22-961, 2023 WL 3149528 (2d Cir. April 20, 2023).

[4] Practice Book § 17-10 provides that "[i]f a judgment fixing a set time for the performance of an act is affirmed on appeal by the Supreme Court and such time has elapsed pending the appeal, the judicial authority which

shortest possible law day based on the delays experienced in the foreclosure action. On September 24, 2021, the defendant filed an objection to the plaintiff's motion to reset the law day, which sought to have the court defer setting a new law day and to stay the action and which, by its title, purported to move, for the third time, to substitute bond. After a hearing on October 25, 2021, the court rendered a judgment of strict foreclosure and set a new law day for January 31, 2022. The court at that time did not address the defendant's motion to substitute bond.

On January 18, 2022, the defendant filed its initial motion to open the judgment for the purpose of extending the law day to May 2, 2022, and its fourth motion to substitute a cash bond for the judgment lien. On January 24, 2022, the court denied the defendant's initial motion to open. Specifically, the court considered the entire record, as well as the relevant facts,[5] and

rendered the judgment appealed from may, on motion and after due notice, modify it by extending the time."

[5] The court enumerated the following facts it considered in reaching its determination:

"1. [The defendant] currently does not have enough funds to produce the cash bond.

"2. [The defendant] currently has cash on hand to put up 20 [percent] of the cash needed for the bond. Counsel for [the defendant] was unable to give the court an exact figure of how much cash would be produced and speculated that it would be about 20 [percent].

"3. [The defendant] is requesting a new law day, [six] months from now in order for the affiliated nonprofits to sell assets in order to pay the cash bond. [Counsel for the veil piercing defendants] testified that the affiliated nonprofits were commercial and residential rental properties that had an estimated value of $10,000,000. He was unaware of the current value of the schoolhouse which is the subject of this action. He did not present evidence as to which buildings would be sold in order to produce the funds to pay for the cash bond.

"4. [The defendant's] counsel did not present potential buyers for the assets mentioned above or a plan on how the bond would be paid for.

"5. [The defendant's] counsel did not know how many students attended the school and could not speculate as to the number of active students. [The defendant] did state that all the students were adults and there were not minor students at the school.

ultimately determined that it would "need more than the representations made by [the defendant's] counsel to find that equity requires an opening of the judgment and extending of the law day. If the court were to grant [the defendant's] motion, there are no assurances provided to [the plaintiff] when and how the cash bond would come into being, or any assurances that the debt owed would be paid. As such, the motion to open the judgment and extend the law day is denied, and the objection thereto is granted." The court extended the law day to February 22, 2022.

On February 3, 2022, the defendant filed a renewed motion to open the judgment, seeking to open the judgment of strict foreclosure, extend the law day, and, for the fifth time, permit substitution of a bond for the judgment lien. On February 18, 2022, the court denied the defendant's motion, stating that "[t]he plaintiff has waited long enough. The equities of this case, taking into account all relevant facts and circumstances, reviewing the pleadings, the arguments of the parties, the written briefs and the appellate record, the court finds that [the defendant] has not met [its] burden of proof and shown, by a preponderance of the evidence, that equity requires an opening of the judgment to obtain a cash bond." The court extended the law day to March 28, 2022.

On March 10, 2022, the defendant filed both this appeal and a motion to reargue the denial of its renewed

"6. [The defendant's] counsel could not provide the current market value of the school and relied upon the appraised value of the subject property which was $620,000 pursuant to Judge Baio's decision of February 24, 2020.

"7. [The defendant] has had months to come up with a plan to pay the full cash bond. As of today's argument, no plan has been presented to the court. In the alternative, [the defendant] is asking the court and the plaintiff to take it on faith, that [it] will do what is necessary to come up with the cash to pay the bond in a timely manner.

"8. This case has been pending since July of 2017. There have been numerous delays due to an appeal and standard motion practice.

"9. The plaintiff . . . has been waiting through these delays and is anxiously awaiting a final resolution of this matter."

motion to open. The trial court denied the defendant's motion to reargue on April 2, 2022, and the defendant thereafter amended its appeal to include the court's denial of the motion to reargue. Subsequently, on May 3, 2022, the plaintiff filed a motion for articulation regarding the court's order denying the defendant's renewed motion to open.[6] On May 13, 2022, the defendant filed its response to the plaintiff's motion for articulation, embedding its own request not only for further clarification with regard to the court's denial of its renewed motion to open but also an articulation as to the court's denial of its motion to reargue.[7] On May 24, 2022, the court issued an articulation, in which it initially addressed the plaintiff's requests. First, the court stated that it "did not reach a consideration of whether or not, 'as a matter of law' the defendant could immediately substitute a bond if it had sufficient funds," explaining that it "did not speculate to consider what could have happened if the facts were different than the facts presented." As to the plaintiff's request concerning the

[6] The plaintiff's motion for articulation sought clarification as to (1) "whether the trial court ruled in the order denying second motion to open that the defendant could have had the right to substitute a bond for the plaintiff's judgment lien as a matter of law if the defendant had sufficient funds on hand to immediately substitute a bond at the time the trial court heard the second motion to open," and (2) "whether the trial court ruled that the defendant could have had the right to substitute a bond for the plaintiff's judgment lien in the amount of the more than two year old value of the $620,000 as a matter of law if the defendant had sufficient funds on hand at the time the trial court heard the second motion to open to immediately substitute a bond."

[7] The defendant's embedded request for articulation sought clarification as to (1) "[t]he legal basis for not considering the merits of the second extension motion, even though the [defendant] did not have the requisite cash on hand on the day [of] the hearing, but could obtain funds within less than one week," and (2) "[t]he legal and factual basis of denying the motion for reargument, even though the [defendant] presented new evidence that the buyer of the property was prepared to close immediately, the buyer's lawyer was holding the cash necessary to close in his trust account, and the sale had been stalled by the plaintiff's threats of sanctions against the defendant."

value of the property, the court explained that it "did not even entertain argument or evidence on whether or not the value [of the property] was still accurate, or whether or not it could be challenged." In response to the defendant's request concerning its ability to obtain cash within one week, the court stated that the legal basis for not considering the merits of a second extension was sufficiently articulated in the original decision. Regarding the second request concerning purported new evidence, the court stated that the defendant's third argument to extend the law day to secure a bond when it did not presently have the funds to secure a bond "was a third bite at the apple," and it further relied on the factual findings set forth in its previous orders based on the "voluminous briefs and extensive oral argument prior to that ruling."

I

On appeal, the defendant first argues that the court improperly denied its renewed motion to open filed after the court denied its January 18, 2022 motion to open. The defendant's argument in support of its claim is twofold.

First, the defendant argues that the court improperly denied its renewed motion to open because the court failed to give full force and effect to its earlier valuation ruling, which granted the defendant permission to substitute a cash bond for the value of the property. Essentially, the defendant argues that the valuation ruling and permission to substitute a bond was a final judgment and the law of the case, and, because the valuation ruling was not disturbed on appeal, the defendant has the absolute right as a matter of law to substitute the cash bond. In support of this argument, the defendant asserts that the valuation ruling did not place a time limit on its right to substitute a bond. Thus, the defendant asserts that the court failed to give full force and

effect to the valuation ruling when it refused to permit it to substitute a cash bond.

Second, the defendant contends that the court improperly denied its renewed motion to open the judgment because the court required it to have immediate cash on hand to post the bond. Specifically, the defendant argues that General Statutes § 52-380e[8] dictates that the posting of a cash bond in lieu of a judgment lien is an absolute right and requires that a reasonable time to exercise that right must be granted because the statute is silent with respect to a time limitation.[9] Therefore, the defendant asserts that the court improperly required it to have cash on hand in order to substitute the bond.

In response, the plaintiff contends that, pursuant to the standard governing a motion to open a judgment of foreclosure, the court properly exercised its discretion in its consideration of the defendant's claim and in weighing the relevant facts. The plaintiff argues that, because in the exercise of its discretion, the court properly considered issues of equity, it did not rule, as a matter of law, that the defendant was required to have cash on hand in order to substitute the bond. In this

[8] General Statutes § 52-380e provides: "When a lien is placed on any real or personal property pursuant to section 52-355a or 52-380a, the judgment debtor may apply to the court to discharge the lien on substitution of (1) a bond with surety or (2) a lien on any other property of the judgment debtor which has an equal or greater net equity value than the amount secured by the lien. The court shall order such a discharge on notice to all interested parties and a determination after hearing of the sufficiency of the substitution. The judgment creditor shall release any lien so discharged by sending a release sufficient under section 52-380d by first class mail, postage prepaid, to the judgment debtor."

[9] The defendant also raises a procedural due process claim concerning its alleged right, as a matter of law, to substitute a bond. Because this claim is being raised for the first time on appeal and was not preserved for appellate review, we decline to consider it. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial"); see also *USAA Federal Savings Bank* v. *Gianetti*, 197 Conn. App. 814, 819, 232 A.3d 1275 (2020).

regard, the plaintiff emphasizes that, in balancing the relative equities, the court considered the defendant's lack of immediate funds as one of many relevant factors and not as the sole basis for denial. We agree with the plaintiff.

We begin by setting forth the applicable standard of review. "We review a trial court's ruling on motions to open under an abuse of discretion standard. . . . Under this standard, we give every reasonable presumption in favor of a decision's correctness and will disturb the decision only where the trial court acted unreasonably or in a clear abuse of discretion. . . . As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Citations omitted; internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 178 Conn. App. 287, 294–95, 175 A.3d 582 (2017).

"Pursuant to General Statutes § 49-15 (a) (1), a trial court may, at its discretion, open and modify a judgment of strict foreclosure upon written motion of any person having an interest in the judgment and for cause shown." Id., 295. "[G]ood cause for opening a [judgment] pursuant to § 49-15 . . . cannot rest entirely upon a showing that the original foreclosure judgment was erroneous. Otherwise that statute would serve merely as a device for extending the time to appeal from the judgment. . . . In reviewing the denial of a motion to open a judgment of strict foreclosure, we are limited to determining whether the court abused its discretion in so ruling or based its ruling on some error of law. If neither such error is established, the court's ruling must be upheld." (Citation omitted; internal quotation marks omitted.) *USAA Federal Savings Bank* v. *Gianetti*, 197 Conn. App. 814, 820, 232 A.3d 1275 (2020).

We conclude that the court did not abuse its discretion in denying the defendant's renewed motion to open

the judgment of strict foreclosure. In its January 24, 2022 memorandum of decision denying the initial motion to open filed on January 18, 2022, the court stated that it took into consideration the entire record and all relevant facts presented by counsel for the defendant and the plaintiff. The court enumerated the specific facts it considered, which included whether the defendant had enough funds to produce the cash bond at the time of the hearing, the defendant's proposed plan to sell commercial and residential property in order to secure the necessary funds, the defendant's inability to present potential buyers of that property, and that the defendant had several months to produce the funds necessary to substitute the bond as permitted by the court's February 24, 2020 order but did not present a plan to secure the funds to the court at the hearing, and instead asked the court and the plaintiff to "take it on faith" that the defendant will come up with the cash to pay the bond in a timely manner. See footnote 5 of this opinion. The court also noted that the case had been pending since July, 2017, and that the parties had experienced numerous delays due to an appeal and standard motion practice. The court ultimately found that the defendant had failed to provide any assurances as to when and how the plaintiff would receive the cash bond, or any assurances that the debt would be paid, especially in light of the defendant's representation that it was seeking to extend the law day for an additional six months. For these reasons, the court denied the January 18, 2022 motion to open.

Similarly, in the court's order denying the defendant's renewed motion to open, the court stated that the defendant's inability to produce the necessary cash bond at the time of the hearing had not changed since it denied the defendant's January 18, 2022 motion. The court again considered all relevant facts and the entire record, incorporating its reasoning enumerated in the January

24, 2022 memorandum of decision, and specifically considered the following additional factors. In particular, it emphasized that the defendant filed its first motion to substitute the judgment for the bond on January 18, 2018, four years prior. The court also emphasized that, when the defendant initially moved for permission to substitute bond in 2018, there was no temporary restraining order in effect to prohibit the sale of assets in order to secure the necessary funds to pay the cash bond. Given the court's evaluation of the record before it, we conclude that the court did not abuse its discretion in denying the defendant's renewed motion to open.

Moreover, the defendant has provided us with neither relevant legal authority nor persuasive analysis that the court committed an error of law in denying its renewed motion to open.[10] To the extent that the defendant

[10] In its principal appellate brief, the defendant directs our attention to our Supreme Court's decision in *Gary Excavating Co.* v. *North Haven*, 163 Conn. 428, 430, 311 A.2d 90 (1972), for the premise that, in carrying out a mandate from our Supreme Court on remand for judgment, the trial court " 'is limited to the specific direction of the mandate as interpreted in the light of the opinion,' " and to *Patron* v. *Konover*, 43 Conn. App. 645, 685 A.2d 1133 (1996), cert. denied, 240 Conn. 911, 690 A.2d 400 (1997), in which this court stated that "[t]he trial court cannot adjudicate rights and duties not within the scope of the remand. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. No judgment other than that directed or permitted by the reviewing court may be rendered, even though it may be one that the appellate court might have directed. The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Internal quotation marks omitted.) Id., 650–51. This precedent is irrelevant to the issue in the present case. This court affirmed the valuation ruling with regard to the court's determined fair market value. *Mirlis* v. *Yeshiva of New Haven, Inc.*, supra, 205 Conn. App. 212. However, in reaching our conclusion, we specifically declined to address the defendant's argument concerning its asserted absolute right to substitute a bond in lieu of the judgment lien. Id., n.6. Therefore, the defendant's argument in the present appeal that this court issued a mandate with respect to creating an absolute right to substitute a cash bond is without merit.

argues that, because the order did not include a time limit, it should be given a reasonable amount of time under the law of the case doctrine to obtain the funds needed to post the bond, we reiterate that the court considered the four years that have elapsed since the entry and affirmance of that valuation ruling to its denials of the motions to open. The court specifically stated that the defendant "had months to come up with a plan to pay the full cash bond," but continued to request more time to come up with the funds. Given our standard of review, we conclude that the court engaged in the proper review of the relevant facts and the entire record before it and, therefore, did not abuse its discretion in denying the defendant's renewed motion to open the judgment.

We also are not persuaded that the court abused its discretion to the extent that it considered that the defendant did not have cash on hand to secure the bond. In claiming legal error, the defendant misconstrues the court's finding to mean that, as a matter of law, the defendant can only substitute a bond if it has the funds immediately available. The court did not expressly make such a pronouncement, nor do we interpret the court's decision to have been based on such a legal principle. At the outset, nothing in § 52-380e suggests that the defendant has an absolute right, as opposed to simply the opportunity, to substitute a cash bond upon the court's granting it permission to do so. Moreover, as the record makes clear, the court considered the fact that the defendant did not have the cash on hand to substitute the bond as one of many factors it considered in reaching its decision to deny the motion. As we discussed previously, the court also considered the defendant's inability to provide a list of potential property buyers to secure those funds and the amount of time elapsed from the date of the valuation ruling granting permission to substitute a bond. Thus, it was

within the court's discretion to deny the defendant's renewed motion to open on the basis of the relevant facts and record before it.

II

The defendant next claims that the court improperly denied its motion to reargue. More specifically, the defendant argues that the court failed to consider purported new evidence showing that it would have access to the funds necessary to substitute a cash bond within one week of that hearing in light of the resolution of some related federal cases. The plaintiff, by contrast, argues that the court properly denied the defendant's motion to reargue because the court again considered the relevant facts and evidence when balancing the equities of the case, namely, that the defendant still did not have sufficient funds at the time of the motion to substitute a cash bond. We agree with the plaintiff.

"We review a trial court's decision to grant a motion to reargue pursuant to the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue . . . is whether the trial court could have reasonably concluded as it did." (Citations omitted; internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 180 Conn. App. 717, 729–30, 184 A.3d 1218 (2018), aff'd, 332 Conn. 93, 209 A.3d 629 (2019).

We conclude that the court did not abuse its discretion in denying the defendant's motion to reargue. In the court's articulation, in response to the defendant's request for an articulation of the legal and factual basis

for denying its motion to reargue, the court cited relevant case law that provides that "the purpose of a reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts." (Internal quotation marks omitted.) *Jaser* v. *Jaser*, 37 Conn. App. 194, 202, 655 A.2d 790 (1995). A motion to reargue "also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citation omitted; internal quotation marks omitted.) *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001). Here, the court based its decision to deny the defendant's motion to reargue on the fact that the defendant still did not have the funds available to secure a bond regardless of its asserted factual developments, as well as the same conclusions reached in its denial of the motion to open that had not changed since its denial of the motion to open. In light of these facts, the court reasoned that granting the motion to reargue would serve only to give the defendant a "third bite at the apple" and, therefore, denied the motion. On our review of the court's factual findings and the relevant supporting case law, we conclude that the court did not abuse its discretion in denying the defendant's motion to reargue.

The judgment is affirmed.

In this opinion the other judges concurred.

AMMAR I. *v.* DEPARTMENT OF CHILDREN AND FAMILIES*
(AC 45265)

Moll, Clark and Lavine, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court denying in part its motion to dismiss the plaintiff's complaint. In his complaint, the plaintiff, a Muslim, alleged that the defendant discriminated against him on the basis of his religion in violation of the applicable statutes (§§ 46a-58 (a) and 46a-71 (a)) during proceedings related to the neglect and custody of his three children and the termination of his parental rights. The trial court granted in part the defendant's motion to dismiss, determining that the majority of the claimed discriminatory conduct was time barred pursuant to the applicable statute ((Rev. to 2019) § 46a-82 (f)). Any claims arising during or after the plaintiff's termination of parental rights trial, however, were not time barred, and the trial court determined, inter alia, that the plaintiff had standing to bring his claims and that his claims for money damages were not barred by sovereign immunity. Thereafter, the defendant filed a motion to reargue, raising, for the first time, a claim that the trial court lacked jurisdiction on the basis of the litigation privilege. The trial court denied the motion and concluded that the litigation privilege did not bar the plaintiff's discrimination claims. *Held* that the trial court erred in denying in part the defendant's motion to dismiss because, on the basis of a review of all of the public policy concerns raised by the parties, this court concluded that the plaintiff's claims were barred by the absolute immunity afforded by the litigation privilege: the discriminatory conduct alleged by the plaintiff did not subvert the underlying purpose of a judicial proceeding because the elements of §§ 46a-58 (a) and 46a-71 (a) do not contemplate a claim based on the improper use of a judicial proceeding but, rather, focus on discriminatory treatment based on membership in a protected class, §§ 46a-58 (a) and 46a-71 (a) do not provide the sort of safeguards against inappropriate retaliatory litigation that were built into the elements of vexatious litigation and abuse of process claims, the allegations in the plaintiff's complaint challenged the defendant's participation in a properly brought legal proceeding, and the complaint did not allege that the defendant initiated the termination

* 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.

proceedings or that it did so for an improper purpose, as the termination petitions were filed by the attorneys for the plaintiff's children and the defendant became involved in the underlying proceedings only because the plaintiff filed an emergency ex parte order of temporary custody against the children's mother, which resulted in the trial court sua sponte removing the children from both parents' care and vesting custody with the Commissioner of Children and Families; moreover, contrary to the plaintiff's assertions, his claims were predicated on conduct similar in essential respects to defamatory statements, namely, the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the termination of parental rights proceedings, and, unlike in *MacDermid, Inc.* v. *Leonetti* (310 Conn. 616), the plaintiff in the present case did not allege in his complaint that the defendant brought a claim or commenced proceedings solely because the plaintiff exercised the rights afforded to him by statute or that it did so solely because of the plaintiff's religion, as the complaint made clear that the defendant did not initiate the termination proceedings and did not become involved until after the plaintiff filed an emergency ex parte order of temporary custody; furthermore, eliminating the litigation privilege for this type of discrimination claim risked a wave of retaliatory litigation against the defendant and its employees by disgruntled parents who have had their children removed from their care or who have had their parental rights terminated, and could interfere significantly with the defendant's general statutory (§ 17a-90) obligation of assuring the adequate care, health and safety of children who require the protection of the state, and, although this court recognized the important remedial purposes that §§ 46a-58 (a) and 46a-71 (a) serve, it could not presume, in the absence of a clear statement of intent by the legislature, that the legislature intended to eliminate the important protections afforded by the litigation privilege in all instances in which a plaintiff asserted a discrimination claim; additionally, other remedies existed for addressing and disincentivizing the alleged conduct, as the allegations that the defendant handled the case inappropriately were litigated during the child protection proceedings and, to the extent that the plaintiff believed that the defendant's participation in the proceedings was vexatious or constituted an abuse of process, he could have sought authorization from the claims commissioner to bring those claims in court for monetary damages.

Argued March 1—officially released June 20, 2023

Procedural History

Action to recover damages for the defendant's alleged discrimination, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Morgan, J.*, denied the defendant's motion

to dismiss, and the defendant appealed to this court; subsequently, this court granted the motion to intervene as an appellee filed by the Commission on Human Rights and Opportunities. *Reversed*; *judgment directed.*

Colleen B. Valentine, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Matthew Larock*, assistant attorney general, for the appellant (defendant).

Ammar I., self-represented, the appellee (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (intervenor Commission on Human Rights and Opportunities).

Opinion

CLARK, J. In this discrimination action, the defendant, the Department of Children and Families, appeals from the judgment of the trial court denying its motion to dismiss the complaint filed by the self-represented plaintiff, Ammar I., and from the court's denials of two of its motions to reargue.[1] On appeal, the defendant claims that the court erred in concluding that (1) the litigation privilege did not bar the plaintiff's claims, (2) sovereign immunity did not bar the plaintiff's claim for

[1] On October 6, 2022, after the defendant filed its principal brief in this appeal but before the plaintiff filed his appellee brief, the Commission on Human Rights and Opportunities (commission) filed a motion to intervene in the appeal as an additional appellee pursuant to General Statutes § 46a-103. General Statutes § 46a-103 provides in relevant part that "[t]he commission, through its counsel or the Attorney General, may intervene as a matter of right in any action brought in accordance with section 46a-100." The commission argued that intervention was appropriate because it had a strong interest in the issues presented and its interests were not properly represented. It argued that the defendant's claim that sovereign immunity bars claims under General Statutes §§ 46a-58 (a) and 46a-71 "poses a risk to the commission's interest, mission, and authority that extends far beyond the limits of the individual case." This court granted the commission's motion on October 19, 2022, and the commission filed its appellate brief on November 30, 2022.

money damages brought pursuant to General Statutes §§ 46a-58 (a) and 46a-71 (a), and (3) the plaintiff had standing to maintain this action following the termination of his parental rights. For the reasons that follow, we agree with the defendant on its first claim and, therefore, reverse the judgment of the trial court.[2]

We begin by setting forth the relevant procedural history of the case. On or about July 11, 2019, the plaintiff filed a complaint against the defendant with the Commission on Human Rights and Opportunities (commission) alleging that the defendant subjected him to a continuous course of religious discrimination during his ongoing child protection cases. On October 17, 2019, the plaintiff obtained a release of jurisdiction from the commission, and he commenced this action against the defendant by complaint dated January 10, 2020. The one count complaint alleged that the defendant discriminated against him on the basis of his religion in violation of §§ 46a-58 (a) and 46a-71 (a),[3] and was predicated

[2] In light of our conclusion, we need not reach the defendant's sovereign immunity or standing claims.

[3] General Statutes § 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability, status as a veteran or status as a victim of domestic violence."

Although § 46a-58 (a) was amended by No. 22-82, § 11, of the 2022 Public Acts, that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

General Statutes § 46a-71 (a) provides: "All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence."

Although § 46a-71 (a) was amended by No. 22-82, § 17, of the 2022 Public Acts, that amendment has no bearing on the merits of this appeal. For convenience, we refer to the current revision of the statute.

on a series of events, including a court order placing the plaintiff's three children in the temporary custody of the Commissioner of Children and Families (commissioner), the filing of neglect petitions against the plaintiff after the children's mother reported that he had assaulted her, the defendant's placement of the children with a practicing Christian couple instead of a Muslim family, and a court order terminating the plaintiff's parental rights. He sought damages in the amount of $65 million and such other relief as the court deemed just and proper.

On March 19, 2020, the defendant filed a motion to dismiss the plaintiff's complaint in its entirety on a host of different grounds, including that the plaintiff's claims were an impermissible collateral attack on multiple final judgments of the Superior Court, certain claims were barred by res judicata and collateral estoppel, the plaintiff lacked standing to assert claims pertaining to his parental rights or his biological children because his parental rights had been terminated, sovereign immunity barred the claims, and the claims were time barred pursuant to General Statutes (Rev. to 2019) § 46a-82 (f) because they arose from conduct that allegedly occurred more than 180 days before the plaintiff filed his complaint with the commission.[4] On April 14, 2020, the plaintiff filed an objection to the defendant's motion to dismiss.

On February 18, 2021, the court, *Morgan*, *J.*, issued an order directing the parties to submit supplemental briefs on various issues the defendant raised in its motion to dismiss. The parties submitted their supplemental briefs to the court on May 3, 2021.

[4] General Statutes (Rev. to 2019) § 46a-82 (f) provides: "Any complaint filed pursuant to this section must be filed within one hundred and eighty days after the alleged act of discrimination, except that any complaint by a person claiming to be aggrieved by a violation of subsection (a) of section 46a-80 must be filed within thirty days of the alleged act of discrimination."

On August 24, 2021, the court issued a memorandum of decision granting in part and denying in part the defendant's motion to dismiss. The court agreed with the defendant that "the vast majority of the claimed discriminatory conduct the plaintiff relies upon in his [commission] complaint is time barred." Specifically, the court explained that "[t]he actions cited by [the defendant] as untimely allegations or claims—the placement of the plaintiff's children with a non-Muslim foster family in July, 2015, the court's August 7, 2015 order sustaining temporary custody of the children in [the commissioner], the neglect decision, and the three permanency plans granted by the court—are all discrete acts which occurred outside the 180 day time period allowed under § 46a-82 (f)." The court therefore concluded that, "to the extent the plaintiff's discrimination claim is based on events arising prior to January 12, 2019, the court finds that it is time barred."

The court, however, was not persuaded by the defendant's other jurisdictional claims. It found that, on the basis of the record before it, the present action was not a collateral attack on any prior judgment because no other court had adjudicated the issue of whether the defendant discriminated against the plaintiff solely on the basis of his religious creed. The court also disagreed with the defendant that its defenses of res judicata and collateral estoppel were properly raised by way of a motion to dismiss. The court also rejected the defendant's argument that sovereign immunity barred the plaintiff's claim for money damages under §§ 46a-58 and 46a-71. Lastly, the court concluded that the plaintiff had standing to bring his claim because, in the court's view, the plaintiff's claim was not premised on the termination of his parental rights. Rather, the court construed the plaintiff's allegations as a claim that the defendant discriminated against him personally because he is Muslim.

On September 3, 2021, the defendant filed a motion to reargue, directing the court to areas in which it believed the court had erred in applying the law or had overlooked relevant legal authority. The defendant also raised, for the first time, a claim that the court lacked jurisdiction on the basis of the litigation privilege. On September 14, 2021, the court denied the defendant's motion to reargue in all respects except as to its claim that the litigation privilege applied and indicated that it would schedule a hearing concerning the applicability of the litigation privilege.

In an order dated November 24, 2021, the court concluded that the litigation privilege did not bar the plaintiff's discrimination claims. The court explained that, "while the plaintiff's complaint contains numerous allegations about [the defendant] and its attorneys' conduct in connection with the neglect, custody and termination of parental rights proceedings, both before and after January 12, 2019 (events prior to which the court has found time barred . . .), the plaintiff's complaint in this action claims that [the defendant] mistreated him throughout his interaction with the agency and used the legal process in an improper manner in order to discriminate against him because he is Muslim. Accordingly, the court finds that the plaintiff's discrimination claim is more akin to a claim of vexatious litigation or abuse of process (where the litigation privilege does not apply), as opposed to a claim for defamation or fraud (where the litigation privilege would apply)." (Citation omitted.)

Dissatisfied with the court's ruling, the defendant filed a motion to reargue on December 14, 2021, claiming that the court "overlooked legal authority and/or made an error in applying the law with respect to its holding that the plaintiff's claims in this case are not barred by [the] litigation privilege." On January 10, 2022,

the court summarily denied the defendant's motion to reargue. This appeal followed.

We begin by setting forth our standard of review. We review the trial court's ultimate legal conclusions and its resulting denial of a motion for dismissal de novo. See *Rioux* v. *Barry*, 283 Conn. 338, 343, 927 A.2d 304 (2007). In conducting this review, "we take the facts to be those alleged in the complaint, construing them in a manner most favorable to the pleader." *Beecher* v. *Mohegan Tribe of Indians of Connecticut*, 282 Conn. 130, 132, 918 A.2d 880 (2007). We are mindful that the doctrine of absolute immunity, also referred to as the litigation privilege,[5] "implicates the court's subject matter jurisdiction"; *Dorfman* v. *Smith*, 342 Conn. 582, 594, 271 A.3d 53 (2022); and that "every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Tyler* v. *Tatoian*, 164 Conn. App. 82, 87, 137 A.3d 801, cert. denied, 321 Conn. 908, 135 A.3d 710 (2016).[6]

Before turning to the merits of the appeal, we begin with a general overview of the litigation privilege. The

[5] The terms "litigation privilege" and "absolute immunity" are used interchangeably throughout this opinion.

[6] The commission argues that de novo review of the defendant's jurisdictional argument is not available because, in its view, the only decision properly before this court is the denial of the defendant's second motion to reargue. It therefore argues that we should review on appeal only whether the court's denial of the defendant's second motion to reargue was an abuse of its discretion. We disagree. It is clear from the defendant's first motion to reargue, and from the court's action on that motion, that the court treated the defendant's litigation privilege argument as a new motion to dismiss. Indeed, in the court's November 24, 2021 order, it explicitly stated that "[t]he defendant's *motion to dismiss* on the ground of absolute immunity is therefore denied." (Emphasis added.) Moreover, "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005). Accordingly, our review of the jurisdictional question before us is de novo. See *Dorfman* v. *Smith*, supra, 342 Conn. 594 ("applicability of absolute immunity implicates the court's subject matter jurisdiction").

immunity of parties and witnesses from subsequent liability, in the form of damages, for their participation in judicial proceedings is well established in both English and Connecticut common law. See, e.g., *Charles W. Blakeslee & Sons* v. *Carroll*, 64 Conn. 223, 232, 29 A. 473 (1894), overruled in part on other grounds by *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Dawkins* v. *Lord Rokeby*, 176 Eng. Rep. 800, 812 (L.R.C.P. 1866); *Henderson* v. *Broomhead*, 157 Eng. Rep. 964, 968 (L.R. Exch. 1859). "In its most basic form, the litigation privilege provides that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . *Hopkins* v. *O'Connor*, [282 Conn. 821, 830–31, 925 A.2d 1030 (2007)]. This includes statements made in pleadings or other documents prepared in connection with a court proceeding. . . . *Scholz* v. *Epstein*, [341 Conn. 1, 28–29, 266 A.3d 127 (2021)]." (Internal quotation marks omitted.) *Deutsche Bank AG* v. *Vik*, 214 Conn. App. 487, 497, 281 A.3d 12, cert. granted, 345 Conn. 964, 285 A.3d 388 (2022).

The litigation privilege "is grounded [on] the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of [actions seeking damages for statements made by such participants in the course of the judicial proceeding]." (Internal quotation marks omitted.) *Priore* v. *Haig*, 344 Conn. 636, 646, 280 A.3d 402 (2022). "Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial . . . proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005); see also *Scholz* v. *Epstein*, supra,

341 Conn. 10 (setting forth policy rationales underlying litigation privilege).

The litigation privilege, which was first recognized to bar persons accused of crimes from suing their accusers for defamation, has been widely extended to causes of action beyond claims of defamation. See *Deutsche Bank AG* v. *Vik*, supra, 214 Conn. App. 497. For example, our courts have applied the privilege to various other torts, including claims of intentional interference with contractual or beneficial relations arising from statements made during judicial proceedings; see *Rioux* v. *Barry*, supra, 283 Conn. 343; and claims brought under remedial statutes, such as the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., which broadly prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. See, e.g., General Statutes § 42-110b (a); *Dorfman* v. *Smith*, supra, 342 Conn. 585; *Tyler* v. *Tatoian*, supra, 164 Conn. App. 84.

The litigation privilege is not without limitations, however. "Specifically, the litigation privilege does not bar claims for abuse of process, vexatious litigation, and malicious prosecution. . . . This is because whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests . . . ." (Citation omitted; internal quotation marks omitted.) *Dorfman* v. *Smith*, supra, 342 Conn. 592.

In determining whether absolute immunity should apply to a particular cause of action, we generally look at "(1) whether the alleged conduct subverts the underlying purpose of a judicial proceeding, in a similar way to how conduct constituting abuse of process and vexatious litigation does; (2) whether the alleged conduct is similar in essential respects to defamatory statements,

inasmuch as a defamation action is barred by the privilege; and (3) whether the alleged conduct may be adequately addressed by other available remedies." *Scholz* v. *Epstein*, supra, 341 Conn. 10–11, citing *Simms* v. *Seaman*, 308 Conn. 523, 545, 552, 69 A.3d 880 (2013). Of course, these factors are " 'simply instructive' . . . ." *Dorfman* v. *Smith*, supra, 342 Conn. 593. "We are not required to rely exclusively or entirely on these factors, but, instead, they are useful when undertaking a careful balancing of all competing public policies implicated by the specific claim at issue and determining whether affording parties this common-law immunity . . . is warranted." Id., 593–94.

The plaintiff's complaint alleges that the defendant discriminated against him on the basis of his religion in violation of §§ 46a-58 (a) and 46a-71 (a), predicated on a series of events, including a court order placing the plaintiff's three children in the temporary custody of the commissioner, the filing of neglect petitions against the plaintiff, the placement of the children with a practicing Christian couple, and the termination of the plaintiff's parental rights. Significantly, the trial court determined that all claims arising earlier than January 12, 2019, were time barred.

On appeal, the defendant claims that the court erred when it concluded that the plaintiff's action is not barred by absolute immunity arising from the litigation privilege. It argues that the only allegations in the plaintiff's complaint that are not time barred concern the defendant's communications, conduct, and legal positions asserted during the proceedings for the termination of the plaintiff's parental rights. The defendant contends that the alleged conduct is precisely the sort of conduct that the litigation privilege is intended to protect. In its view, the defendant's brief makes clear that the plaintiff's purpose for bringing this action is to relitigate the termination of his parental rights and to

retaliate against the defendant for its in-court advocacy throughout the long-standing child protection litigation involving the plaintiff.

The plaintiff and the commission disagree. The plaintiff argues generally that the defendant "primarily used the legal system against [him to] accomplish a purpose that it was not designed for" and that the court "correctly construed the pleadings as being akin to an abuse of process claim or vexatious litigation claim, where absolute immunity does not apply." (Emphasis omitted.) The commission elaborates on the plaintiff's point, arguing that the "closest authority" for why the litigation privilege should not apply in the present case is our Supreme Court's decision in *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 79 A.3d 60 (2013). In that case, our Supreme Court held that the litigation privilege did not apply to a retaliation claim brought by an employee pursuant to the Workers' Compensation Act (act), General Statutes § 31-275 et seq., in violation of General Statutes (Rev. to 2009) § 31-290a,[7] predicated on allegations that the employer's action against the employee for civil theft, fraud, unjust enrichment, and conversion was brought solely to retaliate against the employee for exercising his rights under the act. Id., 617, 622, 626. The commission contends that the court determined in *MacDermid, Inc.*, that the employee's claim of retaliation was sufficiently similar to vexatious litigation or abuse of process to avoid the litigation privilege and that the court's analysis "may be readily adapted to the claims at issue" in the present case.

[7] General Statutes (Rev. to 2009) § 31-290a (a) provides in relevant part: "No employer who is subject to the provisions of this chapter shall discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded to him pursuant to the provisions of this chapter."

All references to § 31-290a in this opinion are to the 2009 revision of the statute.

We have found no appellate authority addressing directly whether the litigation privilege applies to the particular claims before us. As a result, we must undertake "a careful balancing of all competing public policies implicated by the specific claim at issue" and determine whether affording the defendant absolute immunity is warranted in this case. *Dorfman* v. *Smith*, supra, 342 Conn. 593–94. In making that determination, we consider all of the public policy concerns raised by the parties—including those raised in *Simms* and the others that are unique to the present case. See *Scholz* v. *Epstein*, supra, 341 Conn. 27.

First, we consider whether the plaintiff's claims are the kinds that subvert the underlying purpose of a judicial proceeding. We begin with a review of the statutes under which the plaintiff's claims are brought.[8] See id., 18–19 (reviewing language of statutory theft statute). Section 46a-58 (a) provides: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, gender identity or expression, sexual orientation, blindness, mental disability, physical disability, status as a veteran or status as a victim of domestic violence." Section 46a-71 (a) provides: "All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, gender identity or expression, marital status, age, national origin, ancestry, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence."

[8] We take no position on the legal sufficiency of the plaintiff's claims, including whether § 46a-58 (a) grants substantive rights or provides a private cause of action.

Unlike claims for vexatious litigation[9] and abuse of process,[10] the elements of these discrimination statutes do not, on their face, contemplate a claim based on the improper use of a judicial proceeding. Rather, their clear focus is on discriminatory treatment based on membership in a protected class. See *Scholz* v. *Epstein*, supra, 341 Conn. 15–16 (explaining that focus is on *cause of action* rather than on *allegations* in complaint). Nor do these statutes provide the sort of safeguards against inappropriate retaliatory litigation that are built into the elements of vexatious litigation and abuse of process claims. To prevail on a vexatious litigation claim, for instance, a plaintiff must prove that the prior action terminated in the plaintiff's favor. See *Simms* v. *Seaman*, supra, 308 Conn. 542. This requirement "provide[s] adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation." (Internal quotation marks omitted.) Id. And to prevail on an abuse of process claim, a plaintiff must prove that the defendant used the legal process "*primarily* to accomplish a purpose for which it [was] not designed . . . ." (Emphasis in original.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987). Our courts have

[9] A claim for common-law "[v]exatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." *Rioux* v. *Barry*, supra, 283 Conn. 347.

[10] "An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not designed. . . . Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravamen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987).

observed that "the [use] of 'primarily' is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." (Internal quotation marks omitted.) Id. The plaintiff's claims do not by their nature include such protections against potential abuse.

Our Supreme Court has " 'refused to apply absolute immunity to causes of action alleging the improper use of the judicial system' but ha[s] applied immunity to claims premised on factual allegations that challenge the defendant's participation in a properly brought judicial proceeding. . . . The former involves the improper use of the courts 'to accomplish a purpose for which [the courts were] not designed' and is therefore not protected by the litigation privilege. . . . The latter does not involve consideration of whether the underlying purpose of the litigation was improper and, thus, is entitled to absolute immunity, even if the plaintiff alleges that the attorney's conduct constituted an improper use of the courts.' " (Citations omitted.) *Scholz* v. *Epstein*, supra, 341 Conn. 14.

When we go beyond the face of the statute and look at the allegations that remain in the plaintiff's complaint—the ones that are not time barred—we find that they challenge the defendant's participation in a properly brought judicial proceeding. Indeed, by January 12, 2019, the earliest date that the plaintiff could use to support his discrimination claim, the plaintiff's termination of parental rights trial had just commenced. See *In re Omar I.*, 197 Conn. App. 499, 506, 231 A.3d 1196 ("[t]he court, *Burgdorff*, *J.*, conducted a trial on the petitions over the course of fifteen days between January and April, 2019"), cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020). The complaint does not allege that the defendant

initiated those termination proceedings at all, let alone for an improper purpose. Rather, it is clear from the allegations in the complaint that the termination petitions were filed by the attorneys for the plaintiff's own children and that the defendant's participation stemmed from those properly brought and ultimately successful petitions.[11] See id., 505 ("[i]n November, 2018, attorneys representing the children filed petitions to terminate the parental rights of the [plaintiff] and the mother" (footnote omitted)). As the defendant points out, its involvement in the proceedings was compelled by state law, as "[t]he department is a party to *any* order of temporary custody petition, neglect petition, and termination of parental rights petition filed with the Connecticut juvenile court—even where, as here, the department did not file the petition." (Emphasis in original.) See, e.g., General Statutes §§ 17a-112 and 46b-129. It also is clear from the complaint that the defendant became involved in the underlying child protection proceedings in the first instance only because the plaintiff himself filed an emergency ex parte order of temporary custody against the children's mother, which ultimately resulted in the trial court, sua sponte, removing the children from both parents' care and vesting custody with the defendant.[12] See *In re Omar I.*, supra, 508 ("[t]he court, *Abery-Wetstone*, *J.*, issued a bench order of temporary custody removing the children from [their] parents' care, and vested their care and custody with [the commissioner] based on the allegations contained in [the plaintiff's] affidavit" (internal quotation marks omitted)).

[11] In his complaint, the plaintiff asserted that "[t]he children's attorneys filed termination of parental rights petitions on behalf of the three children as the three children expressed a desire to be adopted by the foster mothers."

[12] The plaintiff's complaint stated: "On or around July 29, 2015, the plaintiff filed an emergency custody application with the family court alleging serious concerns regarding the children's safety in the mother's care and the mother's ability to parent the children. Due to the seriousness of the allegations, the court . . . issued an order of temporary custody . . . to the defendant."

Furthermore, contrary to the contentions of the plaintiff and the commission on appeal, the plaintiff's claim, like a defamation claim, is predicated on the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the termination of parental rights proceeding. See *Simms* v. *Seaman*, supra, 308 Conn. 545, 548 (considering whether plaintiff's fraud claim was premised on communication of false statement, like defamation claim). For example, the allegations in the complaint that are not time barred allege, inter alia, that, "[a]s of the date of this complaint, the defendant continues to take the position that the plaintiff is physically violent, that the plaintiff committed domestic violence around the children and that the plaintiff assaulted the mother. The defendant reiterated that position in writing in its September 30, 2019 response to the plaintiff's [commission] complaint and in its brief to the Appellate Court filed on November 14, 2019." The plaintiff's complaint further alleges that the "[d]efendant wilfully, wantonly and unlawfully submitted false evidence to the Superior Court to advocate for termination of the plaintiff's parental rights in order to unlawfully deprive the plaintiff of his parental rights"; that the "[d]efendant wilfully, wantonly and unlawfully through its agent acting in his official capacity . . . testified falsely in trial to advocate for terminating the plaintiff's parental rights"; that the "[d]efendant through its counsel . . . submitted to the Superior Court false material evidence while being aware of its falsity in order to unlawfully deprive the plaintiff of his right to the integrity of his family and to deprive the plaintiff of his constitutional right to raise his own children"; and that the "[d]efendant through its counsel . . . submitted to the Appellate Court a brief containing several misrepresentations unlawfully advocating for termination of the plaintiff's parental rights."

Our courts repeatedly have held that communications such as these, that "are uttered or published in the

course of judicial proceedings, even if they are published *falsely and maliciously* . . . nevertheless are absolutely privileged provided they are pertinent to the subject of the controversy." (Emphasis added.) *Hopkins* v. *O'Connor*, supra, 282 Conn. 838. On that point, our Supreme Court has stated that "the privilege clearly applies" to a plaintiff's claim "premised on false statements contained in pleadings and documents related to the litigation—such as the allegedly false statements contained in the defendant's answer, special defense, and discovery responses . . . ." *Dorfman* v. *Smith*, supra, 342 Conn. 602. It also has made clear that, aside from a few exceptions, the litigation privilege generally bars claims against attorneys for their communications and conduct during judicial proceedings. See *Scholz* v. *Epstein*, supra, 341 Conn. 10 ("the privilege protects the rights of clients who should not be imperiled by subjecting their legal advisors to the constant fear of lawsuits arising out of their conduct in the course of legal representation" (internal quotation marks omitted)).

The commission gives short shrift to these authorities and focuses primarily on our Supreme Court's decision in *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 616. The commission argues that the defendant cannot identify a basis on which to distinguish the retaliation claim at issue in this case from the claims at issue in *MacDermid, Inc.* It contends that the claims in the present case, like those in *MacDermid, Inc.*, all "assert that an individual subject to a particular remedial statute initiated or used litigation for reasons or in a manner that subverts the purposes of the judicial system." The commission further argues that the same remedial policy goals discussed in *MacDermid, Inc.*, apply to most claims of discrimination brought under the statutes over which the commission has jurisdiction. We are not persuaded.

The plaintiff's claims differ from the claim at issue in *MacDermid, Inc.*, in multiple respects and in ways that, on balance, lead us to conclude that the plaintiff's claims are barred by absolute immunity. First, the narrow issue in *MacDermid, Inc.*, was whether absolute immunity applied to a retaliatory discrimination claim brought pursuant to § 31-290a that was predicated on allegations that an employer had sued its employee *solely* because the employee exercised his rights under the act. *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 617, 622. The court ultimately determined that, like claims for vexatious litigation and abuse of process, which explicitly hold individuals liable for using the judicial process for an illegitimate purpose, "§ 31-290a is designed to prevent, or hold the employer liable for, the improper use of the judicial process for the illegitimate purpose of retaliating against an employee for his exercise of his rights under the act." Id., 631. In concluding that the employee's claim under the act was not barred by the litigation privilege, the court observed that the specific allegations the employee made in support of his § 31-290a claim arguably included even more stringent safeguards against abuse than the safeguards that are built into an abuse of process claim because he pleaded in his complaint, and therefore was required to prove, "that the plaintiff filed its claims against him '*solely* because [the employee] exercised his rights under the [act].' " (Emphasis in original.) Id., 634–35.

In contrast, the plaintiff's claims in this case that are not time barred are predicated on the alleged communication of false or misleading statements by the defendant's attorneys and witnesses during the plaintiff's termination of parental rights proceedings. Notably, there is no allegation in the plaintiff's complaint, like there was in *MacDermid, Inc.*, that the defendant brought a claim or commenced proceedings *solely* because the plaintiff exercised rights afforded to him by statute.

Nor are there allegations that the defendant brought a claim or commenced proceedings *solely* because of the plaintiff's religion. As previously explained, the complaint makes clear that the defendant in this case did not initiate the termination proceedings against the plaintiff and that the defendant became involved with the plaintiff and his family in the first instance only after the plaintiff himself filed an emergency ex parte order of temporary custody against the children's mother, which resulted in the trial court, sua sponte, vesting custody of the children with the commissioner. Although there is no question that the plaintiff in this case makes allegations concerning judicial proceedings, unlike the plaintiff in *MacDermid, Inc.*, he does not allege that the defendant used the judicial proceedings for a purpose for which the courts were not designed. See *Dorfman* v. *Smith*, supra, 342 Conn. 599 ("Rather than subverting the purpose of the proceedings, the alleged conduct would have rendered the proceeding unfair. As with claims of fraud, although we do not condone such conduct, such unfairness does not bar absolute immunity . . . .").

Second, our Supreme Court made clear in *MacDermid, Inc.*, that the claim therein arose from a "somewhat unique confluence of circumstances . . . ." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 310 Conn. 636. In determining that the interests weighed against applying the privilege, the court found it significant that the vast majority of retaliation claims under the act did not involve litigation related conduct of an employer and that any chilling effect on employers would be de minimis. Id., 635–36. The court emphasized that "the potential for a retaliation claim as is brought [in the present case] is *extremely limited* in type and circumstance" and agreed with the trial court that "[t]his limited potential

for a § 31-290a claim brought in response to an employer's initiation of litigation against an employee weighs against applying absolute immunity to bar the defendant's counterclaim . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 636.

The same cannot be said with respect to the claims the plaintiff asserts in the present case against the defendant. Eliminating the litigation privilege for these types of discrimination claims—which are easy to allege but hard to prove—could open the floodgates to a wave of retaliatory litigation against the defendant and its employees by disgruntled parents who have had their children removed from their care or who have had their parental rights terminated. See *Simms* v. *Seaman*, supra, 308 Conn. 568 ("[A]brogation of the litigation privilege to permit claims of fraud could open the floodgates to a wave of litigation in this state's courts challenging an attorney's representation, especially in foreclosure and marital dissolution actions in which emotions run high and there may be a strong motivation on the part of the losing party to file a retaliatory lawsuit. Abrogation of the privilege also would apply to the claims of pro se litigants who do not understand the boundaries of the adversarial process, which could give rise to much unnecessary and harassing litigation."). Indeed, eliminating the privilege for claims like those asserted in this case could interfere significantly with the defendant's general statutory obligation of assuring the adequate care, health, and safety of children that require the protection of the state; see General Statutes § 17a-90; as the fear of future retaliatory litigation by parents could inhibit the conduct of the defendant and its agents during the course of litigation necessary to fulfill its statutory charge.

The commission nevertheless contends that, in light of the remedial nature of our antidiscrimination laws, there are strong public policy reasons for not applying

the litigation privilege to the plaintiff's claim of discrimination. It goes further, arguing that the litigation privilege should not apply to most claims of discrimination and appears to suggest that our discrimination statutes have, in effect, abrogated the litigation privilege. But the commission has not cited, and we have not found, any provision in § 46a-58 or § 46a-71 (or elsewhere) that explicitly abrogates the common-law litigation privilege. See *Hopkins* v. *O'Connor*, supra, 282 Conn. 843 ("[a]lthough the legislature may eliminate a [common-law] right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed" (internal quotation marks omitted)); see also *Dorfman* v. *Smith*, supra, 342 Conn. 620 (concluding that plaintiff's remedial claim pursuant to Connecticut Unfair Insurance Practices Act was barred by litigation privilege and noting that legislature did not explicitly abrogate privilege). Although we recognize the important remedial purposes that our antidiscrimination statutes serve, this court cannot presume, in the absence of a clear statement of intent by our legislature, that it intended to go so far as to eliminate the important protections afforded by the litigation privilege in all instances in which a plaintiff asserts a discrimination claim.

Moreover, other remedies exist for addressing and disincentivizing the alleged conduct. The plaintiff's claims in this case stem from his involvement in long-standing child protection litigation and the eventual termination of his parental rights. The allegations that the defendant handled his case inappropriately can be, and in fact were, litigated during the child protection proceedings. See *In re Omar I.*, supra, 197 Conn. App. 503–504. As the defendant points out, the plaintiff was free to raise his claims that the department's reunification services were inadequate due to his religion or that

the department's positions were factually incorrect or simply pretext for discrimination. He similarly was free to raise his claim that the termination of his parental rights was not in the children's best interests.

To the extent the plaintiff believed that the defendant's participation in the proceedings was vexatious or constituted an abuse of process, he could have sought authorization from the claims commissioner to bring those claims in court for monetary damages. See General Statutes § 4-160 (a) ("[w]henever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable"); see also *Morneau* v. *State*, 150 Conn. App. 237, 248, 90 A.3d 1003 (discussing procedure claimant must follow to obtain permission to sue state for monetary damages), cert. denied, 312 Conn. 926, 95 A.3d 522 (2014).

We note that a number of federal courts also have held that absolute immunity extends in certain circumstances to attorneys and employees who are responsible for initiating or participating in juvenile dependency or termination of parental rights proceedings. In *Frazier* v. *Bailey*, 957 F.2d 920, 931–32 n.12 (1st Cir. 1992), for instance, the United States Court of Appeals for the First Circuit—in dismissing the plaintiff's claims of negligence, gross negligence, defamation, intentional infliction of emotional distress, and pursuant to the Massachusetts Civil Rights Act—observed that "courts have provided social workers and other public officials with absolute immunity for actions involving the initiation and prosecution of child custody or dependency proceedings. See *Millspaugh* v. *County Dept. of Public Welfare*, 937 F.2d 1172, 1176 (7th Cir.) (social worker immune from suit for failure to furnish information to the court and pursuing litigation after parents were

clearly entitled to custody), cert. denied, [502 U.S. 1004], 112 S. Ct. 638, 116 L. Ed. 2d 656 (1991); *Stem* v. *Ahearn*, [908 F.2d 1, 6 (5th Cir. 1990)] (social worker possesses absolute immunity when testifying at a child-custody hearing) [cert. denied, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991)]; *Meyers* v. *Contra Costa County Dept. of Social* [*Services*], 812 F.2d 1154, 1156–57 (9th Cir.) (social workers immune as quasi-prosecutorial officers when initiating child dependency proceedings), cert. denied, 484 U.S. 829, 108 S. Ct. 98, 98 L. Ed. 2d 59 (1987); *Malachowski* v. [*Keene*], 787 F.2d 704, 712–13 (1st Cir.) (juvenile officer is immune from damages when initiating juvenile delinquency proceeding), cert. denied, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986); *Kurzawa* v. *Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984) (guardian ad litem retains absolute immunity to enable him to act in the best interest of the child; psychiatrists providing information to court entitled to absolute immunity as functionally analogous to witnesses)." The United States Court of Appeals for the Second Circuit similarly has held that an attorney for a county department of social services who "initiates and prosecutes child protective orders and represents the interests of the [d]epartment [of social services] and the [c]ounty in [f]amily [c]ourt" is entitled to absolute immunity. *Walden* v. *Wishengrad*, 745 F.2d 149, 152 (2d Cir. 1984). In *Walden*, the court concluded that, given "the importance of the . . . activities [of the department of social services], the need to pursue protective child litigation vigorously and the potential for subsequent colorable claims," the attorney must be accorded absolute immunity from claims for damages brought under 42 U.S.C. § 1983, the primary remedial statute for asserting federal civil rights claims against local public entities, officers, and employees. Id.; see also *Cornejo* v. *Bell*, 592 F.3d 121, 128 (2d Cir.) ("[w]e conclude that the lawyer defendants in the instant case

were fulfilling similar functions [as those described in *Walden*], and that the district court thus properly extended to those defendants absolute immunity from the § 1983 claims"), cert. denied, 562 U.S. 948, 131 S. Ct. 158, 178 L. Ed. 2d 243 (2010).

In addition, at least one other state with a litigation privilege similar to ours has held that its privilege extends to claims of discrimination. For example, in *Peterson* v. *Ballard*, 292 N.J. Super. 575, 579–80, 679 A.2d 657 (App. Div.), cert. denied, 147 N.J. 260, 686 A.2d 761 (1996), the New Jersey Appellate Division considered whether the litigation privilege applied to a plaintiff's claim under New Jersey's Law Against Discrimination, New Jersey Statutes Annotated §§ 10:5-5 (a) and 10:5-12 (d), arising from an attorney's interview of a witness in anticipation of trial. During the interview, the plaintiff alleged that the attorney used threats and intimidation to discourage her from testifying for a coworker in a sexual harassment case against their employer and from filing her own harassment claim. Id. In affirming the dismissal of the plaintiff's claims, the court held that "the litigation privilege attaches to [a lawyer's] pre-trial communications with witnesses even though they are alleged to have been conducted in a tortious manner." Id., 589. The court also concluded that the Law Against Discrimination did not abrogate the well established privilege, noting that "implied abrogation of the litigation privilege is not favored." Id., 586. More recently, in *Loigman* v. *Township Committee*, 185 N.J. 566, 584, 588, 889 A.2d 426 (2006), the New Jersey Supreme Court, citing approvingly to *Peterson*, concluded that the litigation privilege also applies to a federal claim under 42 U.S.C. § 1983.

On the basis of our review of all of the public policy concerns raised by the parties—including those raised in *Simms* and the others unique to the present case—

we conclude that the plaintiff's claims are barred by the absolute immunity afforded by the litigation privilege.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to dismiss the complaint in its entirety.

In this opinion the other judges concurred.

MEHDI BELGADA ET AL. *v.* HY'S LIVERY SERVICE, INC., ET AL.
(AC 44659)

Cradle, Suarez and Seeley, Js.

Syllabus

The plaintiff chauffeurs sought to recover damages from the defendants, a livery service and its owners, claiming that the plaintiffs' one hour meal breaks constituted compensable work time under minimum wage law (§ 31-76b (2) (A)) and that the defendants had improperly deducted the meal breaks from their pay. The defendants had informed the plaintiffs in a memorandum that they were implementing a new meal break policy pursuant to the applicable federal regulation (§ 29 C.F.R. 785.19), which required that employees must be completely relieved from duty for purposes of eating regular meals. Under the defendants' policy, chauffeurs would be given a daily one hour, unpaid meal break during which they were to remain within a two mile radius of their next pickup location. The defendants moved for summary judgment, claiming that the meal breaks were not compensable because the plaintiffs spent those breaks engaged in activities that were for their own benefit under the predominant benefit test adopted by the majority of federal circuit courts of appeals, which examines whether activities employees perform during meal breaks are predominantly for the benefit of the employer. The plaintiffs objected and moved for partial summary judgment, claiming that they were working during their meal breaks under the plain language of § 31-76b (2) (A) and that the meal break policy constituted an enforceable contract between the parties that incorporated § 29 C.F.R. 785.19 and required the defendants to completely relieve them from duty during meal breaks. The trial court granted the defendants' motion for summary judgment, concluding that the meal break policy did not constitute a contract between the parties and that the breaks were not compensable work time because the plaintiffs had used them predominantly for their own benefit. On appeal to this court, the plaintiffs claimed, inter alia, that their meal breaks constituted hours worked

under the plain language of § 31-76b (2) (A) because they were required to guard their limousines during meal breaks and remain within two miles of their next pickup location. *Held*:

1. This court agreed with the trial court's determination that the defendants' meal break policy did not give rise to an enforceable contract between the parties, and that, even if it did, it would be governed by the predominant benefit test, under which the trial court properly found that the plaintiffs used their meal breaks predominantly for their own benefit, rather than that of the defendants; the plaintiffs' contention that the defendants had incorporated into the written meal break policy the completely relieved from duty test under 29 C.F.R. § 785.19 was unconvincing, that test having been rejected by most federal courts of appeals in favor of the more flexible predominant benefit test.
2. The plaintiffs could not prevail on their claim that the trial court improperly applied the predominant benefit test in determining that their meal breaks were not compensable under § 31-76b (2) (A): this court concluded that § 31-76b (2) (A) was ambiguous because it did not define work and was persuaded that the predominant benefit test should apply to the plaintiffs' claim, given that the legislative purpose in enacting § 31-76b (2) (A) was to make Connecticut wage law coextensive with federal overtime law; moreover, this court was not convinced by the plaintiffs' assertion that their meal breaks were "hours worked" under the plain language of § 31-76b (2) (A) because they were required to guard their limousines and remain within two miles of their next pickup location, which, they claimed, constituted their "prescribed work place" under the statute, as a meal break is not an hour worked under § 31-76b (2) (A) unless the employee "is required or permitted to work" during that break; furthermore, the plaintiffs' contention that they engaged in "work" under § 31-76b (2) (A) whenever they were at their prescribed workplace, regardless of whether they were on a meal break, would render the meal break exclusion superfluous.
3. The undisputed evidence in the record established that there was no genuine issue of material fact that the plaintiffs' meal breaks were predominantly for their own benefit and, thus, were not compensable as a matter of law: excerpts from the plaintiffs' depositions showed that they were able to go to malls, convenience stores, restaurants and offtrack betting during meal breaks as well as use the Internet on their phones and converse with other chauffeurs in each other's vehicles; moreover, the plaintiffs provided no evidence that they were guarding their limousines during meal breaks, and the record showed that other policies the defendants employed regarding care for and damage to their vehicles were not strictly enforced such that the plaintiffs were prevented, as they claimed, from using their meal breaks for their own purposes; furthermore, activities the plaintiffs were expected to engage in during meal breaks that did benefit the defendants, such as conversing with dispatchers about upcoming trips, cleaning the limousines and

getting gas, did not transform the meal breaks into compensable time, and any burdens those activities placed on the plaintiffs were too minimal to conclude that their meal breaks predominantly benefited the defendants.

Argued September 12, 2022—officially released June 20, 2023

Procedural History

Action to recover damages for allegedly unpaid wages, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Ozalis*, *J.*, granted the plaintiffs' motion for class certification; thereafter, the case was transferred to the judicial district of Hartford, Complex Litigation Docket, where the action was withdrawn as to the plaintiff Benito Hernandez et al.; subsequently, the court, *Moukawsher*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Michael T. Petela, with whom was *Richard E. Hayber*, for the appellants (named plaintiff et al.).

Adam J. Lyke, with whom was *Glenn A. Duhl*, for the appellees (defendants).

Opinion

SEELEY, J. The plaintiffs, a group of chauffeurs who brought this class action[1] complaint seeking unpaid wages, appeal from the summary judgment rendered by the trial court in favor of the defendants, Hy's Livery Service, Inc. (Hy's); Robert L. Levine, Hy's president; and Mathew Levine, Hy's vice president. On appeal, the plaintiffs Mehdi Belgada, Hormoz Akhundzadeh and Daniel Dziekan, as representatives of the class, set forth three arguments in support of their claim that the court improperly resolved the legal issue, namely, whether

[1] The class is defined as "[a]ll current and former employees of [the] defendants who were employed as chauffeurs at any time from January 31, 2016, through the date of final judgment."

the plaintiffs' meal breaks were not compensable time and, consequently, improperly rendered summary judgment for the defendants. We are not persuaded and, accordingly, affirm the judgment of the court.[2]

The record before the court, viewed in the light most favorable to the plaintiffs as the nonmoving party, reveals the following facts and procedural history. Hy's is a limousine service provider owned and operated by the Levines. Hy's employs chauffeurs, including the plaintiffs, to transport its clients to and from destinations, oftentimes airports, in Connecticut and the New York area. Hy's also employs accounting personnel to track the chauffeurs' hours and calculate their pay, as well as dispatchers who act as liaisons for the chauffeurs while they are on duty.

At all relevant times, a typical workday for a chauffeur employed by Hy's was as follows: the chauffeur

[2] We note that the plaintiffs also filed a motion for partial summary judgment in which they argued that Hy's policy governing chauffeur meal breaks was an enforceable contract that required the defendants to completely relieve the plaintiffs from their duties during meal breaks. The plaintiffs further argued that the defendants did not do so, and, therefore, they were entitled to summary judgment. We refer to this argument as the plaintiffs' "contract theory." Although the court did not state specifically that it was denying the plaintiffs' motion, it did conclude that, "[a]s a matter of law on the undisputed facts, [the] meal break policy was not a contract," and it rendered summary judgment in favor of the defendants on the plaintiffs' only claim. The plaintiffs did not specifically file a cross appeal from the implicit denial of their motion. In their preliminary statement of issues and appellate brief, however, the plaintiffs have challenged the court's denial.

Generally, "the denial of a motion for summary judgment is not . . . a final judgment and, thus, not immediately appealable . . . ." (Internal quotation marks omitted.) *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 777 n.3, 290 A.3d 801 (2023). "[However] if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal." (Internal quotation marks omitted.) Id. The plaintiffs also assert their "contract theory" in support of their argument that the court erred by granting the defendants' motion for summary judgment. We reject this claim in part I of this opinion, and, therefore, we affirm the court's denial of the plaintiffs' motion.

would report to Hy's at the start of his or her shift, pick up and inspect a limousine, and spend the remainder of the shift transporting passengers at the direction of dispatch—oftentimes with lags between their trips ranging in duration, other times back-to-back—and then return to Hy's to drop off the vehicle and clock out. The dispatchers communicated with the plaintiffs throughout the day by email, telephone, and through an application on the plaintiffs' phones called the "Livery Coach App."

Between March, 2015, and March, 2016, the Wage and Hour Division of the United States Department of Labor investigated Hy's in response to employee complaints surrounding uncompensated preshift hours and the automatic deducting of a one hour meal break.[3] While this investigation was ongoing, Hy's chauffeur manager, Steven Zubrinsky, sent an email to the plaintiffs on December 30, 2015, and notified them of a new meal break policy that would soon take effect. The new policy stated: "As of the pay period beginning January 3, 2016, all chauffeurs will be given a [one] hour, unpaid meal break every day, while on the road, at a time decided by dispatch pursuant to the [United States] Department of Labor, Code of Federal Regulations, regulation [29 U.S.C. §] 785.19 [2016].[4] You may take that break anywhere within a radius of [two] miles from your next pick up. If for any reason, due to scheduling

[3] According to its narrative report, the wage and hour division did not discover any apparent violations.

[4] The United States Department of Labor regulation cited in the policy memorandum, 29 C.F.R. § 785.19 (2016), provides in relevant part: "(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. . . . The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. . . ."

or length of shift, you did not get that break, and it was deducted, please let me know and it will be adjusted. Also, if you have any questions, please come and see me." (Footnote added.)

Following the implementation of the new policy, Hy's accounting department would review the plaintiffs' schedules to determine if they had sufficient time for an hour-long meal break during each shift that exceeded seven and one-half hours, and, if they did, then, in the absence of any notification that the plaintiffs had to work during that time, the accounting department was directed to record a meal break. Zubrinsky explained this process in his deposition testimony: "A chauffeur finishes one trip and the dispatcher gives him another trip. Now, if that trip is, you know, in a half hour or an hour, then there's no time . . . for you to take your break. . . . [I]f you dropped off at [10 a.m.] and your next trip is not until [3 p.m.], then there's time. So, it all depends on which trip the dispatcher gives them." The accounting department would arbitrarily choose one of the lag time hours to designate as the meal break. For example, in the scenario posed by Zubrinsky, an employee in the accounting department would have designated one of the hours between 10 a.m. and 3 p.m. as the chauffeur's break and then adjusted the plaintiffs' time sheets to reflect an hour-long meal break.

If the plaintiffs were unable to take a meal break but saw the meal break deduction on their time sheets, then, pursuant to the meal break policy, they were to notify management so that it could be corrected. Zubrinsky explained, "[i]f a chauffeur brought it to my attention that . . . the hour was deducted and he didn't feel that it should have been deducted, he would come to me. If he came to me, I would analyze it, and if I determined that he should [not] have gotten the . . . deduction, then I direct [an employee] in accounting to give him back the hour. There [are] gray areas here. If it was

even close, I always erred on the side of the chauffeur." Beginning in August, 2017, Hy's permitted the plaintiffs to self-record their meal breaks on their time sheets using the Livery Coach app.

The plaintiffs first filed suit in 2018 in the United States District Court for the District of Connecticut and alleged that Hy's had violated state and federal law by, inter alia, depriving its chauffeurs of bona fide meal breaks, yet automatically deducting one hour per day from their work time. See *Belgada* v. *Hy's Livery Service, Inc.*, Docket No. 3:18-cv-177 (VAB), 2019 WL 632283 (D. Conn. February 14, 2019). While the case was pending, however, the United States Court of Appeals for the Second Circuit issued a decision in which it held that limousine drivers fall within the taxicab exemption of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., "which exempts from the overtime requirement 'any driver employed by an employer engaged in the business of operating taxicabs.' " *Munoz-Gonzalez* v. *D.L.C. Limousine Service, Inc.*, 904 F.3d 208, 212 (2d Cir. 2018). Consequently, the plaintiffs moved for voluntary dismissal of the FLSA claims with prejudice and dismissal of the state law claims without prejudice, which the District Court granted on February 14, 2019. See *Belgada* v. *Hy's Livery Service, Inc.*, supra, 2019 WL 632283, *8.

Because Connecticut law has a narrower taxicab exemption than federal law that has not been applied to chauffeurs, the plaintiffs filed the present action in the Superior Court on April 2, 2019, claiming only a violation of state law.[5] Specifically, the plaintiffs alleged

[5] Connecticut's taxicab exemption, General Statutes § 31-76i, provides in relevant part: "The provisions of sections 31-76b to 31-76j, inclusive, shall not apply with respect to . . . (8) any person employed as a taxicab driver by any employer engaged in the business of operating a taxicab, if such driver is paid forty per cent or more of the fares recorded on the meter of the taxicab operated by him . . . ."

that Hy's had violated General Statutes § 31-58 et seq., the Connecticut Minimum Wage Act (minimum wage act), by improperly deducting the plaintiffs' pay for their meal breaks. Following one year of discovery, the plaintiffs filed a motion for class certification, which was granted by the court, *Ozalis*, *J.*, on April 20, 2020.[6] See *Belgada* v. *Hy's Livery Service*, *Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-19-6090694 (April 20, 2020).

On September 24, 2020, the defendants filed a motion for summary judgment. The defendants argued that they were entitled to summary judgment because, based on the undisputed facts, the plaintiffs did not perform compensable work during their meal breaks. Specifically, the defendants argued that the meal break time is not compensable because the appropriate test for what constitutes compensable "work" is the predominant benefit test; see part I of this opinion; and, in the present case, the plaintiffs spent their meal breaks engaged in activities that were predominantly for their own benefit.[7] The plaintiffs objected to the defendants' motion and moved for partial summary judgment based on their "contract theory"[8] of liability, pursuant to which Hy's policy as

[6] The defendants claim in their brief to this court that the trial court had improperly granted the plaintiffs' motion for class certification because the plaintiffs failed to demonstrate that they met the requirements of Practice Book §§ 9-7 and 9-8 (3). We decline to address this claim because the defendants failed to file an appeal or a cross appeal on this issue pursuant to Practice Book § 61-8. See, e.g., *Avon* v. *Freedom of Information Commission*, 210 Conn. App. 225, 227 n.1, 269 A.3d 852 (2022).

[7] On appeal to this court, the defendants primarily make this same argument—that the trial court correctly determined that the meal breaks were not compensable because they were predominantly for the benefit of the plaintiffs, not Hy's. They also assert, as an alternative ground for affirming the trial court's judgment, that none of the plaintiffs had reported their complaints to Hy's, and, therefore, Hy's was not on notice that the plaintiffs were working during their meal breaks. In light of our ultimate decision, we need not address this alternative ground for affirmance.

[8] See footnote 2 of this opinion.

to meal breaks was an enforceable contract that the defendants had breached.

On April 13, 2021, the court, *Moukawsher*, *J.*, granted the defendants' motion for summary judgment. After considering the parties' arguments, the court concluded that the plaintiffs' meal breaks did not constitute compensable time. This appeal followed. On appeal, the plaintiffs set forth three arguments in support of their claim that their meal breaks were compensable time, and, therefore, the court improperly granted the defendants' motion for summary judgment. First, the plaintiffs assert their "contract theory," that is, that Hy's meal break policy created an enforceable contract that required the defendants to abide by 29 C.F.R. § 785.19, which they posit invokes the completely relieved from duty test. See part I of this opinion. Second, the plaintiffs claim that they were "working" during their meal breaks pursuant to the plain language of General Statutes § 31-76b (2) (A),[9] and the court erred by applying the predominant benefit test to its analysis under the statute. Finally, the plaintiffs argue that, even if it was proper for the court to apply the predominant benefit test, a genuine issue of material fact exists as to whether the meal breaks were for the predominant benefit of Hy's. We disagree. We will address each argument and set forth additional facts therein, but first, we briefly discuss the applicable standard of review.

"Our standard of review with respect to a court's ruling on a motion for summary judgment is well settled.

[9] General Statutes § 31-76b (2) (A) defines "[h]ours worked" as "all time during which an employee is required by the employer to be on the employer's premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so, provided time allowed for meals shall be excluded unless the employee is required or permitted to work. Such time includes, but shall not be limited to, the time when an employee is required to wait on the premises while no work is provided by the employer."

Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Adams* v. *Aircraft Spruce & Specialty Co.*, 215 Conn. App. 428, 440–41, 283 A.3d 42, cert. denied, 345 Conn. 970, 286 A.3d 448 (2022).

I

We first address the plaintiffs' "contract theory." The plaintiffs argue that the court erred in granting the defendants' motion for summary judgment because there is a genuine issue of material fact as to whether the defendants' December 30, 2015 meal break policy

constituted an enforceable contract under which the defendants were obligated to "completely relieve" the plaintiffs of their duties during their meal breaks. They further contend that there is a genuine issue of material fact as to whether the defendants failed to relieve them completely during their meal breaks because they were, among other things, required to act as de facto security guards of their limousines. We disagree.

The December 30, 2015 meal break policy provides in relevant part that "all chauffeurs will be given a [one] hour, unpaid meal break every day . . . pursuant to the [United States] Department of Labor, Code of Federal Regulations, regulation [§] 785.19." Section 785.19 (a) provides that "[b]ona fide meal periods are not worktime" and that "[t]he employee must be *completely relieved from duty* for the purposes of eating regular meals." (Emphasis added.) In light of this language in 29 C.F.R. § 785.19 (a), at least one federal court of appeals has applied the completely relieved from duty test to determine whether a break is compensable work. See *Brennan* v. *Elmer's Disposal Service, Inc.*, 510 F.2d 84, 88 (9th Cir. 1975). This test requires that an employee be relieved of *all* duties, active or inactive, while on their meal break, otherwise the break is not considered to be bona fide. Id. ("[a]n employee cannot be docked for lunch breaks during which he is required to continue with *any* duties related to his work" (emphasis added)). The majority of the federal courts of appeals, however, including the Second Circuit, have adopted the predominant benefit test, which courts have recognized as a more flexible approach. See generally *Babcock* v. *Butler County*, 806 F.3d 153, 156 (3d Cir. 2015); *Hartsell* v. *Dr. Pepper Bottling Co. of Texas*, 207 F.3d 269, 274 (5th Cir. 2000); *Roy* v. *County of Lexington*, 141 F.3d 533, 544–46 (4th Cir. 1998); *Reich* v. *Southern New England Telecommunications Corp.*, 121 F.3d 58, 64–65 (2d Cir. 1997); *Henson* v. *Pulaski County Sheriff Dept.*, 6 F.3d

531, 534 (8th Cir. 1993); *Alexander* v. *Chicago*, 994 F.2d 333, 337 (7th Cir. 1993).[10] The predominant benefit test examines whether the employee is performing activities during his or her meal break that are predominantly for the benefit of the employer. See *Reich* v. *Southern New England Telecommunications Corp.*, supra, 64.

The plaintiffs argue that the defendants, by citing 29 C.F.R. § 785.19 in their meal break policy, were incorporating the completely relieved from duty test into their contract. The plaintiffs specifically rely on this court's decision in *Greene* v. *Waterbury*, 126 Conn. App. 746, 12 A.3d 623 (2011), in which we stated that, "[w]hen a contract expressly incorporates a statutory enactment by reference, that enactment becomes part of a contract for the indicated purposes *just as though the words of that enactment were set out in full in the contract*." (Emphasis in original; internal quotation marks omitted.) Id., 751. The defendants contend that the policy was not a contract, and that, even if it were, the predominant benefit test would govern the analysis based on the Second Circuit's decision in *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 58. In *Reich*, the Second Circuit rejected the completely relieved from duty test that some jurisdictions had applied to 29 C.F.R. § 785.19 and, instead, applied the predominant benefit test. Id., 63–65; see id., 65 ("[i]n our view, this predominant benefit standard sensibly integrates developing case law with the regulations' language and purpose . . . and more importantly, with the language of the FLSA itself" (citation omitted; internal quotation marks omitted.)).

[10] Additionally, two federal courts of appeals have applied the predominant benefit test to an analysis of 29 C.F.R. § 785.19 in conjunction with 29 U.S.C. § 207 (k), which contains special requirements applicable only to law enforcement officers and firefighters. See *Lamon* v. *Shawnee*, 972 F.2d 1145, 1155 (10th Cir. 1992), cert. denied, 507 U.S. 972, 113 S. Ct. 1414, 122 L. Ed. 2d 785 (1993); *Kohlheim* v. *Glynn County*, 915 F.2d 1473, 1476–77 (11th Cir. 1990).

In the present case, the court agreed with the defendants that the meal break policy was not a contract.[11] It further concluded that, even if the policy were a contract, it would be governed by the predominant benefit test, not the completely relieved from duty test, pursuant to *Reich*. It determined that the plaintiffs' meal breaks were predominantly for their own benefit, and "[t]here is no rational way" to find otherwise.[12]

We agree with the defendants and the court that, even if we were to assume, arguendo, that the meal break policy was an enforceable contract, the predominant benefit test governs our analysis. As we previously stated, the majority of the federal courts of appeals have adopted the predominant benefit test in order

[11] The court specifically concluded that the policy was not a contract because of a disclaimer in Hy's employee handbook. The disclaimer states: "Policies set forth in this handbook do not create an employment contract. The policies and procedures contained here are not intended to create a contract or contractual obligations of any kind, or a contract of employment between Hy's and any of its employees. The provisions of the Handbook may be amended or added to with the express written approval of Ownership."

Notably, neither party raised the disclaimer in the trial court. "This court has held that a trial court lacks authority to render summary judgment on a ground not raised or briefed by the parties that does not implicate the court's subject matter jurisdiction." *Kurisoo* v. *Ziegler*, 174 Conn. App. 462, 470–71, 166 A.3d 75 (2017). Moreover, the defendants have failed to provide us with an adequate record. Specifically, the copy of the handbook that the defendants provided to the trial court as an exhibit to their motion for summary judgment states that it was revised in 2017, and they have not pointed us to anything in the record to show that there was a disclaimer in the handbook in 2015, when the policy was emailed to the plaintiffs.

Thus, we conclude that the court did not have the authority or support in the record to rely on the disclaimer in rejecting the plaintiffs' argument. Nevertheless, for the reasons stated in this opinion, we affirm the court's rendering of summary judgment in favor of the defendants.

[12] The court also concluded that, even if the meal break policy were a contract that was governed by the completely relieved from duty test, there was no genuine issue of material fact that the plaintiffs were completely relieved from their duties during their meal breaks, and, therefore, the defendants were entitled to summary judgment. We need not address this determination because of our ultimate conclusion that the completely relieved from duty test is not applicable.

to interpret 29 C.F.R. § 785.19, including the Second Circuit, which has concluded that "§ 785.19 *must* be interpreted to require compensation for a meal break during which a worker performs activities predominantly for the benefit of the employer."[13] (Emphasis added.) *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 64. The plaintiffs' argument that, because the defendants included 29 C.F.R. § 785.19 in their policy they were therefore intending to incorporate the minority test despite its rejection by most courts, including the Second Circuit, is unconvincing. Accordingly, we agree with the trial court that, even if the policy were a contract, it would be governed by the predominant benefit test.[14]

II

The plaintiffs next claim that the court erred by applying the predominant benefit test in its analysis of whether the plaintiffs' meal breaks were compensable pursuant to § 31-76b (2) (A). The plaintiffs argue that the court's analysis should have started and ended with the text of § 31-76b (2) (A), which defines "hours worked" as "all time during which an employee is required by the employer to be on the employer's premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so, provided time allowed for meals shall be excluded unless the employee is required or permitted

[13] "Although decisions of the Second Circuit are not binding on this court . . . [f]ederal case law, particularly decisions of the [Second Circuit] . . . can be persuasive in the absence of state appellate authority . . . ." (Citation omitted; internal quotation marks omitted.) *United Public Service Employees Union, Cops Local 062* v. *Hamden*, 209 Conn. App. 116, 129 n.6, 267 A.3d 239 (2021).

[14] In part III of this opinion, we conclude, based on our plenary review of the record, that the trial court correctly determined that the plaintiffs' breaks were predominantly for their own benefit and, therefore, that the court properly rendered summary judgment in favor of the defendants.

to work." They argue that, because they were required to "guard" their limousines and remain within two miles of their next pickup during their meal breaks, they therefore were required to remain at their "prescribed work place" and, consequently, were "working." The defendants maintain that this argument by the plaintiffs, if accepted, would render the meal break exclusion of § 31-76b (2) (A) superfluous. We agree with the defendants. We further conclude that § 31-76b (2) (A) is ambiguous because it excludes meal breaks "unless the employee is required or permitted to work" during the break, yet it does not define what constitutes "work." Because we conclude that it is ambiguous, we look to extratextual evidence for interpretive guidance and, in doing so, are persuaded that the proper approach in discerning what constitutes "work" is that taken by the federal courts of appeals, i.e., the application of the predominant benefit test. Accordingly, we reject the plaintiffs' claim that the court improperly applied the predominant benefit test to its § 31-76b (2) (A) analysis.

Although the plaintiffs did not assert this claim in their brief to the trial court in opposition to the defendants' motion for summary judgment, they did raise it at oral argument before the court. They argued that "[t]here is a definition of work under Connecticut law," § 31-76b (2) (A), and "if you interpret that statute . . . this case is over. We win . . . ." The defendants argued in response that, although Connecticut law does govern, it must be interpreted through the predominant benefit test because of our Supreme Court's decision in *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 89 A.3d 841 (2014), in which the court applied the predominant benefit test to a Portal-to-Portal Act issue.[15]

[15] The Portal-to-Portal Act of 1947, 29 U.S.C. § 254 (a), as amended by the Employee Commuting Flexibility Act of 1996, Pub. L. No. 104-188, 110 Stat. 1928, was enacted "in response to initial, broad judicial interpretations of the FLSA that had found employer liability for a variety of preliminary and postliminary activities, thus creating wholly unexpected liabilities. . . . [The Portal-to-Portal Act], accordingly, narrowed the coverage of the FLSA

The trial court in the present case ultimately agreed with the defendants. In its decision, the court stated: "§ 31-76b concerning overtime pay includes a definition of how to calculate '[h]ours worked.' [General Statutes § 31-76b (2) (A).] It says 'time allowed for meals shall be excluded unless the employee is required or permitted to work.' [General Statutes § 31-76b (2) (A).] 'Work' in turn has been interpreted by the Connecticut Supreme Court. In 2014 in *Sarrazin* v. *Coastal, Inc.*, [supra, 311 Conn. 581] the [c]ourt said an employee is engaged in 'work' when spending time 'predominantly for the employer's benefit.' " Because the court in its memorandum of decision already had determined that the plaintiffs' meal breaks were predominantly for their own benefit, it therefore rejected the plaintiffs' argument.

On appeal, the plaintiffs argue that the court erred in applying the predominant benefit test in its § 31-76b (2) (A) analysis. They contend that their meal breaks were "hours worked" pursuant to the plain language of § 31-76b (2) (A) because they were required by Hy's policies to "guard" their limousines and remain within two miles of their next pickup and, therefore, were required to be "at the prescribed work place . . . ." The defendants argue that this claim is an "attempted ambuscade" because the plaintiffs "did not assert that there was any difference between the Connecticut [minimum wage act] standard and the . . . FLSA standard prior to oral argument," and because the plaintiffs' own motion for summary judgment cited to *Sarrazin* "for the proposition that Connecticut law requires that

by excluding liability for most commuting time and preliminary and postliminary activities. . . . The Employee Commuting Flexibility Act of 1996 further limited employer liability by amending the Portal-to-Portal Act to clarify that otherwise non-compensable commuting to work is not compensable merely because the employee uses his employer's vehicle." (Citations omitted; internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 586–87 n.9.

employers pay their employees for all time that is spent 'predominantly for the employer's benefit.' " The defendants further argue that, nonetheless, this claim fails as a matter of law. They maintain that the plaintiffs' interpretation of the statute—that they are working during their meal breaks because they are required to remain at their prescribed workplace—renders the meal break exclusion of the statute superfluous. They contend that the statute "can be read simply and easily . . . as mandating that time during which an employee is required to be at an employer's premises or other workplace constitutes hours worked, except for meal break time, provided no work is done during the meal break," and that *Sarrazin* "is the best authority for the definition of 'work' in Connecticut."

Analysis of this claim "raises a question of statutory construction, which is a [question] of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply." (Internal quotation marks omitted.) *Weems* v. *Citigroup, Inc.*, 289 Conn. 769, 778–79, 961 A.2d 349 (2008). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual

evidence of the meaning of the statute shall not be considered. . . .

"A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation . . . . When a statute is not plain and unambiguous, among other things, we look for interpretive guidance . . . to the legislative policy [the statute] was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Citations omitted; internal quotation marks omitted.) *Centrix Management Co., LLC* v. *Fosberg*, 218 Conn. App. 206, 210, 291 A.3d 185 (2023).

We begin with the text of § 31-76b (2) (A), which defines "[h]ours worked" as "all time during which an employee is required by the employer to be on the employer's premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so, *provided time allowed for meals shall be excluded unless the employee is required or permitted to work*. Such time includes, but shall not be limited to, the time when an employee is required to wait on the premises while no work is provided by the employer." (Emphasis added.) General Statutes § 31-76b (2) (A). Section 31-76b (2) (A) does not address what constitutes "work." If, for example, a chauffeur is on his or her meal break but is required to monitor his or her phone for communications from dispatch, it is unclear under the statute whether that would be considered "work" such that the meal break would actually constitute an "hour worked." Moreover, if the plaintiffs are correct and employees are engaging in "work" under the statute whenever they are at their prescribed workplace regardless of whether they are on a meal break, then, as the defendants point out, the

meal break exclusion of the statute would be superfluous, and "[i]t is well settled that [i]nterpreting a statute to render some of its language superfluous violates cardinal principles of statutory interpretation." (Internal quotation marks omitted.) *In re Annessa J.*, 343 Conn. 642, 674, 284 A.3d 562 (2022).

Although statutory silence does not generally "equate to ambiguity," it "may render a statute ambiguous when the missing subject reasonably is necessary to effectuate the provision as written." (Internal quotation marks omitted.) *State* v. *Ramos*, 306 Conn. 125, 136, 49 A.3d 197 (2012); see also *Stuart* v. *Stuart*, 297 Conn. 26, 37, 996 A.2d 259 (2010) (concluding silence as to standard of proof under statute that provides treble damages for civil theft renders statute ambiguous because there was "more than one plausible interpretation of its meaning"). In the present case, the missing subject—what is "work"—is reasonably necessary to effectuate the statutory definition of "hours worked." Without a definition of work, there is more than one plausible interpretation of its meaning under the statute. Accordingly, § 1-2z permits us to consult extratextual sources.

We first note that the legislative history, including from when § 31-76b (2) (A) was enacted as part of the overtime wage act; see Public Acts 1967, No. 493, § 1, codified at General Statutes § 31-76b (Cum. Supp. 1967); is silent about what constitutes "work" for purposes of this statute. The legislative history does make clear, however, that the purpose of the act was to make Connecticut law coextensive with federal overtime law. See, e.g., Proposed Senate Bill No. 1269, 1967 Sess. ("Statement of Purpose: To extend payment of the same overtime as provided in the federal law to all employees covered by the state minimum wage act"); Conn. Joint Standing Committee Hearings, Labor, 1967 Sess., p. 172, testimony of Department of Labor Deputy Commissioner Leo J. Dunn ("[Senate Bill No.] 1269 is merely

to extend the payment of overtime as provided in the [f]ederal [l]aw to all that are covered by the [s]tate [l]aw. Employers, many times, cite the differences as confusing . . . ."); see also *Williams* v. *General Nutrition Centers, Inc.*, 326 Conn. 651, 659, 166 A.3d 625 (2017) ("[General Statutes §] 31-76c, which sets forth the overtime requirement, is nearly identical to the federal overtime statute," 29 U.S.C. § 207 (a) (1)). We therefore look to decisions of federal courts interpreting "work" under the FLSA for guidance. See, e.g., *Weems* v. *Citigroup, Inc.*, supra, 289 Conn. 779–82 (looking to decisions of other courts interpreting "wages" in § 1-2z analysis after concluding Connecticut's statutory definition was ambiguous and its legislative history silent).

"Although the FLSA itself does not define 'work,' the [United States] Supreme Court has attempted to do so. In *Tennessee Coal, Iron & [Railroad] Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598, 64 S. Ct. [698], 88 L. Ed. 949 (1944) [*Tennessee Coal*], the [c]ourt held that 'work' under the FLSA means 'physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.' At about the same time, the [c]ourt counseled that the determination of what constitutes work is necessarily fact-bound. See, e.g., *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133, 65 S. Ct. [165], 89 L. Ed. 118 (1944) ('Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.'); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136–37, 65 S. Ct. [161], 89 L. Ed. 124 (1944) (similar)." *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 64. This has become known as the predominant benefit test.

Since *Tennessee Coal* and its progeny, federal and state courts consistently have applied the predominant

benefit test in an effort to discern what constitutes compensable "work," including in meal break cases interpreting 29 C.F.R. § 785.19, as discussed in part I of this opinion. In *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 58, for instance, the Second Circuit concluded that, "[t]o be consistent with the FLSA's use of the term 'work' . . . we believe 29 C.F.R. § 785.19 must be interpreted to require compensation for a meal break during which a worker performs activities predominantly for the benefit of the employer." Id., 64. The predominant benefit test also is used to define "work" in cases that present issues under the federal Portal-to-Portal Act relating to commuting time.

In the present case, both the court and the parties specifically relied on our Supreme Court's decision in *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 581, a Portal-to-Portal Act case. The court in *Sarrazin* stated: "Decisions interpreting the Portal-to-Portal Act have carved out an exception to the general rule that travel time is not compensable. Courts have emphasized that the employee bears the burden of demonstrating that his or her travel time is compensable, and that compensability turns on the question of whether the employee's travel time constitutes 'work.' . . . To determine whether travel time constitutes compensable 'work' under the Portal-to-Portal Act, courts consider . . . *whether the 'time is spent predominantly for the employer's benefit or for the employee's* [*which*] *is a question dependent upon all the circumstances of the case.*' " (Citations omitted; emphasis added.) Id., 598.

We find the federal interpretation of "work"—the predominant benefit test—highly persuasive. It is well settled that, when interpreting statutes, words and phrases are to be construed according to their "commonly approved usage"; General Statutes § 1-1 (a); and that is exactly what the United States Supreme Court

did when it created the predominant benefit test. See *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123*, supra, 321 U.S. 598 and n.11 (looking to dictionary definition of "work" in order to define it as it is "commonly used"). The federal test consistently has been applied to Portal-to-Portal Act cases to define "work," including by our Supreme Court in *Sarrazin*,[16]

[16] Although the plaintiff in *Sarrazin* asserted violations of the FLSA and Connecticut law, the court concluded that § 31-60-10 of the Regulations of Connecticut State Agencies, which defines "[t]ravel time" and is seemingly this state's version of the federal Portal-to-Portal Act, confers lesser benefits to employees than does its federal counterpart based on the facts of the case. Consequently, the court concluded that the Connecticut statute was preempted and, therefore, conducted an analysis only under federal law. Justice McDonald authored a concurring opinion in which he disagreed with the majority that the Connecticut statute was preempted. See *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 616–17 (*McDonald, J.*, concurring). His analysis under state law, however, yielded the same result—that the court did not err in concluding that the plaintiff's commuting time was not compensable. Id., 625–26.

Because the court analyzed the plaintiff's claim under federal law, and because *Sarrazin* was a Portal-to-Portal Act case, which the present case is not, we therefore agree with the plaintiffs that *Sarrazin* does not require that, for purposes of Connecticut minimum wage law, the predominant benefit test is the applicable test for what constitutes "work." We consequently agree with the plaintiffs that the trial court erred in citing *Sarrazin* as the authority for its application of the predominant benefit test in its § 31-76b (2) (A) analysis without first engaging in statutory interpretation. However, because we conclude that the federal predominant benefit test is the best definition of "work" for purposes of interpreting § 31-76b (2) (A), we nonetheless affirm the court's judgment. See, e.g., *Amsden* v. *Fischer*, 62 Conn. App. 323, 327, 771 A.2d 233 (2001) (this court "may affirm a trial court's decision that reaches the right result, albeit for the wrong reason" (internal quotation marks omitted)).

We also note that our decision to use the predominant benefit test to interpret § 31-76b (2) (A) is bolstered by the regulation that was relevant in *Sarrazin*, § 31-60-10 (b) of the Regulations of Connecticut State Agencies, which provides in relevant part: "When an employee, in the course of his employment, is required or permitted to *travel for purposes which inure to the benefit of the employer*, such travel time *shall be considered to be working time* and shall be paid for as such. . . ." (Emphasis added.) Thus, the Department of Labor regulation seemingly subscribes to the concept of the predominant benefit analysis in ascertaining what constitutes "work" for purposes of Connecticut wage law.

and has been applied by a majority of the federal courts of appeals in meal break cases involving 29 C.F.R. § 785.19, including the Second Circuit. See *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 64. Given that the legislative purpose of § 31-76b (2) (A) was to make Connecticut's wage law coextensive with its federal counterpart, and the fact that our appellate courts customarily have looked to federal law when interpreting our analogous state law scheme; see, e.g., *Roto-Rooter Services Co.* v. *Dept. of Labor*, 219 Conn. 520, 528 n.8, 593 A.2d 1386 (1991) (considering federal precedent on meaning and scope of FLSA exemption in order to interpret equivalent state law exemption); we determine that the predominant benefit test should be applied to the plaintiffs' state law claim under § 31-76b (2) (A). See also *Williams* v. *General Nutrition Centers, Inc.*, supra, 326 Conn. 659 ("[w]e see no reason to interpret [the relevant Connecticut wage statute] differently from its federal counterpart").[17] Accordingly, we conclude that, pursuant to § 31-76b (2) (A), a meal break is not an "hour worked"

[17] Notably, the plaintiffs themselves seem to agree that it is appropriate for us to rely on federal case law interpreting the FLSA to interpret this state's minimum wage act. In the section of their brief describing the nature of the proceedings and facts of the case, the plaintiffs state: "Connecticut courts look to federal FLSA interpretations to construe the Connecticut [Minimum] Wage Act. The Second Circuit has held that employers must pay wages if they require their employees to spend their time 'predominantly for the benefit of the employer.' *Reich* v. [*Southern New England Telecommunications Corp.*, supra], 121 F.3d [64] . . . (employer required to pay workers because they required that workers guard the employer's vehicles during meal breaks)." The plaintiffs even seem to agree that using the federal test is appropriate for interpreting an undefined term in § 31-76b (2) (A). In one of their arguments in their brief to this court, they state: "Under . . . § 31-76b (2) [(A)], employee time is compensable as 'hours worked' if the employee is 'on duty.' While 'on duty' is not defined by statute, Connecticut courts 'look to decisions interpreting [the] FLSA with respect to claims brought under the [this state's minimum wage act].' . . . *Roto-Rooter Services Co.* v. *Dept. of Labor*, [supra], 219 Conn. 528 n.8 . . . . The Second Circuit has held that employees' time is compensable if it is 'predominantly for the benefit of the employer.' " (Citations omitted.)

unless the "employee is required or permitted to work" during that break, and the test for what constitutes "work" is the predominant benefit test. We therefore reject the plaintiffs' second claim.[18]

III

The plaintiffs finally claim that, even if the court correctly applied the predominant benefit test, it erred by concluding that the defendants had met their burden of demonstrating that, based on the undisputed facts, the meal breaks were for the predominant benefit of the plaintiffs, not Hy's. We are not persuaded.

The predominant benefit test is a case-by-case analysis and requires "an inquiry that is undertaken by assessing the relative benefits gained by the employer and the burdens imposed on the employee by an

[18] At least one court, the United States District Court for the District of Connecticut, already has applied the predominant benefit test to a § 31-76b (2) (A) analysis. In *Richardson* v. *Costco Wholesale Corp.*, 169 F. Supp. 2d 56 (D. Conn. 2001), the plaintiff employees alleged violations of both the FLSA and Connecticut minimum wage law. They alleged that they were required to remain locked in the defendant employer's warehouse after their shifts until the conclusion of the daily closing collection procedure during which employees would, among other things, bring cash from the cash registers to the vault. Id., 59. The employees claimed that the employer's failure to pay them wages for that time constituted a violation of federal and state law. Id. The court stated: "Section 31-76b (2) (A) defines 'hours worked' as 'all time during which an employee [is required] by the employer . . . to be on the employer's premises or to be on duty, or to be at the prescribed work place, and all time during which an employee is employed or permitted to work, whether or not required to do so.' Thus, the determination of whether plaintiffs' claim is meritorious depends upon whether their time spent during the 'lock-up' constitutes work as defined by the Connecticut General Statutes and the FLSA." Id., 60. In a footnote, the court noted that, "[t]o interpret the Connecticut wage and hour statutes, Connecticut courts look to authorities relevant to the FLSA. See *Canzolino* v. *United Technologies* [*Corp.*, judicial district of Ansonia-Milford, Docket No. CV-94-0147285 (November 30, 1998) (23 Conn. L. Rptr. 207)]." *Richardson* v. *Costco Wholesale Corp.*, supra, 60 n.1. The court then applied the predominant benefit test in order to decide whether the employees' time locked up in the warehouse constituted compensable time. Id., 60–61.

employer's demands or restrictions [during] the employee's [meal breaks]." *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 598. Thus, "courts consider whether the 'time is spent predominantly for the employer's benefit or for the employee's [which] is a question dependent upon all the circumstances of the case.' " Id. "The balancing of benefits and burdens is on a continuum, and the more that the employer's requirements burden the employee, preventing the employee from using that . . . time as he otherwise would have, the more likely a court will conclude that the time is for the predominant benefit of the employer. Even if some . . . of the . . . time is for the predominant benefit of the employer, that activity will still be noncompensable if the amount of time involved is de minimis." Id., 602. Essentially, it is a "sliding scale," and, "at a certain point, when the benefits received by the employer and the burdens imposed on the employee are substantial, the time no longer can be viewed as belonging to the employee, and the time becomes compensable." Id., 600.

In *Singh* v. *City of New York*, 524 F.3d 361 (2d Cir. 2008), for instance, which, like *Sarrazin*, was a Portal-to-Portal Act case, the Second Circuit affirmed the District Court's summary judgment rendered in favor of the defendant employer because it concluded that the time for which the plaintiff employees were seeking compensation was de minimis as a matter of law and did not constitute work under the predominant benefit test. Id., 364, 368–69. In that case, the employees were fire alarm inspectors who were required to carry and keep safe necessary inspection documents during their commutes from home to work and back. Id., 365. They argued "that carrying and keeping safe inspection files [affected] their commutes in various ways and that they should therefore be compensated for their time and effort." Id. The Second Circuit disagreed. It noted that,

in order for the plaintiffs to prevail under the Portal-to-Portal Act, they had to demonstrate, inter alia, that carrying the documents during their commute constituted work; id., 367; and "whether an employee's expenditure of time is considered work under the FLSA turns in part on whether that time is spent predominantly for the benefit of the employer or the employee." Id., 368. The court elaborated, stating that, in applying the predominant benefit test, "courts have distinguished between employer requirements that substantially hinder an employee's ability to use the time freely and those requirements that place only *a minimal burden* on the employee's use of time." (Emphasis added.) Id.

Ultimately, the court in *Singh* concluded that "[c]arrying a briefcase during a commute presents only a minimal burden on the inspectors, permitting them freely to use their commuting time as they otherwise would have without the briefcase. Whether it be reading, listening to music, eating, running errands, or whatever else the plaintiffs choose to do, their use of the commuting time is *materially unaltered*. While the [city employer] certainly benefits from the plaintiffs' carrying these materials, it cannot be said that the [c]ity is the predominant beneficiary of this time."[19] (Emphasis

[19] The Second Circuit acknowledged in *Singh* v. *City of New York*, supra, 524 F.3d 369, that its predominant benefit test analysis "in many ways resembles a de minimis test" analysis. The de minimis doctrine originated in a United States Supreme Court decision, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), in which the court observed: "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the [FLSA]. It is only when an employee is required to give up a substantial measure of his [or her] time and effort that compensable working time is involved." Id., 692. The de minimis doctrine has since been construed as requiring the application of three distinct factors: "(1) the administrative difficulty of recording the time; (2) the size of the claim in the aggregate; and (3) whether the tasks occur regularly." *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586, 594–95 n.7 (2d Cir. 2007), cert. denied, 553 U.S. 1093, 128 S. Ct. 2902, 171 L. Ed. 2d 841 (2008). It is often applied in Portal-to-Portal Act cases, including by the Second Circuit. See,

added.) Id., 368–69. Accordingly, the court affirmed the summary judgment rendered in favor of the defendant.

In addition to *Singh*, we agree with the defendants that *Perkins* v. *Bronx Lebanon Hospital Center*, 715 Fed. Appx. 103 (2d Cir. 2018), is instructive. In *Perkins*, the Second Circuit affirmed the District Court's summary judgment rendered in favor of the defendant employer. As summarized by the District Court, the plaintiff in *Perkins*, a "safety officer" employed by the defendant hospital, had to remain on the premises during his meal break and "carry his 'radio, cell phone and/or [f]ire [c]ommand pager' " at all times so that he could be contacted in case of an emergency. *Perkins* v. *Bronx Lebanon Hospital Center*, United States District Court, Docket No. 14-civ.-1681 (JCF) (S.D.N.Y. October 31, 2016), aff'd, 715 Fed. Appx. 103 (2d Cir. 2018). If his meal break was interrupted, hospital policy required

e.g., id., 593; see also id., 594 n.7 (concluding that, based on three factors, pleadings supported finding that time employees spent conducting various activities, such as walking to jobsite and waiting in line to pass through X-ray machine, was so de minimis that it did not constitute compensable work).

In *Singh*, the Second Circuit stated: "Although we reach our holding based on the predominant benefit test, our analysis in many ways resembles a de minimis test. In an analogous case, the United States Court of Appeals for the Sixth Circuit held that police officers need not be compensated for their entire commuting time, during which they were required to monitor police radios in order to respond to emergencies, because 'the amount of work involved in monitoring a police radio during a commute is simply de minimis.' [*Aiken* v. *Memphis*, 190 F.3d 753, 759 (6th Cir. 1999), cert. denied, 528 U.S. 1157, 120 S. Ct. 1164, 145 L. Ed. 2d 1075 (2000)]. As the court explained, the compensability of the commute is determined by 'whether the employer requires the employee to perform a significant amount of work during the commute.' [Id., 759 n.4]. Our analysis mirrors that of the Sixth Circuit; we simply reach our holding through a slightly different path. The point is that, under either approach, when an employee is minimally restricted by an employer during a commute, such that his or her use of commuting time is materially unaltered, the commuting time will generally not be compensable under the FLSA." *Singh* v. *City of New York*, supra, 524 F.3d 369.

In the present case, we acknowledge that our analysis resembles a de minimis test analysis to some extent. However, we, like the Second Circuit in *Singh*, instead reach our holding through the predominant benefit test path.

him to notify his supervisor so that he could be paid for the time. Id. The District Court concluded that, "[a]lthough the [h]ospital indisputably receive[d] some benefit from [the officer's] presence on site, he has the ability to spend his thirty-minute break as he wishes as long as he remains on the premises with a communications device so that he can be contacted in the event of an emergency, and his thirty-minute break has rarely, if ever, been interrupted. Those restrictions do not 'convert . . . meal time to work time.' "[20] Id. The Second Circuit agreed. See *Perkins* v. *Bronx Lebanon Hospital Center*, supra, 715 Fed. Appx. 104. In its brief analysis, the Second Circuit stated: "For a meal break to be

[20] We also find two cases that the District Court in *Perkins* relied on to be persuasive. The court first relied on a decision of the United States Court of Appeals for the Sixth Circuit, *Ruffin* v. *MotorCity Casino*, 775 F.3d 807 (6th Cir. 2015). In that case, the plaintiffs, security guards for a casino, argued that their meal breaks should constitute compensable time because they were required to remain on the casino property, monitor two-way radios, and respond to emergencies if necessary. Id., 809. The court disagreed. It concluded that, under the predominant benefit test, the security guards were not engaging in compensable "work." Id., 814. It specifically concluded that monitoring a radio "is a de minimis activity, not a substantial job duty"; id., 812; and that the evidence was "undisputed that [the] plaintiffs spent their meal periods 'adequately and comfortably' . . . by eating, reading, socializing, and conducting personal business on their phones . . . ." (Citation omitted.) Id. Accordingly, the court "affirm[ed] the grant of summary judgment to [the defendant]." Id., 809.

The District Court in *Perkins* also relied on *Babcock* v. *Butler*, supra, 806 F.3d 153. In *Babcock*, the plaintiffs were correction officers who claimed that their meal breaks constituted compensable time because they could not leave the prison without permission from the warden and had to "remain in uniform, in close proximity to emergency response equipment, and on call to respond to emergencies." Id., 155. They argued that, because of these policies, they could not "run personal errands, sleep, breathe fresh air, or smoke cigarettes during mealtime," and, therefore, they should be compensated. Id. The United States Court of Appeals for the Third Circuit concluded that the District Court had properly granted the defendant's motion to dismiss on the ground that the meal periods were not compensable. Id., 158. The Third Circuit specifically concluded that, "although [the plaintiffs] face[d] a number of restrictions during their meal period, the District Court correctly found that, on balance, these restrictions did not predominantly benefit the employer." Id., 157.

compensable under the FLSA and [the relevant New York State law], that break must be predominantly for the benefit of the employer. . . . Review of the record and relevant case law reveals that the district court correctly concluded that [the officer's] mealtime activities were not predominantly for the hospital's benefit." (Citation omitted.) Id. It consequently affirmed the District Court's summary judgment rendered in favor of the defendant. Id.

We similarly conclude, on the basis of our plenary review of the record, that the defendants met their initial burden of establishing the lack of a genuine issue of material fact that the plaintiffs' meal breaks were predominantly for their own benefit and, accordingly, were not compensable as a matter of law. The evidence submitted by the defendants in support of their motion for summary judgment, particularly the excerpts from the named plaintiffs' depositions, established that the plaintiffs had used their meal breaks for their own benefit and that any burdens placed on them during their breaks were too minimal for it to be said that Hy's was the predominant beneficiary of the time.

The undisputed evidence in the record supports the trial court's determination that the plaintiffs were able to spend their meal break time as they wished. For example, one of the named plaintiffs, Dziekan, stated that, during his meal breaks he would go to malls, convenience stores, restaurants, and offtrack betting. Dziekan also agreed that, in addition to going into restaurants on his meal breaks, he engaged in other activities such as using the Internet on his phone and conversing with other chauffeurs outside, in one another's vehicles, or at service areas at airports. Another named plaintiff, Akhundzadeh, also agreed that, during his breaks, he could go to a restaurant within two miles of his next pickup location and could "go to a limousine parking

lot and chat with friends, acquaintances, [or] other coworkers . . . ."

Although it is undisputed that the plaintiffs were expected to engage in some activities during their meal breaks for Hy's benefit, the defendants have submitted evidence establishing that, as a matter of law, those activities did not transform the meal breaks into compensable work time. For instance, it is undisputed that the plaintiffs were expected to keep their phones on them during their meal breaks so that they could converse with dispatch about new or upcoming trips. However, Dziekan stated in his deposition that he never was unable to enter a restaurant during his breaks because of the risk of dispatch calling him and that, when his meals had been interrupted, he was compensated for the break. It also is undisputed that the plaintiffs were required to monitor the status of their next passenger's arrival flight and, if necessary, clean and vacuum the limousine between trips and get gas. Yet, the undisputed evidence shows that these tasks would only take a few minutes, if they were performed at all. Dziekan testified that monitoring the flight status takes "a few clicks" and that he did not need to vacuum between every trip. Moreover, when Akhundzadeh was asked, "[a]side from [keeping your smartphone on], during these long breaks . . . what were you doing predominantly for the benefit of Hy's during that time period?" he responded, "[j]ust being on call."

Thus, the plaintiffs do engage in some mealtime activities that are indisputably for Hy's benefit, such as keeping their phones on and cleaning the limousines. However, as in *Singh* and *Perkins*, the defendants have demonstrated that those restrictions are minimal, and that, despite these activities, the plaintiffs could spend their breaks however they wished, whether that was by "reading, listening to music, eating"; *Singh* v. *City of New York*, supra, 524 F.3d 368; or even sports betting.

Accordingly, we conclude that the defendants have met their initial burden to demonstrate that, based on the undisputed facts, the plaintiffs' meal breaks were not compensable as a matter of law.

Because the defendants met their initial burden, the plaintiffs then needed to present evidence that demonstrated the existence of a genuine issue of material fact. See, e.g., *Washburne* v. *Madison*, 175 Conn. App. 613, 619–20, 167 A.3d 1029 (2017), cert. denied, 330 Conn. 971, 200 A.3d 1151 (2019). On appeal, the plaintiffs argue that they met their burden because they established that Hy's required them to "guard" their limousines and stay within two miles of their next pickup location. They argue that, therefore, there is a genuine issue of material fact as to whether the meal breaks were for Hy's benefit.

The plaintiffs primarily refer to the following policies in support of their argument: a provision in Hy's employee handbook providing that chauffeurs may be subject to discipline if, inter alia, they "leav[e] a company vehicle unattended for any reason other than the occasion of performing an 'airport pickup' "; a handbook provision relating to chauffeur liability for vehicle damage, which they argue the defendants "routinely charged the[m] [for] under that provision regardless of whether they were at fault"; and the language from the December 30, 2015 meal break policy, providing that the plaintiffs "may take [their meal] break anywhere within a radius of [two] miles from [their] next pick up." The plaintiffs argue that these policies prevented them from using their meal breaks for their own purposes because they were restricted to the two mile radius surrounding their next pickup location and had to guard their limousines during their breaks or otherwise risk being disciplined or facing financial liability. As support for this argument, the plaintiffs rely on *Reich*

v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 58. We disagree.

First, although the plaintiffs rely on these policies to support their position that they had to "guard" their vehicles and, thus, were unable to use their meal breaks for their own purposes, the record indicates these policies were not strictly enforced. For instance, Zubrinsky testified in his deposition that the two mile radius rule "wasn't a strict two miles, you know; guys went more than that, [a]s long as it was reasonable," and that, if "[s]omebody went three or four miles, nobody's bothering anybody." But even if this policy was strictly enforced, federal case law applying the predominant benefit test has consistently held that meal breaks are noncompensable even if the employee is required to remain on the premises, let alone remain within a two mile radius of the premises. See, e.g., *Perkins* v. *Bronx Lebanon Hospital Center*, supra, 715 Fed. Appx. 104; *Babcock* v. *Butler*, supra, 806 F.3d 157; *Ruffin* v. *MotorCity Casino*, 775 F.3d 807, 814 (6th Cir. 2015).[21] Moreover, Dziekan's testimony that he would go to restaurants, offtrack betting, and malls demonstrates that this time, regardless of the geographic parameters, belonged predominantly to the plaintiffs, not Hy's.

More importantly, we are unpersuaded by the plaintiffs' argument because they have not provided any evidence to support their claim that they actually did "guard" their limousines. They have failed to identify a single specific instance in which they lacked the opportunity to take a meal break because they were compelled to "guard" their vehicles. In fact, the defendants have provided evidence to the contrary. Dziekan was specifically asked at his deposition whether he was

[21] Notably, even the federal regulation that the plaintiffs argued was applicable pursuant to their contract theory, 29 C.F.R. § 785.19, provides that "[i]t is not necessary that an employee be permitted to leave the premises" in order for a meal break to be bona fide. 29 C.F.R. § 785.19 (b).

ever "standing out there guarding the car" during his meal breaks, to which he responded, "[n]o." He was then asked, "[w]hen you go in a restaurant to have a meal, do you always sit by the window to watch the car?" and he again responded, "[n]o, I do not." He later stated in response to another question about sitting by the window at a restaurant: "Generally, I don't really keep that in mind. I—you know, back of my mind I'm maybe looking out the window, but I don't necessarily make a conscious effort to do that."

Finally, we are not persuaded by the plaintiffs' reliance on *Reich* v. *Southern New England Telecommunications Corp.*, supra, 121 F.3d 58. In *Reich*, the workers were employed to install, replace, and maintain telephone poles and cables, and therefore "routinely work[ed] on the lines strung between telephone poles, in trenches . . . and in manholes." Id., 62. They were therefore required to stay on the worksite during their meal breaks so they could "secure the area and its equipment and to prevent possible harm to the public." Id., 63. The Second Circuit concluded that their meal breaks were compensable because they were "restricted to the site for the purpose of performing valuable security service for the company." Id., 65. In reaching this conclusion, the court relied on the "importance, indeed indispensability," of the services the workers provided and the fact that, if the workers were not providing this security, the employer would have had to pay others to perform that very service. Id. Again, the plaintiffs in the present case have not provided any evidence to support their contention that they had, in fact, been "guarding" their limousines during their meal breaks, and the record supports a contrary conclusion. Moreover, even if we assume, arguendo, that the plaintiffs had provided such evidence, we are still not persuaded by their reliance on *Reich* because it is indisputable that "guarding" a limousine parked in a restaurant

parking lot is not as "indispensable" of a service as the service provided by the workers in *Reich*.

In sum, we conclude that there was no genuine issue of material fact that the plaintiffs' meal breaks were predominantly for their own benefit, and, therefore, the defendants were entitled to judgment as a matter of law. Accordingly, the court properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLES CORNELIUS *v.* MARKLE INVESTIGATIONS, INC., ET AL.
(AC 45319)

Alvord, Cradle and Clark, Js.

Syllabus

The plaintiff sought damages from the defendants, H Co., a private high school, and M Co., a company that provided investigative services to H Co., for invasion of the plaintiff's privacy by intrusion upon seclusion. The plaintiff attended H Co. in the 1980s but was expelled prior to graduation. In 2001, the plaintiff obtained, without permission, stationery and envelopes embossed with H Co.'s letterhead, with which he attempted to mail an organized hate group's anti-Semitic newsletter to approximately 1000 of H Co.'s alumni. Shortly thereafter, the police searched the plaintiff's home, which was located across the street from H Co.'s campus, and found an arsenal of weapons, bomb making materials, and anti-Semitic and racist materials. The plaintiff pleaded guilty in both state and federal court to charges stemming from the conduct underlying the search and the items seized by the police. He was incarcerated, and H Co. was registered as a victim of his crimes. In 2016, following the plaintiff's release from prison, H Co. hired M Co. to surveil the plaintiff. Thereafter, the plaintiff filed this action against the defendants alleging, inter alia, that, in carrying out their surveillance, the defendants intentionally intruded upon his solitude, seclusion and private affairs or concerns by following and surveilling him in various public spaces and that such an intrusion would be highly offensive to a reasonable person. Each of the defendants filed a motion for summary judgment, asserting, inter alia, that the plaintiff could not demonstrate that he had

an objectively reasonable expectation of seclusion because there was no evidence that he was surveilled in any private place and that their conduct was not highly offensive or strongly objectionable but, rather, was reasonable and justified given the circumstances. The trial court granted the defendants' motions, and the plaintiff appealed to this court. *Held* that the trial court properly rendered summary judgment in favor of the defendants because, in viewing the evidence in the light most favorable to the plaintiff, there were no genuine issues of material fact as to the second and third elements of the plaintiff's claim of invasion of privacy by intrusion upon seclusion: there was no genuine issue of material fact that the plaintiff had an objectively reasonable expectation of seclusion or solitude, and, accordingly, that there was an actionable intrusion, because the defendants surveilled the plaintiff only while he was in a public setting, the defendants never viewed the plaintiff's mail, his wallet or his private bank account when he was observed at an automated teller machine, and the defendants used only basic equipment during their surveillance to capture images of the plaintiff while he was in public; moreover, contrary to the plaintiff's claim, the surveillance was not overzealous or unreasonably intrusive because the defendants did not physically enter the plaintiff's private property, did not utilize advanced electronic surveillance equipment to oversee or overhear the plaintiff's affairs, and did not surveil the plaintiff for the purpose of hounding or harassing him; furthermore, there was no genuine issue of material fact as to whether any alleged intrusion by the defendants would be highly offensive to a reasonable person because the manner in which M Co. surveilled the plaintiff was reasonable and justified, as the plaintiff's history with H Co. and his past conduct rightfully caused H Co. to be concerned about potential danger to its staff and students after the plaintiff was released from prison, such concern was also expressed by the state sentencing court and was acknowledged by the plaintiff himself, and, even after the plaintiff knew he was being surveilled, he sought information regarding the security practices being implemented in schools throughout the state, including at H Co.; accordingly, the burden shifted to the plaintiff, as the nonmoving party, to demonstrate the existence of some disputed factual issue, which the plaintiff failed to do, as the excerpts from transcripts of the depositions of M Co.'s investigators, which the plaintiff presented in support of his assertions, failed to demonstrate any issues of material fact.

(*One judge concurring separately*)

Argued February 27—officially released June 20, 2023

Procedural History

Action to recover damages for invasion of privacy, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S.*

Richards, *J.*, granted the motion to dismiss the plaintiff's claims against the defendant Hopkins Committee of Trustees filed by the defendant Hopkins Committee of Trustees et al.; thereafter, the court, *S. Richards*, *J.*, granted the motions for summary judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Eric M. Creizman, pro hac vice, with whom was *Thomas V. Juneau*, *Jr.*, for the appellant (plaintiff).

Eva K. Larsen, with whom were *Megan A. Kittler*, and, on the brief, *James L. Brawley*, for the appellee (named defendant).

James M. Sconzo, with whom was *Amanda M. Brahm*, for the appellee (defendant Hopkins School, Inc.).

Opinion

ALVORD, J. The plaintiff, Charles Cornelius, appeals from the judgment of the trial court granting the motions for summary judgment filed by the defendants Markle Investigations, Inc. (Markle), and Hopkins School, Inc. (Hopkins School).[1] On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants as to the plaintiff's claim of invasion of privacy by intrusion upon seclusion because genuine issues of material fact existed as to whether (1) the defendants' alleged intrusion was intentional, (2) the defendants' surveillance of the plaintiff solely in public was an actionable intrusion, and (3) the defendants' surveillance of the plaintiff was highly offensive

[1] The plaintiff also named "Hopkins Committee of Trustees" as a defendant in his complaint. Hopkins School and "Hopkins Committee of Trustees" filed a joint motion to dismiss the plaintiff's complaint as to "Hopkins Committee of Trustees" pursuant to Practice Book § 10-30. The court granted the joint motion to dismiss. Accordingly, all references in this opinion to the defendants are solely to Hopkins School and Markle, collectively.

to a reasonable person. We disagree with the plaintiff as to his claims regarding whether there was an actionable intrusion and whether such intrusion was highly offensive[2] and, accordingly, affirm the judgment of the trial court.[3]

The following facts, viewed in the light most favorable to the plaintiff, and procedural history, are necessary for our resolution of this appeal. The plaintiff attended high school at Hopkins School, during which time he was disciplined on several occasions and was expelled from the school for plagiarism in 1987. In October, 2001, the plaintiff obtained, without permission, stationery and envelopes embossed with Hopkins School's letterhead with which he attempted to mail a National Alliance[4] publication to approximately 1000

[2] In light of our conclusion that the court properly rendered summary judgment on the second and third elements of the plaintiff's claim for intrusion upon the seclusion of another, we need not address the plaintiff's claim regarding the first element. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 172–73, 204 A.3d 717 (2019).

[3] In its motion for summary judgment, Hopkins School raised, as an alternative ground for the court to grant summary judgment, that Markle was acting as an independent contractor and, therefore, Hopkins School was not legally liable for any of Markle's alleged tortious conduct. In its memorandum of decision as to Hopkins School, the court explicitly stated that it did "not address [Hopkins School's] argument that Markle was an independent contractor because the investigation and surveillance by Markle was not an intrusion upon [the plaintiff's] seclusion, nor was it highly offensive to a reasonable person." Because we affirm the court's decision, we need not address this alternative ground for affirmance.

[4] In his appendix, the plaintiff included a report authored by the Anti-Defamation League, which states that the National Alliance "is the single most dangerous organized hate group in the United States" and "is determined to secure a racially clean area of the earth . . . no non-whites in our living space . . . [and] will do whatever is necessary to achieve this White living space and to keep it White." (Internal quotation marks omitted.) Anti-Defamation League, Explosion of Hate: The Growing Danger of the National Alliance (2012), pp. 1–3, available at https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Explosion-of-Hate.pdf (last visited June 8, 2023); see *National Alliance* v. *United States*, 710 F.2d 868, 871 (D.C. Cir. 1983) ("[t]he general theme of the [National Alliance] newsletter is that 'non-whites'—principally blacks—are inferior to white Americans of European ancestry ('WAEA'), and are aggressively brutal and

Hopkins School alumni. Approximately one month later, the police lawfully searched the home where the plaintiff lived with his parents. The home was located across the street from Hopkins School's campus. During their search, the police seized an arsenal of weapons of mass destruction, bomb making materials, and anti-Semitic and racist materials. Thereafter, the plaintiff pleaded guilty in state and federal court to charges stemming from the conduct underlying the search and the items seized by the police, for which he was incarcerated. See *Cornelius* v. *Commissioner of Correction*, 167 Conn. App. 550, 551–52, 143 A.3d 1179 (2016). Hopkins School is a registered victim of the plaintiff's crimes.

On November 26, 2018, the plaintiff commenced the present action against the defendants, alleging claims of invasion of his right to privacy, arising from Hopkins School's retention of Markle to conduct surveillance of the plaintiff following his release from prison in September, 2016. In his complaint, the plaintiff alleged that, following his release from consecutive state and federal prison sentences; see id., 552; he resided in a halfway house in Hartford from September, 2016, to November, 2017. The plaintiff alleged that, in April, 2017, he noticed that "he was being surveilled by the same two or three people." He further alleged that such surveillance included individuals observing him outside of the halfway house in Hartford and following him to or through several locations such as malls, stores, restaurants, public libraries, and on public transportation.

The plaintiff alleged that, in November, 2017, he moved to a halfway house in New Haven, where, "[f]rom the moment he arrived . . . [he] noticed [that] he was

dangerous; Jews control the media and through that means—as well as through political and financial positions and other means—cause the policy of the United States to be harmful to the interests of WAEA").

being followed . . . took down the license plate [of the vehicle following him] and, in consultation with his attorneys, provided the information to a private investigator, who traced the automobile to [Markle]." Additionally, he alleged that, "[u]pon information and belief, Hopkins School . . . uses Markle . . . for various matters, and has retained it to follow and surveil the plaintiff." The plaintiff further alleged that his private investigator has "conducted countersurveillance of Markle . . . and has confirmed that [the plaintiff] has . . . been followed and surveilled by Markle . . . ." The plaintiff proceeded to delineate several dates from January 17 to July 26, 2018, and alleged that, on those dates, he was surveilled and followed by Markle's employees and agents.

The plaintiff further alleged that "Hopkins School . . . intentionally intruded upon [his] solitude, seclusion, and private affairs or concerns by directing employees and/or agents of Markle . . . to follow and surveil him in multiple locations, including, but not limited to, his residence; doctor's offices . . . multiple stores, malls, and restaurants; and through multiple cities." Additionally, he alleged that "Markle . . . intentionally intruded upon [his] solitude, seclusion, and private affairs or concerns by following and surveilling him in multiple locations . . . and . . . cities." Moreover, the plaintiff alleged that "[t]he nearly continuous surveillance of [him] is behavior that would be highly offensive to a reasonable person." Finally, the plaintiff alleged that, "[a]t all relevant times . . . Markle . . . was acting at the direction of, and with the full permission and consent of . . . Hopkins School," and, therefore, Hopkins School is "vicariously liable for the actions of . . . Markle . . . ."

On November 2, 2020, the plaintiff filed an expert witness disclosure, in which he disclosed Jim Nanos, a private investigator, owner of a private investigation

company, and owner and operator of an online retailer that sells surveillance equipment. The disclosure stated that Nanos was "expected to testify regarding the industry accepted policies and practices of private investigators, the type of surveillance equipment that is available to licensed private investigators, the capabilities of the surveillance equipment, the types of surveillance equipment and the capabilities of the equipment used by the defendants in this case, and the type of equipment and resources that would be required in order to surveil the plaintiff as alleged in the complaint."

On March 4, 2021, the defendants filed a joint expert witness disclosure, in which they disclosed Eric Daigle, an attorney and "expert in the field of police practices and private security/investigations, fourth amendment protections and privacy considerations . . . ." The defendants' disclosure stated that Daigle "is expected to testify regarding permissible use of surveillance and the reasonable expectations of privacy that an individual in the plaintiff's position can expect, and the actions taken by Markle . . . and/or Hopkins School as [they] relate to the claims asserted by the plaintiff."

On May 17, 2021, the defendants filed separate motions for summary judgment and memoranda of law in support of their motions. In Hopkins School's motion for summary judgment, it asserted, inter alia, that it was "not legally liable . . . because codefendant, Markle . . . did not . . . invade the plaintiff's privacy." In its memorandum of law, to which it attached twenty-two exhibits, Hopkins School set forth that, " '[f]or there to be liability, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object.' " It argued that "[t]here is no evidence in the record that supports

any of these elements and the plaintiff's 'upon information and belief' allegations are insufficient to survive summary judgment."

First, Hopkins School argued that Markle did not commit an intentional intrusion because it had the necessary legal permission to surveil the plaintiff in the manner it did.[5] In support of that contention, Hopkins School pointed to the deposition testimony of Markle's investigator, Thomas Murray, who "testified that the frequency and the duration of the surveillance of the plaintiff was 'typical' " and that they would have basic equipment, such as cell phones and binoculars available to them while surveilling the plaintiff. Additionally, Hopkins School noted that the plaintiff's own expert witness, Nanos, "testified that he and his team commonly use all the surveillance tactics that the plaintiff alleges Markle used—*and more*," which Nanos stated included surveilling a subject in public places and near their home, following them for as long as possible whether they are in a private car or on public transportation, and taking as many videos and photographs as possible with advanced technology because cell phone photography is insufficient. (Emphasis in original.) Finally, Hopkins School pointed to Daigle's affidavit, in which he averred that "[o]bserving, photographing, or recording an individual in a public space is not a violation of a reasonable expectation of privacy."

Second, Hopkins School argued that the "[p]laintiff cannot show that he had an objectively reasonable expectation of seclusion in [the] place at issue" because the plaintiff has demonstrated "no *evidence* that he was

[5] In *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 174, 204 A.3d 717 (2019), this court stated that "an actor commits an intentional intrusion if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." See 3 Restatement (Second), Torts § 652B, comment (b), illustrations (1) through (5), p. 379 (1977).

surveilled in any private place, and his conjecture about where Markle may have done so is insufficient to evade summary judgment." (Emphasis in original; internal quotation marks omitted.) In support of its argument, Hopkins School pointed to the plaintiff's own deposition testimony in which he stated that "he has no reason to believe that Markle ever surveilled him while he was in his home," "he does not believe that Markle ever took pictures of him at his home and only took pictures of him in public places," and his own countersurveillance team "confirmed that Markle did not surveil [him] in 'a place not open or accessible to the public.' "

Third, Hopkins School argued that "Markle's conduct was not highly offensive or [strongly] objectionable, but instead entirely reasonable and justified." (Internal quotation marks omitted.) Hopkins School asserted that the plaintiff "is a dangerous man who Hopkins [School] rightly fears based on . . . the opinions of law enforcement experts" and that the plaintiff "has used false identities, hoarded an array of lethal weapons on multiple occasions, been fixated on white supremacist literature that advocates a race war . . . shown a fascination with school shootings . . . [and] has established animosity toward Hopkins School which is within sight of his house . . . ." In support of its assertions, Hopkins School attached portions of the transcript from the plaintiff's state sentencing proceeding in 2004, at which the court, *Blue*, *J.*, acknowledged that Hopkins School was "understandably concerned, just as almost any of us would be if we were in their shoes" and the plaintiff himself testified that he recognized the concern Hopkins School could have regarding his behavior. Additionally, Hopkins School attached testimony of John Aldi, security risk group intelligence coordinator for the Department of Correction, from the plaintiff's habeas trial that was held approximately one and one-half years prior to the plaintiff's release from prison,

who testified that he had "a true fear of when [the plaintiff is] released" because he "believe[d] [the plaintiff] is plotting [some] sort of violence once he is out."

In Markle's motion for summary judgment, it asserted that "[t]he undisputed evidence . . . reflects that, as a matter of law, [Markle] never engaged in any conduct that would constitute an invasion of privacy, and that no reasonable jury could conclude otherwise." In its memorandum of law, to which it attached seven exhibits, Markle argued that it did not intrude into the plaintiff's solitude or seclusion because "in every instance in which the plaintiff was being surveilled by Markle, *without exception*, [the plaintiff] was in a public area, readily open to general public observation and without any reasonable expectation of privacy" and, therefore, Markle is not liable for invasion of privacy as a matter of law. (Emphasis in original.) Additionally, Markle argued that the surveillance requested by Hopkins School and performed by Markle was reasonable and appropriate under the circumstances. Markle asserted that "[t]he plaintiff's investigation and ultimate arrest for possession and interstate purchase of an illegal high-powered rifle, along with bomb making materials and other dangerous and deadly implements, was precipitated by his theft and use of Hopkins School stationery to distribute ethnic hate literature to former alumni. [Therefore] Hopkins [School] had reasonable grounds to believe its students and/or staff may be targeted upon the plaintiff's release from prison, particularly in light of the discovery of a list of racially charged and militaristic literature in his prison cell shortly before his release."

On October 4, 2021, the plaintiff filed a joint objection to the defendants' motions for summary judgment and a memorandum of law in support of his objection, and he appended six exhibits thereto. The plaintiff argued, inter alia, that "[t]he depositions and other, limited,

discovery materials that the defendants produced demonstrate that a reasonable jury could conclude that the defendants invaded the privacy of the plaintiff [and] [a]s such, the defendants' motions for summary judgment must be denied." Specifically, the plaintiff asserted that genuine issues of material fact existed with respect to whether the investigators viewed his private and confidential banking information while he was at the automated teller machine (ATM) or bank, took photographs of his private and confidential information, and used equipment that enabled them to view the plaintiff's confidential information "from a great distance . . . ." In support of his assertion, the plaintiff appended "pictures [Markle] took of the plaintiff, over his shoulder, of a computer screen while [he was] at a FedEx location," and his own affidavit, in which he averred that he has "accessed [his] bank account information on computers at . . . several FedEx locations." He further argued that the "issue does not just involve the single day that the picture was taken but instead is evidence of the conduct of the defendants for years . . . [and] [a]s a result, it is a question of fact whether the defendants observed this type of confidential material on numerous occasions throughout their daily surveillance." Moreover, the plaintiff argued that "whether the conduct of the defendants was reasonable is a question for the jury to decide" and, in support, noted that "there has been testimony that demonstrates that the defendants followed, photographed, and surveilled [him on] more than 900 days." In conclusion, he stated that "a person does not automatically make public everything he does merely by being in a public place . . . [and that] [t]here exist facts and circumstances whereby a jury could reasonably conclude that the defendants invaded the plaintiff's privacy and should be held liable."

On October 18, 2021, Hopkins School filed a reply to the plaintiff's objection. Therein, Hopkins School

argued, inter alia, that the plaintiff failed to present any admissible evidence that his privacy was invaded but, rather, "merely continues to speculate that *maybe* Markle viewed his ATM PIN number or banking records while he was in public," despite that "every Markle witness denied viewing the plaintiff's banking information and the plaintiff testified that he did not see anything like that happen." (Emphasis in original.) Hopkins School further asserted that the plaintiff "attempt[ed] to manufacture a dispute of fact by way of a self-serving affidavit," however, "[e]very witness that the plaintiff has deposed has confirmed that they did not, and would not have observed the plaintiff's private banking information," and appended testimony from the depositions of three of Markle's investigators in support.

On October 19, 2021, Markle filed a reply to the plaintiff's objection, wherein it reiterated Hopkins School's arguments. Markle emphasized that the plaintiff failed to establish through admissible evidence that the defendants observed any of his private information and that his arguments amounted to mere speculation. Markle supported its argument by appending the testimony of its investigators who "affirmatively denied obtaining any private banking information" of the plaintiff's and did not use "any 'sophisticated equipment' beyond their personal cell phones, which could not possibly have zoomed in several hundred feet to identify information being input into an ATM." Markle further argued that, even if the plaintiff's assertions were true, the fact that Markle's investigators may have viewed the plaintiff's private information "would not amount to an invasion of privacy . . . [because] the plaintiff did not take reasonable steps to ensure the privacy and security of his banking information in public." (Emphasis omitted.) Moreover, Markle argued that the plaintiff submitted no evidence to support his allegations. Finally, Markle argued that the plaintiff failed to cite any legal authority

to support his argument that the mere duration of the surveillance constitutes an invasion of privacy.

On October 20, 2021, the court held oral argument on the defendants' motions for summary judgment. On February 1, 2022, the court granted the defendants' motions for summary judgment and issued a separate memorandum of decision as to each defendant.[6] After setting forth the three elements that a plaintiff must prove to establish a claim for intrusion upon seclusion as articulated by this court in *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 172–73, 204 A.3d 717 (2019), the court proceeded to examine each element to determine whether a genuine issue of material fact existed.

As to the first element, "an intentional intrusion, physical or otherwise"; id., 172; the court determined that the defendants had established that there was no genuine issue of material fact that "any intrusion upon seclusion was not intentional." In support of its determination, the court stated that Dan Markle, owner of Markle, testified that each investigator working for him abides by the law and is told what is legal and illegal. The court noted that his testimony was corroborated by two of Markle's investigators who testified that they were told "not to go anywhere that the public could not go" and that Markle has "policies that they cannot do anything illegal and cannot go into a private space."

Additionally, the court determined that the plaintiff had failed to produce any evidence that raised a genuine issue of material fact. Specifically, it noted that the plaintiff's own expert, Nanos, testified that "the number of photographs taken in the surveillance of the plaintiff

[6] Although separate, each memorandum of decision addressed and analyzed whether there was a genuine issue of material fact as to whether the defendants engaged in conduct that constituted an invasion of the plaintiff's privacy. Accordingly, we discuss the decisions simultaneously.

in the present case was far lower than the number he would have taken," and the court referenced testimony in which Nanos reported that he once took 1,299,327 photographs of an individual over the course of one and one-half years of surveillance. Finally, the court stated that the plaintiff testified that "none of the photos or information from his countersurveillance gave him any reason to believe he was being observed in private, and, to his knowledge, no Markle investigator ever stepped foot on his private property." Therefore, the court found that there was no genuine issue of material fact that, if any intrusion occurred at all, it was not intentional.

As to the second element, which "requires that the intentional intrusion be upon the plaintiff's solitude or seclusion or private affairs or concerns" and requires the plaintiff to "show that he had an objectively reasonable expectation of seclusion or solitude in that place"; *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 175; the court determined that the defendants had established that there was no genuine issue of material fact that "all surveillance occurred in public, and any private matters observed were exhibited to the public gaze." The court noted that the "only instance of private matters *possibly* being observed" is the plaintiff's allegation that Markle viewed his private banking information while he used an outdoor ATM. (Emphasis added.) The court stated, however, that the defendants introduced evidence, via the deposition testimony of Markle's investigators, that Markle did not seek nor obtain the plaintiff's private information, and the plaintiff testified "that he had concluded that he was being surveilled when he was using the ATM because a car was in the vicinity, but that none of the people he thought were following him were within ten feet of him when he was using the ATM, nor did he see anyone surveilling him at all at that time."

The court further concluded that the plaintiff's argument, premised on comment (c) to § 652B of the Restatement (Second) of Torts,[7] "that observing someone entering his PIN number or seeing his bank balance, without any evidence that any such information was used or recorded, is equivalent to an intrusion upon the matter of someone's private undergarments" was unconvincing. The court noted that "a person using an ATM on a public street does not have a reasonable expectation of privacy in that place . . . [because] there is always a possibility that passersby may observe someone's banking information." The court further stated: "Even if such an expectation could be reasonable, there is no evidence of an intrusion into such matters in this case. Rather, the plaintiff merely asserts that an investigator *may* have been in the vicinity of the ATM and *may* have seen or recorded the plaintiff's banking information while driving by. This is not sufficient to demonstrate the existence of an issue of material fact with respect to the second element." (Emphasis in original.) Finally, the court stated that "[t]here is no evidence that the investigators used any technology beyond binoculars and a standard camera or video camera," therefore, the plaintiff's "mere assertion" that Markle may have used more advanced equipment, without

[7] Comment (c) to § 652B of the Restatement (Second) of Torts provides: "The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters." 3 Restatement (Second), Torts § 652B, comment (c), pp. 379–80 (1977).

any evidence, is insufficient to demonstrate the existence of a genuine issue of material fact.

As to the third element, which requires that the intrusion upon the plaintiff's solitude or seclusion be "highly offensive to a reasonable person"; *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 176; the court determined that there is no genuine issue of material fact that "any intrusion upon seclusion would not be highly offensive to a reasonable person . . . [because] [t]he plaintiff's history with Hopkins [School] and his past conduct leading to his imprisonment rightfully caused Hopkins [School] to be concerned about potential danger to its staff and students after the plaintiff's release. [Therefore] Markle's surveillance of the plaintiff in a legal manner in response to this concern was reasonable and justified." In support of the court's conclusion that the surveillance was reasonable and justified, despite it occurring "at times, on a near daily basis over multiple years," the court stated that, "prior to his imprisonment, the plaintiff maintained a stockpile of weapons and bomb making materials"; during his imprisonment, the plaintiff's "release date was also delayed due to concerning materials being found in his cell, including a photograph of the gun used in the Sandy Hook school shooting" and "a list of racially charged and militaristic literature"; "[f]ollowing his release, the plaintiff also moved into his mother's home across the street from Hopkins School"; and, "through the current proceeding and a [Freedom of Information Act] request, the plaintiff tried to learn about security on [Hopkins School's] campus and at other public schools in the state."[8] Accordingly, the court concluded

[8] On March 1, 2021, Hopkins School filed a motion for a protective order pursuant to Practice Book § 13-5 in which it requested that the court issue a protective order "precluding [the plaintiff's] discovery about general security practices, methods, means and procedures on the Hopkins School campus" and attached a supporting memorandum of law. The plaintiff filed an objection to Hopkins School's motion for a protective order and a supporting memorandum of law wherein he requested "that [the] court enter an order

that, "viewed in the light most favorable to the plaintiff, the evidence establishes that there is no genuine issue of material fact that there was no invasion of privacy by intrusion upon seclusion . . . [t]he burden thus shifts to the plaintiff to demonstrate such an issue of material fact . . . [and] [t]he plaintiff has not submitted evidence sufficient to do so." This appeal followed. Additional facts and procedural history will be provided as necessary.

We first set forth the legal principles governing motions for summary judgment and the standard of review applicable to this appeal. "Our review of a trial court's decision granting a motion for summary judgment is well established. Practice Book § 17-49 provides that the judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A material fact is a fact that will make a difference in the result of the case. . . . The facts at issue are those alleged in the pleadings. . . .

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the

denying [Hopkins School's] motion for protective order." The court overruled the plaintiff's objection to Hopkins School's motion for a protective order.

movant, the evidence must be viewed in the light most favorable to the opponent. . . .

"The party opposing a motion for summary judgment must present evidence that demonstrates the existence of some disputed factual issue . . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence. . . . Our review of the trial court's decision to grant a motion for summary judgment 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.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 164–65.

We turn now to the relevant legal principles governing the plaintiff's claim. In *Davidson* v. *Bridgeport*, 180 Conn. App. 18, 29–30 and n.15, 182 A.3d 639 (2018), "this court addressed for the first time an intrusion upon seclusion claim . . . [and] noted that [§] 652B of the Restatement (Second) of Torts provides: One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly

offensive to a reasonable person. . . . It is clear from the Restatement's language that to establish a claim for intrusion upon the seclusion of another, a plaintiff must prove three elements: (1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion or private affairs or concerns, (3) which would be highly offensive to a reasonable person." (Citations omitted; internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 172–73; see also 3 Restatement (Second), Torts § 652B, p. 378 (1977).

On appeal, the plaintiff claims that the court erred in granting the defendants' motions for summary judgment as to each element of his claim for intrusion upon seclusion. Specifically, the plaintiff argues, inter alia, that the court erred in concluding that there was no genuine issue of material fact as to the second element because "surveillance of a person, even if solely limited to surveillance of the target in public places, can satisfy the second element . . . where . . . the investigation was overzealous and unreasonably intrusive." Additionally, the plaintiff argues that, as to the third element, "[t]he trial court erred in concluding that, as a matter of law, the surveillance was 'reasonable given the circumstances and level of concern.' " On the basis of our thorough review of the record, we agree with the court that, viewing the evidence in the light most favorable to the plaintiff, there is no genuine issue of material fact that the conduct the plaintiff attributes to the defendants did not intrude upon his solitude or seclusion or private affairs or concerns, nor would it be considered "highly offensive" to a reasonable person under the circumstances of this case. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 173, 175–76. The following additional facts are relevant to our analysis.

The plaintiff attended high school at Hopkins School during the mid-1980s, during which time he was disciplined for assisting a fellow student in spreading glass on a teacher's driveway and carrying a "throwing star,"[9] and he was expelled in 1987 for plagiarism.

In October, 2001, when the plaintiff was thirty-one years old, he obtained, without permission, stationery and envelopes embossed with Hopkins School letterhead and attempted to mail approximately 1000 Hopkins School alumni a publication of the National Alliance on Hopkins School's stationery because he "wanted [the alumni] to pay attention to it [because it is] from their alma mater."[10] The National Alliance publication was "an eight page [newsletter] . . . exposing that the Jews and Minority groups are controlling the media and television entertainment and that White Americans of European descent have to take back control or risk losing [their] way of life." The plaintiff characterized the publication as "reasonable" and "factual."

[9] A " 'Chinese throwing star' [is] a throwing-knife, throwing-iron, or other knife-like weapon with blades set at different angles." Ind. Code Ann. § 35-47-5-12 (b) (LexisNexis 2016).

[10] The record reflects that, on October 30, 2001, the plaintiff entered a printing shop in East Haven. The plaintiff intended to send approximately 925 addressed and sealed envelopes that were embossed with Hopkins School's name and address. The owner took the order from the plaintiff, who told the owner that his name was Todd Martin, but did not provide the owner with a phone number. The plaintiff told him that he would be back the next day to pay the final cost for the bulk mailing and then left. "After the [plaintiff] left, [the owner] realized that he [had not] asked the man whether the order was to have been placed as a for profit or [nonprofit] mailing . . . [so he] called the Hopkins School to inquire about this at which time he was told that they had never heard of a Todd Martin nor did they authorize any mailing." Hopkins School authorized the owner to open one of the envelopes, the owner proceeded to contact the Postal Inspector's Office to confirm that he could do so, and "when he did he found that it was inserted with what appeared to be a White Supremacist Newsletter." Hopkins School told the owner not to mail the items, and the owner called the police about the incident.

Approximately one month later, the New Haven Police Department, in conjunction with an arrest warrant for the plaintiff, executed a search warrant at the home where the plaintiff was residing with his parents, which is located across the street from the campus of Hopkins School.[11] Upon searching the plaintiff's residence, the police seized a "vast arsenal . . . weapons of mass destruction and . . . anti-[Semitic]/Racist material," which included, among other items, "numerous assault rifles, shot guns, handguns, [knives], practice hand grenades, bomb making materials, [and] razor ribbon wire . . . ." In addition, the police also seized publications with the following titles: "Do-it Yourself Submachine Gun"; "Pipe and Fire Bomb Design"; "How to Be Your Own Undertaker"; "How to Dispose of a Dead Body"; "Up Yours—Guide to Advanced Revenge Techniques"; "The Holy Book of Adolf Hitler"; "Breath of the Dragon, Home-Built Flame [Throwers]"; "Hit Man—A Technical Manual for Independent Contractors"; "Kill Without Joy—The Complete How-to-Kill Book."

Thereafter, the plaintiff pleaded guilty to two counts of possession of an assault weapon and one count of attempted manufacture of a bomb, in state court, and to importing or manufacturing firearms and fraud with identification documents, in federal court. It is undisputed that Hopkins School is a registered victim of the plaintiff's crimes.

During the plaintiff's state sentencing hearing, the court, *Blue*, *J.*, observed that, in his "fifteen years on the bench, [he had not] had a case like this" and that

[11] The record reflects that the arrest and search warrants were precipitated by an "investigation . . . by the Connecticut State Police Firearms Unit into the [plaintiff's] illegal purchase of a banned assault . . . rifle using a stolen identity." The plaintiff confirmed in his deposition testimony that he purchased the weapon with a fake identification because "[he] wanted to keep it . . . [and] figured they were going to ban it."

"[p]art of [him] wants to warehouse [the plaintiff] for the rest of [his] life, not out of vindictiveness . . . but simply out of concern for the protection of society . . . ." Additionally, the court stated that the plaintiff's assertion "that the bomb making collections here were . . . collector's items [was] . . . just a preposterous suggestion" and one that the court was "concerned about." Moreover, the court stated that it believed the plaintiff was "not impulsive in any way, but . . . very deliberate," and that, "for all [his] immaturity, in some ways [the plaintiff has] a way [of] looking forward . . . that is, that [the plaintiff] stated in [his] own testimony that [he was] putting [his gun] away for a rainy decade, and that . . . [he was] storing the bomb materials for the remote future. And the remote future is exactly what [the court is] concerned about." Furthermore, the court recognized that "Hopkins School . . . is understandably concerned about this case, and not . . . vindictive in any way, but understandably concerned just as almost any of us would be if we were in their shoes," a sentiment the plaintiff also acknowledged during his own statements before the sentencing court. The plaintiff was sentenced to ten years and six months' incarceration and ten years of special parole for his state crimes and eighteen months' incarceration for his federal crimes, to be served consecutively. *Cornelius* v. *Commissioner of Correction*, supra, 167 Conn. App. 551–52.

During his incarceration, the plaintiff attempted to contact the National Alliance by letter. Thereafter, prison officials searched the plaintiff's cell and discovered several documents, including an image of the weapon, an assault rifle, that Adam Lanza used during the Sandy Hook Elementary School shootings. The plaintiff testified that he "used to have one," he "liked it . . . thought [the image of the weapon] was a nice picture," and that he "put it up in [his] locker to tick off the guy in the next bunk . . . ." Among the other

documents found in the plaintiff's cell were a handwritten list of organizations, including "Liberation Movement of the German Reich," "The National Alliance," and "NS White Americans Party"; and an order form containing a list of books and DVDs with titles such as, "Cannibal Suburbia," "Hostage Rescue Manual," and "U.S. Army Guide to Boobytraps."

In January, 2014, toward the plaintiff's end of sentence date, he was placed in a restrictive housing unit because his "continued presence in the general population pos[ed] a serious threat to life, property, self, other inmates, and/or the security of the facility . . . ." Additionally, the plaintiff received a security risk group designation based on a finding that he was affiliated with the Aryan Brotherhood. As a result of this designation, the plaintiff lost his risk reduction earned credit (RREC).

The plaintiff filed a habeas petition to challenge the loss of his RREC, which was adjudicated and denied by the trial court and dismissed on appeal. See *Cornelius* v. *Commissioner of Correction*, supra, 167 Conn. App. 552–53, 556. At the trial on the plaintiff's habeas petition, in early 2015, the court heard testimony from Aldi, the security risk group intelligence coordinator for the Department of Correction. He testified that, "[i]n [his] opinion . . . [the department] did the right thing by placing [the plaintiff] in . . . the Special Management Unit, to keep [their] eyes on him." Additionally, Aldi testified that, "[w]hen [he] looked at the totality of the information that we had prior to the designation, then after receiving phone calls from the Hopkins School, from their representation, reading the letters[12] . . . I have a true fear—I have been doing this a long time; I have a true fear of when [the plaintiff is] released."

[12] As set forth in the plaintiff's complaint, "Hopkins [School] submitted letters to the Board of Pardons and Parole opposing parole for [the plaintiff]."

(Footnote added.) Aldi elaborated that "my fear is that, given the opportunity, I believe [the plaintiff] is plotting [some] sort of violence once he is out."

In anticipation of the plaintiff's release from prison, Hopkins School engaged Markle to surveil the plaintiff "to confirm that [the plaintiff] was not (1) attempting to come to [Hopkins School's] property; (2) attempting to stockpile weapons; or (3) meeting with any associates who could help [him] carry out an attack on Hopkins [School]," so that Hopkins School "could adequately respond and protect its community." Markle's surveillance began when the plaintiff was released from prison to a halfway house in Hartford, where he lived for fourteen months, continued when the plaintiff moved to a halfway house in New Haven, and thereafter when the plaintiff moved back into his parents' residence located across the street from Hopkins School. Markle was instructed "to document [the plaintiff's] daily activities," and, when it began surveilling the plaintiff, Markle generally communicated with Hopkins School on a daily basis.

Markle's investigators surveilled the plaintiff only in public places, such as when he "would walk briskly to and from different locations . . . [when] he would put stickers on utility boxes, phone boxes . . . [when] [h]e would travel . . . to the bus terminal . . . [and] by the Connecticut River . . . [and when] he would get on the bus . . . to the library . . . [and to] pick up lunch." During their surveillance of the plaintiff, Markle's investigators utilized portable radios to communicate with one another, a cell phone, and "perhaps a set of binoculars." One of Markle's investigators stated that although he could not estimate the number of photographs he took of the plaintiff during surveillance, it was between ten and fifty, and he would generally "take a picture of any subject at the beginning of a surveillance . . . mean[ing], the . . . first day or so on the

surveillance" and, thereafter, "if [the plaintiff] met with another person . . . ." Additionally, he stated that the type, frequency, and duration of his surveillance of the plaintiff was "typical."

In April, 2017, the plaintiff became aware that he was being surveilled and hired his own private investigation firm, Advanced Investigations, LLC (Advanced), to conduct countersurveillance. Advanced "confirmed that [the plaintiff] has indeed been followed and surveilled by Markle . . . ." Advanced did not identify any time when Markle observed the plaintiff "while [he was] in a place not accessible to the public." The plaintiff himself admitted that during any instance in which he was aware that Markle's investigators were surveilling him, he was in a public setting, including walking along the street, inside a mall, riding on a bus, inside a FedEx location, and while he was driving. Additionally, insofar as the plaintiff was aware, no Markle investigator had "stepped foot" onto his private property, and, although he had "seen them drive by and look at [his] house," he was unaware of any instance in which any Markle investigator observed him while he was inside his house. Finally, the plaintiff did not have any specific knowledge as to whether any Markle investigator had overhead him on the cell phone, obtained any of his financial information, or taken any video or photographs of him while he was in his home.

During the pendency of these proceedings, in 2019, the plaintiff filed a Freedom of Information Act request for records related to the School Security Grant Program (SSGP).[13] Therein, the plaintiff requested an

[13] The Division of Emergency Management and Homeland Security administers the SSGP, which "provides funding to schools to implement security infrastructure improvements. Eligible projects under SSGP include, but are not limited to, replacement or enhancements to doors and windows, access control systems, perimeter security (such as fencing, lighting, bollards, etc.,), interior and/or exterior camera systems and panic alarm systems." State of Connecticut, Division of Emergency Management and Homeland Security, School Security Competitive Grant Program, available at https://portal.ct.gov/

opportunity to inspect or copy public records showing " 'the names of all the security contractors who have received funding under the [SSGP]' " and he "acknowledge[d] that [the Division of Emergency Management and Homeland Security (Division) had] not released the list of schools that have received funding, [because they] have argued [it] would constitute a safety risk under [General Statutes §] 1-210 (b) (19)."[14] In denying the plaintiff's request, the Division stated that "[t]here is a safety risk to persons and/or property in releasing the names and dollar amounts of contractors that have received reimbursement for work performed in support of school security infrastructure projects [because] [t]hat information would provide a roadmap of what type of work was performed and where the work occurred." Additionally, in 2021, Hopkins School filed a motion for a protective order pursuant to Practice Book § 13-5 wherein they requested an order "precluding discovery about general security practices, methods, means and procedures on the Hopkins School campus" due to the plaintiff's counsel asking a Markle investigator about Hopkins School's protective measures during a deposition. See footnote 8 of this opinion.

On appeal, with regard to the second element of intrusion upon seclusion, the plaintiff challenges, inter alia, the court's determination that "no intrusion occurred because 'all surveillance occurred in public, and any private matters observed were exhibited to the public

DEMHS/Grants/School-Security-Competitive-Grant-Program-Overview (last visited June 8, 2023).

[14] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the Freedom of Information Act shall be construed to require disclosure of . . . (19) Records when there are reasonable grounds to believe disclosure may result in a safety risk, including the risk of harm to any person, any government-owned or leased institution or facility or any fixture or appurtenance and equipment attached to, or contained in, such institution or facility, except that such records shall be disclosed to a law enforcement agency upon the request of the law enforcement agency. . . ."

gaze' " and argues that "the trial court improperly considered dispositive the fact that the intrusion occurred in public." The plaintiff further contends that, "[a]lthough a plaintiff may waive some degree of privacy by virtue of his appearance in public, the question does not become whether the intrusion occurred in a public place but rather remains whether the defendant[s] intruded upon the plaintiff's 'private affairs or concerns.' " See 3 Restatement (Second), supra, § 652B, p. 378. We are unpersuaded by the plaintiff's argument.

The second element of intrusion upon seclusion "requires that the intentional intrusion be upon the plaintiff's solitude or seclusion or private affairs or concerns," and this court has held that "[t]he plaintiff . . . must show that he had an objectively reasonable expectation of seclusion or solitude in that place." *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 175; see 3 Restatement (Second), supra, § 652B, p. 378. The Restatement further provides guidance on circumstances in which a defendant's conduct would satisfy the second element of intrusion upon seclusion. Namely, "[t]he invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents." 3 Restatement (Second), supra, § 652B, comment (b), pp. 378–79. Moreover, "[t]he defendant is subject to liability

. . . *only* when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." (Emphasis added.) Id., comment (c), p. 379.

The evidence before the court revealed that there was no genuine issue of material fact as to the second element of intrusion upon seclusion. First, the defendants surveilled the plaintiff only while he was in a public setting, such as while he was riding on public transportation, visiting a library, and walking along the street and, therefore, in settings where he lacked "an objectively reasonable expectation of seclusion or solitude . . . ." *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 175; see also *Perkins* v. *Freedom of Information Commission*, 228 Conn. 158, 174, 635 A.2d 783 (1993) ("a reasonable expectation of privacy must be viewed from the vantage point of an objective, ordinary reasonable person"). Second, the defendants never viewed the plaintiff's "private and personal mail . . . safe or his wallet . . . [or] private bank account . . . ."[15] 3 Restatement (Second), supra, § 652B, comment (b), p. 379. Third, the defendants used

[15] As previously set forth, the trial court stated that "[t]he plaintiff alleges upon information and belief that Markle viewed the plaintiff's private banking information while he was using an outdoor ATM. This is the only instance of private matters possibly being observed in the present case. The defendant[s] [provide] evidence that the investigators did not seek nor obtain the plaintiff's ATM PIN number. . . . The plaintiff's evidence does not contradict this information." (Citation omitted.) See *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 165 ("[t]o oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents" (internal quotation marks omitted)). The court further concluded that the plaintiff's "mere assertion that an investigator *may* have been in the vicinity of the ATM and *may* have seen or recorded the plaintiff's banking information while driving by . . . is not sufficient to demonstrate the existence of an issue of material fact with respect to the second element." (Emphasis in original.) The plaintiff does not argue on appeal that the court improperly determined that he failed to raise a genuine issue of material fact with respect to the viewing of his private information.

only basic equipment, including cell phones, walkie-talkie radio devices, and binoculars, during their surveillance to capture images of the plaintiff while he was in public. See id., comment (c), p. 380 (stating that there is no "liability for observing [a subject] or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye"). Accordingly, we agree with the court that the conduct that the plaintiff attributes to the defendants cannot, as a matter of law, sustain the second element. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 176.

The plaintiff also argues that "surveillance of a person, even if solely limited to surveillance of the target in public places, can satisfy the second element of an intrusion upon seclusion claim where, as here, the investigation was overzealous and unreasonably intrusive." In support of his contention that "ostentatious 'rough shadowing' may give rise to an actionable claim of intrusion upon seclusion"; see 5 Restatement (Second), Torts § 652B, Appendix, reporter's notes, comment (b), pp. 278–79 (1977); he cites cases from an array of other jurisdictions. See *Wolfson* v. *Lewis*, 924 F. Supp. 1413, 1420 (E.D. Pa. 1996) ("[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion"); *Polay* v. *McMahon*, 468 Mass. 379, 385, 10 N.E.3d 1122 (2014) (plaintiffs raised plausible claim for invasion of privacy where they "alleged a continuous surveillance of the interior of their home that was conducted for the purpose of harassment"); *McLain* v. *Boise Cascade Corp.*, 271 Or. 549, 555, 533 P.2d 343 (1975) ("If the surveillance is conducted in a reasonable and unobtrusive manner the defendant will incur no liability for invasion of privacy. . . . On the other hand,

if the surveillance is conducted in an unreasonable and obtrusive manner the defendant will be liable for invasion of privacy." (Citations omitted.)); see also *Galella* v. *Onassis*, 487 F.2d 986, 994 (2d Cir. 1973) (plaintiff photographer found liable on defendant's counterclaim alleging invasion of privacy where his conduct involved physical contact, endangered safety of children, and caused fear when he attempted to obtain photographs of defendant).

Even if this court were to apply the standards as set forth in these other jurisdictions, we are unpersuaded that the plaintiff raised a genuine issue of material fact that the surveillance at issue in this case was unreasonably intrusive, as required by the case law relied on by the plaintiff. In contrast to the facts of the cases the plaintiff cites in support of his argument, the defendants in the present case did not physically enter the plaintiff's private property, the defendants did not utilize advanced electronic surveillance equipment to "oversee or overhear the plaintiff's affairs"; 3 Restatement (Second), supra, § 652B, comment (b), p. 378; and the purpose of the surveillance was not to hound or harass the plaintiff. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 176 (summary judgment on second element is proper where "[a]t no point does the plaintiff indicate that the defendants entered his residence or that they compromised any private information or [his] general privacy"). Therefore, we reject the plaintiff's argument that the surveillance was "overzealous and unreasonably intrusive" such that there existed a genuine issue of material fact as to whether there was any intrusion upon his solitude or seclusion or private affairs or concerns. See *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 175–76.

With regard to the third element of a claim for intrusion upon seclusion, on appeal, the plaintiff claims, inter alia, that "[t]he trial court erred in concluding that,

as a matter of law, the surveillance was 'reasonable given the circumstances and level of concern.' " Specifically, he argues that the court improperly "invaded the province of the jury by resolving several issues of disputed material fact" regarding "the credibility and reasonableness of [Hopkins School's] subjective beliefs about the purported danger that [the plaintiff] posed to its staff and students . . . [and] whether that concern would justify surveilling [the plaintiff] on a near daily basis for over 900 days."[16] (Citations omitted.) We disagree.

The third element of the tort requires that any "intentional intrusion upon a plaintiff's solitude or seclusion be highly offensive to a reasonable person." *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 176. "For there to be liability, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object. See 3 Restatement (Second), supra, § 625B, comment (d) [p. 380]. In the context of intrusion upon seclusion, questions about the reasonable person standard are ordinarily questions of fact, but they become questions of law if reasonable persons can draw only one conclusion from the evidence." *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 173.

Even if we were to assume, arguendo, that there is a genuine issue of material fact with respect to the first two elements of the plaintiff's invasion of privacy claim, we agree with the trial court that there is no genuine issue of material fact as to whether any alleged intrusion by the defendants would be highly offensive to a reasonable person. The court aptly noted that "[t]he plaintiff's history with Hopkins [School] and his past conduct

[16] See footnotes 17, 19, 20, and 21 of this opinion.

leading to his imprisonment rightfully caused Hopkins [School] to be concerned about potential danger to its staff and students after the plaintiff's release." The court further concluded that the manner in which Markle surveilled the plaintiff was "reasonable and justified."[17] Although we emphasize but decline to repeat all the facts as previously set forth in this opinion, it is helpful to reiterate that more than ten years after he was expelled from Hopkins School, the plaintiff acquired, without permission, stationery and envelopes embossed with Hopkins School's letterhead, with which he attempted to mail a National Alliance newsletter to Hopkins School alumni.[18] Shortly thereafter, the police lawfully searched the residence where the plaintiff

[17] In his brief, the plaintiff argues that "the trial court overlooked that . . . at no point during the near daily, yearslong surveillance did the defendants ever observe [the plaintiff] even attempt to come . . . to [Hopkins School's] property, stockpile weapons, or meet with anyone to plot an attack on Hopkins [School]" and that this is "the clearest evidence that the defendants' surveillance . . . was unreasonable . . . ." (Citation omitted.) We disagree with the plaintiff's contention that his purported decision to refrain from engaging in criminal activity while observed by Markle's investigators compels a conclusion that the surveillance was unreasonable. Rather, the purpose for which Hopkins School retained Markle to surveil the plaintiff, regardless of whether the criminal conduct of concern materialized, is relevant to our determination that any invasion of privacy would not be highly offensive to a reasonable person. See *Wolfson* v. *Lewis*, supra, 924 F. Supp. 1421 ("[i]n determining whether an invasion of a privacy interest would be offensive to an ordinary, reasonable person, a court should consider all of the circumstances including the degree of the intrusion, *the context, conduct and circumstances surrounding the intrusion* as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded" (emphasis added; internal quotation marks omitted)); *Sanchez-Scott* v. *Alza Pharmaceuticals*, 86 Cal. App. 4th 365, 377, 103 Cal. Rptr. 2d 410 (2001) (same); see also *Hernandez* v. *Hillsides, Inc.*, 47 Cal. 4th 272, 287, 211 P.3d 1063, 97 Cal. Rptr. 3d 274 (2009) (relevant factors in determining whether alleged intrusion is highly offensive include "the degree and setting of the intrusion, and the intruder's motives and objectives"); *Polay* v. *McMahon*, supra, 468 Mass. 383 ("[i]n determining whether a defendant committed an unreasonable intrusion, we balance the extent to which the defendant violated the plaintiff's privacy interests against any legitimate purpose the defendant may have had for the intrusion").

[18] See footnote 4 of this opinion.

lived, which is located across the street from Hopkins School's campus, and discovered an arsenal of weapons, bomb making materials, and related publications. Moreover, while the plaintiff was imprisoned, he posted in his locker an image of the weapon Adam Lanza used in the Sandy Hook Elementary School shootings because he "liked" that image.[19] Furthermore, Hopkins School is a registered victim of the plaintiff's crimes and the trial court in this civil matter was not the first to assert that the plaintiff's "conduct . . . rightfully caused Hopkins [School] to be concerned about potential danger to its staff and students . . . ."[20] In fact, and notably, this apprehension was also expressed by the state sentencing court, the security risk group intelligence coordinator for the Department of Correction, and even the plaintiff himself, who acknowledged during his state sentencing hearing that he understood the concern that Hopkins School could have over the conduct that led to his incarceration. Finally, after his release from prison and while he knew he was being surveilled, the plaintiff sought information regarding security practices being implemented in schools throughout the state, including but not limited to Hopkins School.[21] Accordingly, we agree with the court that

[19] In his brief, the plaintiff asserts that "the trial court made a gross misstatement of fact when it found that [his] 'release date was . . . delayed due to concerning materials being found in his cell, including a photograph of the gun used in the Sandy Hook school shooting.' . . . This is simply untrue. [His] release date was delayed because prison officials determined that he was affiliated with a security risk group." (Citation omitted.) We are unpersuaded that the reason for the delay in the plaintiff's release date presents a material fact regarding whether the surveillance in this case was highly offensive to a reasonable person.

[20] Accordingly, we are unpersuaded by the plaintiff's contention that a genuine issue of material fact exists as to the reasonableness of the defendants' surveillance in that "Hopkins [School] never produced a single iota of evidence linking [the plaintiff's] possession of ['an illegal high-powered rifle and bomb making materials'] to any animus he may have held against Hopkins [School]."

[21] In his brief, the plaintiff contends that "the trial court misconstrued the reason for [his] requests for information concerning [Hopkins School's]

the defendants' surveillance of the plaintiff was not "conduct to which the reasonable [person] would strongly object." 3 Restatement (Second), supra, § 652B, comment (d), p. 380.

The burden then shifted to the plaintiff, as the nonmoving party, to demonstrate the existence of some disputed factual issue. See *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019) ("[o]nce the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue" (internal quotation marks omitted)). We agree with the court that "[t]he plaintiff has not submitted evidence sufficient to do so."

security measures. . . . Security on [Hopkins School's] campus is relevant to whether the near daily, yearslong surveillance of [the plaintiff] was 'no greater than necessary' to achieve [Hopkins School's] interest in protecting its staff and students"; (citation omitted); and cites *Galella* v. *Onassis*, supra, 487 F.2d 995, in support of such contention. The plaintiff asserts that "the trial court never considered whether the intrusion, even if justified, was greater than necessary to achieve [Hopkins School's] goal of protecting its students and staff." Accordingly, he claims that "reasonable minds may disagree about whether [Hopkins School's] concern justified the ongoing, persistent, and overzealous public surveillance into [his] personal affairs and concerns." We are unpersuaded.

First, our appellate courts have not adopted the standard as set forth in *Galella* and the facts of that case are *overwhelmingly distinguishable* from those of the present case. See *Galella* v. *Onassis*, supra, 487 F.2d 994 ("court found [Donald Galella] guilty of harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of [Jacqueline Onassis's] personality, and invasion of privacy . . . [where] [e]vidence . . . showed that Galella had on occasion intentionally physically touched Mrs. Onassis and her daughter, caused fear of physical contact . . . followed [her] and her children too closely in an automobile, endangered the safety of the children while they were swimming, water skiing and horseback riding"). Second, our conclusion that there is no genuine issue of material fact that the defendants' surveillance at issue here was not highly offensive is premised on the fact that there was no evidence of any intrusion into the plaintiff's personal affairs and that under the circumstances the defendants' conduct was not of the kind "to which the reasonable [person] would strongly object." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 176, quoting 3 Restatement (Second), supra, § 625B, comment (d), p. 380.

As previously set forth, in his opposition to the defendants' motions for summary judgment, the plaintiff argued, inter alia, that genuine issues of material fact existed with regard to whether the defendants' invasion of the plaintiff's privacy was reasonable.[22] In support of his assertions, the plaintiff appended several transcript excerpts from depositions of Markle's investigators, which, as the trial court determined, fail to demonstrate any issues of material fact. Therein, the investigators stated that they were instructed "to not go where the public [cannot] go" and not to "look into somebody's windows . . . go into a private space . . . [or] do things like that . . . [t]hat would be against the law." Additionally, they stated that, during their surveillance of the plaintiff, they primarily utilized their cell phones. In his deposition, Dan Markle testified that, in general, his investigators "mostly . . . use handheld video recorders . . . cell phones . . . and, if need be, some of our investigators have cameras . . . for still photos." Additionally, the investigators further stated that they "take photographs of the subjects during the surveillance and/or video if it's possible," but only when the subjects are "in a public setting . . . [where] another person of the public could [also] do that . . . ." Moreover, one investigator stated that "in five years, [she] maybe took a handful of photographs" and another stated that he took fewer than one hundred photographs during his surveillance of the plaintiff.

[22] Additionally, the plaintiff merely asserted, without any legal or evidentiary support, that a genuine issue of material fact exists as to whether any invasion of privacy was "reasonable" because "[t]he surveillance was so frequent that the individuals conducting the surveillance were unable to [give] an actual number of days of . . . surveillance. Instead, they were only able to give an estimate." We are unpersuaded by the plaintiff's assertion that the "frequency" of the surveillance, under the circumstances of this case, which the court recognized occurred "at times, on a near daily basis over multiple years," raises a genuine issue of material fact that the surveillance constitutes an invasion of privacy.

Accordingly, we agree with the trial court that the plaintiff failed to demonstrate the existence of a material fact as to whether the defendants' surveillance constitutes an intrusion upon seclusion because he failed to set forth any evidence to support his contention that the defendants intruded upon his solitude or seclusion or private affairs or concerns, or that their conduct "would be highly offensive to the ordinary reasonable [person]" under the circumstances. (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, supra, 188 Conn. App. 176; see also id., 165 ("[t]o oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents" (internal quotation marks omitted)).

For the foregoing reasons, we conclude that the court properly rendered summary judgment in favor of the defendants.

The judgment is affirmed.

In this opinion CLARK, J., concurred.

CRADLE, J., concurring. I agree with the majority's well reasoned analysis and conclusion that the defendants Markle Investigations, Inc., and Hopkins School, Inc. (Hopkins School), did not intrude upon the seclusion of the plaintiff, Charles Cornelius, and, therefore, that the plaintiff has failed to satisfy the second element of his invasion of privacy claim. I also agree with the majority that the plaintiff has failed to satisfy the third element of his claim, that the surveillance by the defendants was highly offensive to a reasonable person in that it occurred almost daily for several years.

I write separately because I disagree with the portion of the majority's analysis of the third element of the plaintiff's claim that relies on the plaintiff's previous

conduct to determine whether the defendants' surveillance of him was highly offensive. As the majority aptly states, this court held, in *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 172–73, 204 A.3d 717 (2019), that, in order for an intentional intrusion upon one's seclusion to be actionable, that intrusion must be highly offensive to a reasonable person. Citing, in relevant part, to § 652B, comment (d), of the Restatement (Second) of Torts, this court explained: "For there to be liability, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object." Id., 173; see also 3 Restatement (Second), Torts § 652B, comment (d), p. 380 (1977). In other words, the consideration of this element involves the conduct of the defendants. In my view, *Parnoff* does not support the notion that an alleged intrusion is not highly offensive simply because the plaintiff's past conduct reasonably invites concern as to his activities. To be sure, the defendants engaged in surveillance of the plaintiff in response to their well-founded concern that the plaintiff could be a threat to the safety of Hopkins School's students and staff. Even such a threat, however, would not justify an intentional intrusion into the plaintiff's seclusion if the defendants' conduct was highly offensive. Because there is no legal authority in Connecticut that supports the proposition that a defendant's intentional intrusion upon a plaintiff's seclusion is not highly offensive to the reasonable person if the plaintiff did something to invite concern as to his activities, I do not agree with that portion of the majority's analysis.