IN RE L. T.*
(AC 46069)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children, L and C. The mother had a history of mental health issues and, when she was a minor, had been a victim of sexual abuse and a perpetrator of sexual molestation. The respondent father was incarcerated for sexually assaulting the mother's two older children while they were in the home with L and C. After L and the mother's two older children disclosed to the Department of Children and Families inappropriate behaviors of the mother and a man that she had allowed in the home, the department invoked a ninety-six hour hold on behalf of L and C, and the disposition was later modified to commitment of L and C to the custody of the petitioner, the Commissioner of Children and Families. The petitioner thereafter filed petitions for termination of the mother's parental rights as to L and C. At a family therapy session thereafter arranged by the department, C disclosed to the therapist that L had been sexually abused by a man while in the mother's care, an incident that the mother had not reported to the department. The mother and L and C were thereafter discharged from family therapy, and they continued with their individual therapy. After a trial, the court terminated the mother's parental rights as to both L and C and denied her motion for posttermination visitation. *Held*:

1. The trial court did not improperly determine that the department made reasonable efforts to reunify the respondent mother with L and C and that the mother was unable or unwilling to benefit from those efforts: the court found that the mother was offered numerous services to aid in reunification, including supervised visitation, parenting education,

* 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.

individual counseling services, a psycho-sexual evaluation, in-home services and case management services, and, although the mother had successfully completed services offered, she remained in no better position to resume caretaking responsibilities of L and C; moreover, although the mother argued that the department's efforts were not reasonable because it failed to adequately implement family therapy for the mother and L and C, the court reasonably could have concluded that the individual treatment needs of L and C should take precedence over family therapy, especially given the mother's minimization of the impact of sexual abuse on them; furthermore, the department was not required to do everything possible, just everything reasonable, to promote reunification.

2. The respondent mother could not prevail on her claim that the trial court improperly determined that she failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the lives of L and C: despite the mother's engagement in multiple services, she continued to demonstrate a limited understanding of her own trauma and how it negatively impacted her ability to parent her children and failed to gain an understanding of the trauma endured by L and C while in her care and her role in it; moreover, although the mother had substantially complied with her court-ordered specific steps and made improvements, the completion of specific steps alone is not sufficient to defeat the department's claim that a parent has not achieved sufficient rehabilitation.

3. The trial court did not improperly deny the respondent mother's motion for posttermination visitation with L and C: although the court found that the mother loves L and C and may have had frequent and positive interactions with them, that is just one factor that the court may consider in evaluating whether posttermination visitation is necessary or appropriate, and, even if the court had considered the nature of the mother's previous visitation with L and C, the court also properly considered the mother's inability to parent L and C and the harm that they had suffered as a result of her shortcomings; moreover, the court also considered the mother's combative behavior with the foster parents and her fixation on advice that she perceived might have come from the foster parents, which demonstrated her difficulty coping with visitation; accordingly, the court did not err in determining that it would be neither necessary nor appropriate for the mother to have posttermination visitation with L and C.

Argued May 8—officially released July 21, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with

** July 21, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

respect to their minor children, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, where the matter was tried to the court, *Hoffman*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David E. Schneider, *Jr.*, assigned counsel, for the appellant (respondent mother).

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

D. Keith Foren, supervisory assistant public defender, for the minor child L. T.

Megan Maynard, for the minor child C. T.

Opinion

CRADLE, J. The respondent mother, Amy T.,[1] appeals from the judgments of the trial court terminating her parental rights and denying her motion for postermination visitation as to two of her minor children, L. T. (L) and C. T. (C).[2] On appeal, the respondent claims that the trial court improperly (1) determined that the Department of Children and Families (department) made reasonable efforts to reunify her with the minor children and that she is unwilling or unable to benefit from reunification efforts, (2) determined that she has failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the

[1] The court also terminated the parental rights of the respondent father, Steven T. Because Steven T. is not involved in this appeal, our references in this opinion to the respondent are to the respondent mother.

[2] Although the respondent has other minor children, who are not at issue in this appeal, for the purposes of this opinion, we refer to L and C together as the minor children.

lives of the minor children, and (3) found that posttermination visitation with the minor children was not necessary and appropriate.[3] We affirm the judgments of the trial court.

The following facts, found by clear and convincing evidence by the trial court, and procedural history are relevant to our resolution of this appeal. The department became involved with the respondent in 1992, at age fifteen, when she disclosed that she had sexually molested her younger brother. She subsequently spent time in a residential setting under the care of the department and was diagnosed with post-traumatic stress disorder and conduct disorder. She later disclosed that she had been sexually abused by a babysitter when she was eight years old.

The respondent met the father of her two older daughters, A and I,[4] in 2003, but the two never married. In 2009, the respondent moved in with Steven T., whom she met while they both were in treatment for sexualized behaviors. She stated that she was not concerned about Steven's past offenses—having to do with sexual abuse of his sister—because he was "only a young man when he offended." They married in June, 2010. Their daughters, L and C, who are the minor children in this action, were born in 2010 and 2012, respectively. Subsequently, Steven was convicted of sexually assaulting A and I. The respondent stayed in contact with Steven while he was incarcerated for those offenses. The couple divorced in 2016.

[3] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), the attorneys for the minor children filed statements in this appeal. L's attorney filed a statement adopting the brief filed by the petitioner, the Commissioner of Children and Families, as to the first two issues, and adopting the brief of the respondent as to the third issue, concerning posttermination visitation. C's attorney filed a statement adopting the brief of the petitioner without exception.

[4] A and I, who reside with their biological father, are not at issue in this appeal.

Since the department's first involvement with this family in 2005, there have been seven investigations concerning sexual abuse pertaining to the respondent's children. On January 20, 2017, the petitioner, the Commissioner of Children and Families, filed petitions alleging that all four of the respondent's children had been neglected. On February 16, 2018, the court adjudicated the children neglected and placed them under an order of protective supervision for six months. The court issued specific steps to the respondent to facilitate reunification with the minor children.[5]

[5] The department provided specific steps to the respondent, designed to reunify her with the minor children. The steps are as follows: "[1] Keep all appointments set by or with [the department]. Cooperate with [the department's] home visits, announced or unannounced, and visits by the child(ren)'s court-appointed attorney and guardian ad litem. [2] Keep whereabouts known to [the department] and your attorney. [3] Participate in counseling and make progress toward the identified [parenting and individual] treatment goals. [4] Accept and cooperate with in-home support services referred by [the department], and make progress toward the identified goals. [5] [Do] [n]ot use illegal drugs. [6] Cooperate with court-ordered evaluations or testing. [7] Sign releases allowing [the department] to communicate with service providers to check on your attendance, cooperation, and progress toward identified goals, and for use in future proceedings with this court. Sign releases within [thirty] days. [8] Sign releases allowing your child's attorney and guardian ad litem to review your child's medical, psychological, psychiatric and/or educational records. [9] Get and/or maintain adequate housing and a legal income. [10] Immediately let [the department] know about any changes in the makeup of the household to make sure that the change does not hurt the health and safety of the children. [11] No involvement/further involvement with the criminal justice system. Cooperate with the Office of Adult Probation and comply with conditions of probation. [12] Take care of the children's physical, educational, medical or emotional needs, including keeping the children's appointments with his/her/their medical, psychological, psychiatric, or educational providers. [13] Cooperate with children's therapy. Make all necessary childcare arrangements to make sure the children is/are properly supervised and cared for by appropriate caretaker(s). [14] Keep the children in the state of Connecticut while this case is going on unless you get permission from [the department] or the court to take them out of state. You must get permission first. [15] Visit children as often as [the department] permits and demonstrate appropriate parent/child interaction during visits. [16] Within thirty . . . days of this order, and at any time after that, tell [the department] in writing the name, address, family relationship and birth date of any person(s) who you would like the

In May, 2018, A, I and L "all disclosed [to the department] inappropriate behaviors of [the respondent] and a man that [the respondent] allowed in the home. [The children] disclosed that this man and [the respondent] were acting 'funny' and 'tipsy' and the man pushed [the respondent] down during a yelling match. The man made sexual remarks [toward] I and hugged and kissed [the children] without their permission. [The respondent] also allowed this man to sleep with [the minor children] in the upper bunk. The older children informed [the department] that the man and [the respondent] were intoxicated." Following this disclosure, "[o]n May 18, 2018, the department invoked a [ninety-six] hour hold on behalf of [the minor children]."

On May 21, 2018, the petitioner filed motions for ex parte orders of temporary custody (OTC) for the minor children, which the court granted that day, temporarily committing them to the care and custody of the petitioner. Following a hearing, on May 24, 2018, the court sustained the OTCs. On July 17, 2018, the court modified the February 16, 2018 disposition from protective supervision to commitment of the minor children to the custody of the petitioner. The minor children remained in the petitioner's care at the time of trial.

On April 16, 2019, the court, *Hon. Michael A. Mack*, judge trial referee, approved a concurrent permanency plan of termination of parental rights and adoption or reunification with the respondent. On November 7, 2019, the petitioner filed petitions to terminate the respondent's parental rights as to the minor children, alleging that the department had made reasonable efforts to reunify the respondent with the minor children, that she is unable or unwilling to benefit from

department to investigate and consider as a placement resource for the children. [17] Tell [the department] the names and addresses of the grandparents of the children."

those efforts, and that she failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the lives of the minor children pursuant to General Statutes § 17a-112 (j) (3) (B) (i).

On June 29, 2022, the respondent filed a motion for posttermination visitation, arguing that the minor children "have had consistent, positive visitations with [the] respondent . . . that the minor children remain conflicted about whether or not they should return to [the respondent's] care . . . that the minor children want to have a continuing relationship with [the] respondent . . . that the current foster parents . . . support [the respondent's] continued contact with the minor children . . . [and] continuing visitation . . . would be necessary or appropriate to secure the welfare, protection, proper care and suitable support of the minor children."

On October 4, 2022, following a trial, the court, *Hoffman, J.*, issued a memorandum of decision terminating the respondent's parental rights as to the minor children.[6] In the adjudicatory phase,[7] the court found, by clear and convincing evidence, that the department made reasonable efforts to reunify the minor children with the respondent and, further, that she was unable

[6] The minor children have been together in their current foster placement since April, 2020, and have bonded with their foster family.

[7] "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Citation omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 582–83 n.12, 122 A.3d 1247 (2015).

or unwilling to benefit from the reunification efforts. The court next found, also by clear and convincing evidence, that the respondent "had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, considering the ages and needs of [the minor] children, [she] could assume a responsible position in their lives." In the dispositional phase, the court considered the seven statutory factors of § 17a-112 (k)[8] before finding that it was in the best interests of the minor children to terminate the respondent's parental rights.

The court also denied the respondent's motion for posttermination visitation, "find[ing] by clear and convincing evidence that posttermination visitation is not

[8] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

necessary or appropriate to secure the [minor children's] welfare, protection, [or] proper care [and is not] necessary to provide suitable support to [the minor children]." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The respondent first claims that the court improperly determined that the department made reasonable efforts to reunify her with the minor children and that she was unable or unwilling to benefit from those efforts. We are not persuaded.

"Section 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . [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 . . . .

"The reasonableness of the department's efforts must be assessed in the context of each case. 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]easonable efforts means doing everything reasonable, not everything possible. . . . [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. . . .

"Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review . . . that is, 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]. . . . In so doing, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court and will not disturb the court's subordinate factual findings unless they are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *In re Kylie P.*, 218 Conn. App. 85, 95–96, 291 A.3d 158, cert. denied, 346 Conn. 926, 295 A.3d 419 (2023).

In determining that the department made reasonable efforts to reunify the respondent with the minor children, the court recounted that the respondent was offered numerous services to aid in reunification, including "supervised visitation, parenting education, individual counseling services, a psycho-sexual evaluation, in-home services and case management services."

With respect to whether the respondent was willing and able to benefit from reunification efforts, the court

found that, although "[the respondent] has successfully completed services offered . . . [s]he remains in no better position to resume caretaking responsibilities of [the minor] children despite services offered. While [the respondent] engaged in recommended treatment, she continues to demonstrate a limited understanding and lack of insight into her needs and [those] of [the minor] children in order to keep them safe." The court concluded that "[the respondent has] failed to gain the necessary insight needed to care for [the minor children]. [She has] been unable to do so for most of [the minor children's] young lives."

In challenging the court's determination that the department made reasonable efforts to reunify her with the minor children, the respondent does not dispute the court's finding that the department provided her with numerous services. Instead, she argues that the department's efforts were not reasonable solely because it failed to adequately implement family therapy for the respondent and the minor children.

The following additional facts and procedural history are relevant to this claim. On June 3, 2021, the petitioner filed a motion for a psychological evaluation of the respondent, which the court granted on June 14, 2021. The court appointed Nancy Randall, a psychologist, to conduct the evaluation. Randall conducted the evaluation of the respondent, as well as an interactional evaluation of the respondent with the minor children, and contacted the minor children's therapist, Laura Douglas, who had been treating them since November, 2020. Randall submitted her report to the court on August 8, 2021, a copy of which was admitted into evidence at trial. She reported that the respondent was making good progress toward reunification and concluded that, "[a]t this time, it appears likely that the [respondent] would be able to provide appropriate care for the [minor children] if they were reunified." Nonetheless, Randall also

noted that the minor children's therapist "expressed concerns that the [minor children] would be highly disrupted if they were returned to [the respondent's] care." Thus, Randall concluded that it was "critical that family therapy be set up to deal with the trauma issues and that progress be made in this prior to the [minor children] being reunified. It cannot be adequately determined at this time how difficult that transition may be for the [minor children] and whether they would best be served by returning to [the respondent's] care if such treatment is unsuccessful."

On the basis of Randall's report, the court, on September 21, 2021, approved a concurrent plan of revocation of commitment and reunification of the minor children with the respondent or termination of the respondent's parental rights. In accordance with Randall's recommendation and to support the reunification plan, the department referred the respondent and the minor children for family therapy. At the first session on October 18, 2021, C disclosed to the therapist, James Robertson, that L had been sexually abused by a man while in the respondent's care. The respondent told Robertson that C's disclosure was false and that the department was aware of it. When Robertson reported the disclosure to the department, he was informed that the incident had not been reported. One week after the family session, Robertson met with the respondent alone and learned that the respondent and minor children had been attending individual therapy for various issues. Thereafter, Robertson, after discussing C's disclosure with his supervisor, decided to discharge the respondent and the minor children from family therapy and recommended that they continue with their individual therapy.

On January 13, 2022, the court ordered a psychological evaluation of the minor children, which Randall conducted on February 1, 2022. In her February 28,

2022 report, Randall recommended reinstating family therapy in conjunction with the minor children's individual therapy. Randall noted, however, that, because the minor children had been in the petitioner's care for nearly four years at that time, she questioned "whether it is still appropriate to disrupt a stable preadoptive home in order to make the attempt at reunification, which [could] not be assured to be successful."

Despite that concern, the department again referred the respondent and minor children to family therapy, selecting a family therapist whom Randall had recommended. Antina Falk, the department's social work supervisor for the minor children's cases, testified that the department "scheduled some family therapy that would occur between [the respondent] and the [minor children]. Unfortunately, prior to that family therapy session, [L] was found to be masturbating while holding [C's] hand. . . . [I]t was very concerning because . . . the concern was that, possibly, [L] was going to engage [C] in her sexual, you know—basically, drawing her into the sexual act and potentially perpetrating [sexual abuse on] her younger sister. So based on these concerns, once we brought this information to the [minor] children's therapist, based on those concerns, and with it being timed so closely with the beginning of this family therapy happening again, [Douglas] really was concerned that [L] needed her own more intensive, more sexually reactive based therapy by someone who is certified to provide that therapy. . . . [Family therapy] was strongly frowned upon and [the department] thought that it could be harmful to start family therapy when [L] was going though such a significant process."

On appeal, the respondent argues that the department should have adhered to Randall's recommendation for family therapy instead of the recommendation of

Robertson, who, she alleges, was relatively inexperienced.[9] In so arguing, the respondent ignores the fact that, even if Robertson was less experienced than Randall, he did not make the decision to discontinue family therapy on his own; rather, he did so in conjunction with his supervisor, who agreed with his assessment.[10] Furthermore, it is the province of the trial court to decide how much weight to give to each witness' testimony. See *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015) ("[i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence"

[9] The petitioner argues that the "court is limited to considering events preceding the adjudicatory date—the date on which the termination petition[s] [were] filed or last amended . . . ." The respondent argues that considering later events, including Randall's recommendations about family therapy and the related department actions, is proper because of the concurrent plan of reunification. The petitioner's position is at odds with the position she took in *In re Kyara H.*, 147 Conn. App. 855, 83 A.3d 1264, cert. denied, 311 Conn. 923, 86 A.3d 468 (2014), in which she "concede[d] that, in the absence of a court order that otherwise relieves the department of its reasonable efforts obligation, § 17a-112 (j) (1), as amended by Public Act 06-102, requires the department to prove that it has continued to make reasonable efforts up to the time of the trial's conclusion." (Emphasis omitted.) Id., 871. Consequently, we conclude that the court properly considered the efforts made by the department after the filing of the termination petitions.

[10] Notably, on cross-examination, counsel for the respondent asked Randall to comment on Robertson's competence given his lack of experience as a therapist, and Randall explained that "[Robertson] had limited experience at that point, but he also wasn't a fresh kid out of college. You know, twenty-two years old or something. I don't know what his background might have helped prepare him for, but I also know that he was working under supervision. So, I'll agree that he was fairly inexperienced, but I don't feel that I can speak to his competence level. . . . I understand that that's a discussion he had with his supervisor, to determine what to do. On the surface of it, from the information that I had, I think I would have liked to have seen them do something differently. I think that another therapist may have found some ways to try to work with the family in spite of the obstacles that he was identifying, but I will say that . . . some of that is—I believe there [are] probably other therapists who would agree with him. I think there's disagreement on some of those issues. But yes, I'll agree that I would have liked to have seen him make some further attempts to do family therapy."

(internal quotation marks omitted)). Moreover, despite Robertson's decision to end family therapy, the department subsequently referred the respondent and the minor children to family therapy again, but, as Falk explained in her testimony, the department determined, after consulting with Douglas, that family therapy would be inappropriate due to a recent incident involving sexualized behavior by L. When assessing the reasonableness of the reunification efforts made by the department, we are mindful of the need to consider the particular needs of the family involved. Although family therapy is one tool available to promote reunification in general, the court reasonably could have concluded that the individual treatment needs of the minor children should take precedence over family therapy, especially given the respondent's minimization, as noted by Randall, of the impact of the sexual abuse on the minor children. It also is significant that the respondent does not dispute that the department referred her for a variety of services tailored to address the concerns related to the sexual abuse of the minor children, including both the respondent's ability to protect the minor children and her own mental health. Specifically, the department offered the respondent case management services and referred her for mental health treatment, in-home services, psychological evaluations, dialectical behavior therapy,[11] and parenting education. In her August 8, 2021 report, Randall observed that, since 2018, the respondent mostly complied with the department's referrals and had "participated in individual therapy, a non-offending parents' program, and therapeutic parenting." Thus, the respondent's argument regarding

[11] Dialectical behavior therapy "is a process in which the therapist helps the patient find and employ strategies and ultimately synthesize them to accomplish consistently the defined ultimate goal and is used to treat borderline personality disorders and addictive personality disorders. To be successful, it demands honesty both from the patient and the clinician." (Internal quotation marks omitted.) *In re Aubrey K.*, 216 Conn. App. 632, 660–61 n.14, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023).

additional family therapy ignores the principle that the department need not do everything possible, just everything reasonable, to promote reunification. See *In re Corey C.*, 198 Conn. App. 41, 59, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020). Indeed, our Supreme Court has upheld a court's determination of reasonable efforts "[e]ven [when] the evidence had established that additional family therapy might have been beneficial." *In re Melody L.*, 290 Conn. 131, 147, 962 A.2d 81 (2009), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

Accordingly, on the basis of the foregoing, the court reasonably determined that the cumulative effect of the evidence was sufficient to justify its ultimate conclusion that the department made reasonable efforts to reunify the respondent with the minor children.[12]

II

The respondent also claims that the court improperly determined that she failed to rehabilitate within the meaning of § 17a-112 (j) (3) (B). Specifically, she argues that the court's determination is improper because she has substantially complied with her court-ordered specific steps. We disagree.

"Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. . . . That ground exists when a parent of a child whom the court has found to be neglected fails to

[12] Because we conclude that the court properly determined that the department made reasonable efforts to reunify the respondent with the minor children, we do not consider the respondent's claim that the court improperly determined that she was unable or unwilling to benefit from such services. See *In re Elijah C.*, 326 Conn. 480, 493, 165 A.3d 1149 (2017) ("Section 17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Internal quotation marks omitted.)).

achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child. . . .

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . [I]n assessing rehabilitation, 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. . . .

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, 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]. . . . When applying this standard,

we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Isabella Q.*, 217 Conn. App. 837, 848–49, 290 A.3d 889, cert. denied, 346 Conn. 927, 292 A.3d 3 (2023).

In finding that the respondent failed to achieve such a degree of personal rehabilitation as would encourage a belief that within a reasonable time she could assume a responsible position in the lives of the minor children, the court explained that, "[a]lthough [the respondent] is engaged in individual counseling and receives [dialectical behavior therapy] services as well as psycho-sexual counseling, she continues to demonstrate a limited understanding of her own trauma . . . . It was reported in 2019, by [the respondent's] therapist . . . that [the respondent] did not have a concept of the negative impact of how her sexual abuse history has impacted her ability to parent [the minor] children. . . . [Douglas] credibly testified that, in her work with [the respondent], [the respondent] was often dismissive and minimized the sexual abuse endured by [the minor] children and that, in May of 2022, at a Child and Family [Team] meeting,[13] [the respondent] appeared to be remaining in her own trauma as evidenced by her scattered discussion of her own sexual experiences as well as [the department's involvement] in her childhood as if it [were] happening to her today and not [to] the [minor children]. Clearly [the respondent] has failed to gain an understanding of the trauma the [minor children] endured while in her care and her role in it. [The respondent] has failed to gain an understanding and an ability to engage with [the minor] children related to the sexual abuse they experienced, navigate their feelings in a healthy way and support them appropriately,

[13] The Child and Family Team meeting included the department, the respondent, the respondent's lawyer, and Douglas.

hence she cannot keep them safe in the future." (Footnote added.) The court further found that, "[d]espite [the respondent's] engagement in multiple services, [the respondent] continues to demonstrate a limited understanding of her own trauma and how it has impacted her parenting and keeping [the minor] children safe. She has clearly failed to gain an understanding of the negative impact of sexual abuse on [the minor] children and it has affected her ability to keep [them] safe." The court concluded that, "[d]espite [the department's] reasonable efforts, [the respondent is] unable to parent [the minor children] and serve as their caretaker. [She is] unable to meet the[ir] developmental and emotional needs. . . . [The respondent] has [not] made significant progress toward personal rehabilitation and clearly cannot assume a responsible position in the lives of [the minor] children given their ages and needs. It is clear that [the respondent] loves [the minor children], but her attempts to reunify with them have failed . . . . "

On appeal, the respondent argues that she has not failed to rehabilitate because she substantially complied with her court-ordered specific steps.[14] Particularly, she

[14] The respondent also argues that she loves the minor children and has a positive relationship with them. It is well settled that "[t]he fact that the respondent may love the child[ren] does not in itself show rehabilitation." *In re Paul M.*, 154 Conn. App. 488, 500, 107 A.3d 552 (2014); see also *In re Ashley S.*, 61 Conn. App. 658, 667, 769 A.2d 718 (This court upheld the trial court's finding that "[a] parent's love and biological connection . . . is simply not enough. [The petitioner] has demonstrated by clear and convincing evidence that [the respondent] cannot be a competent parent to these children because she cannot provide them a nurturing, safe and structured environment." (Internal quotation marks omitted.)), cert. denied, 255 Conn. 950, 769 A.2d 61 (2001). Even in cases such as this, in which a parent makes efforts to reunify, "motivation to parent is not enough; ability is required." (Internal quotation marks omitted.) *In re Paul M.*, supra, 499 (determining that respondent had failed to rehabilitate despite remaining in constant contact about child's welfare and vigorously contesting motion to cease reunification efforts); see also *In re Alison M.*, 127 Conn. App. 197, 208, 15 A.3d 194 (2011) (determining that respondent had not demonstrated sufficient rehabilitation even though she was able to maintain her mental stability

contends that she has addressed the factors that led to the initial removal of the minor children from her care, such as "exposure of the [minor] children to inappropriate individuals, parenting, and unaddressed mental health issues." In support of her argument, she refers to reports from her therapists that she has "gained both intellectual and emotional insight, as well as developed an understanding on how to make better choices" and has also been able to "reduce her anxiety and depressive symptoms." She further highlights that she is not involved with the criminal justice system, she is employed, and she has signed the requisite releases to allow the department to communicate with service providers.

Again, although the respondent has complied with the department's recommendations and has made improvements, the court found, and the record reflects, that she nevertheless remains unable to parent the minor children and serve as their caretaker. In so finding, the court referred to statements by the minor children's therapist that the respondent still does not understand her role in their sexual trauma. The court's findings regarding the respondent's dismissive behavior during family therapy support the inference that she is not in a position to meet their developmental and emotional needs. Those findings are supported by the testimony of Randall, who explained that the respondent's minimization of the disclosure during family therapy with Robertson was "a concern . . . that would need to be addressed and changed in order for them to have a successful family therapy." The fact that the respondent minimized and denied her daughter's disclosure of sexual abuse during family therapy in October, 2021, after she had been engaged in services to assist her in supporting [the minor] children for more than

and keep her home safer and cleaner). Therefore, the respondent's reliance on her love for and relationship with the minor children is unavailing.

three years, supports the court's finding that the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3). Indeed, Randall also opined, "although I do believe the [respondent] has made some gains in being able to have better relationships with the [minor children], she, at least at this point, has not demonstrated that she's able to provide them with the home that [they need] . . . . I don't think that they can tolerate waiting much longer for [permanency]." This observation is in accord with the court's findings.

Consequently, despite some evidence of improvement, the totality of the evidence is sufficient to support a determination that the respondent has not "corrected the factors that led to the initial commitment." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 586, 122 A.3d 1247 (2015).

Furthermore, "[the] completion or noncompletion [of specific steps] . . . does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights . . . ." (Citation omitted.) *In re Elvin G.*, 310 Conn. 485, 508, 78 A.3d 797 (2013). "Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Internal quotation marks omitted.) Id.

Given the evidence of the respondent's continued minimization of the sexual abuse inflicted on the minor children, and considering the minor children's emotional needs due to the trauma they have experienced, we conclude that the court reasonably determined that the cumulative effect of the evidence was sufficient to justify its ultimate conclusion that the respondent has

failed to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time she could assume a responsible position in the lives of the minor children.

III

The respondent last claims that the court improperly denied her motion for posttermination visitation. Specifically, she argues that the frequency and quality of her visitation with the minor children prior to the termination of her parental rights precluded a finding that posttermination visitation with the minor children was neither necessary nor appropriate. We disagree.

"[A] trial court has the authority to consider a motion for posttermination visitation when the court considers termination of parental rights pursuant to § 17a-112 (j). . . . This authority . . . originates from the trial court's broad authority in juvenile matters, codified at [General Statutes] § 46b-121 (b) (1), 'to make and enforce such orders . . . necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child,' including orders impacting parental rights, such as termination and visitation." (Citation omitted; footnote omitted.) *In re Annessa J.*, 343 Conn. 642, 667–68, 284 A.3d 562 (2022). When evaluating whether posttermination visitation should be ordered, "the mo[st] prudent approach . . . is to adhere to the standard that the legislature expressly adopted [in § 46b-121 (b) (1)]—necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . ." (Internal quotation marks omitted.) Id., 668. "The term 'necessary,' when used in this context, has one fixed meaning: 'Impossible to be otherwise . . . indispensable; requisite; [or] essential.' " Id., 673. "In the context of posttermination visitation, we read the word 'appropriate' to mean 'proper,' "

given its placement after "the more exacting term, 'necessary.' " Id., 674. The court's "necessary or appropriate" standard "is purposefully more stringent than the 'best interest of the child' standard, as the trial court must find that posttermination visitation is necessary or appropriate—meaning 'proper'—to secure the child's welfare." Id. It would be a "rare circumstance in which a trial court could simultaneously terminate parental rights and, in the same proceeding, order posttermination visitation." Id.

It is well settled that we review a trial court's exercise of authority under § 46b-121 (b) (1) for an abuse of discretion. *In re K. M.*, 217 Conn. App. 687, 702, 289 A.3d 1240 (2023). "Whether . . . posttermination visitation [is necessary or appropriate] is, of course, a question of fact for the trial court, which has the parties before it and is in the best position to analyze all of the factors which go into the ultimate conclusion that [posttermination visitation is in the best interest of the child]. . . . Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child." (Citations omitted; internal quotation marks omitted.) *In re Ava W.*, 336 Conn. 545, 589–90, 248 A.3d 675 (2020).

It is axiomatic that we review a trial court's factual determinations for clear error. "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, however, [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 Anthony S.*, 218 Conn. App. 127, 153, 290 A.3d 901 (2023). On review for clear error, "the mere existence in the record of evidence that would support a different conclusion, without more, is not sufficient to undermine the finding of the trial court." (Internal quotation marks omitted.) *In re Anaishaly C.*, 190 Conn. App. 667, 682, 213 A.3d 12, cert. denied, 345 Conn. 914, 283 A.3d 505 (2019).

Here, in finding that posttermination visitation was neither necessary nor appropriate, the court explained that "[t]he record is replete with examples of [the respondent's] failure to acknowledge and validate the [minor children] as to their feelings and past experiences." The court found that "[t]he clear evidence in this matter shows that [the minor children] have suffered emotional and sexual abuse while in [the respondent's] care and that [the respondent] has little insight into her own trauma and how that has affected her parenting. [She] has been reluctant to talk about the trauma experienced by the [minor children]. The [minor children] do talk about [the respondent] in positive terms, but their relationship does not seem to be more than a visiting one. [L] has expressed a need for this matter to be 'over and done with' and [C] refers to [the respondent] as 'Amy' and has expressed a desire to stay in the foster

home because 'it is safe and not crazy.' The [minor children] need to have a permanent resolution as to custody and visitation . . . ."

The respondent claims that the court erred in denying her motion for posttermination visitation because she has had frequent and positive visits with the minor children. Specifically, she argues that she "had visited [the minor] children consistently during the four years they were in the care of the department"; that the trial court acknowledged her love for the minor children; and that "[t]he court-appointed evaluator [Randall] noted that stopping the visits in this case would be a significant loss to the [minor] children." The respondent also argues that "[she] and the minor children have a bond" and that "[t]he minor children spoke of [the respondent] in positive terms."

Although the respondent loves the minor children and may have had frequent and positive interactions with them, that is just one factor that the court *may* consider in evaluating whether posttermination visitation is necessary or appropriate. It was not required to do so. Moreover, even if the court did consider the nature of the respondent's previous visitation with the minor children, and agreed with her that it was frequent and positive in nature, that determination, in itself, would not have been dispositive of the required inquiry of whether posttermination visitation was necessary or appropriate. In denying the respondent's motion, the court properly considered the respondent's inability to parent the minor children and the harm that they have suffered as a result of her shortcomings. The court also explained that the respondent's combative behavior with the foster parents, and her fixation on advice that she perceives might have come from the foster parents, demonstrate her difficulty coping with visitation. We therefore conclude that the court did not err in determining that it would be neither necessary nor

appropriate for the respondent to have posttermination visitation with the minor children.

The judgments are affirmed.

In this opinion the other judges concurred.

IN RE KYREESE L., JR.*
(AC 45846)

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

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, K. The mother was referred to a variety of services by the Department of Children and Families for, inter alia, substance abuse, mental health treatment and parenting, but she struggled to engage in those services. Following a trial, the court concluded that, although the department had made reasonable efforts to reunify the mother and K and the mother eventually completed most of her services, she was unable or unwilling to benefit from those services because she did not successfully complete a certain therapeutic program to which she had been referred, which provided a path to reunification, and she did not attend a psychological evaluation, which provided another path to reunification. *Held*:

1. This court concluded that there was sufficient evidence to support the trial court's finding that the department made reasonable efforts to reunify the respondent mother with K: the department provided the mother with a significant number of appropriate services and, although the mother claimed that she missed certain sessions of the therapeutic program to which she had been referred because the department failed to provide childcare for her other minor child, there was no evidence that the mother ever requested such childcare assistance from the

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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 Appellate 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.

department or sought an order to compel the department to provide such assistance; moreover, the mother testified at trial that she lived with her mother and that her mother would often care for her other minor child when she needed to go to a meeting, or, if her mother was not available, that she could bring the other minor child with her to meetings, such that the evidence did not support the mother's contention that the department's failure to provide childcare assistance prevented her from attending the therapeutic sessions; moreover, because this court determined that the record contained sufficient evidence to support the trial court's reasonable efforts determination, it was not required to review that court's secondary determination that the mother was unable or unwilling to benefit from the department's reunification efforts.

2. The trial court properly found that the respondent mother failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of K, she could assume a responsible position in the life of K: in concluding that the mother failed to sufficiently rehabilitate, the trial court reasoned that K required a consistent, rational, predictable and sober caregiver, and considered the fact that K had had two bone fractures, the cause of which remained unexplained, that occurred while in the care of the mother and K's father, that the mother's failure to complete certain services to which she had been referred was due to her inability to balance her reunification efforts with K with her obligation to care for her other minor child, and, thus, that she was not consistent or predictable; moreover, ample evidence supported the court's finding that the mother's failure to fully participate in the programs that could have assessed her potential for rehabilitation and assisted her in that endeavor was part of a broader pattern of delay and lack of engagement with her services.

Argued March 7—officially released July 26, 2023**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the respondent John Doe was defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. Shelley A. Marcus*, judge trial referee; judgment terminating the respondents' parental rights,

** July 26, 2023, the date that this opinion was released as a slip opinion, is the operative date for all substantive and procedural purposes.

from which the respondent mother appealed to this court. *Affirmed.*

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

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

Opinion

CLARK, J. The respondent mother, Naila S.,[1] appeals from the judgment of the trial court terminating her parental rights as to her minor child, Kyreese L., Jr. (Kyreese). The respondent claims that the court erred in concluding that (1) the Department of Children and Families (department) made reasonable efforts to reunify the respondent with Kyreese, (2) the respondent was unable or unwilling to benefit from reunification services, and (3) the respondent failed to achieve a sufficient degree of personal rehabilitation. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of the respondent's claims on appeal. "The [respondent] has [had] a substance abuse history of excessive use of marijuana from the age of fifteen as well as being involved in incidents of intimate partner violence (IPV) with the father [Kyreese L., Sr.]. The [respondent] was

[1] The court also terminated the parental rights of Kyreese L., Sr., and John Doe. Kyreese L., Sr., who we refer to as the father in this opinion, signed an Acknowledgement of Paternity one day after the child's birth, but he claimed during the underlying proceedings that he might not be Kyreese, Jr.'s father. The court ordered a paternity test, but the father and the child did not attend the testing appointment, so John Doe was necessarily cited into the case. Because neither Kyreese L., Sr., nor John Doe have appealed from the judgment of the trial court, all references to the respondent are to Naila S. only.

abused as a child and uses marijuana as a coping skill for her depression and anxiety. . . . The parents also have histories with [the department] as children subject to abuse and/or neglect.

"This case opened on May 14, 2019, when [the department] received a referral from a Yale New Haven Hospital [hospital] social worker informing the petitioner, [the Commissioner of Children and Families], that the [respondent] tested positive for marijuana at the time of Kyreese's birth. The [respondent] also tested positive for marijuana at her prenatal appointments throughout her pregnancy. As a result, the [respondent] was substantiated for neglect of Kyreese.

"[The department] referred the [respondent] to Family Based Recovery (FBR) for substance use and mental health treatment. The [respondent] participated in the FBR program, but she continued to test positive for marijuana from May through September of 2019 and, therefore, received no benefit from it. . . .

"On August 16, 2019, the [respondent] contacted the New Haven Police Department to report the occurrence of a physical altercation between her and the father. An arrest warrant was issued for the father with charges of risk of injury to a minor, as Kyreese was present; assault in the third degree; and breach of the peace. Thereafter, on September 10, 2019, the father contacted the New Haven police to report another physical altercation with the [respondent]. This time the [respondent] was the aggressor, and she was arrested for risk of injury, assault in the third degree and breach of the peace. The [respondent] had been holding Kyreese during this incident, and they both fell down the stairs. As a result, Kyreese was taken to the hospital to be assessed, and the child was released the same day; however, the [respondent] was required to bring Kyreese back to the hospital the following day, September 11,

for a skeletal examination. [The department] created a safety plan for the [respondent] and Kyreese that included no contact with the father, filing a restraining order against the father, and continuation with her services including engagement in IPV services.

"The [respondent] brought Kyreese to [the hospital] on September 11, 2019, for his skeletal examination, and [the department] received the result the next day. Kyreese suffered a fracture to the right distal femur and a potential fracture to the left arm. [A physician with the hospital's] DART Team,[2] could not opine definitively if the injuries were the result of abuse and scheduled further scans in two weeks. Thus, [the department] sought and was granted an order of temporary custody (OTC) on September 16, 2019, as the parents could provide no explanation for the injuries to Kyreese and the injuries occurred while he was in their care.

"A neglect petition was filed simultaneously with the OTC. The OTC was sustained on September 20, 2019. The updated skeletal scans were completed, which showed injury to Kyreese's other leg as well. [The physician] opined to [the department's] social worker, Artemesia C., in October of 2019, that the injuries to Kyreese were highly indicative of child abuse. Further, [the department's social worker] testified credibly that these injuries did not occur when the [respondent] and Kyreese fell down the stairs. Rather, these types of injuries are incurred because someone pulled on the baby's legs. Kyreese was placed with fictive kin suggested by the [respondent], where he remains to date.[3]

"On October 31, 2019, the court adjudicated Kyreese as a neglected child and committed him to [the department's] care. The preliminary specific steps were made

[2] "The DART Team is a group of physicians, nurses and staff at [the hospital] dedicated to assessing children for the possibility of child abuse."

[3] "Kyreese is placed with the [respondent's] former foster mother."

final. A permanency plan of [termination of parental rights] and adoption was approved by [the trial] court . . . on April 27, 2021, and March 3, 2022 . . . . This petition was filed on October 4, 2021, and amended on November 22, 2021." (Footnotes in original.)

The court, *Hon. Shelley A. Marcus*, judge trial referee, held a virtual trial on the petition for termination of parental rights on July 11 and 13, 2022. On July 27, 2022, the court issued a memorandum of decision granting the petition to terminate the parental rights of the respondent, the father, and John Doe.[4] This appeal followed.[5] Additional facts and procedural history will be set forth as necessary.

I

The respondent first challenges the court's conclusions that the department made reasonable efforts to reunify her with Kyreese and that she was unable or unwilling to benefit from those efforts. We are not persuaded.

We begin by setting forth additional facts relevant to the respondent's claims as to the department's reunification efforts. "The [respondent] had been sporadically engaging with FBR at the time of the OTC. The [respondent] was discharged from FBR when the OTC was granted because FBR is an in-home service for substance abuse, mental health and parenting and Kyreese was no longer in the home.

"Subsequent to the discharge from FBR, the [respondent] was referred by [the department] to Monarch, LLC, on October 23, 2019, for substance abuse and mental health treatment. However, the [respondent] failed to attend. The [respondent] was also referred to

[4] See footnote 1 of this opinion.

[5] The attorney for the minor child has adopted the petitioner's appellate brief.

IPV-FAIR for IPV treatment on September 16, 2019. It took the [respondent] eight months to complete IPV-FAIR, [which she did] on May 26, 2020. The program should have been completed in four months. IPV-FAIR recommended ongoing mental health treatment for the [respondent] at discharge.

"[The department] made a referral for the [respondent] to [Multidimensional Family Recovery (MDFR)] on June 4, [2020], as she was struggling to engage in reunification services. MDFR is a community based service that assists parents who are having difficulty engaging in services. The [respondent] was unsuccessfully discharged from MDFR for lack of engagement.

"After the [respondent's] unsuccessful discharge from MDFR, [the department] referred the [respondent] to [Midwestern Connecticut Council of Alcoholism, Inc. (MCCA)] for mental health and substance abuse treatment on September 28, 2020. The [respondent] did not attend her intake at MCCA until December 28, 2020. The [respondent] was recommended to attend MCCA's Intensive Outpatient Program (IOP), which would address anger management as well as substance use and mental health. The [respondent's] attendance was very sporadic, but she finally completed her IOP in October of 2021. [The department's] social worker, Joel P., testified credibly that the [respondent] attended her program for ten months, which is a very lengthy period of time. The program is usually much shorter in duration. The [respondent] was not recommended for additional services upon discharge.

"[The department] also referred the [respondent] for visitation and parenting classes, initially with Family Centered Services. The [respondent] was consistent with her in person visitation. However, during the closure caused by the COVID-19 pandemic, visits were transitioned to virtual, twice a week, facilitated by the foster

mother. There were periods of time when the [respondent] failed to keep consistent contact with the foster mother for virtual visits, but the [respondent's] attendance virtually improved during the holiday period in 2021. The visits transitioned to in person visitation in the fall of 2021 [occurring] once per week for one hour at the [the department's] office, and the [respondent] was very consistent until December of 2021, after which she missed seven visits without explanation and without calling to cancel. Thereafter, the [respondent] maintained her consistency with her weekly visitation. The [respondent] was engaging and appropriate during visits but needed correction regarding her tardiness to visits and using her telephone during visitation. The [respondent] was responsive to these suggestions and corrected her behavior.

"In addition, during this time frame, the [respondent] gave birth to another child, Nariea, [in July], 2021. The [respondent tested] positive for marijuana upon Nariea's birth. The [respondent] appeared to be more motivated to complete her programs after Nariea was born, as that child remains in her care, and a period of protective supervision was permitted to expire in July of 2022. The [respondent] completed her parenting program, Circle of Security, in February of 2022, during that period of protective supervision. As the [respondent] appeared to be more successfully navigating parenting and was successfully engaging in services despite her engagement being delayed and lengthy in nature, [the department] made a referral to 'r kids Therapeutic Family Time (TFT) in April of 2022.

"Unfortunately, the [respondent] reverted to her previous pattern of delay and lack of engagement with regard to TFT. The [respondent] was assigned a clinician in May of 2022, but the [respondent] failed to engage for an additional four weeks, with no explanation as to why. TFT is a twelve week program that

provides supervised visitation and individual parenting guidance in the context of weekly visits and individual sessions. The goal is to hopefully move on to a reunification assessment and then to transition the child home.

"[The department's] social worker, James R., credibly testified that the [respondent] only completed four of eight visitation sessions [with TFT] and none of her individual meetings. In addition, the [respondent] provided no explanation to 'r kids or to [the department] as to the reasons for her failure to comply with the program. [James R.] conversed with the [respondent] about the importance of completion of the TFT program in order to reunify with Kyreese. Nevertheless, the [respondent] missed one half of her visits. The program must be concluded within twelve weeks, and, as the [respondent] missed four of eight visits, she [could not] timely complete the program. As a result, 'r kids [could not] complete a reunification assessment and, therefore, [could not] recommend moving on to the next step, Reunification Therapeutic Family Time, which would have provided a path to reunify with Kyreese. The [respondent], when asked . . . why she missed the visits, replied that strep throat caused her to miss two visits and providing care of Nariea was the reason that she missed the other two visits. While it appear[ed] that [she was] able to care for one child, [her response made] it apparent that the [respondent was] overwhelmed by having to care for two children, in that the [respondent was] not able to attend visits that were essential to reunification."

The court also found that "the [respondent] fail[ed] to attend a psychological evaluation that would have assessed her readiness for reunification with Kyreese and would have made recommendations for services to aid in that endeavor. The [respondent] was given ample opportunity to attend, in that the evaluation was scheduled for March 15, 2022, and then, when the

[respondent] failed to attend, was rescheduled twice [to] May 17, 2022, and June 6, 2022. [The department] sent the [respondent] notice by mail informing her of the date, time and place of the evaluation and offered her transportation. The [respondent] never responded except on one occasion when she called . . . James R. on the morning of the evaluation asking for transportation. At that point, it was too late for her to attend her appointment. The [respondent's] testimony that she did not have notice of the evaluations is not credible due to the fact that the notices were sent to the address she gave to the court when sworn in for her testimony and . . . James R. credibly testified that the notices were never returned to him by the post office."

The court ultimately concluded that the respondent "failed to engage in the two most important requirements for potential reunification with Kyreese. Therefore, although the [respondent] eventually completed most of her services, she was unable or unwilling to benefit from those services because she [would] not successfully complete TFT, which provided a path to reunification, and she did not attend the psychological evaluation, which provided another path to reunification. [The department] also made reasonable efforts to reunify the [respondent] and Kyreese . . . ."

A

The respondent first argues that the court erred in concluding that the department made reasonable efforts to reunify her with Kyreese.[6] We are not persuaded.

[6] The respondent also argues, for the first time on appeal, that our body of law concerning reasonable efforts to reunify is unconstitutional. Specifically, she argues that, because General Statutes § 17a-111b (a) (2) provides that the petitioner need not prove that the department made reasonable efforts to reunify if the court previously approved a permanency plan of termination and adoption, the statutory scheme "allows for an impermissible end run around the clear and convincing evidentiary standard required, as a matter of due process, in all termination hearings. . . . [A]t the permanency plan hearing, the [petitioner] is merely required to satisfy [her] burden . . . by

"[General Statutes §] 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . [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. . . . [T]he 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 . . . ." (Citation

a mere preponderance of the evidence." She therefore contends that this system violates due process and seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

In this case, however, the court never relieved the petitioner of her burden of proving that the department made reasonable efforts to reunify. Instead, the court found, by clear and convincing evidence, that the department made "reasonable efforts . . . to reunify Kyreese and [the respondent] and that the [respondent] was unable or unwilling to benefit from reunification efforts." Because the court properly found, on the basis of clear and convincing evidence, that the department made reasonable efforts to reunify the respondent and the child, we need not address the respondent's constitutional claim. See *In re Brayden E.-H.*, 309 Conn. 642, 656, 72 A.3d 1083 (2013) (noting that Connecticut courts "follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions" (internal quotation marks omitted)).

omitted; internal quotation marks omitted.) *In re Kylie P.*, 218 Conn. App. 85, 95–96, 291 A.3d 158, cert. denied, 346 Conn. 926, 295 A.3d 419 (2023).

We review a trial court's reasonable efforts determination for evidentiary sufficiency. *In re Oreoluwa O.*, 321 Conn. 523, 533, 139 A.3d 674 (2016). Pursuant to that standard, "we consider 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]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 789, 127 A.3d 948 (2015).

The respondent argues that the department failed to make reasonable reunification efforts because it did not provide her with childcare for Nariea, which she claims she needed in order to attend TFT. She notes that the court specifically credited her testimony that she missed TFT sessions due to lack of childcare for Nariea and argues that such a finding necessarily implies that, because the department did not provide childcare, its reunification efforts were unreasonable. We disagree.[7]

As the respondent acknowledges, "the department provided [her] with a significant number of services,

[7] As the petitioner points out, the respondent did not raise this argument in the trial court. Our Supreme Court has noted that "the proper place for the respondent to have raised her claim [that the department should have offered childcare services] was in the trial court, where the issue could have been litigated and a factual record developed as to whether reasonable reunification efforts required the department to [provide childcare]." *In re Elijah C.*, 326 Conn. 480, 503–504, 165 A.3d 1149 (2017). Nevertheless, the record in this case is sufficient for us to review the respondent's claim that, because the department did not offer the respondent childcare services, its reunification efforts were unreasonable.

and the services provided were appropriate." It referred the respondent to FBR, which provided substance abuse counseling, mental health treatment, and parenting training; Monarch, LLC, which provided substance abuse and mental health treatment; IPV-FAIR, which provided intimate partner violence treatment; MDFR, which provided assistance with reunification service engagement; and MCCA, which provided anger management, substance abuse, and mental health counseling. When the respondent completed these services—albeit after substantial delay—and showed an ability to safely care for Nariea, the department offered additional services: TFT, which provides supervised visitation and individual counseling; and a psychological evaluation, which would have allowed the department to determine whether additional services were necessary to achieve reunification. The petitioner pursued the petition for termination of parental rights only after the respondent failed to attend the psychological evaluation or any individual TFT sessions and attended only one half of the supervised visits that TFT provided.

Although the respondent claims that she missed the TFT sessions because the department failed to provide childcare for Nariea, there is no evidence that the respondent ever requested such childcare assistance from the department or sought an order to compel the department to provide such assistance. As this court previously has held, a parent's failure to ask the department for assistance, in conjunction with that parent claiming for the first time on appeal that such assistance was necessary, "undermines [the] argument that those services were part of what the department should have provided as part of its reasonable efforts to reunify . . . ." *In re Corey C.*, 198 Conn. App. 41, 64, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

Moreover, the respondent testified at trial that she lived with her mother and that her mother would often

care for Nariea when the respondent needed to go to a meeting or, if her mother was not available, that she could bring Nariea with her to the meetings. She specifically testified, "when I have meetings to go to . . . like, with [TFT], I can't bring—well, *I can bring* [*Nariea*] *if needed*, but they would prefer that, you know, she stays home so they could see how [Kyreese and I] interact. So . . . *when I go to those visits*, [*my mother will*] *watch her*." (Emphasis added.) The evidence, therefore, does not support the respondent's contention that the department's failure to provide childcare assistance prevented her from attending the TFT sessions.

On the basis of our review of the record, we conclude that there is sufficient evidence to support the court's finding that the department made reasonable efforts to reunify the respondent with Kyreese.

B

The respondent also challenges the court's conclusion that she was unable or unwilling to benefit from reunification services. As noted earlier in this opinion, a determination that a parent is unable or unwilling to benefit from reunification services is not necessary if a court has determined that the department made reasonable efforts to reunify a parent with his or her child. See *In re Elijah C.*, 326 Conn. 480, 493, 165 A.3d 1149 (2017) ("[§] 17a-112 (j) clearly provides that the department is not required to prove both circumstances" (internal quotation marks omitted)). Because we have already determined that the record contains sufficient evidence to support the court's reasonable efforts determination, we need not review the court's secondary determination that the respondent was unable or unwilling to benefit from the department's reunification efforts. See id.

II

The respondent's final claim on appeal is that the court erred in concluding that she failed to rehabilitate.

Specifically, she argues that this conclusion is erroneous because the court credited her explanation for missing one half of the TFT sessions. We disagree.

The following legal principles are pertinent to our review of the respondent's claim. Section 17a-112 (j) provides in relevant part that "[t]he Superior Court . . . may grant a petition filed pursuant to this section if . . . (3) . . . (B) the child . . . (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life." (Internal quotation marks omitted.) *In re Kylie P.*, supra, 218 Conn. App. 108.

In reviewing a trial court's determination that a parent failed to sufficiently rehabilitate, "the appropriate standard of review is one of evidentiary sufficiency . . . ." (Internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 588, 122 A.3d 1247 (2015). As explained in part I A of this opinion, this standard requires a reviewing court to determine "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]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) Id. Although our appellate courts apply an evidentiary sufficiency standard of review to the trial court's ultimate determination on this question, "clear error review is [still] appropriate for the trial court's subordinate factual findings . . . ." (Footnote omitted.) Id., 587.[8]

The following additional findings of fact of the court are relevant to our resolution of this claim. The court found that "[t]he [respondent] has had issues with substance abuse and her mental health since the age of fifteen. The [respondent], by her own admission, began her journey to potential reunification badly. She acknowledge[d] that . . . in the beginning . . . she was working on her own mental health, she was angry,

[8] Prior to *In re Shane M.*, supra, 318 Conn. 569, courts had applied the clear error standard of review both to a trial court's determination that a parent failed to rehabilitate and to that court's subordinate factual findings. See, e.g., *In re Elvin G.*, 310 Conn. 485, 499, 78 A.3d 797 (2013). The respondent argues in her appellate brief that "the standard of review as established by our Supreme Court in *In re Shane M.* is improper and should be replaced by the former clear error standard." As the respondent acknowledges, however, this court is bound by our Supreme Court's precedent. *State* v. *Hurdle*, 217 Conn. App. 453, 475, 288 A.3d 675 ("[i]t is axiomatic that this court, as an intermediate body, is bound by Supreme Court precedent and [is] unable to modify it" (internal quotation marks omitted)), cert. granted, 346 Conn. 923, 295 A.3d 420 (2023).

and she was not receptive to referrals made for her by [the department]. The [respondent] credit[ed] the birth of Nariea with her desire to engage with services which she believe[d] [were] helpful."

The court acknowledged "that the [respondent] has made excellent progress in completing programs, albeit over an extraordinary length of time, that led to her being able to parent Nariea, with the assistance of the maternal grandmother, with a period of protective supervision being permitted to expire in early July of 2022. However, each child and each situation is unique. Kyreese came into care, in part, because he had unexplained injuries that have still not been explained to date. [A physician] opined that these injuries were highly indicative of child abuse. The [respondent] was given an opportunity, after her success with Nariea, to show her ability to reunify with Kyreese by attending TFT in order to be assessed by 'r kids for reunification and by attending a psychological evaluation which would have also assessed her ability to parent Kyreese within the foreseeable future. The [respondent] did not attend the psychological [evaluation] at all, despite being given three opportunities to do so. The [respondent] has attended TFT visits but has missed one half of them as well as all of her individual sessions and will not successfully complete the program. The [respondent] attributes missing visits to her having to care for Nariea. This testimony is credible and makes it apparent that the mother is not able to safely parent more than one child."

In concluding that the respondent failed to sufficiently rehabilitate, the court reasoned that "Kyreese requires a consistent, rational, predictable and sober caregiver. Kyreese had two fractures, the cause of which remains unexplained, that occurred while in the care of the [respondent] and the father. The [respondent] has failed to rehabilitate regarding Kyreese in that

she has not shown the ability to care for Kyreese and Nariea and, thus, she is not consistent, nor is she predictable. The [respondent] failed to fully participate in the programs that could have assessed her potential for rehabilitation and assisted her in that endeavor. . . . For all of the foregoing reasons, neither the [respondent] nor the father has rehabilitated in the three years that Kyreese has been in care, and they cannot do so within a reasonable time."

On appeal, the respondent argues that there is insufficient evidence in the record to support the court's determination that she failed to rehabilitate because the court did not sufficiently credit her reasons for failing to fully engage with TFT. As set forth in part I A of this opinion, however, the record does not support the respondent's claim that she failed to attend TFT because the department did not provide her with childcare. Rather, the trial court found that the respondent's failure to successfully complete TFT was due to her inability to balance her reunification efforts with Kyreese with her obligation to care for Nariea, which made it apparent that she was "not able to safely parent more than one child." The respondent argues that this finding is incongruent with the court's separate finding explicitly crediting her testimony that she missed two TFT visits due to a lack of childcare and two more TFT visits because she had strep throat, but the respondent ignores the other evidence in the record. Although the court credited the respondent's explanation for missing one half of the supervised TFT visits, she also missed, without explanation, every individual TFT session and the psychological evaluation, which were intended to assess "her ability to parent Kyreese . . . within the foreseeable future."

Moreover, ample evidence supports the court's finding that the respondent's failure "to fully participate in the programs that could have assessed her potential

for rehabilitation and assisted her in that endeavor" was part of a broader "pattern of delay and lack of engagement" with her services. The respondent was referred to IPV-FAIR, which should have taken four months to complete but took the respondent eight. The respondent was referred to the intensive outpatient program with MCCA, which took ten months to complete but "is usually much shorter in duration." When the respondent was struggling to engage in services, the department referred her to MDFR to assist with that, but she was unsuccessfully discharged from MDFR for lack of engagement. She had seven unexplained absences from supervised visits with Kyreese after December, 2021, separate from the four TFT visits that she missed. She later failed to engage in a psychological evaluation, despite the fact that it was rescheduled twice to accommodate her. The record also reflects that the respondent failed to fully benefit even from those services that she did complete, as evidenced by the fact that she participated in three different substance abuse services—FBR, Monarch, LLC, and MCCA—but still tested positive for marijuana when she gave birth to Nariea.

On the basis of our review of the record in this case, we conclude that there is sufficient evidence to support the court's finding that the respondent failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of Kyreese, she could assume a responsible position in his life.

The judgment is affirmed.

In this opinion the other judges concurred.

ERICA LAFFERTY ET AL. *v.* ALEX EMRIC JONES ET AL.

(AC 46194)

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

Syllabus

The plaintiff in error, P, who was the attorney for the defendants in the underlying consolidated actions, filed a writ of error challenging the order by the trial court, *Bellis*, *J.*, suspending him from the practice of law for a period of six months. Judge Bellis had conducted a show cause hearing at which P appeared and was represented by counsel and in which the Chief Disciplinary Counsel participated. Judge Bellis found, by clear and convincing evidence, that P had violated certain Rules of Professional Conduct and ordered his suspension. P effectuated service of process on the first defendant in error, the Office of Chief Disciplinary Counsel. In response, disciplinary counsel filed a motion to dismiss on the ground of misjoinder. Thereafter, P made service on the second defendant in error, Judge Bellis, who subsequently filed a motion to dismiss for lack of proper service of process. *Held:*

1. This court denied disciplinary counsel's motion to dismiss: disciplinary counsel appeared in the underlying matter and participated in the show cause hearing before the trial court without objection and was responsible for its prosecution, and he did not cite any authority to support the proposition that he was a misjoined party in a disciplinary proceeding, even if that proceeding had been initiated by the trial court; moreover, by virtue of disciplinary counsel's institutional role and powers set forth in the rule of practice (§ 2-34A (b)), he is the party perhaps most well suited to participate in the writ of error and to defend the propriety of the trial court's order suspending P from the practice of law.
2. This court granted Judge Bellis' motion to dismiss for lack of proper service of process and dismissed the writ of error with respect to her, finding that P did not serve her in a timely manner and that she filed a timely motion to dismiss.

Considered March 1—officially released August 1, 2023

Procedural History

Writ of error from the order of the Superior Court in the judicial district of Waterbury, *Bellis*, *J.*, suspending the plaintiff in error from the practice of law for a period of six months; thereafter, the defendants in error each filed a motion to dismiss. *Motion to dismiss denied as to the defendant in error Office of Chief*

Disciplinary Counsel; motion to dismiss granted and writ of error dismissed as to the defendant in error Hon. Barbara N. Bellis.

Christopher T. DeMatteo, in opposition to the motions.

Brian B. Staines, in support of the motion filed by the Office of Chief Disciplinary Counsel.

Robert J. Deichert, assistant attorney general, in support of the motion filed by Hon. Barbara N. Bellis.

Opinion

PER CURIAM. This writ of error was commenced by the plaintiff in error, Norman A. Pattis—a Connecticut attorney and counsel of record for the defendants, Alex Emric Jones and Free Speech Systems, LLC,[1] in the underlying consolidated tort actions[2] arising out of the mass shooting at Sandy Hook Elementary School. The plaintiff in error challenges the order of the second defendant in error, Honorable Barbara N. Bellis,[3] suspending him from the practice of law for a period of six months for violating numerous provisions of the Rules of Professional Conduct.

In response to the writ of error, the first defendant in error, the Office of Chief Disciplinary Counsel, filed a motion to dismiss on the ground of misjoinder. Judge Bellis also filed a motion to dismiss the writ of error

[1] Although there were additional defendants who participated in the underlying actions, Jones and Free Speech Systems, LLC, were the only remaining defendants at the time of the show cause hearing described in this opinion. We therefore refer in this opinion to Jones and Free Speech Systems, LLC, as the defendants.

[2] The consolidated actions are *Lafferty* v. *Jones*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-18-6046436-S; *Sherlach* v. *Jones*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-18-6046437-S; and *Sherlach* v. *Jones*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. CV-18-6046438-S.

[3] In this opinion, we refer to the second defendant in error interchangeably as the trial court and Judge Bellis.

for lack of proper service of process. By separate orders dated March 1, 2023, we denied the motion to dismiss filed by the Office of Chief Disciplinary Counsel and granted Judge Bellis' motion to dismiss, indicating in both orders that an opinion would follow. This opinion provides our reasons for those orders.

The following facts and procedural history are relevant to our resolution of the motions to dismiss. On August 4, 2022, in each of the consolidated actions, the trial court issued, sua sponte, an order requiring Attorney Pattis to appear and show cause at a hearing on August 10, 2022, "as to whether he should be referred to disciplinary authorities or sanctioned by the court directly; see . . . Practice Book [§] 2-45; regarding the purported release of medical records of the plaintiffs, in violation of state and federal statute and this court's protective order, to unauthorized individuals." The order also directed the clerk "to notify Chief Disciplinary Counsel, Brian Staines [disciplinary counsel], of the show cause hearing and . . . to immediately provide him with a copy of this order." Disciplinary counsel had previously filed an appearance.

On August 10, 17 and 25, 2022, the trial court conducted the show cause hearing, at which Pattis appeared and was represented by counsel; disciplinary counsel also participated in the hearing. In a memorandum of decision dated January 5, 2023, the trial court found, by clear and convincing evidence, that Pattis had violated rules 1.1, 1.15 (b), 3.4 (3), 5.1 (b), 5.1 (c), and 8.4 (4) of the Rules of Professional Conduct. As discipline for those violations, the court suspended Pattis from the practice of law in the state of Connecticut for a period of six months (suspension order). This writ of error followed.[4]

[4] The suspension order is currently stayed. The following recitation sets forth the procedural background leading to the issuance by this court of a stay.

On January 6, 2023, Pattis filed in the trial court, pursuant to Practice Book § 61-12, a motion for a stay of the suspension order during the pendency

On January 20, 2023, Pattis filed in this court a writ of error, which had been allowed and signed by a clerk of the court in which the suspension order was issued. See Practice Book § 72-3 (a). The writ of error designated the return date as February 7, 2023. The writ of error, which does not expressly identify any defendant in error, was accompanied by a signed marshal's return of service, indicating that service had been made *upon disciplinary counsel* on January 13, 2023. Thus, because Pattis had complied with the requirements of Practice Book § 72-3 (c), the writ of error *as to disciplinary counsel* was deemed properly returned to the appellate clerk on January 20, 2023.

On January 30, 2023, Pattis filed a docketing statement identifying only disciplinary counsel as the defendant in error. That same day, pursuant to Practice Book

of the defendants' appeals in the underlying actions and of any writ of error proceedings relating to the suspension order. On January 11, 2023, the trial court denied that motion. On January 12, 2023, Pattis filed in this court, pursuant to Practice Book §§ 61-14 and 66-6, an emergency motion for review seeking an interim stay of the suspension order pending the filing and adjudication of a motion for review of the trial court's January 11, 2023 denial of his motion for a stay. That same day, this court granted Pattis' emergency motion for review and granted in part the relief requested, stating that the suspension order "is hereby stayed until Monday, January 23, 2023. If . . . Pattis files a motion for review on or before January 23, 2023, and files a writ of error in full compliance with the appellate rules on or before January 25, 2023, then this emergency stay will remain in effect until the resolution of the motion for review."

On January 20, 2023, Pattis filed his writ of error. That same day, Pattis filed a motion for review of the trial court's January 11, 2023 denial of his motion for a stay.

On January 23, 2023, this court "ordered, sua sponte, that the trial court, *Bellis*, *J.*, articulate the factual and legal basis for its order of January 11, 2023, denying the motion for a discretionary stay of its January 5, 2023 order suspending . . . Pattis from the practice of law in Connecticut for six months. See *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 457–58 [493 A.2d 229] (1985)." That same day, the trial court issued an articulation.

On February 9, 2023, this court granted Pattis' motion for review and granted in part the relief requested, stating that "the trial court's January 5, 2023 disciplinary order is stayed until final resolution of the writ of error."

§ 66-8, disciplinary counsel filed his motion to dismiss the writ of error, contending that (1) according to the January 30, 2023 docketing statement, he was the only defendant in error, (2) he was a misjoined party, and (3) Judge Bellis had not been served.

On January 31, 2023, Pattis filed an amended docketing statement stating that both disciplinary counsel and Judge Bellis are the defendants in error. On February 3, 2023, Pattis filed a signed marshal's return of service, indicating that service had been made with respect to Judge Bellis on January 31, 2023. On February 10, 2023, pursuant to Practice Book § 66-8, Judge Bellis filed her motion to dismiss the writ of error for lack of proper service of process.

I

We first address disciplinary counsel's motion to dismiss the writ of error on the ground of misjoinder.[5] Specifically, disciplinary counsel argues that he is not a proper party to this writ of error proceeding.[6] We are not persuaded.

According to our review of the record, disciplinary counsel appeared in the underlying matter and essentially was responsible for prosecuting the alleged violations of the Rules of Professional Conduct that the court had alleged against the plaintiff in error. Disciplinary counsel did not raise any objection to participating in the show cause hearing (and he does not claim otherwise on appeal). He entered into stipulations of fact, submitted a memorandum of law with respect to Pattis'

[5] See *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 274, 253 A.3d 13 (2020) ("[w]hether the [parties] are the correct party is an issue of misjoinder and does not implicate the court's subject matter jurisdiction").

[6] In his motion to dismiss—filed prior to Judge Bellis being identified as a second defendant in error in Pattis' amended docketing statement and served with process—disciplinary counsel does not argue that the writ of error should be dismissed on the basis of the nonjoinder of an indispensable party, i.e., Judge Bellis. See footnote 9 of this opinion.

invocation of the fifth amendment privilege against self-incrimination, called his own witnesses, cross-examined Pattis' witnesses, expressly took the position in a posttrial brief that Pattis had violated various provisions of the Rules of Professional Conduct and the General Statutes, and even made the recommendation that Pattis be suspended for a period of six months—a recommendation that the court adopted.

Moreover, disciplinary counsel has not cited any authority, and we are not aware of any, to support the proposition that he is a misjoined party in a disciplinary proceeding, even if initiated by a trial court, particularly when he participated without objection and was responsible for its prosecution.[7] We note that, of the cases referenced in disciplinary counsel's motion to dismiss, which appear with and without citation, for the proposition that the trial court is the proper defendant in error in a writ of error proceeding arising from attorney discipline in an underlying matter, none stands for the proposition that disciplinary counsel is a misjoined party in such a matter. See *State* v. *Perez*, 276 Conn. 285, 885 A.2d 178 (2005); *Burton* v. *Mottolese*, 267 Conn. 1, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004); *Briggs* v. *McWeeny*, 260 Conn. 296, 796 A.2d 516 (2002); *Ambrose* v. *Ambrose*, Connecticut Appellate Court, Docket No. AC 45424 (writ of error filed April 11, 2022). Accordingly, those cases, particularly those decisions issued prior to the creation of the Office of Chief Disciplinary Counsel, effective January 1, 2004, are inapposite to the precise question before us.

In our view, disciplinary counsel, by virtue of his active participation in the underlying proceedings and

[7] We do not perceive any jurisdictional or other bar to adjudicating Pattis' writ of error with only the participation of disciplinary counsel in light of our dismissal of the writ of error as to Judge Bellis, as we explain in part II of this opinion.

his institutional role and powers set forth in Practice Book § 2-34A (b), is the party perhaps most well suited to participate in this writ of error and to defend the propriety of Judge Bellis' order suspending Pattis from the practice of law. Indeed, the underlying disciplinary procedures invoked by the trial court are akin to an attorney presentment proceeding, which disciplinary counsel routinely initiates and prosecutes. See Practice Book § 2-34A (b) (7).

II

We next address Judge Bellis' motion to dismiss the writ of error. In support of her motion, Judge Bellis makes three contentions: (1) Pattis did not serve "[a]ll parties to the underlying action," namely, the plaintiffs, as required by Practice Book § 72-3 (e); (2) Pattis did not serve her in a timely manner; and (3) the materials served on Judge Bellis did not include a summons. Because we agree with the second contention, we grant Judge Bellis' motion to dismiss the writ of error.[8]

We begin with a review of the applicable rules of appellate procedure that govern our resolution of Judge Bellis' motion. Practice Book § 72-3 (a) requires that a writ of error be presented for signature to a judge or clerk of the court in which the judgment or decision was rendered within twenty days of the notice of the complained of judgment or decision. Section 72-3 (b) further provides: "The writ of error shall be *served* and returned *as other civil process*, except that the writ of error shall be served at least ten days before the return day and shall be returned to the appellate clerk at least one day before the return day. The return days are any Tuesday not less than twelve nor more than thirty days after the writ of error is signed by a judge or clerk of the court." (Emphasis added.)

[8] Accordingly, we need not address the first and third contentions.

In the present case, the writ of error was served on Judge Bellis on January 31, 2023, which is fewer than ten days from the February 7, 2023 return day. The record also demonstrates that Judge Bellis filed her motion to dismiss on February 10, 2023, nine days after her attorney filed an appearance on February 1, 2023. Accordingly, because process was not served in a timely manner upon Judge Bellis, who filed a timely motion to dismiss, we grant Judge Bellis' motion to dismiss the writ of error for lack of proper service of process.[9] See *Chevalier* v. *Wakefield*, 85 Conn. 374, 375, 82 A. 973 (1912) (when writ of error is not "served and returned within the prescribed period before its return day," writ "must fail as any other action must").

The motion to dismiss filed by disciplinary counsel is denied; the motion to dismiss filed by Judge Bellis is granted and the writ of error as it pertains to Judge Bellis is dismissed.

[9] In our view, under the circumstances of this case, the dismissal of the writ of error as to Judge Bellis for lack of proper service upon her does not implicate this court's jurisdiction over the writ in its entirety. Indeed, only in cases involving the imposition of summary criminal contempt by a trial court do our appellate rules governing writs of error designate that the defendant in error be the Superior Court. Practice Book § 72-3 (e). Prior to the adoption of Practice Book § 72-3 (e) in 2003, writs of error challenging summary criminal contempt were often brought against one of the underlying parties to the case rather than the Superior Court itself. See *Brown* v. *Regan*, 84 Conn. App. 100, 851 A.2d 1249 (naming supervisory assistant state's attorney as defendant in error), cert. denied, 271 Conn. 926, 859 A.2d 577 (2004). Moreover, because the legislature has repealed the statutes regulating the writ; see Public Acts 2003, No. 03-176, § 3; see also General Statutes (Rev. to 2003) § 52-272 et seq.; the "sole responsibility [is] on the courts to regulate and limit writs of error . . . ." E. Prescott, Connecticut Appellate Practice & Procedure (7th Ed. 2021) § 9-1:1.2, p. 549. We do not interpret our rules of practice regulating writs of error to require the dismissal of a writ for lack of jurisdiction if the plaintiff in error has failed to name or properly serve the judge who imposed discipline on an attorney in the underlying proceeding. Dismissal of the entire writ seems particularly unjustified in the circumstances of this case, in which the propriety of the court's order disciplining Pattis will be defended by disciplinary counsel.

DIANA CURLEY *v.* THE PHOENIX INSURANCE COMPANY (AC 45054)

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

Syllabus

Pursuant to statute (§ 38a-336 (a) (2)), an automobile liability insurance policy must "provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112."

Pursuant further to statute (§ 38a-336 (f)), "an employee of a named insured injured while occupying a covered motor vehicle in the course of employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage."

The plaintiff, who suffered injuries when a motor vehicle driven by a nonparty tortfeasor struck a rental vehicle she was operating in the course of her employment, sought to recover underinsured motorist benefits in connection with insurance coverage provided by the defendant insurance company to U Co., the plaintiff's employer. The trial court granted the defendant's motion for summary judgment, which asserted that the plaintiff was not occupying a "covered auto" under the underinsured motorist endorsement of the policy. The trial court thereafter denied the plaintiff's motion to reargue, which claimed that the court's interpretation of the policy violated § 38a-336 (a) (2) and overlooked the business auto extension endorsement that broadened the definition of insured in the business auto coverage form of the policy. On the plaintiff's appeal to this court, *held*:

1. Contrary to the defendant's argument, the plaintiff's claims regarding the application of § 38a-336 and the business auto extension endorsement were reviewable by this court: although the plaintiff raised these claims for the first time in her motion to reargue, the circumstances of the present case justified a deviation from the general rule that unpreserved claims will not be reviewed, because the minimum, necessary requirements for review were met, as the record was adequate for review and the parties had had an opportunity to be heard on the issues, and, although the defendant objected to this court's review of the plaintiff's unpreserved claims, it addressed the merits of those claims in its appellate brief and did not claim it would be unfairly prejudiced if this court reviewed the claims; moreover, this court's consideration of the plaintiff's arguments did not amount to an ambuscade on the court or the defendant, as the plaintiff relied on the minimum amounts of automobile insurance coverage mandated by statute (§ 14-112) in her opposition to

the defendant's motion for summary judgment in arguing that she was an insured under the policy, § 38a-336 (a) (1) (A) specifically references § 14-112, and, although the plaintiff did not reference § 38a-336 in her opposition to the motion for summary judgment, the unpreserved issues were discussed during oral argument before the trial court, it was undisputed that the plaintiff alerted the trial court to the issues in her motion to reargue and the defendant addressed the merits of those claims in its objection to the motion to reargue; furthermore, this court would not ignore a clearly applicable statute and the express provisions of the insurance policy in conducting its plenary review of the court's decision; additionally, the defendant did not claim that the plaintiff failed to raise her arguments as a matter of strategy.

2. The trial court improperly rendered summary judgment for the defendant because the court's construction of the automobile insurance liability policy violated § 38a-336 (a) (2):

a. This court concluded that the plaintiff was an insured under U Co.'s policy for purposes of liability coverage: although the rental agreement for the vehicle the plaintiff had been driving at the time of her injuries was not included in the summary judgment record and this court did not know whether the vehicle was rented by U Co. or by the plaintiff, the plaintiff would be an insured for liability coverage under either scenario, a necessary predicate for the plaintiff's claim for underinsured motorist coverage pursuant to § 38a-336.

b. The trial court improperly rendered summary judgment for the defendant, that court having incorrectly concluded that there was no genuine issue of material fact that the plaintiff was not entitled to underinsured motorist benefits: although § 38a-336 limits an employee's right to recover underinsured motorist benefits under an employer's policy by requiring that an employee must be "occupying a covered vehicle" in the course of employment, the plaintiff was operating a covered motor vehicle because, had she caused the accident, it was undisputed that she and U Co. would have been entitled to liability coverage; moreover, the defendant misconstrued § 38a-336 (f) as allowing it, through its policy language, to sever liability coverage from uninsured and underinsured motorist coverage, which § 38a-336 (f) does not allow, rather, § 38a-336 (f) specifically refers to an employer's "otherwise applicable" uninsured and underinsured motorist coverage, which is delineated in § 38a-336 (a), and, thus, the defendant could not rely on § 38a-336 (f) to limit the underinsured motorist coverage in its policy only to injuries arising out of an insured's use of a specified vehicle; furthermore, it was not reasonable to read § 38a-336 (f) as an expansive exception to the express requirements of § 38a-336 (a) that insurers provide equivalent liability and uninsured and underinsured motorist coverage "[n]otwithstanding any provision of this section," which necessarily includes subsection (f), and § 38a-336 (f) clearly and unambiguously requires that the defendant comply with the other provisions of § 38a-336 before reducing the limits

of uninsured and underinsured coverage to an amount less than the limits of liability coverage under the policy and there was no evidence establishing that U Co. expressly waived the statutorily mandated coverage.

Argued February 1—officially released August 1, 2023

Procedural History

Action to recover underinsured motorist benefits allegedly due under a commercial automobile liability insurance policy issued by the defendant, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Michael S. Taylor, with whom were *Brendon P. Levesque*, and, on the brief, *Peter C. Bowman*, for the appellant (plaintiff).

James E. Wildes, for the appellee (defendant).

Opinion

BRIGHT, C. J. In this action to recover underinsured motorist benefits, the plaintiff, Diana Curley, appeals from the judgment of the trial court rendering summary judgment for the defendant, The Phoenix Insurance Company. The court concluded that the plaintiff was not an insured within the meaning of the commercial automobile liability insurance policy issued by the defendant to the plaintiff's employer, the University of Bridgeport (university), because she was not occupying a covered vehicle for purposes of the underinsured motorist coverage endorsement. On appeal, the plaintiff claims that the court improperly rendered summary judgment for the defendant because (1) the court's construction of the university's policy violates General Statutes § 38a-336 (a) (2), (2) the plaintiff is entitled to underinsured motorist benefits pursuant to the policy's

business auto extension endorsement, and (3) denying the plaintiff underinsured motorist benefits would violate public policy. We agree with the plaintiff's first claim and, therefore, reverse the judgment of the trial court.

The record reveals the following undisputed facts, viewed in the light most favorable to the plaintiff, and procedural history. On November 16, 2017, the plaintiff was operating a rental vehicle on Route 15 in Trumbull on her way to an off campus event as part of her duties for the university when her vehicle was struck from behind by a vehicle operated by Jennifer N. Sandoval-Giannone (tortfeasor). The plaintiff suffered various injuries due to the collision and received $250,000 from the tortfeasor, which exhausted the tortfeasor's liability coverage under the tortfeasor's automobile insurance policy. At the time of the accident, the university's insurance policy provided underinsured motorist coverage with a limit of $1 million per person.[1]

In 2020, the plaintiff initiated the underlying action against the defendant pursuant to § 38a-336, seeking underinsured motorist benefits pursuant to the university's insurance policy.[2] The plaintiff alleged that the vehicle she was operating at the time of the accident was

[1] General Statutes § 38a-336 (e) provides in relevant part: "[A]n 'underinsured motor vehicle' means a motor vehicle with respect to which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the uninsured motorist portion of the policy against which claim is made under subsection (b) of this section."

[2] General Statutes § 38a-336 (b) provides in relevant part: "An insurance company shall be obligated to make payment to its insured up to the limits of the policy's uninsured and underinsured motorist coverage after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements, but in no event shall the total amount of recovery from all policies, including any amount recovered under the insured's uninsured and underinsured motorist coverage, exceed the limits of the insured's uninsured and underinsured motorist coverage. . . ."

covered under the university's policy. The defendant moved for summary judgment on the plaintiff's complaint, asserting that the plaintiff was not occupying a "covered 'auto' " within the meaning of the "CONNECTICUT UNINSURED AND UNDERINSURED MOTORISTS COVERAGE" endorsement (underinsured motorist endorsement) to the university's policy. The underinsured motorist endorsement defines an insured differently depending on whether the named insured is an individual or a corporation. The defendant noted in its motion for summary judgment that, because the university is a corporation, an insured is defined as "[a]nyone 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' The covered 'auto' must be out of service because of its breakdown, repair, servicing, 'loss' or destruction." The defendant argued that "the vehicle the plaintiff was in was not a covered automobile under the policy and the covered vehicles were not out of service." In support of its motion, the defendant submitted an affidavit from Cheryl Nyarady, an employee in the university's human resources department, in which she averred that the plaintiff was operating a rental vehicle at the time of the accident, that the university neither owned nor leased the vehicle occupied by the plaintiff, and that the vehicles owned or leased by the university were not out of service.[3]

In the plaintiff's objection to the defendant's summary judgment motion, she asserted that she was an insured under the university's policy. She relied on the "LESSOR—ADDITIONAL INSURED AND LOSS PAYEE" endorsement (lessor endorsement), which modifies the insurance coverage provided under the "AUTO DEALERS COVERAGE FORM," the "BUSINESS AUTO COVERAGE FORM," and the "MOTOR CARRIER COVERAGE FORM," which are among the forms included in

[3] The defendant also submitted an affidavit from Richard Spring, a claims representative for the defendant, and a certified copy of the university's policy.

the policy. The coverage section of the lessor endorsement provides that "[a]ny 'leased auto' designated or described in the Schedule will be considered a covered 'auto' [the university] own[s] and not a covered 'auto' [the university] hire[s] or borrow[s]." Paragraph E of the lessor endorsement, titled "Additional Definition," provides: "As used in this endorsement: 'Leased auto' means an 'auto' leased or rented to [the university], including any substitute, replacement or extra 'auto' needed to meet seasonal or other needs, under a leasing or rental agreement that requires [the university] to provide direct primary insurance for the lessor." The plaintiff asserted in her objection that (1) she was an insured under the policy because the university had authorized her to rent the vehicle for use in performing her job duties, (2) allowing an employer and insurer to conspire to deny employees statutorily required coverage would violate public policy, and (3) because General Statutes § 14-112 requires a driver to maintain minimum amounts of liability insurance for any vehicle, including rental vehicles,[4] the university's policy, by its

[4] General Statutes § 14-112 provides in relevant part: "(a) To entitle any person to receive or retain a motor vehicle operator's license or a certificate of registration of any motor vehicle . . . the commissioner shall require from such person proof of financial responsibility to satisfy any claim for damages by reason of personal injury to, or the death of, any one person, of twenty-five thousand dollars, or by reason of personal injury to, or the death of, more than one person on account of any accident, of at least fifty thousand dollars, and for damage to property of at least twenty-five thousand dollars. When the commissioner requires proof of financial responsibility from an operator or owner of any motor vehicle, he may require proof in the amounts herein specified for each vehicle operated or owned by such person. . . .

"(b) Such proof of financial responsibility shall be furnished as is satisfactory to the commissioner and may be evidence of the insuring of the named insured or resident relative of the named insured against loss on account of legal liability of the named insured or resident relative of the named insured for injury to or the death of persons and damage to property in the respective amounts provided by this section in the form of a certificate signed by any person authorized in writing by an officer of any company authorized to issue such insurance in this state or any agent of such company licensed under the provisions of section 38a-769, showing that a policy of

terms, provides coverage for the rental vehicle in the present case.

In its reply memorandum to the plaintiff's objection to its motion for summary judgment, the defendant noted that, although the lessor endorsement states that it modifies the insurance coverage provided under three specific forms, it does not state that it modifies the insurance coverage provided under the underinsured motorist endorsement. Therefore, according to the defendant, the lessor endorsement was irrelevant to whether the plaintiff was an insured for the purposes of making a claim for underinsured motorist coverage. The defendant maintained that the underinsured motorist endorsement is unambiguous and that the plaintiff is not an insured thereunder.

Following oral argument on the defendant's motion, the court, on May 28, 2021, rendered summary judgment for the defendant. After setting forth the parties' respective positions, the court reasoned "that the language of the insurance policy as to the issues raised in this case is clear and unambiguous. The insurance policy is titled 'Commercial Automobile.' The declaration provides that '[t]he Commercial Automobile Coverage Consists of these Declarations and the Business Auto Coverage Form shown below.' The declaration further identifies the form of business of the insured as a 'Corporation.' The declaration and 'Business Auto Coverage Form' provide that uninsured and underinsured motorist coverage is provided to 'Owned "Autos" Only: only those "autos" [the university] own[s] . . . .'

"The [underinsured motorist] endorsement provides that 'this endorsement modifies insurance provided

insurance in such amounts, noncancellable except after ten days' written notice to the commissioner, has been issued to the person furnishing such proof . . . ."

We note that, although the legislature has amended § 14-112 since the events underlying this appeal; see, e.g., 2017 Public Acts, No. 17-114; those amendments are not relevant to the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

under the following . . . BUSINESS AUTO COVERAGE FORM . . . . With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.' The endorsement modifies the uninsured and underinsured [motorist] coverage described above as follows: where the named insured is a corporation, the insured is '[a]nyone "occupying" a covered "auto" or a temporary substitute for a covered "auto." The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.'

"The plaintiff's reliance on the [lessor] endorsement to support the argument that the insurance policy provided insurance to the plaintiff based upon the facts of this case is misplaced. The court finds that the language of this endorsement is plain and unambiguous. The endorsement specifically provides that '[w]ith respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.' The endorsement does not modify the uninsured and underinsured [motorist] coverage.

"Based upon the clear and unambiguous language of the insurance policy, the plaintiff was not an insured and is not entitled to make a claim for underinsured motorist benefits from the defendant." (Footnotes omitted.)

On June 17, 2021, the plaintiff filed a motion seeking reargument and reconsideration pursuant to Practice Book § 11-12 (motion to reargue). In that motion, the plaintiff claimed that the court's interpretation of the policy violated § 38a-336 (a) (2), which requires that an automobile liability insurance policy "provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law," and overlooked the "BUSINESS

AUTO EXTENSION ENDORSEMENT," which broadens the definition of insured in the business auto coverage form.[5]

The defendant filed an objection to the motion to reargue, arguing that the plaintiff failed to raise her arguments in her objection to its motion for summary judgment and that she should not be permitted to raise them for the first time in a motion to reargue. Alternatively, the defendant argued that both of the plaintiff's arguments failed on the merits. On July 16, 2021, the court denied the plaintiff's motion to reargue without comment and sustained the defendant's objection.[6] This appeal followed.[7]

On appeal, the plaintiff claims that the court erred in rendering summary judgment for the defendant because

[5] In a footnote in that motion, the plaintiff stated that the court "ruled on the defendant's summary judgment motion based on its examination of the complaint, pleadings, and exhibits, including the plaintiff's statements about the vehicle shortage and [the] corporate account [with a rental car company] maintained by the [university]. . . . To remove any doubt as to the adequacy of the record, the plaintiff attaches herewith an affidavit formally averring those same facts. (Ex. A.)." (Citation omitted.) The plaintiff, however, failed to include any exhibits with her motion to reargue.

[6] Because the court denied the motion to reargue without explanation, it is unclear whether the court denied the motion because the plaintiff failed to assert the claims raised therein in opposition to the defendant's motion for summary judgment or whether it rejected the plaintiff's claims on the merits. The plaintiff sought permission from this court to file a late motion for articulation as to the denial of her motion to reargue, which this court denied. See footnote 7 of this opinion. Although the plaintiff stated in her appeal form that she was appealing from the "summary judgment for the defendant, and . . . the denial of reconsideration," she does not argue on appeal that the court abused its discretion in denying her motion to reargue.

[7] On August 12, 2021, the plaintiff filed a motion for permission to file a late appeal. This court granted the plaintiff's motion, and the plaintiff filed this appeal on October 19, 2021. After filing her appeal, the plaintiff filed motions requesting permission to file late motions for articulation and rectification. The plaintiff sought to have the trial court articulate the factual and legal basis for its order denying her motion to reargue and rectify the record to include an affidavit that inadvertently was not included with her motion to reargue. See footnote 5 of this opinion. This court denied both motions on April 13, 2022.

(1) the court's interpretation of the university's policy violates § 38a-336, (2) the court failed to consider the business auto extension endorsement, and (3) allowing an employer to provide liability coverage for its employees but not underinsured motorist coverage would violate public policy.[8]

Before turning to the parties' arguments, we first set forth the applicable standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing 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. . . .

"Summary judgment shall be granted 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 fact is material when it will make a difference in the outcome of a case. . . . The party moving for summary judgment bears the burden of demonstrating the absence of any genuine issue of material fact. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"Appellate review of the trial court's decision to grant summary judgment is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are

[8] In her principal brief to this court, the plaintiff did not renew her primary claim before the trial court regarding the lessor endorsement. After oral argument before this court, we ordered, sua sponte, that the parties may file supplemental briefs addressing whether the trial court properly determined that there was no genuine issue of material fact as to whether the plaintiff was entitled to underinsured motorist benefits under the policy and the lessor endorsement. In her supplemental brief, the plaintiff claimed that the court properly applied the plain meaning of the lessor endorsement and erred only in failing to apply § 38a-336 in construing the policy as a whole. In light of the plaintiff's position, we do not consider this issue.

legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Puente* v. *Progressive Northwestern Ins. Co.*, 181 Conn. App. 852, 856–57, 188 A.3d 773, cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

In addition, because this appeal involves the construction of both an insurance policy and a statute, we set forth the standard of review for those issues. When, as in the present case, the insurance policy is unambiguous; see part II A of this opinion; "[t]he construction of an insurance policy presents a question of law that we review de novo. . . . When construing an insurance policy, we look at the [policy] as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Citation omitted; internal quotation marks omitted.) *Kling* v. *Hartford Casualty Ins. Co.*, 211 Conn. App. 708, 712–13, 273 A.3d 717, cert. denied, 343 Conn. 926, 275 A.3d 627 (2022). Likewise, the construction of a statute presents a question of law subject to de novo review. See *Aldin Associates Ltd. Partnership* v. *State*, 209 Conn. App. 741, 767, 269 A.3d 790 (2022).

I

As an initial matter, the defendant contends that this court should not consider the plaintiff's claims regarding the application of § 38a-336 and the business auto extension endorsement because the plaintiff raised those claims for the first time in her motion to reargue, the denial of which she does not challenge on appeal. According to the defendant, the plaintiff improperly sought a second bite at the proverbial apple when she filed a motion to reargue asserting claims that she could have raised in her opposition to the defendant's motion for summary judgment.

The plaintiff responds that her claims are within the scope of the issue raised before the trial court. She

argues that "the trial court . . . was required to construe the policy as a matter of law, and to do so within the framework of our established [underinsured motorist] statutes and public policy, including the requirements imposed by . . . §§ 38a-336 and 14-112, and [§] 38a-334-6 of the Regulations of Connecticut State Agencies. This court should not affirm a decision that is in conflict with the law the trial court was required to apply simply because the plaintiff may not have addressed every possible argument in support of the issue raised." The plaintiff also notes that she asserted her statutory argument expressly in her motion to reargue "when the trial court still had an opportunity to address the issues the plaintiff claimed it had overlooked" and that "there is no prejudice to the defendant, as it has had the opportunity to brief the issue on the merits." We conclude that the plaintiff's claims are reviewable.

We begin with the governing legal principles. This "court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. Accordingly, "appellate review generally is limited to issues that were distinctly raised at trial. . . . Only 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. . . .

"It is equally well settled, however, that a reviewing court, although not *bound* to consider a claim that was not raised to the trial court, may do so at its discretion. . . . We are unaware of any statutory or procedural

rule limiting that discretion." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Leilah W.*, 166 Conn. App. 48, 59, 141 A.3d 1000 (2016); see also *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 143, 84 A.3d 840 (2014) (reviewing court's authority to consider unpreserved claims "is limited neither by statute nor by procedural rules"); *Imperial Casualty & Indemnity Co.* v. *State*, 246 Conn. 313, 321, 714 A.2d 1230 (1998) ("The application of [Practice Book] § 60-5 is discretionary . . . and in exceptional circumstances, even claims not properly raised below will be considered. . . . [I]n some instances we may overlook the procedural error and consider a question not properly raised below, not by reason of the appellant's right to have [the claim] determined but because, in our opinion, in the interest of the public welfare or of justice between the parties, the question ought to be considered." (Citation omitted; internal quotation marks omitted.)); *Persico* v. *Maher*, 191 Conn. 384, 403, 465 A.2d 308 (1983) ("[w]hile we are not bound to consider such claims of error, and do not ordinarily do so, we have upon occasion considered a question which was not so raised . . . because in our opinion in the interest of public welfare or of justice between individuals it ought to be done" (internal quotation marks omitted)).

Our Supreme Court has explained that there is a difference between a claim and an argument in support of a claim for purposes of our rules of preservation: "[O]rdinarily, [a reviewing court] will decline to address only a *claim* that is raised for the first time on appeal. . . . [A] claim is an entirely new legal issue, whereas, [g]enerally speaking, an argument is a point or line of reasoning made in support of or in opposition to a particular claim. . . . Because [o]ur rules of preservation apply to claims . . . [and not] to legal arguments . . . [w]e may . . . review legal arguments that differ

from those raised below if they are subsumed within or intertwined with arguments related to the legal claim before the court." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Markley* v. *State Elections Enforcement Commission*, 339 Conn. 96, 104–105 n.9, 259 A.3d 1064 (2021).

In the present case, the plaintiff claims that the court's construction of the university's policy is legally incorrect because it violates § 38a-336 and fails to apply the business auto extension endorsement. In her opposition to the defendant's motion for summary judgment, however, she neither cited nor discussed § 38a-336 or the business auto extension endorsement. Instead, she raised these arguments distinctly for the first time in her motion to reargue the court's decision, which generally does not preserve an issue for appellate review. Compare *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 634, 99 A.3d 1079 (2014) ("[r]aising an issue for the first time in a motion to reargue will not preserve that issue for appellate review"), with *Twin Oaks Condominium Assn., Inc.* v. *Jones*, 132 Conn. App. 8, 15 n.5, 30 A.3d 7 (2011) (plaintiff preserved its challenge to court's award of damages because court set forth damages calculation in memorandum of decision and plaintiff filed motion to reargue), cert. denied, 305 Conn. 901, 43 A.3d 663 (2012). The plaintiff contends, however, that these are not new claims but, rather, are new arguments in support of the sole legal claim she raised in opposition to the defendant's motion for summary judgment.

We need not decide whether the plaintiff's arguments properly are classified as new claims or legal arguments because, assuming without deciding that they are unpreserved legal claims, the circumstances of the present case "justify a deviation from the general rule that unpreserved claims will not be reviewed." *Blumberg*

Associates Worldwide, Inc. v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 161.

Our Supreme Court has explained that "the minimal requirements for review of an unpreserved claim are that the record must be adequate for review, such that there is no need for additional trial court proceedings or factual findings, and all parties must have had an opportunity to be heard on the issue. . . . In addition, review of an unpreserved claim generally is inappropriate if it results in unfair prejudice to any party. Prejudice may be found, for example, when a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial. . . . Moreover, because it may be difficult for a party to prove definitively that it would have proceeded in a different manner and, as a result, would suffer unfair prejudice if the reviewing court were to consider the unpreserved issue, once that party makes a colorable claim of such prejudice, the burden shifts to the other party to establish that the first party will not be prejudiced by the reviewing court's consideration of the issue. . . .

"[A]lthough these conditions are *necessary* for the review of unpreserved claims, they are not alone *sufficient.* Review of an unpreserved claim may be appropriate, however, when the minimal requirements for review are met *and* (1) the party that did not raise the claim does not object to review . . . or (2) the party who raised the unpreserved claim cannot prevail. . . . [I]f either of these additional conditions are met, the reviewing court has broad discretion to review the claim or, alternatively, to decline to do so . . . .

"As we have indicated, there also are circumstances that militate in favor of reviewing unpreserved claims even over the objection of a party. [Our Supreme Court]

has reviewed unpreserved claims pursuant to its supervisory power when the claim was of a *public character* . . . when there was an intervening change in the law . . . when there was a newly established, undisputed fact on which both parties relied . . . when the trial court's evidentiary ruling was correct but for the wrong reason . . . and when the claim involves judicial bias. . . . This list is not intended to be exhaustive, and, indeed, it would be impossible to catalogue all of the circumstances under which review of an unpreserved claim might be appropriate. It is clear, however, that these are exceptional cases, in which the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims. [For this reason], [our Supreme Court has] emphasize[d] that a general statement by a reviewing court that the review of an unpreserved claim is warranted in the interests of justice between the parties or because no party will be prejudiced is not alone sufficient. Rather, unless all parties agree to review of the unpreserved claim or the party raising the claim cannot prevail, the reviewing court should provide specific reasons, based on the exceptional circumstances of the case, to justify a deviation from the general rule that unpreserved claims will not be reviewed." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) Id., 155–61.

Initially, we note that the minimum, necessary requirements for review are met in the present case—the record is adequate for review, as there is no need for additional trial court proceedings or factual findings, and the parties have had an opportunity to be heard on the issues. See id., 155–56. Also, although the defendant objects to our consideration of these issues, it addressed the merits of the plaintiff's claims in its appellate brief and has not claimed that it would be unfairly prejudiced

if we review the claims. See id., 156. The typical additional conditions for review of an unpreserved claim, however, are not met in the present case, because the defendant objects to our review of the plaintiff's unpreserved claims and because the plaintiff will prevail on her statutory claim. Nevertheless, we conclude that "the interests of justice, fairness, integrity of the courts and consistency of the law significantly outweigh the interest in enforcing procedural rules governing the preservation of claims."[9] Id., 160. We reach this conclusion for several reasons.

First, our consideration of the plaintiff's arguments would not amount to ambuscade on the trial court or the opposing party. The plaintiff relied on the statutorily mandated minimum amounts of automobile insurance coverage under § 14-112 in her opposition to summary judgment in arguing that, pursuant to the statute and the express terms of the policy, the plaintiff was an insured under the policy. Section 38a-336 (a) (1) (A) specifically references § 14-112, providing that "[e]ach automobile liability insurance policy shall provide . . . underinsured motorist coverage . . . with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112 . . . ." In addition, although the plaintiff failed to reference § 38a-336 specifically in her opposition to the defendant's motion for summary judgment, counsel for the plaintiff, after arguing that the university's policy clearly provided coverage, further argued that "there are other arguments in which insurance coverage is required [in] the state of Connecticut. And, so, if you accept [the defendant's] argument, that means there's a fleet of vehicles from

[9] Our conclusion is limited to the particular circumstances of the present case and should not be understood as relaxing the well established rule that we will not review claims of error not raised before and decided by the trial court. See, e.g., *Theodore* v. *Lifeline Systems Co.*, 173 Conn. App. 291, 314, 163 A.3d 654 (2017) ("[i]t is well settled that this court generally does not review claims not raised before the trial court").

the [u]niversity . . . driving around the roads of Connecticut without insurance coverage. Clearly, there was insurance coverage on this vehicle. It's the policy that [the university] had. It [is] set forth by both the affidavits of the [university] as well as the representative from [the defendant], and as such, we think . . . there is coverage on this loss . . . ." Indeed, the exchange between the court and counsel for the defendant that immediately followed the argument by the plaintiff's counsel indicates that they understood that argument to be that the defendant's assertion would mean that some motor vehicles could be operated in the state without the statutorily required minimum amount of uninsured and underinsured motorist coverage:

"The Court: [I]f I understand the argument [of the plaintiff's counsel, it] is that . . . an employee of the [u]niversity . . . doing work on behalf of the university . . . rents a car to go to a [u]niversity . . . function or provides the declaration or the insured—it's insured under this policy. And, the argument being that anybody then who rents a car in this type of situation is, to [the plaintiff's] point, driving without any . . . underinsured [motorist] coverage. Is that—am I missing anything there?

"[The Defendant's Counsel]: That's easily what he's arguing, but I don't know that there's no underinsured motorist coverage. It says no underinsured motorist coverage provided through this policy; [the rental car company] may very well have provided underinsured motorist coverage. They may have had an obligation to do that. All I know is that the [u]niversity . . . didn't purchase underinsured motorist coverage for this particular situation because the policy doesn't provide for [it]." As this exchange reflects, the substance of the plaintiff's statutory argument was understood by the court and the defendant's counsel during oral argument.

Furthermore, although the plaintiff failed to raise these issues distinctly until after the court rendered summary judgment for the defendant, there is no dispute that she alerted the court to the issues that she raises on appeal in her motion to reargue and that the defendant addressed the merits of these claims in its objection to the plaintiff's motion to reargue. In her motion to reargue, the plaintiff claimed that the court had overlooked § 38a-336 and the business auto extension endorsement and that the statute dictated a different result. Alerting the trial court to matters that the court may have overlooked is the proper use of a motion to reargue. See, e.g., *Hudson Valley Bank* v. *Kissel*, 303 Conn. 614, 625, 35 A.3d 260 (2012) (concluding that defendant "relied on the motion to reargue for a proper purpose—to call to the attention of the court the controlling principle of law that [it] had failed to apply"); *Intercity Development, LLC* v. *Andrade*, 286 Conn. 177, 189, 942 A.2d 1028 (2008) (concluding that defendants failed to preserve their challenge to calculation of amount of mechanic's lien and noting that "defendants could have filed a motion to reargue pursuant to Practice Book § 11-12 specifically detailing their dispute regarding calculation of the mechanic's lien before the trial court"); *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 145, 152 n.3, 204 A.3d 712 (2019) (declining to review plaintiff's unpreserved claim and noting that plaintiff "never filed a motion for articulation or a motion for reargument with the trial court, which he could have filed if he believed that the court failed to address his purported excessive force argument"); *Hall* v. *Gulaid*, 165 Conn. App. 857, 865, 140 A.3d 396 (2016) (noting that plaintiff could have filed motion to reargue and thereby "alerted the court that it had overlooked the applicability of [General Statutes] § 52-593"). Thus, although the plaintiff should have raised her arguments more clearly prior to the rendition

of judgment, there is precedent supporting the plaintiff's use of a motion to reargue to bring to the attention of the court that a statute or issue has been overlooked.

Accordingly, under these circumstances, in which the unpreserved issues were discussed during oral argument before the trial court and raised distinctly in the plaintiff's motion to reargue the court's decision, our review of the issues in the present case would not amount to the type of ambush of the trial court and the opposing party that we routinely avoid by declining to review unpreserved claims. See, e.g., *In re Brayden E.-H.*, 309 Conn. 642, 655–56, 72 A.3d 1083 (2013) (although respondent raised constitutional claim for first time in motion to reargue, because petitioner addressed merits in objection to motion to reargue and because trial court rejected claim on merits, "the dual concerns underlying the rules of preservation, fair notice to the trial court and opposing counsel . . . were satisfied" (citations omitted)); see also *Overley* v. *Overley*, 209 Conn. App. 504, 513, 268 A.3d 691 (2021) ("[t]he purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties" (internal quotation marks omitted)), cert. denied, 343 Conn. 901, 272 A.3d 657 (2022); *Wiltzius* v. *Zoning Board of Appeals*, 106 Conn. App. 1, 15–16, 940 A.2d 892 (although plaintiff raised res judicata issue for first time in motions for reargument and reconsideration after court issued decision, issue was reviewable because parties had addressed it and because trial court considered it before rendering final judgment), cert. denied, 287 Conn. 906, 950 A.2d 1283 (2008), cert. denied, 287 Conn. 906, 950 A.2d 1283 (2008), and cert. denied, 287 Conn. 907, 950 A.2d 1284 (2008); cf. *White* v. *Mazda Motor of America, Inc.*, supra, 313 Conn. 631–34 (noting that passing comment during oral argument before trial court and reference in motion to reargue were inadequate to introduce alternative theory of

liability not alleged in complaint); *Taylor* v. *Zoning Board of Appeals*, 65 Conn. App. 687, 696–97, 783 A.2d 526 (2001) (declining to review plaintiffs' unpreserved claim because "claim was not raised by the plaintiffs before the trial court, either in the original complaint or in any subsequent filings, including their motion to reargue the trial court's decision").

Second, the plaintiff's arguments on appeal relate to the sole issue decided by the trial court—whether the plaintiff was entitled to underinsured motorist benefits under the university's policy—and are subject to de novo review. See *Kling* v. *Hartford Casualty Ins. Co.*, supra, 211 Conn. App. 712–13 (construction of insurance policy is question of law subject to de novo review); see also *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 767 (construction of statute is question of law subject to de novo review). Accordingly, in reviewing the trial court's determination that there was no genuine issue of material fact that the plaintiff was not entitled to underinsured motorist benefits under the policy, we must conduct our own review of the policy and apply the applicable law. "In such circumstances, the facts are not in dispute and, because [our] review is de novo, the precise legal analysis undertaken by the trial court is not essential to the reviewing court's consideration of the issue on appeal." *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 395–96, 757 A.2d 1074 (2000). Under these circumstances, we will not ignore a clearly applicable statute and the express provisions in the policy in conducting our plenary review of the court's decision.[10] See, e.g., *G & H Investment Co.* v. *Raymond*, 113 Conn. 778, 779, 155 A. 497

[10] We note that, although the plaintiff has not invoked the plain error doctrine, our Supreme Court routinely has held that a court's failure to apply an applicable statute is plain error. See *Genovese* v. *Gallo Wine Merchants, Inc.*, 226 Conn. 475, 480 n.6, 628 A.2d 946 (1993) ("[i]t is plain error for a trial court to fail to apply an applicable statute, even in the absence of the statute having been brought to its attention by the parties"); *Ralto*

(1931) ("even though no claim was made to the trial court that the giving of notice of dishonor was waived by the terms of the note, we are not debarred from

Developers, Inc. v. *Environmental Impact Commission*, 220 Conn. 54, 59, 594 A.2d 981 (1991) ("[w]e have noticed plain error in the failure of a trial court to apply a clearly relevant statute to the case before it" (internal quotation marks omitted)); *State* v. *Preyer*, 198 Conn. 190, 199, 502 A.2d 858 (1985) ("[a] charge that demonstrates that the trial court has overlooked the applicable statute justifies consideration as plain error"); *State* v. *Burke*, 182 Conn. 330, 331–32, 438 A.2d 93 (1980) (exercising discretion to consider defendant's unpreserved statutory claim because, "[w]here the legislature has chosen specific means to effectuate a fundamental right, failure to follow the mandatory provisions of the statute is plain error, reviewable by this court"); *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 181 Conn. 607, 609, 436 A.2d 1259 (1980) ("oversight of a clearly applicable statute can be considered plain error"), cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed. 2d 258 (1985); *Stoni* v. *Wasicki*, 179 Conn. 372, 377, 426 A.2d 774 (1979) (although not raised by parties on appeal, court concluded that trial court's failure to apply applicable statute constituted plain error); see also *Persico* v. *Maher*, supra, 191 Conn. 403–404, ("[i]t appearing that the limiting statute was overlooked in the court below and that public welfare would be best served by resolving this issue, we will consider this [unpreserved] claim"); *Campbell* v. *Rockefeller*, 134 Conn. 585, 588, 59 A.2d 524 (1948) (considering unpreserved claim as to application of federal statute because "[w]hile ordinarily questions not raised at the trial will not be considered on appeal, an exception is made when a pertinent statute has been overlooked"); *Leary* v. *Citizens & Manufacturers National Bank*, 128 Conn. 475, 478–79, 23 A.2d 863 (1942) (noting that our Supreme Court has reviewed unpreserved claims "where the error was manifest . . . where an applicable statute was overlooked . . . and where the error went to a vital issue in the case" (citations omitted)); *Adley Express Co.* v. *Darien*, 125 Conn. 501, 504, 7 A.2d 446 (1939) (court, sua sponte, raised applicability of statute because "pertinent statute [was] overlooked"); *Stevens* v. *Neligon*, 116 Conn. 307, 311, 164 A. 661 (1933) (although applicable statute neither was brought to attention of trial court nor relied on by plaintiff, "it [was] sufficient if the complaint states facts which, if true, give an action under the statute, and the statute is the law of the land which the parties and the court were conclusively presumed to know").

Similarly, this court can commit plain error by ignoring a plainly applicable statute or rule of practice when conducting plenary review of a trial court's decision on a question of law. See, e.g., *Mueller* v. *Tepler*, 312 Conn. 631, 645–46, 95 A.3d 1011 (2014) (Appellate Court committed plain error by affirming judgment of trial court rendered on stricken complaint on alternative basis instead of remanding case to trial court with direction to allow plaintiff to amend complaint pursuant to Practice Book § 10-44). Nevertheless, because the plaintiff's claims with respect to the application of § 38a-336 and the business auto extension endorsement expressly were raised before the trial court in her motion to reargue, addressed before the trial court on the merits by the defendant, and briefed on the merits before us, we need not employ plain error review.

considering it, and there is abundant reason to do so where, by oversight, a judgment has entered contrary to the law applicable under the plain terms of the written instruments which lay at the basis of the case and which both parties must be presumed to know, and upon an issue not raised by the pleadings"); *Schmidt* v. *Manchester*, 92 Conn. 551, 555, 103 A. 654 (1918) ("It does not appear that the [applicable statute] was brought to the attention of the Superior Court, nor that it was relied upon by the plaintiff. It was, however, the law of the land, which the parties and the court were conclusively presumed to know." (Internal quotation marks omitted.)); see also *Harlach* v. *Metropolitan Property & Liability Ins. Co.*, 221 Conn. 185, 191–92, 602 A.2d 1007 (1992) ("It is well settled that an insurance contract must be read to include provisions that the law requires be included and to exclude provisions that the law prohibits. . . . Unless the agreement indicates otherwise, [an applicable] statute existing at the time an agreement is executed becomes a part of it and must be read into it just as if an express provision to that effect were inserted therein." (Citation omitted; internal quotation marks omitted.)).

Finally, the defendant does not claim, and there is no indication, that the plaintiff failed to raise these specific arguments as a matter of strategy. Cf. *State* v. *Burke*, 182 Conn. 330, 332 n.3, 438 A.2d 93 (1980) ("[T]he statute in question had been in effect for four months, yet seems to have escaped the attention of the trial court and the state as well as defense counsel. Had there been any indication that defense counsel had made a strategic decision to sit silently at the close of the charge, and then raise this claim of error if the verdict proved unpalatable . . . we would have refused to review the defendant's claim." (Citation omitted.)). Accordingly, assuming that the plaintiff's claims are

unpreserved, we exercise our discretion to consider their merits.

II

The plaintiff claims that the court improperly rendered summary judgment for the defendant because the court's construction of the policy violates § 38a-336 (a) (2), which requires that an automobile liability insurance policy "provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112." Accordingly, the plaintiff argues that, because she is an insured for purposes of liability coverage and because there is no evidence that the university requested a lesser amount of underinsured motorist coverage, § 38a-336 requires that she be insured for underinsured motorist coverage. Thus, as an initial matter, we consider whether the plaintiff is an insured under the policy for purposes of liability coverage, as that is a necessary predicate to her claim for underinsured motorist coverage pursuant to the statute.

A

We begin with the relevant provisions of the university's policy, which we conclude are unambiguous. See *Ceci* v. *National Indemnity Co.*, 225 Conn. 165, 172, 622 A.2d 545 (1993) (court "must first determine whether the policy provision is ambiguous").

Item one of the "BUSINESS AUTO COVERAGE PART DECLARATIONS" (declarations) provides that "[t]he Commercial Automobile Coverage Part consists of these Declarations and the Business Auto Coverage Form shown below." Item two of the declarations sets forth the coverages and limits of insurance, explaining

that "[c]overage applies only to those 'Autos' shown as Covered 'Autos.' 'Autos' are shown as covered 'autos' for the applicable coverages by the entry of one or more of the symbols from Section 1—Covered Autos of the Business Auto Coverage Form next to the name of the coverage [covered auto symbol]." Below that explanation, a table provides that the covered auto symbol for "COVERED AUTOS LIABILITY" is "1" and the covered auto symbol for "UNINSURED AND UNDERINSURED MOTORISTS COVERAGE" is "2."

Section I of the business auto coverage form describes the covered auto symbols and provides that symbol "1" is "Any 'Auto,' " and symbol "2" is "Owned 'Autos' Only," i.e., "Only those 'autos' [the university] own[s] . . . . This includes those 'autos' [the university] acquire[s] ownership of after the policy begins." Section II of the coverage form, titled "COVERED AUTOS LIABILITY COVERAGE," provides that the defendant "will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.' " Paragraph A 1 of the section II coverage form provides in relevant part: "The following are 'insureds': a. [The university] for any covered 'auto.' b. Anyone else while using with [the university's] permission a covered 'auto' [the university] own[s], hire[s] or borrow[s] . . . ."

Among the policy endorsements is the business auto extension endorsement, which modifies paragraph A 1 of section II of the business auto coverage form and adds the following provisions: "An 'employee' of [the university] is an 'insured' while operating an 'auto' hired or rented under a contract or agreement in an 'employee's' name, with [the university's] permission, while performing duties related to the conduct of [the university's] business"

We conclude, and the parties agree, that the plaintiff is an insured for purposes of liability coverage.[11] Although the rental agreement for the plaintiff's vehicle is not included in the summary judgment record and, therefore, we do not know whether the vehicle was rented by the university or by the plaintiff, the plaintiff would be an insured for liability coverage under the policy in either scenario. That is, if the plaintiff's vehicle was rented by the university, the plaintiff would be an insured for purposes of liability coverage because she would have been "using with [the university's] permission a covered 'auto' [the university] own[ed], hire[d] or borrow[ed] . . . ." Likewise, if the plaintiff rented the vehicle in her own name, she would be an insured for liability purposes under the coverage form, as amended by the business auto extension endorsement, because she would have been operating an " 'auto' . . . rented under a contract . . . in an 'employee's' name, with [the university's] permission, while performing duties related to the conduct of [the university's] business."

Accordingly, having determined that the plaintiff is an insured under the policy for purposes of liability coverage, we turn to the plaintiff's claim that, in the absence of a waiver by the university, § 38a-336 mandates that she also be insured for underinsured motorist coverage.

B

We begin with the relevant legal principles regarding underinsured motorist coverage.[12] "Our state law requires

[11] The defendant concedes that the business auto extension endorsement amends the definition of an insured under the coverage form for purposes of liability coverage. In addition, during oral argument before this court, counsel for the defendant agreed that the plaintiff was an insured for purposes of liability coverage under the policy.

[12] As previously noted in this opinion, the construction of a statute is a question of law subject to plenary review. See *Aldin Associates Ltd. Partnership* v. *State*, supra, 209 Conn. App. 767.

all motor vehicle owners to maintain a minimum amount of automobile liability insurance coverage. General Statutes § 38a-335 (a). The legislature understood that some motorists will not comply with this law, however. Thus, to protect properly insured motorists from the negligence of financially irresponsible motorists, our state law expressly provides that every automobile insurance policy must provide its insured with a minimum amount of uninsured and underinsured motorist coverage as provided for in § 14-112 (a)." *Tannone* v. *Amica Mutual Ins. Co.*, 329 Conn. 665, 672, 189 A.3d 99 (2018).

Specifically, § 38a-336 (a) provides in relevant part: "(1) (A) Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, the insurer of which becomes insolvent prior to payment of such damages. . . .

"(2) Notwithstanding any provision of this section, each automobile liability insurance policy issued or renewed on and after January 1, 1994, shall provide uninsured and underinsured motorist coverage with limits for bodily injury and death equal to those purchased to protect against loss resulting from the liability imposed by law unless any named insured requests in writing a lesser amount, but not less than the limits specified in subsection (a) of section 14-112. . . ."

Section 38a-334-6 of the Regulations of Connecticut State Agencies sets forth the minimum provisions for

underinsured motorist coverage and the permitted exclusions and reductions to such coverage. The regulation provides that an insurer shall provide uninsured or underinsured motorist coverage for "the occupants of every motor vehicle to which the bodily injury liability coverage applies"; Regs., Conn. State Agencies § 38a-334-6 (a); and that "[t]he limit of the insurer's liability may not be less than the applicable limits for bodily injury liability specified in subsection (a) of section 14-112 of the general statutes, except that the policy may provide for the reduction of limits to the extent that damages have been (A) paid by or on behalf of any person responsible for the injury, (B) paid or are payable under any workers' compensation law, or (C) paid under the policy in settlement of a liability claim." Regs., Conn. State Agencies § 38a-334-6 (d) (1). Pursuant to the regulation, "[t]he insurer's obligations to pay may be made inapplicable: (1) To any claim which has been settled with the uninsured motorist without the consent of the insurer; (2) if the uninsured or underinsured motor vehicle is owned by (A) the named insured or any relative who is a resident of the same household or is furnished for the regular use of any of the foregoing, (B) a self insurer under any motor vehicle law, or (C) any government or agency thereof; (3) to pay or reimburse for workers' compensation or disability benefits." Regs., Conn. State Agencies § 38a-334-6 (c).

"Thus, by its terms, § 38a-336 (a) (1) requires that each automobile liability policy provide uninsured and underinsured motorist coverage to a class of persons that is coextensive with that insured under the liability section of the policy." *Gomes* v. *Massachusetts Bay Ins. Co.*, 87 Conn. App. 416, 425–26, 866 A.2d 704, cert. denied, 273 Conn. 925, 871 A.2d 1031 (2005); see also *Gormbard* v. *Zurich Ins. Co.*, 279 Conn. 808, 823, 904 A.2d 198 (2006) (noting that there is "no better example of an attempt to limit otherwise mandated uninsured

motorist coverage than a definition in an insurance policy that purports to limit uninsured motorist coverage to injuries arising out of the insured's use of a specified vehicle"); *Middlesex Ins. Co.* v. *Quinn*, 225 Conn. 257, 268, 622 A.2d 572 (1993) ("insurer cannot limit otherwise mandated underinsured motorist coverage by labeling a forbidden exclusion as a definition"); *Platcow* v. *Yasuda Fire & Marine Ins. Co. of America*, 59 Conn. App. 47, 56 n.16, 755 A.3d 356 (2000) ("[i]t is undisputed that, in this state, mandatory uninsured motorist coverage operates in parity with liability insurance coverage"); *Bailey* v. *Peerless Ins. Co.*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-08-50085155-S (September 15, 2009) (48 Conn. L. Rptr. 514, 516) (The trial court held that the plaintiffs' "right to pursue underinsured motorist benefits cannot be restricted to the use of particular vehicles. To allow the distinction contained within the [defendant's insurance policy] would be to ratify a disparity between coverage for liability purposes and coverage for purposes of underinsured motorist benefits. [Our] Supreme Court, in *Quinn* and *Gormbard*, has specifically rejected any such distinction, as a violation of public policy.").

"Our state has consistently maintained a strong public policy favoring uninsured motorist coverage . . . since 1967 . . . . Specifically, that public policy dictates that every insured is entitled to recover for the damages he or she would have been able to recover if the uninsured motorist [responsible for the insured's injury] had maintained a policy of liability insurance. . . . In short, the legislature and [our Supreme Court] have a well established and deliberate policy in favor of insuring the risk of loss resulting from the negligence of uninsured and underinsured motorists.

"The rationale behind this policy is to reward those who obtain insurance coverage for the benefit of those

they might injure. . . . We have supported coverage arrangements that have *furthered* the important public policy goals of the uninsured motorist statute. . . . And in support of the broad, remedial purpose of the uninsured motorist statute . . . [our Supreme Court has] stated that an insurer may [not] circumvent th[at] public policy . . . .'' (Citations omitted; emphasis in original; internal quotation marks omitted.) *Tannone* v. *Amica Mutual Ins. Co.*, supra, 329 Conn. 673.

In the present case, the plaintiff claims that the court's construction of the university's policy ''would provide liability coverage of $1 million and [underinsured motorist coverage] of $0, for the same accident. . . . There is no dispute that [the] plaintiff would be an insured for purposes of liability coverage. The defendant claims instead that, while liability coverage is available, [underinsured motorist] coverage is not. This position does not comport with the statute.'' (Citation omitted; emphasis omitted.) The plaintiff further claims that the court's construction of the policy would violate Connecticut's statutory minimum coverage requirements under § 14-112.

In arguing to the contrary, the defendant does not dispute that the plaintiff would be an insured for purposes of liability coverage under the policy. See footnote 11 of this opinion. Instead, the defendant relies on § 38a-336 (f), which provides: ''Notwithstanding subsection (a) of section 31-284, an employee of a named insured injured while occupying a covered motor vehicle in the course of employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage.'' General Statutes § 31-284 (a), the workers' compensation exclusivity provision, provides that the Workers' Compensation Act (act), General Statutes § 31-275 et seq., is the exclusive remedy for an employee injured or killed in the course

of her employment. According to the defendant, § 38a-336 (f) "supports [its] position that the plaintiff was not a covered person for the purposes of . . . underinsured motorist claims. The plaintiff does not meet the definitional requirements under the policy . . . ." We are not persuaded by the defendant's argument.

The defendant relies on this court's decisions in *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 87 Conn. App. 418–19, and *Ludemann* v. *Specialty National Ins. Co.*, 117 Conn. App. 656, 980 A.2d 343, cert. denied, 294 Conn. 917, 983 A.2d 851 (2009), as support for its position. In *Gomes*, a plaintiff was working as a volunteer fire policeman directing traffic when he was struck from behind by a vehicle driven by a tortfeasor. *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 418. The plaintiff received workers' compensation benefits for his injuries and, after exhausting the limits of liability coverage under the tortfeasor's insurance policy, brought an action against his employer's insurer for underinsured motorist benefits. Id., 419. The trial court rendered summary judgment for the insurer, concluding "that the exception to the workers' compensation exclusivity provision provided by § 38a-336 (f) was not applicable because the plaintiff was in the middle of an intersection directing traffic when struck and was not occupying a covered vehicle as defined by the policy to mean in, upon, getting in, on, out or off." (Internal quotation marks omitted.) Id., 420.

The plaintiff appealed to this court, claiming that the trial court "improperly construed § 38a-336 (f) as limiting underinsured motorist coverage to those employees of a named insured who are injured while 'occupying' a covered motor vehicle, rather than construing it to require such coverage to any person insured under the liability portion of the policy." Id., 423. In rejecting that claim, this court reasoned that, "[p]rior to the enactment of § 38a-336 (f), our Supreme Court

held that . . . § 31-284 (a) precluded an employee injured while operating the employer's vehicle in the course of employment from seeking uninsured or underinsured motorist benefits directly from a self-insured employer; *Bouley* v. *Norwich*, 222 Conn. 744, 761, 610 A.2d 1245 (1992); or from the employer's insurance carrier. *CNA Ins. Co.* v. *Colman*, 222 Conn. 769, 773–74, 610 A.2d 1257 (1992). In 1993, the General Assembly legislatively overruled *Bouley* and *Colman* when it enacted § 38a-336 (f). In *Reliance Ins. Co.* v. *American Casualty Co. of Reading, Pennsylvania*, 238 Conn. 285, 679 A.2d 925 (1996), in holding that § 38a-336 (f) applied retroactively, our Supreme Court stated that the statute was 'intended to be clarifying legislation and, as such, must be accepted as a declaration of the legislature's original intent pertaining to the *interplay* between the uninsured motorist provision of . . . § 38a-336 and the workers' compensation exclusivity provision of § 31-284.' . . .

"Although the plaintiff urges this court to harmonize what he contends to be a continuing conflict between the statutory mandate of uninsured and underinsured coverage and the impact of the workers' compensation exclusivity provision, we decline to do so because we conclude that the legislature appropriately resolved the conflict when it enacted § 38a-336 (f). . . .

"On the basis of the language of § 38a-336 (f), it is apparent that the legislature addressed the *interplay* between the uninsured and underinsured motorist statute and the [act] by providing a *limited* exception to the exclusivity provision. The legislature could have chosen to allow the *Bouley* and *Colman* decisions to stand, or it could have chosen to provide a broader exception to the exclusivity provision. Instead, the legislature chose to harmonize the conflicting statutory schemes by providing an exception, while limiting its

applicability to those employees 'injured while *occupying* a covered motor vehicle . . . .' " (Citations omitted; emphasis in original.) Id., 427–29. Accordingly, this court held "that the court properly construed § 38a-336 (f) as limiting underinsured motorist coverage to those employees of a named insured who are injured while 'occupying' a covered motor vehicle." Id., 430.

Similarly, in *Ludemann* v. *Specialty National Ins. Co.*, supra, 117 Conn. App. 657, a plaintiff, who was employed as a police officer, was directing traffic when he was struck and injured by a vehicle operated by a tortfeasor. The plaintiff received workers' compensation benefits for his injuries and, after he exhausted the coverage of the tortfeasor's liability insurance policy, sought underinsured motorist coverage under his employer's automobile insurance policy. Id. The case was submitted to arbitration for the arbitrators "to determine whether [the plaintiff] was barred from receiving underinsured motorist benefits because, at the time he was injured, he was not *occupying* his police cruiser for the purposes of § 38a-336 (f). . . . [T]he arbitration panel rendered an award in favor of the [insurer]. The [plaintiff] filed an application in the trial court, asking the court to vacate the award. The court denied the application to vacate, and the [plaintiff] appealed to this court." (Emphasis in original.) Id.

On appeal, the plaintiff in *Ludemann* claimed, inter alia, that the court improperly concluded that he was barred from recovering as an insured pursuant to § 38a-336 (f) because he was not occupying a motor vehicle. Id., 657–58. In a per curiam opinion, this court noted that the trial court's decision was "consistent with our applicable statutes and decisional law. See *Gomes* v. *Massachusetts Bay Ins. Co.*, [supra, 87 Conn. App. 416]. We therefore adopt the court's well reasoned decision." *Ludemann* v. *Specialty National Ins. Co.*, supra, 658; see also *Ludemann* v. *Specialty National Ins. Co.*, 51

Conn. Supp. 326, 335, 982 A.2d 659 (2008) (holding that arbitration panel properly relied on *Gomes* in concluding that plaintiff was not " 'occupying' " motor vehicle pursuant to § 38a-336 (f)), aff'd, 117 Conn. App. 656, 980 A.2d 343, cert. denied, 294 Conn. 917, 983 A.2d 851 (2009).

The defendant contends that the present case is analogous to *Gomes* and *Ludemann* and argues that, "under [§] 38a-336 (f), underinsured motorist coverage was not available to the plaintiffs in *Gomes* and *Ludemann*. The Appellate Court in *Gomes* rejected the argument that [§] 38a-336 required that underinsured motorist coverage be afforded to any person insured under the liability portion of the policy. It is a necessary predicate to the plaintiff's argument—that there needed to be a waiver of the underinsured coverage limits in this case—that an insurance policy that provides liability coverage must necessarily provide underinsured motorist coverage. The *Gomes* decision and the text of [§] 38a-336 (f) undermines this predicate. Section 38a-336 (f) by its express terms does not authorize an underinsured motorist claim by the plaintiff because although she was an employee of the [u]niversity . . . she was not occupying a covered motor vehicle."

The plaintiff responds that *Gomes* and *Ludemann* are distinguishable from the present case because neither plaintiff in those cases was operating a motor vehicle when he was injured by an underinsured motorist. In addition, the plaintiff argues that, contrary to the defendant's assertion, the court in *Gomes* reaffirmed the central premise of her argument, namely, that "§ 38a-336 (a) (1) requires that each automobile liability policy provide uninsured and underinsured motorist coverage to a class of persons that is coextensive with that insured under the liability section of the policy." *Gomes* v. *Massachusetts Bay Ins. Co.*, supra, 87 Conn. App. 425–26. We agree with the plaintiff.

The defendant's reliance on § 38a-336 (f), *Gomes*, and *Ludemann* in the present case is misplaced. To be sure, § 38a-336 (f) limits an employee's right to recover uninsured and underinsured motorist coverage under an employer's policy by requiring that an employee must be "occupying a covered motor vehicle in the course of employment . . . ." Neither plaintiff in *Gomes* or *Ludemann*, however, was occupying a covered motor vehicle when he was injured. Indeed, neither plaintiff was occupying *any* vehicle when he was injured, and that fact was dispositive of both cases. By contrast, in the present case, the plaintiff was operating a covered motor vehicle at the time of the accident, as it is undisputed that, had she caused the accident, she and the university would have been entitled to liability coverage under the university's policy. Thus, we must resolve an issue not addressed in *Gomes* and *Ludemann*—whether, for purposes of § 38a-336 (f), a motor vehicle can be "covered" for purposes of liability coverage and "not covered" for purposes of uninsured and underinsured motorist coverage.

We conclude that the plain language of § 38a-336 (f), when read in conjunction with the other provisions of § 38a-336, belies the defendant's argument. As noted previously in this opinion, § 38a-336 (f) provides in relevant part: "[A]n employee of a named insured injured while occupying a covered motor vehicle in the course of employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage." The defendant misreads this language as allowing it, through its policy language, to sever liability coverage from uninsured and underinsured motorist coverage. The statute does no such thing. All that § 38a-336 (f) does is limit when an employee can bring a claim for benefits under an employer's uninsured and underinsured motorist coverage by requiring that the employee be injured while occupying a covered motor

vehicle at the time of the accident. This exception to the act thus limits the class of claimants, but it does not alter in any way the insurer's statutory obligation to provide the "otherwise applicable uninsured and underinsured motorist coverage." There is no indication in § 38a-336 (f) that the legislature intended to distinguish between a covered motor vehicle for liability coverage and a covered motor vehicle for uninsured and underinsured motorist coverage. To the contrary, § 38a-336 (f) specifically refers to the employer's "otherwise applicable uninsured and underinsured motorist coverage." The coverage that is "otherwise applicable" is spelled out in detail in § 38a-336 (a).

First, § 38a-336 (a) (1) (A) requires in relevant part: "Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage . . . for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles . . . ." Second, § 38a-336 (a) (2) requires that the mandated uninsured and underinsured motorist coverage have limits equal to those purchased for liability coverage and sets forth specific procedures that an insurer must follow when an insured requests to reduce to the statutory minimum the amount of uninsured and underinsured motorist coverage under an insurance policy. Notably, § 38a-336 (a) (2) makes clear that the requirement to provide equivalent liability and uninsured and underinsured motorist coverage exists "[n]otwithstanding any provision of this section," which necessarily includes subsection (f).

Thus, by the plain language of the statute, the defendant cannot rely on the language of subsection (f) of § 38a-336 to avoid its statutory obligations by, as the defendant has done here, limiting by policy definition

"uninsured motorist coverage to injuries arising out of [an] insured's use of a specified vehicle." *Gormbard* v. *Zurich Ins. Co.*, supra, 279 Conn. 823. Indeed, our Supreme Court expressly has held that an insurer may not do so. See *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 268 ("[a]n insurer cannot limit otherwise mandated underinsured motorist coverage by labeling a forbidden exclusion as a definition").[13] Yet, the defendant's interpretation of § 38a-336 (f) would do just that. In fact, following the defendant's argument to its logical conclusion, an insurer, relying on § 38a-336 (f), could exclude all of an employer's vehicles from its definition of covered motor vehicles in an uninsured and underinsured motorist endorsement and be in full compliance with § 38a-336 (a). That the legislature expressly stated that the requirements of subsection (a) must be met "[n]otwithstanding" any other provision of § 38a-336 precludes such an outcome. Simply put, it is not reasonable to read § 38a-336 (f) as an expansive exception to the clearly expressed policy in § 38a-336 (a). See, e.g., *Gormbard* v. *Zurich Ins. Co.*, supra, 819 ("[i]nsurance companies are powerless to restrict the broad coverage mandated by [§ 38a-336]" (internal quotation marks omitted)).

Moreover, § 38a-336 is a remedial statute intended to promote the "well established and deliberate policy in favor of insuring the risk of loss resulting from the negligence of uninsured and underinsured motorists." *Tannone* v. *Amica Mutual Insurance Co.*, supra, 329 Conn. 673. This policy "requires an insurer to provide uninsured motorist benefits to any insured under the automobile liability policy." *Middlesex Ins. Co.* v.

[13] Although *Middlesex Ins. Co.* v. *Quinn*, supra, 225 Conn. 257, was decided in 1993, before subsection (f) was added to § 38a-336; see Public Acts 1993, No. 93-297, § 1 (effective January 1, 1994); our Supreme Court subsequently reaffirmed its holding in *Quinn* in 2006, in *Gormbard* v. *Zurich Ins. Co.*, supra, 279 Conn. 821–25.

Quinn, supra, 225 Conn. 267. Accordingly, we "must apply § 38a-336 (a) (2) consistent with the maxim that remedial statutes should be construed liberally in favor of those whom the law is intended to protect [and that] exceptions to those statutes should be construed narrowly." (Internal quotation marks omitted.) *Russbach* v. *Yanez-Ventura*, 213 Conn. App. 77, 102, 277 A.3d 874, cert. denied, 345 Conn. 902, 282 A.3d 465 (2022). Applying this principle, there simply is no language in § 38a-336 (f) to suggest that the legislature intended to create a broad exception to the express requirements of § 38a-336 (a). The absence of any such language is significant, "as it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Citation omitted.) *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183, cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). Indeed, when the legislature has intended to create an exception to the broad coverage mandated by § 38-336 (a), it has done so expressly. See, e.g., General Statutes § 38a-336 (a) (1) (C) ("[n]o insurer shall be required to provide uninsured and underinsured motorist coverage to (i) a named insured or relatives residing in the named insured's household when occupying, or struck as a pedestrian by, an uninsured or underinsured motor vehicle or a motorcycle that is owned by the named insured . . . or (ii) any insured occupying an uninsured or underinsured motor vehicle or motorcycle that is owned by such insured"); Regs., Conn. State Agencies § 38a-334-6 (setting forth minimum provisions for uninsured and underinsured motorist coverage and permissible exclusions); see also *Anastasia* v. *General Casualty Co. of Wisconsin*, 307 Conn. 706, 714, 59 A.3d 207 (2013) ("an insurer may not, by contract, reduce its liability for . . . uninsured or

underinsured motorist coverage, except as [§ 38a-334-6] of the Regulations of Connecticut State Agencies expressly authorizes" (internal quotation marks omitted)).

Consequently, reading the statute as a whole, the "otherwise applicable" language of § 38a-336 (f) clearly and unambiguously requires that the defendant comply with the other provisions of § 38a-336 before reducing the limits of uninsured and underinsured coverage to an amount less than the limits of liability coverage under the policy. Therefore, because there is no evidence in the record establishing that the university expressly waived the statutorily mandated coverage, as required by § 38a-336 (a) (2), the court improperly rendered summary judgment for the defendant, as the defendant failed to establish that the plaintiff is not entitled to underinsured motorist benefits.[14]

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

CAZENOVIA CREEK FUNDING I, LLC *v.* THE WHITE EAGLE SOCIETY OF BROTHERLY HELP, INC., GROUP 315, POLISH NATIONAL ALLIANCE, ET AL.
(AC 45065)

Elgo, Suarez and Clark, Js.

Syllabus

The plaintiff, C Co., sought to foreclose municipal tax liens on certain real property in the city of Bridgeport owned by the defendant. Following

[14] In light of our conclusion that, on the basis of the application of § 38a-336 to the university's policy, the court improperly rendered summary judgment for the defendant, we do not address the plaintiff's remaining arguments.

the defendant's failure to pay property taxes in 2012 and 2013, the city imposed liens on the property and assigned the liens to C Co.'s predecessor in interest, M Co. M Co. thereafter assigned the tax liens to C Co. C Co. commenced the present foreclosure action and filed a motion for summary judgment as to liability only. The trial court found that the liens had been properly assigned and that no genuine issue of material fact existed as to the defendant's liability. Thereafter, B Co. was substituted as the plaintiff. The court rendered a judgment of foreclosure by sale, from which the defendant appealed to this court, claiming, inter alia, that the court improperly determined that the tax liens for the grand lists of 2012 and 2013 properly were assigned to C Co. *Held*:

1. The trial court properly rendered summary judgment as to liability: C Co. met its prima facie burden of establishing its ability to foreclose on the tax liens, pursuant to the rule of practice (§ 10-70) governing the foreclosure of municipal tax liens, by producing, inter alia, the certificates of continuing tax lien and the chain of lien assignment from the city to C Co.; moreover, although the defendant alleged, as a special defense, that the assignment of the liens was defective and in violation of the applicable statute (§ 12-195h) because there was no proof that a "legislative body" had approved the assignment of the liens, that defense failed, as the defendant's support for this defense, including minutes from three city council meetings that it alleged did not reflect an approval of a resolution to assign taxes for the 2012 or the 2013 grand list, did not include evidence that those were the only city council meetings held between the relevant dates when a resolution assigning the liens from 2012 or 2013 could have been adopted, and the defendant failed to present evidence to prove that the liens assigned to the unpaid balances from the 2012 and 2013 bills were not encompassed in the city council's resolution to approve the assignment of liens for fiscal year 2014.
2. The defendant could not prevail on its claim that the trial court's factual findings with respect to payments made by the defendant and the amount of debt owed to C Co. were clearly erroneous: although C Co. submitted copies of the certificates of continuing lien showing that unpaid taxes were assessed to the property and due for the 2012 and 2013 tax bills and an affidavit from M Co. stating that a demand had been made on the defendant to pay the delinquent taxes but that no payment had been made, the defendant did not rebut this evidence with any proof that payments had been made to either M Co. or C Co.; moreover, the record reflected that the court properly considered the evidence that the defendant submitted, including three canceled checks, a computerized printout from the city showing two payments credited to the 2012 bill and an affidavit from the defendant's agent asserting that payments had been made in full to the city, and concluded that the canceled checks and proof of payment history were not sufficient to demonstrate that the subsequent liens had been released or satisfied.

Argued January 17—officially released August 1, 2023

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Dale W. Radcliffe*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the plaintiff withdrew its action as against the defendant John Doe; subsequently, CC1 CT II, LLC, was substituted as the plaintiff; thereafter, Benchmark Municipal Tax Services, Ltd., was substituted as the plaintiff; subsequently, the court, *Hon. Dale W. Radcliffe*, judge trial referee, rendered judgment of foreclosure by sale, from which the named defendant appealed to this court. *Affirmed.*

John T. Bochanis, for the appellant (named defendant).

Juda J. Epstein, for the appellee (substitute plaintiff).

Opinion

ELGO, J. The named defendant, The White Eagle Society of Brotherly Help, Inc., Group 315, Polish National Alliance,[1] appeals from the judgment of foreclosure by sale rendered by the trial court in favor of the substitute plaintiff, Benchmark Municipal Tax Services, Ltd.[2] On appeal, the defendant claims that

[1] Also named as defendants in the operative complaint were the Water Pollution Control Authority for the city of Bridgeport, Aquarion Water Company of Connecticut, and John Doe. On February 20, 2020, the plaintiff withdrew its action as against John Doe. Because the Water Pollution Control Authority for the city of Bridgeport and Aquarion Water Company of Connecticut have not participated in this appeal, we refer to The White Eagle Society of Brotherly Help, Inc., Group 315, Polish National Alliance as the defendant.

[2] Cazenovia Creek Funding I, LLC, commenced this tax lien foreclosure action in 2018. By order dated September 21, 2020, the court granted the motion to substitute CC1 CT II, LLC, as the plaintiff in lieu of Cazenovia Creek Funding I, LLC. The court thereafter granted the motion to substitute Benchmark Municipal Tax Services, Ltd., as the plaintiff in lieu of CC1 CT II, LLC.

the court improperly (1) rendered summary judgment against it as to liability after determining that the tax liens for the grand lists of 2012 and 2013 properly were assigned to the plaintiff and (2) found that the debt was due to the plaintiff. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The defendant is the uncontested owner of real property located at 595 East Washington Avenue in Bridgeport (property). On April 4, 2014, the collector of revenue for the city of Bridgeport (city) recorded a certificate of continuing tax lien on the property for the taxes due in the amount of $12,838.74 associated with the bill for the 2012 grand list (2012 bill). On June 24, 2014, the city assigned the tax lien to the plaintiff's predecessor in interest, MTAG Services, LLC, for the unpaid tax amount plus interest for the 2012 bill. On April 2, 2015, the city's collector of revenue recorded a second certificate of continuing tax lien on the property for the taxes due in the amount of $29,820 associated with the bill for the 2013 grand list (2013 bill). On April 27, 2015, the city assigned the tax lien for the unpaid tax amount plus interest for the 2013 bill to MTAG Services, LLC .[3]

On July 8, 2015, MTAG Services, LLC, assigned its interest in the tax liens to the plaintiff and duly recorded the assignment with the Bridgeport town clerk's office. This assignment identified the defendant by name and property address, and it listed an "approximate balance due" in the amount of $17,202.53 for the 2012 grand list lien and $35,762.15 for the 2013 grand list lien.

[3] The assigning certificates, copies of which were submitted in support of the motion for summary judgment, state that all "right, title and interest" the city has to secure unpaid taxes, interest, charges, and fees associated with the lien are transferred to MTAG Services, LLC. The assigning certificates list the bill numbers for which taxes were due and identify the property by address and the defendant's name.

The plaintiff, as the purported owner of the liens, commenced the present foreclosure action in April, 2018. On August 31, 2018, the defendant filed an answer that included six special defenses, alleging, inter alia, that (1) the plaintiff failed to prove that the city properly assigned the lien and, thus, the plaintiff did not have the authority to collect any unpaid taxes, and (2) all applicable taxes had been paid.[4]

On September 18, 2018, the plaintiff moved for summary judgment, arguing that no genuine issue of material fact existed with respect to the defendant's liability. In support of that motion, the plaintiff attached evidence to establish that (1) the defendant owned the property at all relevant times, (2) the city filed certificates of the continuing tax liens against the property relating to the 2012 and 2013 bills, (3) the liens were assigned to MTAG Services, LLC, (4) MTAG Services, LLC, assigned the liens to the plaintiff, and (5) demand for payment had been made but the defendant failed to make any payments.

The defendant filed an objection to the plaintiff's motion for summary judgment on November 19, 2018. In its accompanying memorandum of law, the defendant attached evidence to establish that payments had been made to the city tax collector. The defendant also supplied copies of the minutes, agenda, and resolutions to assign the tax liens from the June 2 and June 16, 2014, and the April 20, 2015 city council meetings.

On February 18, 2020, the court held a hearing on the motion for summary judgment as to liability and heard arguments from both parties, at the conclusion of which it found that no genuine issue of material fact existed as to liability and that the liens associated with

[4] The defendant also alleged accord and satisfaction as a special defense. The court rejected that special defense, and the defendant does not challenge the propriety of that determination in this appeal.

the 2012 and 2013 bills had been properly assigned. The court also noted that the defendant would have the opportunity at a later date to argue the special defense of whether the taxes had been paid. The court thus granted the motion for summary judgment as to liability only against the defendant.[5]

On February 19, 2020, the plaintiff filed a motion for a judgment of strict foreclosure. On October 13, 2021, the trial court held a hearing on the plaintiff's motion for a judgment of strict foreclosure. After hearing arguments from both parties, the court ordered foreclosure by sale in favor of the plaintiff due to the substantial equity that existed in the property. On October 21, 2021, a notice of the judgment of foreclosure by sale was sent to the defendant. From that judgment, the defendant now appeals.

I

On appeal, the defendant claims that the court improperly rendered summary judgment as to liability in favor of the plaintiff after determining that the tax liens for the grand lists of 2012 and 2013 properly were assigned to the plaintiff. The defendant argues that it was the plaintiff's burden to prove that the assignment of the liens was proper through a sufficient showing that (1) the municipal tax was "duly and properly assessed upon the property" pursuant to Practice Book § 10-70 (a) (2), (2) the assignment procedure was correctly executed by a "legislative body" in compliance with General Statutes § 12-195h, and (3) the city properly assigned the liens to the plaintiff. We disagree.

The legal principles and standard of review that govern our review of the defendant's claims are well settled. "On appeal, [w]e must decide whether the trial court

[5] Following the rendering of summary judgment as to liability only, the defendant filed an appeal with this court, which was dismissed for lack of a final judgment.

erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Because the trial court rendered judgment for the [plaintiff] as a matter of law, our review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record. . . . 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. . . . A material fact is a fact that will make a difference in the outcome of the case. . . . Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party 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." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 630–31, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014).

Practice Book § 10-70 delineates the plaintiff's burden of proof in a municipal tax lien foreclosure action. It provides in relevant part: "(a) In any action to foreclose a municipal tax or assessment lien the plaintiff need only allege and prove: (1) the ownership of the liened premises on the date when the same went into

the tax list, or when said assessment was made; (2) that thereafter a tax in the amount specified in the list, or such assessment in the amount made, was duly and properly assessed upon the property and became due and payable; (3) (to be used only in cases where the lien has been continued by certificate) that thereafter a certificate of lien for the amount thereof was duly and properly filed and recorded in the land records of the said town on the date stated; (4) that no part of the same has been paid; and (5) other encumbrances as required by the preceding section. . . .'' Practice Book § 10-70 (a).

In support of its motion for summary judgment, the plaintiff submitted (1) a copy of the deed establishing the defendant's ownership of the property at issue, (2) certificates of continuing tax liens for taxes due on the property relating to the 2012 and 2013 bills, (3) certificates of assignment to the plaintiff's predecessor in interest for taxes and interest due on the property relating to these bills, (4) a certificate of assignment of tax liens to the plaintiff from the predecessor in interest, and (5) an affidavit from the predecessor in interest attesting that the defendant had failed to make any payment. Practice Book § 10-70 (b) provides that, ''[w]hen the lien has been continued by certificate, the production in court of the certificate of lien, or a certified copy thereof, shall be prima facie evidence that all requirements of law for the assessment and collection of the tax or assessment secured by it, and for the making and filing of the certificate, have been duly and properly complied with.'' Therefore, the plaintiff met its prima facie burden of establishing its ability to foreclose by producing the certificate of continuing tax lien and the chain of lien assignments from the city to the plaintiff.

The defendant argues that it was the plaintiff's burden to establish that the liens recorded by the city were

properly authorized by the "legislative body" prior to being assigned to a third party in accordance with § 12-195h. We disagree. Practice Book § 10-70 (b) makes clear that, after presenting prima facie evidence, as the plaintiff has done here, "[a]ny claimed informality, irregularity or invalidity in the assessment or attempted collection of the tax, or in the lien filed, shall be a matter of affirmative defense to be alleged and proved by the defendant." For example, in *Benchmark Municipal Tax Services, Ltd.* v. *Now Entity, LLC*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6057211-S (December 16, 2016), the defendant made an argument similar to that advanced by the defendant in the present case when it alleged that it was the plaintiff's burden to prove that the assignment of a tax lien complied with § 12-195h. Although that decision is not binding authority upon this court, we look favorably upon its holding that, once a plaintiff has "made a prima facie case in compliance with Practice Book § 10-70, the burden of alleging and proving noncompliance with . . . § 12-195h would fall on [the] defendant." Id.

In the present case, the defendant's answer contained several special defenses, two of which allege the purported defective assignment of the liens. It is well established that "[t]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . Further . . . [t]he applicable rule regarding the

material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings. . . . [B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018). "In mortgage foreclosure cases, courts require that a viable legal defense directly attack the making, validity, or enforcement [of the note and mortgage]. . . . [S]pecial defenses which are not limited to the making, validity or enforcement of the note or mortgage fail to assert any connection with the subject matter of the foreclosure action and as such do not arise out of the same transaction as the foreclosure action." (Citation omitted; internal quotation marks omitted.) Id., 750–51. Because a defective assignment could impact the enforcement of a mortgage lien, the court was correct to consider it as a valid special defense.

In support of this special defense, the defendant supplied city council minutes from three different city council meetings. The defendant argued that, because these city council minutes did not reflect an approval of a resolution to assign taxes for the 2012 grand list nor the 2013 grand list, the assignments failed to comply with § 12-195h because there was no proof that a "legislative body" approved the assignment of the liens. Although the defendant concedes that the city council, at one of its meetings, assigned tax liens for "fiscal year 2014," it argues that there is no proof that the "fiscal year 2014" encompasses liens related to assessments from the 2012 or 2013 tax bills.

This argument fails for two reasons. First, the liens could have been validly assigned at any city council

meeting between the dates that the city recorded the certificate of continuing liens and the date that the liens were assigned to a third party. Although the defendant supplied minutes for three different city council meetings, there is no evidence in the record, via affidavit or other form of proof, that these were the only city council meetings held between the relevant dates when a resolution assigning the liens from 2012 or 2013 could have been adopted.

Second, the plaintiff's prima facie evidence "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." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, supra, 151 Conn. App. 631. The defendant failed to present evidence to prove that the liens assigned to unpaid balances from the 2012 and 2013 bills were not, in fact, encompassed in the city council's resolution to approve assignment of liens for fiscal year 2014. For that reason, we conclude that the court properly determined that there was no genuine issue of material fact as to whether the assignments in question were defective and rendered summary judgment accordingly.

II

The defendant also claims that the court improperly determined the debt due to the plaintiff. The defendant argues: (1) it was the plaintiff's burden to prove that no part of the assessed lien had been paid in accordance with Practice Book § 10-70 (a) (4); and (2) the court erroneously found that the taxes in question had not been paid.

As to the first argument, the defendant correctly states that it is the plaintiff's burden to prove "a tax . . . or such assessment . . . was duly and properly

assessed upon the property and became due and payable . . . [and] no part of the same has been paid." Practice Book §10-70 (a). To meet this burden, the plaintiff submitted copies of the certificates of continuing lien to the trial court showing that unpaid taxes were assessed to the property and due for the 2012 and 2013 tax bills. The plaintiff also submitted an affidavit from its predecessor in interest, MTAG Services, LLC, stating that a demand had been made on the defendant to pay the delinquent taxes but that no payments had been made. The defendant did not rebut this evidence with any proof that payments had been made to either the plaintiff or its predecessor in interest. The plaintiff thus met the requirements under §10-70 (a), and the burden shifted to the defendant to allege and prove, as an affirmative defense, "[a]ny claimed informality, irregularity or invalidity in the assessment or attempted collection of the tax, or in the lien filed . . . ." Practice Book § 10-70 (b).

The defendant also argues that the court erroneously found that the taxes in question had not been paid. As evidence of payment, the defendant submitted (1) three canceled checks made payable to the "Tax Collector City of Bridgeport," (2) a computerized printout from the city showing two payments credited to the 2012 bill, and (3) an affidavit from the defendant's agent asserting that payments had been made in full to the city. On appeal, the defendant contends that the court ignored that evidence and, as a result, erroneously calculated the debt due to the plaintiff.

Whether payment was tendered by a defendant in a foreclosure action is a question of fact. See *Homecomings Financial Network, Inc.* v. *Starbala*, 85 Conn. App. 284, 289, 857 A.2d 366 (2004). "Questions of fact are subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when

although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Murtha* v. *Hartford*, 303 Conn. 1, 12–13, 35 A.3d 177 (2011).

Contrary to the defendant's assertion, we conclude that the record reflects that the court properly considered the evidence submitted. The court reviewed the evidence, heard arguments from both sides, and then determined that (1) two of the canceled checks and the computerized printout reflected partial payments made toward the 2012 bill, (2) the lien associated with 2012 bill properly was assessed for a remaining unpaid balance, and (3) the canceled checks and proof of payment history were not sufficient to demonstrate that the subsequent liens had been released or satisfied. As to the third canceled check, there was no evidence in the record indicating that this payment had been applied to the 2013 bill as the defendant argued.

Although the defendant alleged, as a special defense, that all applicable taxes had been paid, it was the defendant's burden to put forth sufficient evidence to prove this assertion. The defendant did not provide the court with any evidence that payments had been made to either the plaintiff or the plaintiff's predecessors in interest to satisfy its tax obligations. Accordingly, we conclude that the court's factual findings with respect to payments made by the defendant and the amount of debt owed to the plaintiff are not clearly erroneous.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE *v.* LINDA BOOKER ET AL.

(AC 45473)

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

Syllabus

W Co., the plaintiff's predecessor in interest, sought to foreclose a mortgage on certain real property owned by the defendants. The defendants had executed a promissory note in the original principal amount of $231,920, which was secured by the mortgage. Thereafter, the defendants signed a loan modification agreement that they had negotiated with O Co., a loan servicing company, the terms of which, inter alia, increased the outstanding principal amount of the debt to $400,706.05. O Co. did not sign the loan modification agreement. After the defendants defaulted on the note and mortgage due to the nonpayment of monthly installments of principal and interest, W Co. declared the entire balance of the note due and payable and sought strict foreclosure of the mortgaged property. Thereafter, W Co. assigned the mortgage to the plaintiff, and the trial court granted W Co.'s motion to substitute the plaintiff as a party to the action. The trial court granted the plaintiff's motion for summary judgment as to liability and rendered a judgment of strict foreclosure. The trial court denied the defendants' motion for reconsideration. The defendants filed a motion to open and vacate the judgment, asserting, for the first time, that there was a discrepancy between the debt amount alleged in the complaint and that found in the strict foreclosure judgment. Two days later, the defendants filed their first appeal, claiming that the trial court erred in denying their motion for reconsideration. Approximately one week later, pursuant to the applicable statute (§ 49-15), title to the mortgaged property vested in the plaintiff. This court dismissed the appeal as moot, and our Supreme Court denied the defendants' petition for certification to appeal. Thereafter, the defendants filed a memorandum of law in support of their motion to open and vacate the judgment, claiming that the trial court made a fundamental mistake in relying on the principal debt amount listed in the plaintiff's affidavit of debt, namely, $400,706.05, rather than on the $231,920 amount alleged in the complaint. The trial court denied the defendants' motion, and the defendants appealed to this court. *Held*:

1. Contrary to the plaintiff's claim, this court did not lack subject matter jurisdiction over the defendants' appeal:

   a. Although title to the mortgaged property had vested in the plaintiff following the passage of the law day in accordance with § 49-15, because the defendants claimed that the trial court made a fundamental mistake in relying on an incorrect principal amount of the debt when rendering its judgment of strict foreclosure, and because the defendants' claims of mistake and fraud presented the trial court with colorable grounds for equitable relief pursuant to *U.S. Bank National Assn.* v. *Rothermel* (339 Conn. 366), the defendants' appeal was not moot; accordingly, this court could exercise its limited, continuing jurisdiction, consistent with § 49-15, to provide the defendants with practical relief in the event that it concluded that the trial court improperly declined to exercise its jurisdiction and afford the defendants relief.

   b. The defendants did not abandon their claim regarding the principal debt amount by failing to raise it in their initial appeal to this court: the defendants' motion to open was not denied until after their initial appeal had been dismissed, and, as a result, the defendants could not have waived their right to raise the claim of error in the present appeal when the trial court had not ruled on the issue until after the initial appeal had been dismissed.

2. The trial court did not abuse its discretion in denying the defendants' motion to open on the merits because the facts alleged did not present the type of rare and exceptional circumstance required pursuant to *Rothermel* for the court to exercise a limited form of continuing jurisdiction after title to the mortgaged property had vested in the plaintiff:

   a. The trial court reasonably could have concluded that, even if a mistake had occurred, it did not rise to the level of the rare and exceptional circumstance that would require a court in equity to provide relief, as the plaintiff expressly relied on the $400,706.05 principal debt amount in both of its motions for summary judgment, the defendants opposed both motions yet, in doing so, failed to raise the issue regarding the amount of the debt, and a copy of the loan modification agreement that had been signed by the defendants was before the trial court; moreover, the trial court reasonably could have determined that the defendants had ample opportunities throughout the lifespan of the case to raise the issue of the modified debt amount and that their decision to delay doing so until after title to the real property had vested in the plaintiff undermined their argument that the alleged mistake warranted equitable relief.

   b. The defendants' bare assertion of fraud by the plaintiff did not satisfy the clear and satisfactory evidence standard, and it fell short of the rare and exceptional circumstance justifying continuing jurisdiction under *Rothermel* because the defendants did not present any persuasive evidence that the plaintiff intentionally pleaded a greater debt amount than was actually owed so that its mortgage servicer could earn an increased

fee; moreover, the plaintiff's assertion that the loan modification agreement modified the loan did not prove that it was aware that the modified principal amount of the debt was inaccurate, throughout the entirety of the action the plaintiff consistently alleged that the principal debt amount was $400,706.05, and it reasonably could be inferred that the plaintiff acted under the belief that the loan modification agreement was effective because it was signed by the defendants.

Argued April 10—officially released August 1, 2023

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Spader*, *J.*, granted the motion filed by the plaintiff Wilmington Trust, National Association, as Trustee of ARLP Securitization Trust, Series 2015-1 to substitute U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust as the plaintiff; thereafter, the court, *Cordani*, *J.*, granted the plaintiff's motion for summary judgment as to liability against the named defendant et al. and rendered a judgment of strict foreclosure; subsequently, the court, *Baio*, *J.*, denied the motion for reconsideration filed by the named defendant et al. and the named defendant et al. appealed to this court, which dismissed the appeal as moot; thereafter, our Supreme Court denied the petition for certification to appeal filed by the named defendant et al.; subsequently, the court, *Cirello*, *J.*, denied the motion to open the judgment filed by the named defendant et al., from which the named defendant et al. appealed to this court. *Affirmed.*

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

William Dziedzic, with whom, on the brief, was *Adam L. Avallone*, for the appellee (plaintiff).

Opinion

SUAREZ, J. In this residential mortgage foreclosure action, the defendants Linda Booker and Ulish Booker,

Jr., appeal from the trial court's denial of their motion to open the judgment of strict foreclosure rendered in favor of the plaintiff U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust.[1] The defendants claim that the court erred in denying their motion to open the judgment because the court improperly decided not to exercise its discretion and afford them relief in connection with the grounds of mistake and fraud raised therein.[2] The plaintiff argues that this court should dismiss the appeal because (1) the defendants' appeal is moot, as title in the mortgaged property has vested in the plaintiff, and (2) the defendants should not be allowed to raise their claim of error because it could have been raised in the defendants' prior appeal in this action. The plaintiff also argues that the court did not abuse its discretion in denying the motion to open. We reject the plaintiff's jurisdictional and reviewability arguments and conclude that the court properly denied the defendants' motion to open. Accordingly, we affirm the judgment of the court.

[1] The underlying action was commenced by Wilmington Trust, National Association, as Trustee of ARLP Securitization Trust, Series 2015-1 (Wilmington Trust). Thereafter, the court granted Wilmington Trust's motion to substitute U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust as the plaintiff. Accordingly, in this opinion, we will refer to U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust as the plaintiff. Moreover, in this opinion, the term defendants refers only to Linda Booker and Ulish Booker, Jr. New Century Mortgage Corporation, although named as a defendant in the original summons and complaint, did not appear in the underlying proceeding and is not participating in this appeal.

[2] We note that the defendants briefed this argument as two separate claims. The first being that "[t]he defendants' claim of error involves such a fundamental mistake as to warrant the court exercising continuing equitable jurisdiction, notwithstanding the time limitations of [General Statutes §] 49-15" and the second being that "[t]he trial court erred in failing to open and vacate its judgment following the plaintiff's postjudgment admission that the court had entered judgment on a mortgage note that was neither [pleaded] nor produced to the court." Because these two claims are closely related, we will address both of them together in part II of this opinion as part of our discussion regarding whether the court erred in denying the defendants' motion to open the judgment.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On April 25, 2017, the original plaintiff, Wilmington Trust, National Association, as Trustee of ARLP Securitization Trust, Series 2015-1 (Wilmington Trust), filed a complaint against the defendants, alleging the following facts: On March 30, 2006, the defendants were indebted to New Century Mortgage Corporation (New Century) in connection with a promissory note executed in favor of New Century in the amount of $231,920. The note was secured by a mortgage, executed by the defendants, on their property located in West Haven. Seven years later, the defendants negotiated with Ocwen Loan Servicing, LLC (Ocwen),[3] for a loan modification and signed an agreement dated December 9, 2013, the terms of which increased the principal debt balance to $400,706.05 and reduced the interest rate to 6 percent (2013 loan modification agreement). Ocwen did not sign the 2013 loan modification agreement.

Following a series of assignments, Wilmington Trust became the assignee of the mortgage and, therefore, was entitled to collect the debt evidenced by the note and was entitled to enforce the mortgage. As of April 1, 2014, the defendants were in default on the note and mortgage because of nonpayment of the monthly installments of principal and interest. Wilmington Trust thereafter exercised its option to declare the entire balance of the note due and payable and sought strict foreclosure of the defendants' mortgaged property.

The record reflects the following additional procedural history. On June 29, 2017, Wilmington Trust assigned the mortgage to the plaintiff and, on January 11, 2018, moved to substitute it as the plaintiff in this

[3] Ocwen is a third-party loan servicing company. Although Ocwen negotiated a loan modification agreement with the defendants, it is not a party to this action and is not participating in this appeal. In footnote 8 of this opinion, we set forth the specific terms of the agreement.

action. On January 26, 2018, Wilmington Trust moved for a judgment of strict foreclosure of the defendants' mortgaged property. On January 29, 2018, the court, *Spader*, *J.*, granted Wilmington Trust's motion to substitute the plaintiff as the party plaintiff. On May 9, 2018, the plaintiff moved for summary judgment as to liability, and the court, *Hon. Anthony V. Avallone*, judge trial referee, denied the motion without prejudice due to a discrepancy with the assignments of the mortgage as set forth in the plaintiff's complaint.[4] On September 28, 2018, the plaintiff filed a subsequent motion for summary judgment as to liability. On January 7, 2019, the court, *Cordani*, *J.*, granted the September 28, 2018 motion for summary judgment. On January 25, 2019, the defendants, in a self-represented capacity, filed a motion to reargue the September 28, 2018 motion for summary judgment. On February 4, 2019, the court, *Cordani*, *J.*, denied the defendants' motion to reargue and rendered a judgment of strict foreclosure for the plaintiff, setting the law day for April 22, 2019. On April 22, 2019, the defendants filed a motion to open the judgment and extend the law day. On April 22, 2019, the court, *Cordani*, *J.*, denied their motion and reset the law day to May 20, 2019.

On May 14, 2019, Ulish Booker, Jr., filed a bankruptcy petition pursuant to chapter 13 of the United States Bankruptcy Code, which resulted in an automatic stay of the law day. On April 2, 2020, the United States Bankruptcy Court for the District of Connecticut dismissed his bankruptcy case. On November 6, 2020, the

[4] The discrepancy with the assignments in the complaint involved the order of the dates in the mortgage assignment between Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, as Trustee of ARLP Trust 2 and Wilmington Trust, the original plaintiff. Although the plaintiff never amended the complaint to resolve the discrepancy, the defendants have not raised an appellate claim related to this issue and, thus, have abandoned any claim related thereto. See *Russell* v. *Russell*, 91 Conn. App. 619, 634–35, 882 A.2d 98, cert. denied, 276 Conn. 924, 888 A.2d 92 (2005), and cert. denied, 276 Conn. 925, 888 A.2d 92 (2005).

plaintiff filed a motion to reenter the strict foreclosure judgment and set a new law day. On January 25, 2021, the court, *Baio*, *J.*, held a hearing and granted the plaintiff's motion, setting the law day for March 22, 2021.[5] On February 16, 2021, the defendants filed a motion for reconsideration of the granting of strict foreclosure, arguing that they did not receive proper notice of the January 25, 2021 hearing and that the plaintiff lacked standing due to the discrepancy with the assignments of the mortgage as set forth in the complaint.[6] On March 11, 2021, the court, *Baio*, *J.*, denied the defendants' motion for reconsideration. On March 16, 2021, the defendants filed a motion pursuant to Practice Book § 10-33 to open and vacate the judgment of strict foreclosure on the ground that the court lacked subject matter jurisdiction due to the discrepancy with the assignments of the mortgage. In their March 16, 2021 motion to open the judgment, for the first time in this action, the defendants also argued that the debt amount found in the strict foreclosure judgment was different than the amount alleged in the complaint. On March 18, 2021, the defendants filed their first appeal in this action (first appeal), claiming that the court erred in denying their February 16, 2021 motion for reconsideration. On March 24, 2021, title in the property vested in the plaintiff. On April 9, 2021, the defendants, who had been self-represented until this time, retained counsel.

On May 4, 2021, this court, in the first appeal, ordered the parties, sua sponte, to file memoranda of law as to why the defendants' appeal should not be dismissed as moot because the law day had passed and title had vested in the plaintiff. On May 26, 2021, after reviewing

[5] The court also determined that the debt owed by the defendants was $641,635.30 and the fair market value of the property was $258,000.

[6] As we stated previously in this opinion, the alleged discrepancy, discussed in footnote 4 of this opinion, led to the denial of the plaintiff's May 9, 2018 motion for summary judgment.

the memoranda of law submitted by the parties, this court dismissed the defendants' appeal as moot. On August 17, 2021, the defendants petitioned our Supreme Court for certification to appeal, which was denied on October 26, 2021.

On February 25, 2022, the defendants, through counsel, filed a memorandum of law in support of their March 16, 2021 motion to open the judgment. Therein, the defendants claimed that the court made a fundamental mistake by relying on an incorrect principal debt amount, taken from the plaintiff's affidavit of debt, when rendering its judgment of strict foreclosure. Specifically, the defendants alleged that the court erred by using the principal debt amount of $400,706.05, in accordance with the proposed 2013 loan modification agreement, instead of the original principal debt amount of $231,920, as alleged in the complaint. The defendants argued that the court has equitable jurisdiction to correct a fundamental mistake under our Supreme Court's decision in *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 373, 260 A.3d 1187 (2021). On March 14, 2022, the plaintiff filed an objection to the defendants' March 16, 2021 motion to open, arguing that the defendants' claim of error did not warrant the exercise of the court's equitable jurisdiction to open the judgment.

On April 14, 2022, the trial court, *Cirello*, *J.*, held a hearing on the defendants' March 16, 2021 motion to open the judgment and denied the motion.[7] In its order

[7] We note that the record does not contain the transcript of the April 14, 2022 hearing. Pursuant to Practice Book § 63-4 (a) (2), the defendants filed a statement with this court that no transcript is necessary. This court frequently has declined to review claims on appeal because the appellant has failed to provide an adequate record for review. See, e.g., *Rino Gnesi Co.* v. *Sbriglio*, 83 Conn. App. 707, 712, 850 A.2d 1118 (2004). In the present case, we will review the defendants' claim, as there exists a sufficient basis for appellate review based on the parties' pleadings, the defendants' memorandum of law, and the court's April 14, 2022 order. See id. Although a transcript of the hearing on the motion would have aided and been relevant to our understanding of the legal arguments raised in the trial court proceedings, neither party has suggested that the hearing was evidentiary in nature

of April 14, 2022, denying the motion, the court stated that, "[a]fter reviewing the court file, the written and oral arguments and all the relevant exhibits, the court finds that there are no legal or equitable reasons to reopen the judgment. . . . To allow the defendants a second bite at the apple to raise claims made in this motion to open is not equitable to all parties concerned." This appeal followed.

On May 13, 2022, the plaintiff filed a motion to dismiss this appeal, arguing that this court lacks subject matter jurisdiction over the appeal because (1) the appeal is moot, as title has vested in the plaintiff, and (2) the claims raised in the appeal could have been raised in the defendants' first appeal. On June 29, 2022, this court denied the plaintiff's motion to dismiss without prejudice to the parties addressing the jurisdictional issue raised by the plaintiff in their appellate briefs. Additional facts and procedural history will be set forth as necessary.

I

As a preliminary matter, we address the arguments raised by the plaintiff that it characterizes as implicating this court's subject matter jurisdiction. First, the plaintiff argues that this court lacks subject matter jurisdiction because title has vested in the plaintiff, and, therefore, the appeal is moot, as this court cannot provide any practical relief to the defendants. Second, the plaintiff argues that the defendants' claim could have been

nor does the trial court record include exhibits from the hearing. The defendants attached several documents, marked as "exhibits," to their memorandum of law. It appears from the record presented to this court that the court relied on those documents in its consideration of the defendants' motion to open. Furthermore, it is not necessary that we review the transcript of the hearing to ascertain the nature of the arguments raised therein, as there does not appear to be any dispute with respect to the legal grounds on which the defendants relied in bringing their motion to open the judgment.

raised in a prior appeal and, thus, has been abandoned. We are not persuaded.

A

"A threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . It is well established that the subject matter jurisdiction of the Appellate Court . . . is governed by [General Statutes] § 52-263, which provides that an aggrieved party may appeal to the court having jurisdiction from the final judgment of the court. . . . [O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case. . . . If it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Trumbull* v. *Palmer*, 123 Conn. App. 244, 249–50, 1 A.3d 1121, cert. denied, 299 Conn. 907, 10 A.3d 526 (2010), and cert. denied, 299 Conn. 907, 10 A.3d 526 (2010).

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may

not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021).

Motions to open judgments of strict foreclosure are governed by General Statutes § 49-15 (a) (1). Under § 49-15 (a) (1), courts *generally* cannot open a judgment of strict foreclosure after the passage of the law days because such an event vests absolute title in the encumbrancer. See *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 375. Both our Supreme Court and this court, however, have established that courts may, in rare and exceptional cases, exercise a limited form of continuing jurisdiction over motions to open strict foreclosure judgments after the passage of the law days, notwithstanding the statutory limitation imposed by § 49-15. Id., 376–77. Our Supreme Court has indicated that rare and exceptional cases may include circumstances involving "[f]raud, accident, mistake, and surprise . . . ." (Internal quotation marks omitted.) Id., 379. In *Rothermel*, our Supreme Court stated that "[t]rial courts may, under existing case law, grant motions to dismiss pursuant to § 49-15 in cases in which a claim raised in a postvesting motion to open fails to present *colorable grounds* for equitable relief under these limited exceptions, and appellate courts may continue to summarily dismiss appeals taken from those rulings." (Emphasis added.) Id., 379–80 n.11. This court has defined a colorable claim as "one that is superficially well founded but that may ultimately be deemed invalid . . . ." *Sharon Motor Lodge, Inc.* v. *Tai*, 82 Conn. App. 148, 158–59, 842 A.2d 1140, cert. denied, 269 Conn. 908, 852 A.2d 738 (2004).

In the present case, the defendants claim, in their March 16, 2021 motion to open, that the court made a fundamental mistake by using the incorrect principal amount when rendering its judgment of strict foreclosure. Specifically, the defendants argued that the court mistakenly relied on the plaintiff's affidavit of debt, which stated that the debt was $400,706.05 in accordance with the proposed 2013 loan modification agreement, instead of on the complaint, which alleged that the original principal debt amount was $231,920. The defendants assert that the correct principal debt amount is $231,920 because the 2013 loan modification agreement never became effective, as there is no evidence in the record that the conditions precedent in the agreement have been met, Ocwen is not a party to the present action, and Ocwen did not sign the agreement.[8] The defendants further argued that the plaintiff fraudulently represented to the court in its affidavit of debt an incorrect principal debt amount because the plaintiff's mortgage servicer could potentially earn its fee as a fixed percentage of the outstanding principal balance, providing an incentive for the plaintiff to intentionally inflate the principal debt amount.

The defendants' claims of mistake and fraud presented the trial court with colorable grounds for equitable relief under *Rothermel*, and, accordingly, we may exercise our limited form of continuing jurisdiction to provide the defendants practical relief in the event that we conclude, as the defendants claim, that the trial

[8] The terms of the 2013 loan modification agreement are in relevant part as follows: "In order for the terms of this modification to become effective, you promise to make an initial down payment . . . of $3,510.55 on or before 1/1/2014 and two (2) equal monthly payments of principal and interest in the amount of $2,732.14 to Ocwen ('Trial Period') beginning on 2/1/2014, and thereafter due on [the] same day of each succeeding month. . . . You agree that, at the end of the Trial Period, the new principal balance due under your modified Note and the Mortgage will be $400,706.05." The defendants signed the 2013 loan modification agreement, but Ocwen did not.

court improperly declined to exercise its discretion and afford them relief in connection with their claims of mistake and fraud embodied in their motion to open. Thus, the defendants' appeal is not moot.

B

The plaintiff next claims that this court lacks subject matter jurisdiction because the defendants could have raised the issue regarding the principal debt amount used in the judgment of strict foreclosure in their prior appeal. The plaintiff relies on *Connecticut Savings Bank* v. *Heghmann*, 193 Conn. 157, 159–60, 474 A.2d 790, cert. denied, 469 U.S. 883, 105 S. Ct. 252, 83 L. Ed. 2d 189 (1984), for the notion that once an issue has been abandoned on appeal, it is waived and may not be resurrected. As a preliminary matter, we disagree with the plaintiff insofar as it characterizes this claim as being jurisdictional in nature. The issue of whether the defendants have waived their claim of error by failing to raise it in their first appeal involves important jurisprudential principles as to when it is appropriate for us to review a claim that has not been properly preserved, but in no way implicates this court's jurisdiction to resolve the appeal. Addressing the argument as one that is properly related to reviewability, we are not persuaded that we should decline to review this claim.

"It is well established that when a party brings a subsequent appeal, it cannot raise questions which were or could have been answered in its former appeals. . . . Failure to raise an issue in an initial appeal to this court constitutes a waiver of the right to bring the claim." (Internal quotation marks omitted.) *Disciplinary Counsel* v. *Evans*, 159 Conn. App. 343, 356, 123 A.3d 69 (2015). This court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 80 Conn. App. 436, 445, 835 A.2d 491

(2003), cert. denied, 268 Conn. 920, 846 A.2d 881 (2004). This principle applies, however, only when "the issue that a party seeks to raise in a subsequent appeal was one that the party actually litigated *prior to the initial appeal* such that the issue *could have been raised in the initial appeal*." (Emphasis in original; internal quotation marks omitted.) *Disciplinary Counsel* v. *Evans*, supra, 356.

With these principles in mind, we conclude that the plaintiff's reliance on *Heghmann* is misplaced. In *Heghmann*, the defendants appealed to our Supreme Court from a judgment of foreclosure by sale. *Connecticut Savings Bank* v. *Heghmann*, supra, 193 Conn. 158. After our Supreme Court dismissed the appeal, the trial court opened the judgment for the purpose of setting a new sale date. Id. Subsequently, the defendants moved to open the judgment, which motion was denied by the trial court. Id. The defendants brought a subsequent appeal from the denial of their motion to open, in which they attempted to challenge the rulings that led to the original judgment of foreclosure by sale. Id., 158–59. In affirming the judgment of the trial court in the subsequent appeal, our Supreme Court, on the basis of a review of the preliminary statement of issues in the prior appeal, concluded that "the arguments now being advanced by the defendants could have been asserted in that appeal which was dismissed. . . . [T]he defendants are obliquely attempting to revive an appeal that has succumbed by being abandoned." (Footnote omitted.) Id., 159–60.

In the present case, the defendants first asserted the discrepancy with the principal debt amount in the foreclosure judgment on March 16, 2021, when they filed their motion to open the judgment. This occurred two

days prior to the filing of their initial appeal.[9] However, the defendants' March 16, 2021 motion to open was not denied until April 14, 2022, after the prior appeal was dismissed on May 26, 2021. It would strain logic for this court to conclude that the defendants, in connection with the prior appeal, somehow waived their right to raise the current claim of error in the present appeal, related to the ruling of April 14, 2022, when the trial court did not rule on the issue raised in the claim until after the prior appeal was dismissed. Therefore, we conclude that the defendants did not waive the claim that the court erred in denying their March 16, 2021 motion to open.

II

We now turn to the defendants' claim that the court improperly denied their motion to open the judgment on its merits. We are not persuaded.

In their memorandum in support of their March 16, 2021 motion to open, the defendants asserted that, notwithstanding the fact that title had vested in the plaintiff in accordance with § 49-15 due to the passage of the law day, under the unique circumstances of this case, the court should exercise continuing jurisdiction pursuant to *Rothermel* to afford them relief. In its April 14, 2022 order, the court rejected the defendants' arguments and concluded that there were no legal or equitable grounds on which to open the judgment. On appeal, the defendants argue that the court erred in denying their motion to open and vacate the strict foreclosure judgment by improperly deciding not to exercise its limited equitable discretion and afford them relief in connection with their claims of mistake and fraud. The

[9] Although the 2013 loan modification agreement was attached as an exhibit to the defendants' February 16, 2021 motion for reconsideration, the issue of the discrepancy between the principal debt amounts was not distinctly raised until they filed their March 16, 2021 motion to open.

plaintiff contends that the court did not abuse its discretion by denying the defendants' March 16, 2021 motion to open and vacate the judgment because the facts alleged do not show that this case presents the type of rare and exceptional circumstance described in *Rothermel*. We agree with the plaintiff.

"The relevant standard of review is well established. Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion."[10] (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 381. When considering whether the court has abused its discretion, "we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *Federal Deposit Ins. Corp.* v. *Owen*, 88 Conn. App. 806, 811–12, 873 A.2d 1003, cert. denied, 275 Conn. 902, 882 A.2d 670 (2005). The court's factual findings, however, are subject to the clearly erroneous standard of review. See *U.S. Bank National Assn.* v. *Rothermel*, supra, 382. "The law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory

[10] The defendants argue that the standard of review should be plenary, as their claim involves the court's interpretation of the pleadings. A foreclosure action is an equitable proceeding, however, and the determination of what equity requires is a matter of discretion for the court. See *McCord* v. *Fredette*, 92 Conn. App. 131, 132–33, 883 A.2d 1258 (2005). We therefore review the trial court's decision in granting or refusing an application to open a judgment under an abuse of discretion standard. *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 381.

remedies provided by the legislature." (Internal quotation marks omitted.) Id., 374.

As previously discussed in part I A of this opinion, § 49-15 (a) (1) governs the court's authority to open a judgment of strict foreclosure. It provides: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, *provided no such judgment shall be opened after the title has become absolute in any encumbrancer* except as provided in subdivision (2) of this subsection." (Emphasis added.) General Statutes § 49-15 (a) (1).

"In Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests absolute title in the encumbrancer." *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 375. We previously have read § 49-15 (a) (1) "in a manner that generally prohibits mortgagors from obtaining practical relief after the passage of the law days and, as a result, ha[ve] concluded that both postvesting motions to open a judgment and subsequent appeals related to them are moot." Id. Nevertheless, our Supreme Court and this court have recognized that the trial court possesses inherent powers to provide limited forms of continuing equitable relief after the passage of the law days in "rare and exceptional" cases, consistent with § 49-15. Id., 376–77.

The limited exception allowing courts to open a judgment of strict foreclosure after title has vested in an encumbrancer originated in *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 257, 708 A.2d 1378 (1998). In *Jajer*, the plaintiff brought an action for foreclosure of

a mortgage and mistakenly omitted from its complaint one of the three parcels of land included in the mortgage conveyance. Id., 253. After the trial court rendered a judgment of strict foreclosure on that complaint, the law days had passed, and title for the two included parcels of land vested in the plaintiff, the plaintiff discovered its mistake and moved to open the court's judgment to amend its complaint to include the third parcel of land. Id., 253–54. Our Supreme Court concluded that § 49-15 did not deprive the court of jurisdiction to open the judgment of foreclosure due to the plaintiff's clerical error. Id., 260. The court stated that, "consistently with its authority to exercise its equitable discretion in foreclosure proceedings, the trial court must be afforded the authority to open judgments on a case-by-case basis 'in order that complete justice may be done.' " Id., 261.

Likewise, in *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1, 12–13, 85 A.3d 1 (2014), this court held that the trial court, in rare and exceptional circumstances, has equitable discretion in a foreclosure proceeding to open a judgment after the passage of the law days. Specifically, this court held that an attorney's false certification to the court that the plaintiff had complied with the court's judgment by notifying all nonappearing defendant owners of the equity, constituted a rare and exceptional circumstance allowing the court to open the judgment of strict foreclosure despite the passing of the law day. Id., 3–5. This court explained, "[E]quity permits a court to provide relief in response to an *egregious mistake*." (Emphasis added; internal quotation marks omitted.) Id., 12.

In *Rothermel*, our Supreme Court further clarified that, pursuant to *Jajer* and *Melahn*, the court should consider using its equitable authority to open a judgment after the passage of law days only when the claim raises a colorable ground for equitable relief. *U.S. Bank*

National Assn. v. *Rothermel*, supra, 339 Conn. 379–80 and n.11. In that case, the defendant obtained the funds needed to purchase a parcel of real property by signing a note promising to pay the principal and interest on a loan that was secured by a mortgage on the property. Id., 369. The defendant defaulted on the note and the plaintiff moved for strict foreclosure of the mortgaged property. Id. The trial court granted the plaintiff's motion and rendered a judgment of strict foreclosure. Id. After granting fifteen of the plaintiff's motions to open the judgment, which were filed with the defendant's consent, the trial court set the law day for March 12, 2019. Id., 369–70. On March 13, 2019, the defendant filed another motion to open the judgment, one day after the law day had passed. Id., 371. The defendant claimed that she had relied on both written and oral misrepresentations by the plaintiff's loan servicer, causing her to file the motion to open the strict foreclosure judgment after the passage of the law day. Id., 370–71. Specifically, the defendant alleged that the loan servicer told her that the "foreclosure sale" was scheduled for March 13, 2019. Id. The trial court denied the defendant's motion to open the judgment, stating that "it did not have 'jurisdiction or authority' to open the judgment under § 49-15" after the passage of the law day. Id., 371. The trial court also denied the defendant's motion on its merits, stating that she became aware of the law day on March 9, 2019, and that she had acted in a " 'dilatory and cavalier' manner by unnecessarily delaying the filing of her own motion to open the judgment." Id., 371–72. The defendant appealed, and this court dismissed her appeal as moot. Id., 372.

Our Supreme Court granted certification and reversed this court's judgment dismissing the appeal. Id., 372, 385. The court reasoned that the defendant "raised a colorable claim falling within a class generally recognized in equity and sought relief through the court's

inherent, continuing jurisdiction as previously established in *Melahn*"; id., 380; but ultimately determined that the trial court did not abuse its discretion in concluding that the circumstances did not warrant an award of equitable relief because the late filing of the motion was, in part, due to the defendant's own inaction. Id., 384–85. Our Supreme Court cautioned, however, that "the jurisdictional conclusion reached in the present appeal should not be taken as an invitation for parties in strict foreclosure proceedings to repackage motions to open the judgment filed after the passage of the law days in a manner that superficially invokes the inherent powers underlying *Jajer* or *Melahn*. Exceptions to the general rule against postvesting motions to open judgments of strict foreclosure are, in fact, rare and exceptional. A bare assertion that equity requires such relief is insufficient; as in the present case, the party seeking to invoke the trial court's continuing jurisdiction must base their motion to open on particularized factual allegations that could support a claim cognizable in equity." Id., 379 n.11. As we stated in part I A of this opinion, our Supreme Court has provided some guidance as to what exceptional cases may justify the trial court exercising its continuing equitable authority after the passage of the law days, noting that "[f]raud, accident, mistake, and surprise are recognized grounds for equitable interference." (Internal quotation marks omitted.) Id., 379.

In the present case, the defendants, in their motion to open, raised a colorable claim that fell within the ambit of *Rothermel* by arguing that the court should exercise its equitable, continuing jurisdiction on the basis of mistake and fraud. The court did not dismiss the motion to open on the grounds that it lacked subject matter jurisdiction or that it was unable to exercise its discretion to grant the defendants relief, if warranted. Instead, it considered the merits of the motion after

holding a hearing, at which the parties were afforded an opportunity to address the matter. After the hearing, the court denied the motion on its merits.

As stated previously in this opinion, the court, in its order denying the motion to open, stated in broad terms that no legal or equitable grounds existed to grant the defendants' motion and that "[t]o allow the defendants a second bite at the apple to raise claims made in this motion to open is not equitable to all parties concerned." Insofar as the defendants alleged that a mistake had occurred, the court reasonably could have concluded that this case does not rise to the level of a rare and exceptional circumstance that would require a court in equity to provide relief, considering the statutory limitations set forth in § 49-15. In *Melahn*, this court stated that "[e]quity will not, save in rare and extreme cases, relieve against a judgment rendered as the result of a mistake on the part of a party or his counsel, unless the mistake is unmixed with negligence, or . . . unconnected with any negligence or inattention on the part of the judgment debtor . . . ." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Melahn*, supra, 148 Conn. App. 11. In the present case, the plaintiff stated in its complaint that "[t]he unpaid balance due pursuant to the terms of said note is $400,706.05" plus interest, late charges and collection costs. Moreover, the plaintiff expressly relied on the modified debt amount in both of its motions for summary judgment. The defendants, however, opposed the motions and failed to raise the issue regarding the amount of the debt owed. Additionally, we note that, before the court was a copy of the 2013 loan modification agreement, signed by the defendants. See footnote 8 of this opinion. The existence of this agreement undermines the defendants' assertion that a mistake had been made. Moreover, the court, in its discretion, reasonably may have determined that, for the defendants to now raise the

issue of the modified debt amount at the eleventh hour, after title has vested in the plaintiff, undermines their argument that the alleged mistake warrants equitable relief. The defendants have had ample opportunities throughout the five year lifespan of this case to raise the issue of the modified debt amount mentioned in paragraph five of the complaint and consistently throughout the pleadings. From these considerations, it follows that the court was disinclined to provide the defendants with the proverbial "second bite at the apple."

The defendants also argue that the plaintiff's reliance on the modified principal debt amount in its affidavit of debt amounted to intentional fraud because the plaintiff, in its objection to the defendants' motion to open, implicitly admitted that it was aware of the disconnect between the original and modified principal debt amounts when the plaintiff asserted that the defendants should have realized that the debt figure was based on the 2013 loan modification agreement. We are not persuaded.

This court has defined fraud as "deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . . Additionally, [t]he party asserting such a cause of action must prove the existence of the first three of [the] elements by a standard higher than the usual fair preponderance of the evidence, which higher standard we have described as clear and satisfactory or clear, precise and unequivocal." (Internal quotation marks omitted.)

Miller v. *Guimaraes*, 78 Conn. App. 760, 780–81, 829 A.2d 422 (2003).

In the present case, the defendants do not draw our attention to any persuasive evidence in the record to support a finding that the plaintiff knew about the discrepancy between the original and modified principal debt amounts, let alone to evidence that the plaintiff intentionally pleaded the higher amount so that its mortgage servicer could earn a higher fee on the outstanding principal balance. A bare assertion of fraud is not the equivalent of clear and satisfactory evidence.

What the plaintiff stated in its objection to the defendants' motion to open does not reasonably support an inference that the plaintiff had knowledge of the inaccuracy of the modified principal debt amount. The plaintiff explicitly stated: "In the instant matter, the defendants fail to offer even a scintilla of evidence to prove that they were misinformed about the terms, or the amount of the loan. The subject loan was modified by way of [the 2013] [l]oan [m]odification [a]greement dated December 9, 2013, and signed by the defendants." The plaintiff's assertion does not prove the fact, by clear and satisfactory evidence, that it was aware that the modified principal debt amount was inaccurate. To the contrary, the plaintiff's assertion supports its position that it believed the 2013 loan modification agreement was effective and accurately reflected the debt owed by the defendants. Throughout the entirety of this action, the plaintiff has consistently alleged that the principal debt owed by the defendants was $400,706.05. Furthermore, it reasonably can be inferred that the plaintiff acted under the belief that the 2013 loan modification agreement was effective because the defendants had signed it. Therefore, the defendants' bare assertion of intentional fraud by the plaintiff falls woefully short of a rare and exceptional circumstance required by *Rothermel*.

Accordingly, we conclude that the court did not abuse its discretion in denying the defendants' March 16, 2021 motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

BROWNSTONE EXPLORATION & DISCOVERY PARK, LLC *v.* DIANE BORODKIN (AC 45127)

Alvord, Moll and Seeley, Js

Syllabus

The plaintiff filed an application to compel arbitration in a separate personal injury action that had been brought by the defendant for personal injuries that she allegedly sustained when she slipped and fell on an unmarked tree root while walking in a park owned by the plaintiff. Prior to entering the park, the defendant signed an agreement that provided, inter alia, that any claims arising out of participation in aquatic and quarry adventure activities would be submitted to arbitration and that the question of whether a claim is subject to arbitration would be decided by the arbitrators. After an evidentiary hearing, the trial court found that, although parties can agree to arbitrate the issue of arbitrability by means of an express provision to that effect, the agreement, taken as a whole, was ambiguous, and, because the court found that the question of arbitrability was not expressly reserved for the arbitrator by the language of the agreement, it was up to the court, not the arbitrators, to decide whether the claim was arbitrable. In determining arbitrability, the court determined that the defendant's claim was not arbitrable because the agreement could be interpreted as requiring arbitration only for claims related to inherently hazardous aquatic and quarry adventure activities, not ordinary negligence, which is what the court determined was alleged in the personal injury action. Last, the court concluded, sua sponte, that the application to compel arbitration had to be denied on additional procedural grounds, finding that it was improper for the plaintiff to have filed an independent proceeding to compel arbitration pursuant to statute (§ 52-410), rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by statute (§ 52-409). *Held:*

1. The trial court incorrectly concluded that the question of arbitrability was not expressly reserved to the arbitrators and erroneously made the

arbitrability determination itself: although the general rule in Connecticut is that the court is responsible for deciding whether a dispute is arbitrable in the absence of the parties' contrary intent, parties to an arbitration agreement may provide in their agreement that the arbitrating body, rather than a court, shall interpret the arbitration agreement to determine whether the issue in dispute is within the purview of the parties' undertaking to arbitrate, either by including in their arbitration agreement an express provision to that effect or, alternatively, through the use of broad terms to describe the scope of arbitration, and, in the present case, there was clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability; moreover, even if the agreement were ambiguous as to whether the personal injury claim was arbitrable, the agreement was not ambiguous as to who decides that question but, rather, expressly provided that the arbitrators decide arbitrability; furthermore, contrary to the defendant's argument, whether a claim falls within the language of the arbitration agreement in the present case is the very issue of arbitrability, not a condition precedent to arbitration that must first be satisfied by the court.

2. The trial court incorrectly denied the plaintiff's application to compel arbitration on procedural grounds without first providing the parties with the opportunity to address the procedural issue: the defendant did not, at any point, argue to the trial court that the plaintiff's application was procedurally defective, and the trial court did not, at any point, notify the parties that it was considering this procedural issue or provide the parties with an opportunity to brief it or otherwise be heard on it; accordingly, it was improper for the court, sua sponte, to raise and address this issue in denying the plaintiff's application.

Argued March 9—officially released August 1, 2023

Procedural History

Application to compel arbitration, brought to the Superior Court in the judicial district of Hartford, where the court, *M. Taylor*, *J.*, denied the plaintiff's application, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Karen L. Dowd, with whom were *Kenneth J. Bartschi* and *Rachel M. Bradford* and, on the brief, *Christopher M. Vossler*, for the appellant (plaintiff).

Elisabeth M. Swanson, for the appellee (defendant).

Opinion

SEELEY, J. The plaintiff, Brownstone Exploration & Discovery Park, LLC (Brownstone), appeals from the

judgment of the trial court denying its application to compel arbitration of a dispute involving the defendant, Diane Borodkin, who previously had filed an action against Brownstone for personal injuries (personal injury action) that she allegedly sustained when she slipped and fell on an unmarked tree root while walking on a path just past the entrance to a park owned and operated by Brownstone. Brownstone filed its application pursuant to General Statutes § 52-410 seeking to compel arbitration of the dispute in accordance with an agreement that Borodkin signed when she entered the park, which was titled "Release and Waiver of Claims Arising From Inherent Risks, Indemnity and Arbitration Agreement" (agreement). The trial court found the language of the arbitration provision in the agreement to be ambiguous and, as a result, concluded that the issue of arbitrability was a matter for the court to decide. The court further determined that the claim was not arbitrable because it did not fall within the scope of the agreement. Finally, the court concluded, sua sponte, that Brownstone's application also must be denied on procedural grounds.

On appeal, Brownstone claims that (1) the court erred by concluding that the issue of arbitrability was a matter for the court, not the arbitrators, to decide, and (2) the court erred in denying its application to compel arbitration on procedural grounds. We agree with both of these claims[1] and, thus, reverse the judgment of the court.[2]

[1] Brownstone also claims on appeal that, even if it were proper for the court to determine the issue of arbitrability, its determination that the claim was not arbitrable under the agreement was incorrect. Because we agree with Brownstone's first claim that it was improper for the *court* to address arbitrability, we need not reach its claim that the court's ultimate arbitrability conclusion was improper.

[2] Prior to oral argument, we issued the following order to the parties: "Effective October 1, 2018, the legislature adopted part I of Chapter 909, referred to as the Revised Uniform Arbitration Act, General Statutes §§ 52-407aa through 52-407eee. It appears from the record that the agreement at issue here was entered into after October 1, 2018. See General Statutes § 52-

The record reveals the following facts and procedural history. The park owned and operated by Brownstone consists of a twenty-seven acre quarry with zip lines, a waterslide, rock climbing activities, cliff jumping, and inflatables. On July 14, 2019, Borodkin went to the park with her husband and two of their grandchildren. Although Borodkin and her husband did not plan on participating in the activities at the park themselves, they nonetheless were required to purchase their own tickets to enter. Soon after Borodkin entered the park, she tripped over a tree root. On January 6, 2021, Borodkin commenced a personal injury action against Brownstone seeking damages for injuries she allegedly sustained due to her fall.

On February 24, 2021, Brownstone commenced the present proceeding seeking to compel arbitration pursuant to the agreement that Borodkin signed before she entered the park, which provides in relevant part: "I, [Borodkin], in consideration for being allowed by [Brownstone] to use its facilities, use its equipment and to participate in aquatic and quarry adventure activities, *hereby release it . . . from any and all claims involving injury, damage or death resulting from risks inherent in the activities in which I am about to engage in*. RELEASOR acknowledges that these inherent risks include, but are not limited to: climbing; slipping; falling; jumping; collisions with objects and other people; artificial and natural surfaces, including slippery surfaces; aerial activities; rough or uneven terrain, including trails, rocks and tree roots . . . . RELEASOR knows that aquatic challenge and adventure activities can be inherently hazardous, and that participants can injure themselves as a result of these inherent risks. *RELEASOR freely assumes the risk for all injuries, damages*

407cc. At oral argument . . . counsel shall be prepared to address whether the Revised Uniform Arbitration Act applies and, if so, whether that has any effect on the issues in this appeal." In light of our ultimate conclusions, however, we need not address the applicability of the act.

or death caused by, or related to, risks inherent to the activity in which I am about to engage." (Emphasis in original.)

The next paragraph of the agreement contains the arbitration clause at issue, which provides in relevant part: "The parties hereby agree that any claim by any party arising out of my participation in this activity, except indemnification claims, shall be submitted for arbitration to the American Arbitration Association, and not by way of civil lawsuit filed in either the state or federal courts. Three arbitrators, including one neutral, shall be utilized. *They* shall decide: (1) if the claim is subject to arbitration under this agreement; and (2) whether the injuries and damages claimed by RELEASOR arise out of risks inherent to this activity. . . ." (Emphasis in original.)

The matter was set for an evidentiary hearing before the trial court, *M. Taylor, J.*, on July 28, 2021, during which the court heard testimony from Thomas Loring, the director of guest services for Brownstone, and Borodkin. Loring explained that every guest is required to sign the same agreement in order to enter the park and that Borodkin did so on the date of the incident. Borodkin confirmed that the signature on the agreement was hers but testified that she did not read it and that she "didn't understand most of it." After the hearing, the parties submitted briefs to the court. In short, Borodkin argued that arbitration should not be compelled because the agreement as a whole was a contract of adhesion and unenforceable as a matter of public policy. Brownstone dedicated most of its posthearing brief to refuting Borodkin's argument that the agreement in its entirety was unenforceable. Brownstone, however, also countered that the parties should be compelled to arbitrate, arguing that both the issue of arbitrability, that is, whether the claim is subject to arbitration under the

agreement, and the merits of the claim should be arbitrated.

On September 15, 2021, the court issued its memorandum of decision. The court first concluded that it was up to it, not the arbitrators, to determine arbitrability. The court reasoned that, although case law provides that parties can agree to arbitrate the issue of arbitrability by means of "an express provision" to that effect, "[i]n the present matter, the question of arbitrability is *not* expressly reserved for the arbitrator by the language of the agreement . . . ." (Emphasis added.) The court focused its analysis on the language at the beginning of the arbitration clause, which states that the parties agree that "any claim by any party arising out of [Borodkin's] participation in this activity . . . shall be submitted for arbitration . . . ." The court reasoned that, because "participation in this activity" refers to "aquatic and quarry adventure activities," which does not necessarily include walking on an entrance path, the language of the agreement could be interpreted in favor of either party. As a result, the court concluded that the agreement, "taken as a whole," was ambiguous. It therefore reasoned that, because the agreement was ambiguous, it was up to the court, not the arbitrators, to decide whether the claim was arbitrable.

In determining arbitrability, the court relied on several principles, including that (1) ambiguity in the language of a contract should be construed against the drafter; see *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 273, 990 A.2d 1274 (2010); and (2) "[t]he law does not favor contract provisions which relieve a person from his own negligence . . . ." (Internal quotation marks omitted.) *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 319, 885 A.2d 734 (2005). Applying these principles, the court determined that Borodkin's claim was not arbitrable. The court specifically reasoned that, pursuant to *Hanks*, the agreement can be interpreted

as requiring arbitration only for claims related to the "inherently hazardous aquatic and quarry adventure activities," not ordinary negligence, which is what the court determined was alleged in the personal injury action. Because the court concluded that the claim was not arbitrable, it therefore reasoned that it need not reach Borodkin's argument that the agreement as a whole was a contract of adhesion, which would thereby render it unenforceable as a matter of public policy.

Last, the court concluded, sua sponte, that the application to compel arbitration had to be denied on additional procedural grounds. Specifically, the court concluded that it was improper for Brownstone to have filed an independent proceeding to compel arbitration pursuant to § 52-410, rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by General Statutes § 52-409.[3]

Brownstone subsequently filed a motion to reargue and for reconsideration (motion to reargue). It first argued that the court erred by assessing the issue of arbitrability because the agreement expressly reserves that question for the arbitrators. In making this argument, Brownstone cited the portion of the agreement that states that "*they*," referring to the arbitrators, "shall decide . . . if the claim is subject to arbitration under this agreement . . . ." (Emphasis in original.) It further

[3] General Statutes § 52-410 provides in relevant part: "A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the superior court . . . for an order directing the parties to proceed with the arbitration in compliance with their agreement. . . ."

General Statutes § 52-409 provides in relevant part: "If any action for legal or equitable relief or other proceeding is brought by any party to a written agreement to arbitrate, the court in which the action or proceeding is pending, upon being satisfied that any issue involved in the action or proceeding is referable to arbitration under the agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in compliance with the agreement . . . ."

argued that the court's conclusion that the application must be denied on procedural grounds was incorrect and that it was improper for the court to raise the procedural issue sua sponte without affording the parties the opportunity to brief it or address it during the hearing. The court denied Brownstone's motion to reargue in a one sentence order, which stated that "[t]he subject of arbitration is 'this activity,' which the court found ambiguous and construed against the drafter." This appeal followed.

I

Brownstone first claims on appeal that the court erred by concluding that the question of "arbitrability was not expressly reserved to the arbitrators" and by making the arbitrability determination itself. We agree.

Because the issue of whether the court correctly concluded that it was up to it, not the arbitrators, to decide arbitrability is a question of law, our standard of review is de novo. See *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 205 Conn. App. 299, 315, 258 A.3d 711 (2021), aff'd, 346 Conn. 391, 291 A.3d 64 (2023).

It is well settled that "[a party] can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, [it] has agreed so to do. . . . Because arbitration is based on a contractual relationship, a party who has not consented cannot be forced to arbitrate a dispute." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 541, 205 A.3d 552 (2019). The threshold issue concerning an arbitration agreement is the question of arbitrability. Arbitrability refers to "whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Two distinct issues arise when addressing the question of arbitrability: "(1) whether

the parties agreed to arbitrate the underlying merits of the case, i.e., whether the matter is arbitrable; [and] (2) who has the primary authority to decide that question—the arbitrator or the court . . . ." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 541. Generally, the second question—*who* is to decide whether a dispute is arbitrable—must be examined prior to the question of *whether* the dispute is arbitrable. See *New Britain* v. *AFSCME, Council 4, Local 1186*, 304 Conn. 639, 647 n.8, 43 A.3d 143 (2012) ("[a]lthough these . . . inquiries are inextricably linked . . . most cases . . . require appellate courts to examine them out of order").

In Connecticut, the general rule is that the court is responsible for deciding whether a dispute is arbitrable "absent the parties' contrary intent . . . ." Id., 647. However, "the language of the contract controls . . . ." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 542. "Parties to an arbitration agreement may provide in their agreement that the arbitrating body, rather than a court, shall interpret the arbitration agreement to determine whether the issue in dispute is within the purview of the parties' undertaking to arbitrate." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 749, 714 A.2d 649 (1998). They can do so by including in their arbitration agreement an "express provision" to that effect or, alternatively, "through the use of broad terms to describe the scope of arbitration, such as all questions in dispute and all claims arising out of the contract or any dispute that cannot be adjudicated." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, supra, 542. In *Lupone* v. *Lupone*, 83 Conn. App. 72, 76, 848 A.2d 539, cert. denied, 270 Conn. 910, 853 A.2d 526 (2004), for example, this court concluded that the arbitration agreement at issue contained both. We reasoned that, "[i]n addition to defining broadly the

scope of arbitration by use of the expansive prefatory phrase, '[a]ny dispute, difference, disagreement, or controversy among the [parties],' the clause expressly reserves to the [arbitration] panel the authority to decide any dispute arising out of 'the interpretation of the meaning or construction of the [a]greement . . . .' The issue of arbitrability arises directly from the interpretation of the meaning of the arbitration clause contained in the parties' agreement. The terms of the clause, therefore, mandate that the issue of arbitrability be determined by the panel." Id.

If "there is clea[r] and unmistakabl[e] evidence" that the parties have agreed to arbitrate the issue of arbitrability; (internal quotation marks omitted) *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 542; then the court must "issue an order compelling arbitration without further consideration of the scope of the agreement to arbitrate." *Levine* v. *Advest, Inc.*, supra, 244 Conn. 750. Conversely, if the "agreement is ambiguous as to *who*, i.e., the arbitrating body or the court, is to interpret the arbitration agreement to determine whether the agreement provides for arbitration of the issue in dispute . . . [then] the court, not the arbitrating body, initially interprets the arbitration agreement to make that determination." (Emphasis in original.) Id.

Exercising our plenary review, we conclude that, in the present case, there is clear and unmistakable evidence that the parties agreed to arbitrate the issue of arbitrability. As stated earlier in this opinion, the agreement first states: "The parties hereby agree that any claim by any party arising out of [Borodkin's] participation in this activity . . . shall be submitted for arbitration . . . ." "This activity" refers to Borodkin's participation in the aquatic and quarry activities offered by the park. The arbitration provision then states: "Three arbitrators . . . shall be utilized. *They* shall decide: (1)

if the claim is subject to arbitration under this agreement . . . .'' (Emphasis in original.) Whether the claim is subject to arbitration under the agreement is synonymous with whether the claim is arbitrable. Hence, the agreement expressly reserves the right to the arbitrators to decide arbitrability. See *Lupone* v. *Lupone*, supra, 83 Conn. App. 76 (concluding that arbitration agreement mandated that arbitrators determine arbitrability by expressly reserving for arbitrators authority to decide issues arising out of interpretation and construction of agreement, which necessarily included issue of arbitrability); see also *Considine* v. *Brookdale Senior Living, Inc.*, 124 F. Supp. 3d 83, 90 (D. Conn. 2015) (concluding that language in arbitration agreement providing that it includes ''any dispute concerning the arbitrability of any such controversy or claim'' clearly and unmistakably indicated intent to have arbitrator decide matter of arbitrability (internal quotation marks omitted)). Accordingly, the issue of arbitrability should have been decided by the arbitrators, not the court.

In support of her argument that we should affirm the judgment of the trial court, Borodkin counters that the question of arbitrability was not expressly reserved for the arbitrators because the language of the arbitration clause is limited to claims arising out of participation in the aquatic and quarry activities at the park. She maintains that because it is unclear whether her claim, which stemmed from injuries she sustained when she tripped on a tree root while entering the park, constitutes a claim arising out of participation in those activities, the agreement is therefore ambiguous. In light of that ambiguity, she argues that it was proper for the court to determine arbitrability itself. We disagree. Borodkin is conflating the two distinct issues of *whether* the claim is arbitrable and *who* decides that question. It is up to the court to determine arbitrability when the agreement is ambiguous as to *who* is to determine arbitrability—

the arbitrators or the court—not *whether* the claim is arbitrable. See *Levine* v. *Advest, Inc.*, supra, 244 Conn. 750. The agreement in the present case is not ambiguous as to who decides that question; rather, it expressly provides that the arbitrators decide that question.

Borodkin next argues that it was proper for the court to assess the issue of arbitrability itself because "a condition precedent must be met in order for the arbitration clause to be triggered: the claim must arise from participation in inherently dangerous aquatic and quarry adventure activities," and "[w]hen arbitration is dependent upon meeting a condition precedent, the question of arbitrability is for the court." She specifically relies on *White* v. *Kampner*, 229 Conn. 465, 641 A.2d 1381 (1994), as support for her argument. Brownstone argues that *White* is not applicable and that the present case does not contain a condition precedent. We agree with Brownstone.

In *White*, the arbitration agreement at issue contained a mandatory negotiation provision that required the parties to negotiate prior to submitting any dispute to arbitration. Id., 468. Our Supreme Court determined that "[t]he trial court correctly interpreted the contractual language to require satisfaction of the provisions of the mandatory negotiation clause as a condition precedent to arbitration, and correctly determined that this arbitrability issue was one for the courts to determine, not the arbitrator." Id., 473. The arbitration provision at issue in *White*, however, is distinguishable from the provision in the present case. In *White*, the provision began with "broad language that generally grant[ed] jurisdiction to the arbitrator to determine the issue of arbitrability" but also contained "express language in the contract [that] restrict[ed] the breadth of that clause." Id. Specifically, the provision made arbitrable " '[a]ny dispute or question arising under the provisions of [the agreement],' " but only that " '*which* [*had*] *not*

been resolved under' the mandatory negotiation provision." (Emphasis in original.) Id. Thus, before the arbitrators could decide arbitrability, the court in *White* had to first determine whether the dispute was subject to mandatory negotiation as required under the contract. Id.

Conversely, in the present case, the arbitration provision does not have any express language attached to it that restricts its breadth. Rather, it is similar to the broad language in the beginning of the clause in *White*—it states that "any claim by any party arising out of [Borodkin's] participation in this activity" shall be submitted to arbitration. Put simply, whether a claim falls within the language of the arbitration agreement in the present case is the very issue of arbitrability, not a condition precedent to arbitration that must first be satisfied by the court. Thus, we are not persuaded by Borodkin's argument that, pursuant to *White*, it was the court's "job" to decide the issue of arbitrability.[4]

[4] Borodkin also argues that Brownstone did not preserve its claim that the arbitrators, not the court, should have decided the issue of arbitrability. We disagree. "[B]ecause the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *Overley* v. *Overley*, 209 Conn. App. 504, 513, 268 A.3d 691 (2021), cert. denied, 343 Conn. 901, 272 A.3d 657 (2022).

Throughout the proceeding, Brownstone sought arbitration of the issue of arbitrability. Although the parties' posthearing briefs to the court primarily addressed the issue of whether the agreement was an unenforceable contract of adhesion and, to a lesser extent, whether the claim was arbitrable, Brownstone did assert in its posttrial brief that "the parties have agreed to arbitrate (1) *whether the claim is subject to arbitration under the agreement*; and (2) whether the injuries and damages claimed arise out of risks inherent to the activities." (Emphasis added.) Moreover, when the court rejected the contract of adhesion argument, Brownstone filed a motion to reargue in which it fully set forth its claim that the issue of arbitrability should have been decided by the arbitrators. It subsequently filed a motion for articulation of that issue, which the court denied, as well as a motion for review with this court of the denial of its motion for articulation, which this court granted but denied the relief requested. Accordingly, we conclude that this claim

II

Brownstone next claims that the court erred by, sua sponte, denying its application to compel arbitration on procedural grounds. Specifically, the court concluded that it was improper for Brownstone to have filed an independent proceeding to compel arbitration pursuant to § 52-410, rather than filing a motion in the pending personal injury action to stay that proceeding, as provided for by § 52-409.[5] On appeal, Brownstone argues that it was improper for the court to have raised this procedural issue sua sponte without first providing the parties with the opportunity to address it. We agree.[6]

"As our Supreme Court has explained, due to the adversarial nature of our judicial system, [t]he court's function is generally limited to adjudicating the issues *raised by the parties* on the proof they have presented and applying appropriate procedural sanctions on

was articulated before the trial court with sufficient clarity to put the court on notice and, therefore, was preserved adequately.

[5] See footnote 3 of this opinion.

[6] Brownstone also argues that (1) the court's logic was flawed because its interpretation of § 52-410 and its interplay with § 52-409 was incorrect, and (2) it misconstrued the facts, as Brownstone did file a motion pursuant to § 52-409 in the personal injury action. Because we agree with Brownstone that it was improper for the court to raise this procedural issue sua sponte, we need not consider these claims. We note, however, that it appears that Brownstone did in fact file a motion to stay the personal injury action pursuant to § 52-409. See *Nowak* v. *Environmental Energy Services, Inc.*, 218 Conn. App. 516, 523 n.5, 292 A.3d 4 (2023) ("[t]here is no question . . . concerning . . . [the] power [of appellate courts] to take judicial notice of files of the Superior Court, whether the file is from the case at bar or otherwise").

Borodkin commenced the personal injury action on January 6, 2021. Soon after, in February, 2021, Brownstone brought this proceeding under § 52-410. On March 9, 2021, Brownstone filed a motion pursuant to § 52-409 to stay proceedings in the underlying personal injury action. *Borodkin* v. *Brownstone Exploration & Discovery Park, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-21-6137485-S (March 9, 2021). That motion was granted by the court, *Hon. Robert B. Shapiro*, judge trial referee, on March 25, 2021, and the matter was stayed.

motion of a party." (Emphasis in original; internal quotation marks omitted.) *Somers* v. *Chan*, 110 Conn. App. 511, 528, 955 A.2d 667 (2008). Additionally, it is axiomatic that parties should be afforded "adequate notice of the issues the court intend[s] to address . . . ." (Internal quotation marks omitted.) Id., 529. Thus, a trial court generally acts in excess of its authority when it raises and considers, sua sponte, issues not raised or briefed by the parties. See id. (concluding that court improperly raised and decided issues in its memorandum of decision of which parties were not afforded adequate notice); see also *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015) ("we conclude, under the facts of this case, that the court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties").

In *Haynes Construction Co.* v. *Cascella & Son Construction, Inc.*, 36 Conn. App. 29, 647 A.2d 1015, cert. denied, 231 Conn. 916, 648 A.2d 152 (1994), for instance, this court concluded that the trial court had erred by resolving the dispute on a claim not presented to it. In that case, the trial court granted the plaintiff's amended application to vacate an arbitration award because, in part, the arbitrator had failed to disclose fully that he had an ongoing attorney-client relationship with the in-laws of a principal of the defendant company at the time of the arbitration. Id., 31. However, although the plaintiff had claimed at the hearing on the motion to vacate that there was "evident partiality on the part of the arbitrator which was not fully disclosed"; (internal quotation marks omitted) id., 33; it was "obvious [to this court] from a review of the transcript of the hearing . . . that the plaintiff was concerned with a possible previously undisclosed social or personal relationship between the arbitrator and [the principal's] in-laws, *not* with their attorney-client relationship." (Emphasis

added.) Id., 36. In fact, any potential conflict arising out of that attorney-client relationship had been expressly waived at the arbitration hearing. Id. Therefore, this court concluded that it was improper for the trial court to base its decision on this ground because it was not raised as an issue by the parties. See id., 36–37. We reasoned: "When the trial court surprises a party by deciding a case on a claim that was not presented to it, that party obviously is no longer in a position to counter the claim. By its ruling, the trial court deprived the defendant of its right to put on evidence regarding the disclosure of the attorney-client relationship by the arbitrator." Id., 37.

Similarly, in *Jackson* v. *Pennymac Loan Services, LLC*, 205 Conn. App. 189, 191, 257 A.3d 314 (2021), the trial court granted the defendant's motion to dismiss after it concluded, sua sponte, that the plaintiffs did not meet their burden of establishing that they complied with the relevant statutory notice requirement. The defendant had not made this argument to the court, and the parties were not notified by the court that it was considering this issue, nor were they afforded an opportunity to be heard on it. Id. As a result, on appeal, this court concluded that it was improper for the court to rely on the notice issue "without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements." Id., 196. We therefore reversed the judgment of the trial court. Id., 205.

In the present case, the record reveals that Borodkin did not, at any point, argue to the trial court that Brownstone's application was procedurally defective. The record further reveals that the court did not, at any point, notify the parties that it was considering this procedural issue or provide the parties with an opportunity to brief it or otherwise be heard on it. Accordingly, we agree with Brownstone that it was improper for the

court, sua sponte, to raise and address this issue in denying Brownstone's application.

In summary, for the foregoing reasons, we agree with Brownstone that the court erred by determining the issue of arbitrability itself, as opposed to allowing the arbitrators to do so. We also agree that the court erred by, sua sponte, denying Brownstone's application to compel arbitration on procedural grounds.[7]

The judgment is reversed, and the case is remanded with direction to grant Brownstone's application to compel arbitration so that the arbitrators can decide the issue of arbitrability.

In this opinion the other judges concurred.

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[7] Even though the trial court, in its memorandum of decision, did not address Borodkin's argument that the agreement as a whole is an unenforceable contract of adhesion, we nonetheless conclude that it is appropriate for us to direct that court to order the parties to proceed with arbitration, including a determination of arbitrability. It is well settled that "an arbitration provision is severable from the remainder of the contract . . . [and], unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." (Internal quotation marks omitted.) *Stack* v. *Hartford Distributors, Inc.*, 179 Conn. App. 22, 30, 177 A.3d 1201 (2017). Thus, even if the agreement in its entirety is a contract of adhesion, the arbitration provision within it is severable, and the contract's validity is a question for the arbitrators.