IN RE CHRISTINA C.*
(AC 45864)

Suarez, Seeley and Bishop, Js.

Syllabus

The petitioner, the Commissioner of Children and Families, appealed to this court from the judgment of the trial court denying a petition to terminate the parental rights of the father with respect to his minor child, C, and granting a motion filed by the respondent father to transfer legal guardianship of C from the petitioner to his mother, D. C, who had previously been adjudicated neglected and placed in the petitioner's custody, had been residing with the same foster family since her discharge from the hospital after her birth almost three years earlier. D, who lived in New York, had never been C's foster parent or her temporary custodian. Following a consolidated trial on the petition to terminate parental rights and the motion to transfer guardianship, the trial court concluded that the petitioner had proven by clear and convincing evidence that statutory (§ 17a-112) grounds existed to terminate the father's parental rights. In the dispositional phase of the termination trial, the court made written findings with respect to each of the seven factors set forth in the applicable statute (§ 17a-112 (k)) but did not make any findings concerning C's best interests or issue any orders before it addressed the motion to transfer guardianship and rendered its judgment. On the petitioner's motion to reargue, the trial court issued a corrected memorandum of decision in which it detailed the results of an investigation that had been conducted by a New York children's agency to assess D as a possible placement resource for C. The court found that the evidence was clear and convincing that D was a suitable and worthy person to be awarded permanent legal guardianship of C and that legal guardianship vested in D was in C's best interests. *Held*:

1. The trial court applied an incorrect legal standard in granting the respondent father's motion to transfer guardianship from the petitioner to D: because it was undisputed that D was not C's foster parent or temporary custodian, pursuant to the rule of practice (§ 35a-12A (d)) governing motions to transfer guardianship, the respondent father, as the moving party, had the burden to demonstrate both that D was a suitable and worthy person to become C's guardian and that transferring guardianship to D was in C's best interests, and a careful review of the court's

* 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.

memorandum of decision in its entirety revealed that the court did not hold the father to his burden of proof, the decision having been devoid of a correct statement of the law, let alone a conclusion that the father had satisfied his burden of proof; moreover, the trial court's statement that it had not been shown that placement with D would be detrimental to C, in the absence of a countervailing analysis, led this court to conclude that the court improperly placed the burden of proof on the petitioner and C, both of whom opposed the father's motion, to demonstrate that transferring guardianship to D would be detrimental to C; accordingly, because the trial court applied an incorrect legal standard, the appropriate remedy was to reverse the judgment of the trial court granting the motion to transfer guardianship and remand the case for a new hearing.

2. The trial court, having found that multiple grounds existed for terminating the respondent father's parental rights with respect to C, erred in denying the petition to terminate the parental rights of the father without considering whether that ruling was in C's best interests: although the trial court, in the dispositional portion of its decision, made several subordinate findings concerning the father, all of which strongly suggested that the court would likely conclude that the termination of his parental rights was in C's best interests, the court did not thereafter in the best interests portion of its decision set forth a finding concerning the dispositive issue of whether terminating the father's parental rights was in C's best interests, and, instead, concluded that terminating the mother's parental rights with respect to C was in C's best interests, adoption of C was not appropriate as D was a suitable and worthy person, and that legal guardianship of C, vested in D, was in C's best interests; moreover, although the court appeared to have denied the termination petition as to the father solely because it concluded that D should become C's legal guardian, there was no basis in law for the court to have conflated the issues of whether legal guardianship should be vested in D and whether the petition to terminate the father's parental rights should be granted; accordingly, this court reversed the judgment of the trial court denying the termination petition with respect to the father and remanded the case to the trial court for a new dispositional hearing at which its sole focus was to be on whether it was in C's best interests to terminate the father's parental rights with respect to her.

Argued March 8—officially released August 16, 2023**

Procedural History

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

** August 16, 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 child, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the respondent father filed a motion to transfer legal guardianship of the minor child to the paternal grandmother; thereafter, the case was tried to the court, *Hon. John Turner*, judge trial referee; judgment terminating the respondent mother's parental rights, denying the petition as to the respondent father, and transferring permanent legal guardianship of the minor child to the paternal grandmother, from which the petitioner appealed to this court. *Reversed in part*; *further proceedings*.

Evan O'Roark, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellant (petitioner).

Stein M. Helmrich, for the appellee (respondent father).

James P. Sexton, assigned counsel, for the minor child.

Opinion

SUAREZ, J. The petitioner, the Commissioner of Children and Families, appeals from the judgment of the trial court (1) granting the motion of the respondent father, Christopher C.,[1] to transfer legal guardianship of his biological daughter, C, from the petitioner to his mother, D, and (2) denying the petition to terminate the parental rights of the respondent with respect to C.[2] The petitioner claims that, in granting the motion

[1] In the underlying proceedings, the court also granted the petitioner's motion to terminate the parental rights of C's biological mother, T, with respect to C. T has not appealed from the judgment and has not participated in this appeal. Our references in this opinion to the respondent are to Christopher C. Our resolution of the claims in this appeal do not affect the judgment rendered against T.

[2] Pursuant to Practice Book § 79a-6 (c), the attorney for the minor child has filed a letter with the Office of the Appellate Clerk adopting the position of the petitioner.

to transfer guardianship, the court erred as a matter of law by assuming that transferring guardianship was in C's best interests, thereby shifting the burden of proof to the petitioner to demonstrate that granting the motion would be detrimental to C. The petitioner also claims that, having found that multiple grounds existed for terminating the respondent's parental rights with respect to C, the court thereafter erred in denying the petition to terminate his parental rights without considering whether that ruling was in C's best interests. We agree with both of the petitioner's claims and therefore reverse in part the judgment of the trial court.

Following a consolidated hearing on the petitioner's petition to terminate the parental rights of the respondent,[3] as well as the respondent's motion to transfer legal guardianship of C from the petitioner to D, the court, *Hon. John Turner*, judge trial referee, set forth the following relevant findings and procedural history in its memorandum of decision, dated July 27, 2022: "C

[3] With respect to the respondent, the petitioner alleged in the termination petition filed on May 12, 2021, that (1) C had been found in a prior proceeding to have been neglected, abused, or uncared for and the respondent had failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of C, he could assume a responsible position in her life; (2) C had been denied by acts of commission or omission of the respondent the care, guidance, or control necessary for her physical, educational, moral or emotional well-being; (3) an ongoing parent-child relationship did not exist between the respondent and C; and (4) the respondent, the father of a child who was under the age of seven and who was neglected, abused, or uncared for, had failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of C, he could assume a responsible position in her life and his parental rights as to another child were previously terminated pursuant to a petition filed by the petitioner. See General Statutes § 17a-112 (j) (3) (B) (i), (C), (D), and (E).

On December 2, 2021, the petitioner amended the termination petition to allege that reasonable efforts to reunify were not required for the respondent and T because the court, on November 20, 2020, and September 28, 2021, had approved a permanency plan other than reunification in accordance with General Statutes § 17a-111b.

is [T's] first born and only child. She has no prior child protective services history. [The Department of Children and Families (department)] became involved with the family [in September], 2019, upon C's birth at the Waterbury Hospital. Although [the respondent] was with [T] at the hospital, he left prior to C's birth to meet friends. The hospital reported [that T] had given birth to a baby girl . . . who tested positive for opiates and cocaine at birth.

"[T] had a prior history of [intravenous] drug use. There were track marks 'all over her body.' She tested positive for heroin and cocaine at delivery, was experiencing withdrawals, and tested positive for hepatitis C. She admitted using heroin the day before C's birth. She had no prenatal care, no baby supplies, was homeless, and had no income. She further stated that she did not know the first thing about parenting a child.

"On September 10, 2019, [T] told [the department] that she was an addict; she had been using six to eight bags of heroin intravenously every day, she had been using for twelve years; she had a criminal history, was on probation, and . . . she engaged in prostitution and had no [other] income . . . .

"[The respondent] told [the department] on September 10, 2019, [that] he had been diagnosed with posttraumatic [stress] disorder (PTSD). He was not receiving treatment for his mental health. He had a lengthy criminal history, including periods of incarceration. He was on probation and under supervision. He was homeless and living in a local hotel with [T]. They had no income and no supplies for C. He admitted that he had a history of smoking marijuana and that he had recently violated his probation. On September 12, 2019, his probation officer informed [the department] that [the respondent] had persistently tested positive for marijuana and had tested positive for cocaine.

"On September 13, 2019, [the petitioner] filed for an ex parte order of temporary custody (OTC). [The petitioner] contemporaneously filed a neglect petition on behalf of C. [The court, *Grogins*, *J.*] found [that the department] had made reasonable efforts to eliminate or prevent C's removal. The OTC for C was granted ex parte and temporary custody of her was vested in [the petitioner]. Preliminary specific steps for [T] and [the respondent] were issued on September 13, 2019, and served upon them on September 17, 2019. Neither [T] nor [the respondent] appeared for the OTC preliminary hearing on September 30, 2019. Each of them was defaulted and the OTC was sustained.

"[T] and [the respondent] appeared on October 23, 2019. They were appointed counsel. Paternity of C was established by the court on November 19, 2019, based on an affidavit and affirmation of paternity that had been duly executed by [T] and [the respondent]. On November 19, 2019, [T] entered a [plea of nolo contendere] and [the respondent] was granted permission to stand silent. The court, [*Hon. Wilson J. Trombley*, judge trial referee], adjudicated C neglected and committed her to the care and custody of [the petitioner]. Final specific steps were approved, ordered, and issued to [T] and [the respondent].

"On November 20, 2020, the court approved a permanency plan of [termination of parental rights] and adoption for C, along with a concurrent plan of reunification. The court further found that [the department] had made reasonable efforts to effectuate the permanency plan. On May 12, 2021, [the petitioner] filed a [termination of parental rights] petition on behalf of C to terminate [T's] and [the respondent's] parental rights. On September 28, 2021, the court again approved a permanency plan for C of [termination of parental rights] and adoption with a concurrent plan [of] reunification with [T].

The court found [that the department] had made reasonable efforts to achieve the permanency plan. On December 15, 2021, the court granted [the petitioner's] motion to amend its pending petition to include: 'Reasonable efforts to reunify are not required for [T and the respondent] because the court had approved a permanency plan other than reunification in accordance with [General Statutes § 17a-111b].' "[4]

After setting forth specific findings related to T, which are not germane to the claims before us, the court made the following specific findings related to the respondent: "[The respondent] was born in July, 1983. He was raised in New York, New York, by his mother and extended maternal family members. He has a general education diploma. He has been employed as an auto mechanic and at several factories. For several years prior to C's birth, he was unemployed. He has been diagnosed with PTSD. He received individual therapy sessions in 2008 for PTSD, reportedly as a result of being hit by a bus and having been attacked by thirty-three people while incarcerated.

"[The respondent] has a total of eight children. Besides C, six of his other children are not in his care. Three of them reside in New York, two of them reside in New Jersey, and one child resides in Connecticut. All of his other six children reside with their mothers or maternal relatives. He does not provide any care or financial support for any of his children. He has a prior child protective services history. His name appears in two child protective services cases. His prior history with [the department] involved another child . . . who entered [the department's] care via an OTC on October 3, 2013. [The child] was committed on February 26, 2014. Thereafter, [the respondent] failed to address his

[4] The court previously had approved the permanency plans on November 20, 2020, and September 28, 2021.

needs surrounding illegal substance use, mental health, housing, and incarceration. His parental rights [with respect to the child] were terminated on January 6, 2016, pursuant to a petition filed at the Superior Court for Juvenile Matters.

"[The respondent] has a criminal history in New York, Florida, and Connecticut. His criminal history in Connecticut includes convictions for sale of a hallucinogen, two criminal possession of a firearm/defensive weapon convictions, illegal discharge of a firearm, disorderly conduct and interfering, possession with intent to sell narcotics, and violation of probation. He is currently serving a five year sentence after being convicted on November 5, 2019, of possession with intent to sell narcotics." (Footnote omitted.)

The court made specific findings with respect to C, as follows: "C was born [in September], 2019. She is almost three years old. At birth she tested positive for opiates. On September 18, 2019, she was discharged from the hospital into [the petitioner's] care. She resides in a two parent, [department] licensed, nonrelative foster home. She has resided there since her release from the hospital after her birth. There is another foster child and two dogs in the home. This is the only home she has ever known. She refers to her foster parents as 'mama and dada.'

"In October, 2019, she began Birth to Three services. She made significant progress in her development and was successfully discharged on April 28, 2020. Her foster mother is a pediatric occupational therapist, who provides her with ongoing developmental support. C is developmentally on target and medically and dentally up to date."

The court then made the following additional findings concerning compliance with the specific steps: "Preliminary specific steps were issued to [T] and [the respondent] on September 13, 2019. Final specific steps were

provided to them on November 19, 2019, to facilitate their reunification with C.

* * *

"[The respondent] complied with his specific steps in that his whereabouts have been known to [the department] since his incarceration on September 20, 2019. He has made himself available to [the department] via phone calls. He has participated in administrative case review meetings and scheduled court hearings. He completed a Tier 2 substance abuse group and began the Fatherhood Program. He submitted to random drug testing in May, 2022.[5] He has regularly and consistently visited C. He has not cancelled any visits.

"He did not comply with his specific steps in that he continued to get involved with the criminal justice system. He received two disciplinary reports while incarcerated. In December, 2019, he received a disciplinary report and pleaded guilty to being disruptive and not following the rules. In November, 2020, he received a disciplinary report and pleaded guilty to receiving Suboxone through the mail. On October 18, 2021, he was denied parole due to 'inadequate institutional program participation and evidence of offender change' and 'poor institutional adjustment.' " (Footnote in original.)

The court stated that it had "considered the evidence related to the circumstances and events prior to May 12, 2021, the date the [termination of parental rights] petitions were filed, insofar as the allegation that the child was found in a prior proceeding to have been neglected, abused, or uncared for and that [T and the respondent] have failed to achieve the degree of personal rehabilitation such as would encourage the belief that within a reasonable time, considering the age and

[5] "The results were unknown when the trial concluded."

needs of the child, either of them could assume a responsible position in the life of the child. Regarding the allegation of failure to achieve rehabilitation, the court has also considered the evidence and testimony related to circumstances through the conclusion of the trial, for the purpose of assessing the degree of rehabilitation, if any, that [T] or [the respondent] has achieved.

"Upon review . . . the court concludes by clear and convincing evidence presented that the statutory grounds alleged for [the] termination of the parental rights of [T] and [the respondent] exist."

In the adjudicative phase of the termination of parental rights proceeding, the court found that the department had made reasonable efforts to reunify T and the respondent with C, that T and the respondent were unwilling or unable to benefit from those reunification efforts, and that such efforts were no longer appropriate.

With respect to the statutory grounds for termination codified in General Statutes § 17a-112 (j) (3) (B) (i)[6] and (E),[7] the court made the following additional findings:

[6] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[7] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights

"[The respondent's] parental rights to another child . . . were terminated on January 6, 2016, pursuant to a petition filed at the Superior Court for Juvenile Matters. C was adjudicated neglected and committed to the care and custody of [the petitioner] on November 19, 2019. Preliminary specific steps were issued to [the respondent] on September 13, 2019. Final specific steps were provided to [the respondent] on November 19, 2019, to facilitate his reunification with C. His presenting problems included criminal activity and incarceration, unresolved substance abuse issues, mental health, transience, intimate partner violence, [and an] inability to provide a stable, safe, and nurturing environment for C.

"[The respondent] has an extensive history of criminal behavior and incarcerations. He was incarcerated on September 20, 2019, and convicted on November 5, 2019, of possession with intent to sell narcotics. He was given a five year sentence. In May, 2022, he was released on placement to a halfway house out of state. He remains on parole to another state or jurisdiction.

"The conditions of his release to a halfway house require him to engage in domestic violence and mental health services and to have no contact with [T]. After his release to a halfway house, he was referred to the Community Renewal Team . . . for services. The services have not begun. His maximum release date is December 4, 2024. While incarcerated, he completed a Tier 2 substance abuse group and began the Fatherhood Program. Since his release from incarceration, he has continued to visit C. Although she remains hesitant around him, he has been consistent and has not cancelled any visits.

"C is thirty-four months old. She has continuously been in [the petitioner's] care since September 13, 2019.

of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

She needs permanency in the sense that she needs to know who the responsible adults in her life are and who is consistently caring for her, available for her, and meets her basic social, emotional, and physical needs. She is fully dependent on a stable caregiver to meet all her needs.

"There is no indication whether or when [the respondent] will ever be able to provide a safe, stable, and nurturing home for C. It is uncertain when or whether he will be released from prison, parole to a halfway house in another state under the terms of the Interstate Compact for Adult Offender Supervision, or to a full parole in the state of Connecticut, and establish himself to assume a responsible position in C's life. She needs stability and a permanency plan with a clear path forward.

"The court cannot find reason to be encouraged that within a reasonable time, considering C's age and needs, [the respondent] will be able to assume a responsible position in her life. The level of rehabilitation he has achieved falls short of that which would reasonably encourage a belief that at some future date he can assume a responsible position in his child's life. The court does find [that] there is clear and convincing evidence to believe that he will not be able to assume a responsible position in C's life within a reasonable period of time. The evidence is clear and convincing that [the respondent's] parental rights to another child were previously terminated pursuant to a petition filed by the [petitioner]. C is a child, under the age of seven who is neglected, abused or uncared for. [The respondent] has failed, or is unable, or is unwilling, to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of C, he could assume a responsible position in her life.

"The court finds by clear and convincing evidence that [the petitioner] has met [her] burden of proving by clear and convincing evidence that C was found in a prior proceeding to have been neglected and that [the respondent] has failed or is unable to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable period, considering the age and needs of C, he could assume a reasonable position in her life.

"The court finds by clear and convincing evidence that C is a child, under the age of seven, who is neglected, abused or uncared for. [The respondent] has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, he could assume a responsible position in the life of the child.

"[The petitioner] has met [her] burden of proving by clear and convincing evidence that [the respondent's] parental rights to another child . . . were terminated on January 6, 2016, pursuant to a petition filed at the Superior Court for Juvenile Matters by the [petitioner]." (Footnote omitted.)

With respect to the statutory ground for termination codified in § 17a-112 (j) (3) (C),[8] the court made the following findings: "C was born [in September], 2019. [The respondent] was incarcerated on September 20,

[8] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (C) the child has been denied, by reason of an act or acts of parental commission or omission including, but not limited to, sexual molestation or exploitation, severe physical abuse or a pattern of abuse, the care, guidance or control necessary for the child's physical, educational, moral or emotional well-being, except that nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights . . . ."

2019. At that time, C was just days old. He has been incarcerated since then. His contact with C has occurred while he has been incarcerated. He has been minimally involved in her life since her birth.

"As a result of his criminality (arrests, convictions, incarceration) [the respondent] has deprived C of the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being. He has been unable to be a consistent figure in her life. He has not presented himself to care for C. He has not paid any child support for her.

"[The petitioner] has proven [the ground for termination set forth in § 17a-112 (j) (3) (C)] by clear and convincing evidence that C has been denied, by reason of an act or acts alleged as to [the respondent] of commission/omission the care, guidance, or control necessary for C's physical, educational, moral, or emotional well-being."

With respect to the statutory ground for termination codified in § 17a-112 (j) (3) (D)[9], the court made the following findings: "It would seem from the plain meaning of the statutory language for this ground that [the respondent] has not met the day-to-day parenting capability that the statute appears to require. . . .

"[The respondent] has not established much of a relationship with C because he has been incarcerated for most of her life. Before he was incarcerated, he had spent limited time with her. He has had [a] limited

[9] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that . . . (3) . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

opportunity to form a bonding and nurturing relationship with her, or to develop an ongoing parent-child relationship with her, such as ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral, and educational needs of the child. He has had minimal involvement in her life. His involvement in her life has been the [department] arranged visits with her. He has not supported her emotionally, financially, or consistently cared for her physically. Although he has consistently visited C, she remains hesitant around him. She does not have a bond with [the respondent]. She does not recognize him as a reliable and supportive caretaker. To allow further time for establishment or reestablishment of a parent-child relationship is detrimental to the best interests of this child.

"[In September], 2022, C will be three years old. [The respondent] has not developed, nor been able to develop, an ongoing parent-child relationship with C, such as ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral, and educational needs of the child, during the nearly three years he has been imprisoned. Although he has been released to a halfway house, his maximum release date is December 4, 2024. The uncertainty renders him, at present, unable to assume a responsible [position] in C's life within a reasonable period of time.

"This court finds by clear and convincing evidence that there is no ongoing parent-child relationship between [the respondent] and C. To permit additional time for him to develop a parent-child relationship would not be in C's best interest. She is thriving in a safe, stable, nurturing preadoptive home. It would be detrimental to her best interest to allow further time for such a relationship to be established and developed. The court finds [that the petitioner] has proven [this

ground] by clear and convincing evidence as to [the respondent].''

Having found that the petitioner had proven by clear and convincing evidence that there were grounds to terminate the respondent's parental rights, the court then turned to the dispositional phase of the proceeding and made written findings with respect to each of the seven factors set forth in § 17a-112 (k).[10] With respect to the timeliness, nature and extent of services offered to the respondent, the court found: ''[The department] offered [the respondent] referral to substance abuse and mental health services prior to his incarceration. [The department] encouraged him to engage in services at the prison where he was being housed and recommended that he take part in counseling at the correctional facility where he was imprisoned. He reported

[10] 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

nothing was up and running due to COVID-19. While incarcerated, he did complete a Tier 2 substance abuse group and began the Fatherhood Program."

With respect the reasonable efforts made at reunification, the court also found that, "[o]n November 20, 2020, and September 28, 2021, the court found that [the department] set reasonable and realistic expectations to reunify . . . [the respondent] with C, and made reasonable efforts to achieve the permanency plan . . . . On April 17, 2020, [the respondent] presented his mother, [D], as a placement resource for C."

With respect to the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, the court found that "[f]inal specific steps for [T and the respondent] were approved by the court on November 19, 2019, to address their presenting problems and to facilitate reunification with C. The department fulfilled its obligations under the specific steps and other court orders. Notwithstanding the specific steps ordered and issued by the court, there has been minimal sustained cooperation and progress made by [T] or [the respondent] with the recommended services."

With respect to the feelings and emotional ties of C, the court stated: "C was removed and placed in [the department's] care on September 13, 2019, through a ninety-six hour hold. Her current nonrelative foster parents have been her main caregivers since then, and often advocate for her when engaging with her providers. C is very bonded with her foster family. She looks to them for guidance and care. She is comfortable, content, and well-adjusted to their home. She looks to them for comfort, support, and to meet her physical, emotional, medical, and educational needs. C is solely dependent on

unreasonable act of any other person or by the economic circumstances of the parent."

her caregivers for stability, security, love, and to have her basic physical needs met to thrive and grow. Her nonrelative foster parents have expressed a desire to adopt her should she become available for adoption. C's paternal grandmother has consistently visited [with] her virtually and/or in person once or two times a month. There was insufficient evidence presented to find that C has formed an attachment or bond to her paternal grandmother."

The court also found that "[the department] has been involved with this family since [September], 2019. Despite [the department] offering services to [T] and [the respondent] that have included case management, transportation, safety planning, permanency team meetings, supervised visits, referrals for mental health counseling, referrals to inpatient and outpatient substance abuse treatment services, and parenting education services, neither [T] nor [the respondent] has adjusted their life circumstances in order to be able to parent C. Neither [T] nor [the respondent] has achieved a degree of stability to provide C with a safe and stable environment to grow and thrive. . . .

"Neither [T] nor [the respondent] has been prevented by [the department] from maintaining or establishing a meaningful relationship with C 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."

Before making any findings concerning C's best interests or issuing any orders, the court addressed the respondent's motion to transfer guardianship of C to the respondent's mother, D, who resides in New York.[11]

[11] The motion was filed on January 3, 2022. On the same date, the respondent also filed a motion to consolidate the motion to transfer guardianship with the petition for termination of parental rights. As discussed earlier in this opinion, the court held a consolidated hearing on the petition and the motion to transfer guardianship.

By way of procedural history, we observe that, therein, the respondent alleged that, subsequent to the petitioner's filing of the neglect petition, D "came forward as a resource for [C]. As a result of her inquiry, the petitioner requested that an Interstate Compact Study be completed with the assistance of the New York City Administration for Children's Services. . . .

"On September 20, 2021, [the] New York City Administration for Children's Services issued [its] final report approving [D] and her spouse as a placement for [C]."

The respondent argued that it was "in the best interests of [C] to have [D] become her legal guardian as this placement would allow [C] to remain with her biological family and is the least restrictive alternative placement." The attorney for the minor child objected to the respondent's motion on the ground that C had been in her current placement with a foster family since birth and that D's involvement in C's life had been minimal. Thus, the attorney for the minor child argued that a transfer of guardianship to D was not in C's best interests. The petitioner also objected to the motion on the ground that, "[f]or her entire young life, [C] has been in the care of her current preadoptive foster parents. She is thriving in that home. . . . Transfer of guardianship does not afford [C] permanency nor is it consistent with her best interests."

In its memorandum of decision issued on July 27, 2022, the court, in relevant part, terminated the parental rights of T with respect to C, denied the petition to terminate the parental rights of the respondent with respect to C, and "transfer[red] . . . permanent legal guardianship [of C] to . . . [D]." On July 29, 2022, the petitioner, pursuant to Practice Book § 11-11, filed a "Motion to Reargue and Reconsider." The petitioner raised several grounds in support of the motion. With respect to the court's decision denying the petition for

termination of parental rights as to the respondent, the petitioner argued that the decision was inconsistent with the court's findings in the dispositional phases of the proceeding. The petitioner argued that "[t]he court's findings of fact strongly support granting termination of parental rights of both parents." With respect to the court's decision to transfer permanent legal guardianship of C to D, the petitioner argued that the ruling was improper because "[n]either the respondent father nor any other party filed a motion for permanent transfer of guardianship [of C]. Thus, a motion for permanent transfer of guardianship was not before the court." The petitioner argued that the ruling violated principles of due process and fundamental fairness, it was made in the absence of notice required by General Statutes § 46b-129 (j) (6) (B), it was made in the absence of necessary findings required by § 46b-129 (j) (6) (B), and it violated the Interstate Compact on the Placement of Children in that approval under the compact had expired on June 30, 2022. Moreover, the petitioner argued that the court had applied an incorrect legal standard as reflected in the portion of its decision in which it stated that "it has not been shown that placement with [D] would be detrimental to [C]."

On August 22, 2022, the court held a remote hearing to address the petitioner's motion and the respondent's objection thereto. On August 29, 2022, the court issued a memorandum of decision with respect to the motion in which it granted relief by way of correcting only the portions of its original decision in which it addressed the "Motion to Transfer Legal Guardianship" as well as its "best interest conclusion." In its corrected decision, the court also corrected its final orders.[12]

[12] The court, however, did not correct the remainder of its original decision and did not alter any of its other findings with respect to the termination of parental rights proceeding.

With respect to the merits of the respondent's motion to transfer guardianship, the court stated in its corrected decision: "On April 17, 2020, [the respondent] identified his mother [D] as a placement resource for C. She resides in New York with her husband, [E], and her thirty-two year old daughter, [Z]. Upon being contacted by [the department, D] reported [that] she needed time to consider being C's caretaker and to discuss the matter with her husband and daughter.

"C was seven months old when [D] notified [the department] on May 7, 2020, [that] she was willing to care for C. On September 15, 2020, [the respondent] again asked [the department] to 'look into' his mother as a placement resource for C. On September 28, 2020, he again notified [the department] that his mother was willing to be a resource, but he had not heard anything back, and he would like for [his mother] to be considered as a resource.

"On October 7, 2020, [the department] began monthly virtual visits between C and [D]. [The department] offered [D] more frequent visits, however, [D] chose to begin visiting C once per month. On November 20, 2020, [the department] agreed to continue assessing [D] as a possible placement resource for C by initiating an Interstate Compact and facilitating virtual visits between [D] and C. The Interstate Compact Packet . . . was submitted to the New York Administration for Children Services . . . by [the department] on January 29, 2021.

"[D], [E] and [Z] participated in and fully cooperated with the requirements for the [Interstate Compact Packet]. They provided their fingerprints and submitted to a physical examination. Medicals for the three of them were completed in May, 2021. [The New York Administration for Children Services] completed [various background] checks on them between April 26,

2021, and September 8, 2021. They completed Reasonable/Prudent Parenting Training in June and July, 2021. On September 17, 2021, [D] and [E] accepted and signed the policy on discipline guidelines. [The New York Administration for Children Services] issued its final assessment and determination report on September 20, 2021, approving [D] and [E] as a placement for C.

"[The department] and [D] agreed in March, 2021, to increase virtual visits with C to twice a month. On July 12, 2021, [the department] offered [D] two in person visits per month. [D] requested that one of the visits remain virtual and that one visit be in person because she had to travel by train from New York to Connecticut to visit.

"[D] participated in her first in person visit with C on September 22, 2021. She also participated in an [administrative case review] meeting on September 28, 2021. On October 20, 2021, she participated in a second visit. On October 18, 2021, she agreed to visit C every Thursday beginning November 4, 2021. [D] attended all of her in person visits with C and paid for all of her travel expenses to visit C. A fourth in person visit was held on November 12, 2021. [D] attended the in person visit with [E] and her adult daughter.

"On November 15, 2021, [the department] decided not to support C being placed with [D] and to support C remaining in her foster placement. [The department] rescheduled the November 18 visit to November 22. The November 22 visit was cancelled due to C being sick.

"On December 1, 2021, [the department] notified [D] of its decision to support C remaining in her current foster placement and reduced [D's] visit to one per month. [D] continued to participate in the one hour monthly visits and attended all [of] the scheduled visits. C was unable to fully complete any of the one hour visits. [D] agreed to terminate the visits early stating

she does not want to distress C and would prefer to follow her lead. C has slowly but steadily demonstrated improved comfort with [D]. During each visit, C is lasting longer in duration and demonstrating increased interaction with [D]. C now freely and cheerfully holds her hand while walking around with her.

"[D] is fifty-eight years of age. She and [E] have been a couple for the past twelve years. They have been married since 2016. Each member of the household is in good physical and mental health. She has lived in New York since 1977. References were submitted to [the New York Administration for Children's Services] attesting to each of their moral character, mature judgment, ability to manage resources, and capacity to develop a meaningful relationship with children. Neither [D] nor [E] have any other children. [D] and [E] are both retired. Before retiring, she worked thirty-one years for the [United States] Postal Service. [E] was employed by the University of New York City as a college professor. He is currently employed part-time as an adjunct lecturer. He does not work during the summer months. Their home in New York is located in a gated community. They also own a vacation home in Puerto Rico, and a vacation apartment in Santo Domingo. [Z] is employed full-time as a certified public accountant . . . . [D] and [E] have a combined monthly income of more than $6394 per month. [Z] contributes to the household's expenses. [D] has the wherewithal and is willing to adequately provide for C's financial needs and general welfare.

"C's foster parents have provided her with constant attention, care, and love. They have demonstrated their commitment to her and an ability to meet all of her needs. Their home is the only home that C has ever known. The preponderance of [the] evidence presented showed that [D] diligently pursued custody of C, that [D], [E], and [Z] remained consistent in this desire, and

have the ability to meet all of her needs. [D] is willing to allow C to continue to have a relationship with her foster family and facilitate it for as long as necessary to make a transition easier for C. This court cannot conclude that it would be in C's long-term best interests to be deprived of her biological relatives ([D], [E], and [Z]) when it has not been shown that placement with her paternal grandmother would be detrimental to her. As set forth in section VII [of the court's decision, entitled "Best Interest Conclusion"] the court finds that vesting legal guardianship of C in [D] is in C's best interests.

"The final report and assessment of [D] and her household by [the New York Administration for Children's Services] and the evidence at trial is clear and convincing that [D] is a worthy, suitable, and appropriate person to be granted permanent custody and guardianship of C. The court finds [D] to be a suitable and appropriate person to be awarded permanent guardianship of C." (Footnotes omitted.)

In its corrected decision, the court then set forth what it titled its "Best Interest Conclusion" as follows: "The court has considered C's best interests, including her health, safety and need for permanency. . . .

"Neither [T] nor [the respondent] has made sufficient progress in their life circumstances for either of them to reunify with C. [T] has remained transient. She has not achieved a significant period of sobriety, nor has she maintained consistent contact with her daughter. [The respondent] has continued needs in the areas of mental health, domestic violence, housing, and employment. He has only recently been released from prison on placement to a halfway house out of state. He remains on parole to another state or jurisdiction. He is currently residing in a halfway house and unable to provide care for C. His criminal history and continued

needs in the areas of mental health, domestic violence, housing, and employment, leads the court to conclude that he cannot assume a responsible position in C's life within a reasonable time.

"It is uncertain when or whether [the respondent] will ever be able to provide a safe, stable, and nurturing home for C. It is uncertain whether he will remain released from prison, on parole to a halfway house in another state under the terms of the Interstate Compact on Adult Offender Supervision, or granted a full parole in the state of Connecticut, and establish himself to assume a responsible position in C's life. She needs stability, and a permanency plan with a clear path forward.

"The court cannot find reason to be encouraged that within a reasonable time, considering C's age and needs, [the respondent] will be able to assume a responsible [position] in her life. She needs permanency in the sense that she needs to know who the responsible adults in her life are and who is consistently caring for her, available for her, and meets her basic social, emotional, and physical needs. The court is mindful that C has continuously been in [the petitioner's] care for thirty-four months, since [September], 2019, and is very comfortable and making progress in her preadoptive home.

"Based upon all the foregoing, the court finds by clear and convincing evidence that termination of the parental rights of [T] is in the best interests of C. Having found by clear and convincing evidence that statutory grounds for termination of the parental rights of [the respondent] exist, the court finds that adoption of C is not appropriate as there is a proposed permanent relative legal guardian . . . . The proposed permanent legal guardian, [D], is a suitable and worthy person, able and willing to assume the rights and responsibilities for

C. [D] is committed to remaining [the permanent legal guardian] for C until she attains the age of majority.

"The court further finds by clear and convincing evidence that permanent legal guardianship of C, vested in her paternal grandmother, is in [C's] best interests. This finding is made after considering the child's age, sense of time, need for a secure and permanent environment and the totality of this child's circumstances." (Citation omitted.)

The court ordered that T's parental rights with respect to C be terminated but that the respondent's parental rights with respect to C were "not terminated." The court approved the motion to transfer legal guardianship of C to D. The court stated in its order that "[t]he immediate transfer of legal guardianship of C to [D] is not ordered. Subsequent to the conclusion of the trial, the court was informed that the Interstate Compact Study issued by the state of New York for [D] expired on June 30, 2022, without a request for a further extension. Therefore, the [petitioner] is ordered to initiate and diligently pursue a new Interstate Compact Study by the state of New York for [D]. An updated status report on the progress of the Interstate Compact shall be filed with the court and all counsel of record every thirty . . . days.

"The transfer of legal guardianship to [D] shall occur after C has been placed with [D] for a period of six . . . months.

"The [petitioner] shall prepare a permanency plan for C with a permanency plan goal of transferring legal guardianship to [D] by August 31, 2023, and after C has been transitioned from the foster parents and placed with [D] for six months.

"Pursuant to [§ 17a-112 (o)], [the petitioner] shall report and present to the court, within thirty days of

this corrected memorandum of decision and orders, a case plan for C, to transfer legal guardianship of C to [D], and shall timely present such further reports to the court as required by law." This appeal followed.

I

We first address the petitioner's claim that in granting the motion for transfer of guardianship, the court erred as a matter of law by assuming that transferring guardianship was in C's best interests, thereby shifting the burden of proof to the petitioner to demonstrate that granting the motion would be detrimental to C. The petitioner argues that the court abused its discretion because it applied an incorrect legal standard when adjudicating the motion to transfer guardianship. The claim, thus, raises a question of law that is subject to plenary review on appeal. See *In re Deboras S.*, 220 Conn. App. 1, 43, 296 A.3d 842 (2023) ("whether the [trial] court applied the correct legal standard is a question of law subject to plenary review" (internal quotation marks omitted)). We agree with the petitioner that the court applied an incorrect legal standard in granting the motion for transfer of guardianship.

"[A] motion . . . seeking to transfer guardianship of a child or youth from the petitioner to an individual other than the parent or former guardian, should be adjudicated by the court pursuant to subsection (j) of § 46b-129." *In re Avirex R.*, 151 Conn. App. 820, 832–33, 96 A.3d 662 (2014). A motion to transfer guardianship is dispositional in nature; see Practice Book § 35a-12A (a); and "does not require the court to review the underlying cause for commitment, which has already been judicially determined during an earlier phase of the proceeding." *In re Avirex R.*, supra, 835. Section 46b-129 (j) (2) provides in relevant part: "Upon finding and adjudging that any child or youth is uncared for, neglected or abused the court may . . . (B) vest such

child's or youth's legal guardianship in any private or public agency that is permitted by law to care for neglected, uncared for or abused children or youths or with any other person or persons found to be suitable and worthy of such responsibility by the court, including, but not limited to, any relative of such child or youth by blood or marriage . . . ."

Practice Book § 35a-12A provides guidance with respect to how a trial court should adjudicate motions to transfer guardianship. A motion for transfer of guardianship that seeks to vest guardianship of a child or youth in a relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, is governed by § 35a-12A (b).[13] See also General Statutes § 46b-129 (j) (3). A motion for transfer of guardianship that would require the removal of a child or youth from any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, is governed by § 35a-12A (c).[14] Practice Book § 35a-12A

[13] Practice Book § 35a-12A (b) provides: "In cases in which a motion for transfer of guardianship seeks to vest guardianship of a child or youth in any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child. In such cases, there shall be a rebuttable presumption that the award of legal guardianship to that relative shall be in the best interests of the child or youth and that such relative is a suitable and worthy person to assume legal guardianship. The presumption may be rebutted by a preponderance of the evidence that an award of legal guardianship to such relative would not be in the child's or youth's best interests and such relative is not a suitable and worthy person."

[14] Practice Book § 35a-12A (c) provides: "In cases in which a motion for transfer of guardianship, if granted, would require the removal of a child or youth from any relative who is the licensed foster parent for such child or youth, or who is, pursuant to an order of the court, the temporary custodian of the child or youth at the time of the motion, the moving party has the initial burden of proof that an award of legal guardianship to, or

(d) provides: "In all other cases, the moving party has the burden of proof that the proposed guardian is suitable and worthy and that transfer of guardianship is in the best interests of the child."

It is not disputed that D is not C's foster parent or temporary custodian. While in the petitioner's custody, C has been residing with a foster family for almost her entire life. In light of the authority previously cited, the respondent's burden to prevail on his motion to transfer guardianship from the petitioner to D was to demonstrate both that D was a suitable and worthy person to become C's guardian and that transferring guardianship to D was in C's best interests. The respondent was not entitled to the presumption that D satisfied either prong of this analysis.

In evaluating a trial court's decision, it is appropriate to consider the decision as a whole and not to focus on statements in artificial isolation. A careful review of the court's memorandum of decision in its entirety, including the corrected portion of its original decision, however, leads us to the conclusion that the court did not hold the respondent to his burden of proof. The court's decision is devoid of a correct statement of the law with respect to the respondent's burden of proof, let alone a conclusion that the respondent had satisfied his burden of proof. In its decision, the court stated: "This court cannot conclude that it would be in C's long-term best interests to be deprived of her biological relatives ([D], [E], and [Z]) when it has not been shown that placement with her paternal grandmother would be detrimental to her." In the absence of a countervailing analysis, this statement leads us to conclude that the

an adoption by, such relative would not be in the child's or youth's best interest and that such relative is not a suitable and worthy person. If this burden is met, the moving party then has the burden of proof that the movant's proposed guardian is suitable and worthy and that transfer of guardianship to that proposed guardian is in the best interests of the child."

court improperly placed the burden of proof on the petitioner and C, both of whom opposed the respondent's motion, to demonstrate that transferring guardianship to D would be detrimental to C.

Having determined that the court applied an incorrect legal standard, we must consider the proper remedy. Our Supreme Court has stated that, "[w]hen an incorrect legal standard is applied, the appropriate remedy is to reverse the judgment of the trial court and to remand the case for further proceedings." *Nationwide Mutual Ins. Co.* v. *Pasiak*, 346 Conn. 216, 227, 288 A.3d 615 (2023). We are persuaded that the court's error requires a new hearing with respect to the motion to transfer guardianship.[15]

II

Next, we consider the petitioner's claim with respect to the portion of the judgment denying the petition[16] to terminate the respondent's parental rights with respect

[15] The petitioner also argues that the court (1) erred as a matter of law by prospectively ordering the transfer of guardianship, reflecting that it had speculated about C's best interests in the future and (2) found, contrary to its findings concerning the strong bond that C has with her foster family, that D was suitable and worthy to assume guardianship over C and that transferring guardianship was in C's best interests. In light of our conclusion that a new trial is required because the court did not apply the correct burden of proof in ruling on the respondent's motion to transfer guardianship, we do not reach these additional arguments. Although this court may consider additional claims that, despite not being dispositive of the appeal, are sufficiently likely to arise on remand; *Murchison* v. *Waterbury*, 218 Conn. App. 396, 412, 291 A.3d 1073 (2023); we are not persuaded that these additional arguments fall into that category. Addressing these claims would require this court to speculate that, applying the correct burden of proof, the trial court will reach the same factual and legal conclusions that it did in rendering its prior judgment on the motion to transfer guardianship.

[16] As stated in our recitation of the procedural history, the court did not explicitly "deny" the petition with respect to the respondent but stated in its orders that "[t]he parental rights of [the respondent] are not terminated." We interpret this order to be the equivalent of a denial of the petition with respect to the respondent.

to C.[17] The petitioner argues that, having found that multiple grounds existed for terminating the respondent's parental rights with respect to C, the court thereafter erred in denying the petition to terminate his parental rights without considering whether that ruling was in C's best interests, instead focusing on the fact that D was a resource to care for C. We agree with the petitioner.

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

[17] The petitioner argues that, if we conclude that reversible error exists with respect to the motion to transfer guardianship, we should summarily reverse the court's denial of the petition with respect to the respondent's parental rights. In this regard, the petitioner argues that the two decisions, which were addressed in the same memorandum of decision, are inextricably linked to an improper evaluation of C's best interests. We disagree with the petitioner's view. We have concluded in part I of this opinion that the court committed reversible error in granting the motion to transfer guardianship because it did not apply the proper burden of proof. We did not reach the petitioner's alternative claims of error with respect to the court's evaluation of C's best interests in its adjudication of the motion. See footnote 15 of this opinion.

"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 Autumn O.*, 218 Conn. App. 424, 430–31, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023). "[Section] 17a-112 (k) requires the court in the dispositional phase to make written findings regarding seven statutory factors, including '[t]he 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' and whether the department 'has made reasonable efforts to reunite the family . . . .' General Statutes § 17a-112 (k) (1) and (2). The factors, however, serve simply as guidelines to assist the court in its determination of the child's best interest, and each factor need not be proven by clear and convincing evidence." (Footnote omitted.) *In re Victoria B.*, 79 Conn. App. 245, 258–59, 829 A.2d 855 (2003).

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve

simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"[T]he fact that the legislature [has interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing of evidence . . . by the legislature. [If] . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A] trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound. . . .

"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." (Citations omitted; internal quotation marks omitted.) *In re Aubrey K.*, 216 Conn. App. 632, 654–55, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023). "[A] judicial termination of parental rights may not be premised on a determination that it would be in the child's best interests to terminate the parent's rights in order to substitute another, more suitable set of adoptive parents. Our statutes and [case law] make it crystal clear that the determination of the child's best interests comes into play only after statutory grounds for termination of

parental rights have been established by clear and convincing evidence. . . . The court, however, is statutorily required to determine whether the parent has achieved 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 . . . .'' (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 80–81, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.2d 217 (2020).

In the present case, the petitioner does not claim that the court's best interests determination with respect to the respondent was clearly erroneous. Rather, the petitioner argues that the court, relying on its decision to award legal guardianship of C to D, improperly failed to make such a determination at all. Because the claim focuses not on the outcome of a proper analysis, but on the propriety of the court's legal analysis of the petition to terminate the respondent's parental rights, we construe it to raise an issue of law that is subject to our plenary review. See, e.g., *In re James O.*, 160 Conn. App. 506, 515, 127 A.3d 375 (2015) (claim that court considered improper factors and thus did not engage in proper analysis of termination of parental rights petition warrants plenary review), aff'd, 322 Conn. 636, 142 A.3d 1147 (2016).

Our careful examination of the trial court's memorandum of decision reflects that, in the adjudicative phase of the termination of parental rights proceeding, the court unambiguously found ''that the statutory grounds alleged for termination of the parental rights of [T] and [the respondent] exist.'' In the dispositional phase of the proceeding, the court correctly stated that it had to determine ''whether termination of [T's] and [the respondent's] parental rights [was] in the best interests of C.'' The court made findings pursuant to the seven

factors enumerated in § 17a-112 (k). Before addressing the issue of whether it was in C's best interests to terminate the respondent's parental rights, however, the court then analyzed and ruled on the respondent's motion to transfer legal guardianship of C to D. After concluding that it was in C's best interests to grant the motion, the court finally set forth what it entitled its "Best Interest Conclusion."

Although, in the dispositional portion of its decision, the court made several subordinate findings concerning the respondent, all of which strongly suggested that the court would likely conclude that the termination of his parental rights is in C's best interests, it is significant that the court did not thereafter in the best interests portion of its decision set forth a finding concerning the dispositive issue of whether terminating *his* parental rights with respect to C was in C's best interests. Instead, the court concluded that terminating T's parental rights with respect to C was in C's best interests and that, "[h]aving found by clear and convincing evidence that statutory grounds for termination of the parental rights of [the respondent] exist, the court finds that adoption of C is not appropriate as . . . [D] is a suitable and worthy person" and "that legal guardianship of C, vested in [D], is in C's best interests."

The petitioner argues, and we agree, that the court appears to have denied the termination petition as to the respondent solely because it concluded that D should become C's legal guardian. There was no basis in law for the court to have conflated the issues of whether legal guardianship should be vested in D and whether the petition to terminate the respondent's parental rights should be granted. Stated otherwise, the court's conclusion that it was in C's best interests for a biological relative, D, to become C's legal guardian was immaterial to the court's evaluation of whether, in the dispositional phase of the proceedings, it was in C's best interests to terminate the respondent's parental rights.

For the foregoing reasons, we conclude that the court misapplied the law in adjudicating the petition with respect to the respondent's parental rights with regard to C. The proper remedy is for this court to reverse the judgment of the trial court denying the termination petition with respect to the respondent and to remand the case to the trial court for a new dispositional hearing at which it solely focuses on whether it is in C's best interests to terminate the respondent's parental rights with respect to her.[18] In reaching this conclusion, we are mindful of the factual nature of the court's inquiry as to whether termination of the respondent's parental rights is in C's best interests. Although the court made several findings concerning the respondent pursuant to § 17a-112 (k), which are strongly suggestive that termination of the respondent's parental rights would be in C's best interests, it did not state an ultimate finding with respect to what was in C's best interests as far as the respondent's parental rights are concerned. Similarly, although the court's factual findings are strongly suggestive of termination, we cannot speculate as to what ultimate finding the court might have reached on the basis of these findings. "[The] seven factors serve simply as guidelines to the court and are not statutory prerequisites that need to be proven before termination

[18] As we stated previously in this opinion, in the adjudicative phase of the termination of parental rights hearing, the trial court found by clear and convincing evidence that multiple statutory grounds for termination of the respondent's parental rights with respect to C had been proven by clear and convincing evidence. In this appeal, there is no claim that the court erred with respect to its adjudicative findings, nor does our resolution of the claims raised in this appeal call into question the propriety of those adjudicative findings. Accordingly, although we conclude that the trial court committed legal error in the dispositional phase of the hearing, and a new dispositional hearing is necessary, we need not and do not set aside the findings made in the adjudicative phase of the hearing. See, e.g., *In re Juvenile Appeal (83-BC)*, 189 Conn. 66, 81, 454 A.2d 1262 (1983) (judgment terminating respondent's parental rights is "set aside except for the adjudication of the existence of the [statutory] ground for termination" and is remanded for new dispositional hearing).

can be ordered . . . . We have held . . . that the petitioner is not required to prove each of the seven factors by clear and convincing evidence. . . . Where . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Nioshka A. N.*, 161 Conn. App. 627, 635–36, 128 A.3d 619, cert. denied, 320 Conn. 912, 128 A.3d 955 (2015).

As this court has observed, "[a]t a dispositional hearing under . . . § 17a-112 (d), the emphasis appropriately shifts from the conduct of the parents to the best interests of the children. . . . *Our review is limited to determining whether the trial court's judgment was clearly erroneous or contrary to law.* . . . This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . In a case that is tried to the court . . . the judge is the sole arbiter of the credibility of witnesses, and the weight to be given to their specific testimony." (Citations omitted; emphasis added; internal quotation marks omitted.) *In re Felicia B.*, 56 Conn. App. 525, 526, 743 A.2d 1160, cert. denied, 252 Conn. 951, 748 A.2d 298 (2000).

The judgment granting the respondent father's motion to transfer guardianship is reversed and the case is remanded for a new hearing on that motion; the judgment denying the petition to terminate the respondent father's parental rights is reversed only with respect to the dispositional determination regarding the respondent father and the case is remanded for a new dispositional hearing for a determination of whether

the termination of the respondent father's parental rights with respect to C is in her best interests; the judgment on the petition to terminate the respondent parents' parental rights is affirmed in all other respects.

In this opinion the other judges concurred.

MARLENA ANDERSON-HARRIS *v.* DANA HARRIS (AC 45100)

Moll, Seeley and Pellegrino, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving her marriage to the defendant and issuing certain financial orders regarding child support, alimony and the distribution of the parties' property. The parties' marriage had been beset by financial difficulties. After the plaintiff, who had been diagnosed with bipolar disorder, was released from a psychiatric hospital, she began accusing the defendant of having sexually abused their two minor children. After the plaintiff filed the dissolution action, she began removing the children from school, creating significant issues with their academic progress. The court held hearings on the plaintiff's allegations of abuse and twice referred the parties to the family relations office of the Court Support Services Division before revoking the referral and ordering the parties and the children to undergo psychological evaluations. Several months later, when the evaluations had not been done due to the parties' inability to pay for them and the state's refusal to pay for them, the plaintiff moved for a continuance of the trial. The court denied the plaintiff's motions for a continuance, and she agreed to undergo a limited evaluation for the purpose of determining whether she could assume a custodial role in the children's lives. After a bifurcated trial, in which child custody issues were deferred, the court dissolved the parties' marriage and issued financial orders, although the psychological evaluations of the parties and the children had not been completed. The plaintiff then revoked the releases she had signed pertaining to her health records for the limited evaluation, and the court awarded the defendant sole legal and physical custody of the children. *Held*:

1. The plaintiff could not prevail on her claims that the trial court violated her right to due process when it rendered judgment before the court-ordered psychological evaluations were completed and improperly denied her motions for a continuance because the evaluations had not been completed:

a. This court declined to review the plaintiff's unpreserved claim that the trial court's entry of child custody and visitation orders were violative of the statute (§ 46b-7) and rule of practice (§ 25-60) that proscribe the rendering of judgment before the evaluations were filed and counsel had a reasonable opportunity to examine them; because the plaintiff failed to distinctly raise her due process claim at trial and neither requested review pursuant to nor addressed the requirements of *State* v. *Golding* (213 Conn. 233), this court considered her claim abandoned.

b. The trial court did not abuse its discretion in denying the plaintiff's motions for a continuance: the plaintiff had several months to prepare for trial, as the matter had been pending and scheduled for four to five months at the time she filed her motions, and the issue of child custody had been deferred so that family relations could determine whether the plaintiff was ready to assume a joint custodial role in the children's lives; moreover, the plaintiff informed the court at the start of trial that she had not participated in a psychological evaluation and had failed to comply with the court's orders to file a financial affidavit, disclose her expert witness and respond to the defendant's discovery requests.

2. Contrary to the plaintiff's claims, the trial court's financial orders did not constitute an abuse of its discretion, as the court's memorandum of decision provided the bases for its orders pertaining to child support and alimony and the applicable statutory (§§ 46b-81 and 46b-82) factors the court considered: although the court was not required to state specifically how it weighed those factors or what importance it assigned to them, the court stated that it considered the statutory criteria, closely examined the parties' financial affidavits and recognized that the parties' were "tottering on the brink of disastrous debt," and, as this court was required to make every reasonable presumption in favor of the correctness of the trial court's orders, the comments the court made throughout its financial orders supported the conclusion that it considered the statutory factors; moreover, contrary to the plaintiff's assertions, the court did discuss the origins of the parties' debt and acknowledged that it stemmed from a tax warrant, it clarified in an addendum to its memorandum of decision its reasons for awarding both of the parties' vehicles to the defendant, and it did not err by not considering how the plaintiff's mental health issues impacted her ability to work, as it was not this court's function to review the evidence to determine if a conclusion different from the one the trial court reached could have been reached.

3. The plaintiff could not prevail on her claim that this court should order a new trial because the trial judge's retirement left her unable to obtain an articulation of the court's memorandum of decision and to provide an adequate record for appellate review: despite the plaintiff's contention that the court's orders were confusing and the record unclear as to what evidence the court relied on, the court's thorough memorandum of decision clearly set forth the basis for its financial and child custody

orders, which included references to the criteria of the relevant statutes, §§ 46b-81 and 46b-82, and demonstrated the court's consideration of the controlling legal principles and relevant factors relating to those matters; moreover, the decision provided the bases for determining the reasoning underlying the court's orders and set forth the court's findings and credibility determinations as well as the efforts to obtain psychological and other evaluations of the parties; furthermore, the court summarized the relevant events of the marriage, which included the children's educational struggles and the plaintiff's mental health issues and repeated, unsubstantiated allegations of sexual abuse against the defendant, and detailed the plaintiff's actions that served to thwart the completion of its second referral of the parties to family relations for a determination of their fitness to act as custodians of the children.

Argued April 3—officially released August 22, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the defendant filed a cross complaint; thereafter, the court, *Ficeto*, *J.*, denied the plaintiff's motions for a continuance; subsequently, the case was tried to the court, *Hon. Marylouise Schofield*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court; thereafter, the plaintiff filed an amended appeal; subsequently, the court, *Ficeto*, *J.*, denied the plaintiff's motion for articulation. *Affirmed.*

Marlena Anderson-Harris, self-represented, the appellant (plaintiff).

Nicole S. Shepter, for the appellee (defendant).

Opinion

SEELEY, J. The self-represented plaintiff, Marlena Anderson-Harris, appeals from the judgment of the trial court dissolving her marriage to the defendant, Dana Harris. In this appeal, the plaintiff claims that (1) the court improperly rendered judgment in the dissolution action before court-ordered evaluations were completed, (2) the court abused its discretion in issuing certain financial orders, including those related to child support and alimony, and (3) a new trial is necessary because she was unable to provide an adequate record

for appellate review as a result of the retirement of the trial judge. We affirm the judgment of the court.

The record and the court's memorandum of decision set forth the following facts and procedural history. The parties were married on December 14, 2007, and are the parents of twin girls (children) born in December, 2013. Prior to the birth of the children, the marriage had been strained due to multiple miscarriages suffered by the plaintiff. After the children were born, the parties struggled financially. The plaintiff stayed home to care for the children, while the defendant worked outside of the home for a telecommunications company in its sales department. The defendant, therefore, was the sole wage earner for the family, which made finances precarious and caused marital strain. In 2015, for instance, the parties were facing eviction, utility shutoffs for nonpayment, and food insecurity.

Between 2014 and 2015, the defendant grew increasingly concerned with the plaintiff's mental health. At the request of the defendant, the plaintiff eventually sought medical care for her mental illness in 2015. She entered inpatient treatment and was diagnosed with bipolar disorder. During this time period, the defendant changed jobs and took a pay cut to be at home more, and the plaintiff, an accomplished seamstress, began working from home making upholstery covers for chiropractor tables. The plaintiff did not, however, contribute her earnings to the household with any regularity.

In 2020, the parties' relationship and marriage deteriorated significantly. The plaintiff continued to struggle with her mental health and voluntarily committed herself into a psychiatric hospital. The hospital confirmed her diagnosis of bipolar disorder and recommended outpatient treatment upon her release, which "was not followed . . . ." After her release from the hospital, the plaintiff began to accuse the defendant of having sexually abused the children repeatedly starting in 2014, when they were six months old, although the record is

unclear as to whom these allegations were made. The plaintiff also began to take the children to a casino so that she could gamble multiple times a week. The plaintiff frequently would put the children in a childcare facility, lose her money gambling at the casino, and then call the defendant to bring money so that they could pay the childcare costs. During June or July of that same year, the plaintiff ceased her upholstery business when she began to receive money on a weekly basis from a federal program due to the COVID-19 pandemic.

In July, 2020, the plaintiff surprised the defendant by filing the present dissolution action.[1] At the same time, the plaintiff also filed her first of many applications for an emergency ex parte order of custody. In her application, she alleged that the defendant was "potentially dangerous" and requested that the children receive counseling regarding "possible sexual abuse . . . ." The court denied her application. On September 14, 2020, after a hearing, the court, *Ficeto*, *J.*, ordered, inter alia, that the parties share joint legal custody of the children and referred the case to the Family Relations Office (family relations) of the Court Support Services Division of the Judicial Branch.[2] During the September

[1] In her complaint, the plaintiff alleged that the marriage had broken down irretrievably and requested that it be dissolved. She further sought a fair division of the property and debts, alimony, child support, sole custody of the children, and that their primary residence be with her. On August 20, 2020, the defendant filed an answer and cross complaint. He sought a dissolution of the marriage, sole custody of the children, child support, educational support for the children pursuant to General Statutes § 46b-56c, an equitable division of the property and estate of the parties, settlement of all real and personal property between the parties, reasonable attorney's fees, and all other relief that the court might order.

[2] General Statutes § 46b-3 provides in relevant part: "(a) The judges of the Superior Court shall appoint such domestic relations officers and other personnel as they deem necessary for the proper operation of the family relations sessions. . . ."

Although § 46b-3 was amended by No. 22-26, § 61, of the 2022 Public Acts, which made technical changes to the statute that are not relevant to this appeal, for clarity, we refer to the current revision of the statute. See also

14, 2020 hearing, the defendant testified that his mother would come to the house during his custodial time to assist him. He further testified that, on occasion, the plaintiff would come over during his custodial time to "clean the insides" of the children's private areas.[3]

In the fall of 2020, the plaintiff began removing the children from school, creating significant issues with their academic progress. Specifically, schoolwork was not submitted during October and November, 2020, resulting in a notice in January, 2021, that the children might not advance to the next grade. Nevertheless, the plaintiff and the children travelled out of state in January, 2021, and "disappear[ed]" from February 5 until March 18, 2021, during which time the defendant lacked any knowledge of their location. It subsequently was

State of Connecticut Judicial Branch, Court Support Services Division, Family Services (Civil and Criminal), available at http://www.jud.ct.gov/cssd/familysvcs.htm (last visited August 15, 2023) ("Family Services addresses concerns such as child custody, child access, financial matters, property disputes, and Temporary Restraining Orders. This is done through Alternative Dispute Resolution services, such as Early Intervention Program, General Case Management, Pre-trial Settlement Negotiation, Conciliation, Mediation, and Conflict Resolution Conferences, where disputes can often be addressed in a way that promotes individual responsibility and self-determination. There are situations where parents cannot reach an agreement regarding their parenting dispute. In these cases, Family Services conducts Issue-Focused Evaluations, Comprehensive Evaluations and Intensive Case Management Service. Parenting plans that are focused on the best interests of the children are then recommended to the parents and the court.").

[3] The defendant's counsel represented to the court that the Wolcott Police Department had notified the Department of Children and Families (department) on June 27, 2020, regarding the allegations of sexual abuse against the defendant. At the September 14, 2020 hearing, the defendant's counsel stated that the allegations were unsubstantiated and that "[t]he police department did not feel it necessary to investigate or follow-up . . . ." The court, in its oral decision in which it determined that the parties were to share joint legal custody, indicated that it was "not concerned about [the] allegations of sexual abuse." It reasoned: "[W]hen you go to the police and the police don't do anything, and you go to [the department] . . . and there's no safety plan, [that] speaks volumes. The [department] will enter a safety plan immediately if [it] feel[s] that there is a risk to the children, and here we are several months later, and there's still no safety plan."

revealed that the plaintiff and the children had lived in various homeless shelters during this time period.

During the time period between July, 2020, when the plaintiff first filed the dissolution action, and April, 2021, when the plaintiff returned from having "disappear[ed]," the plaintiff filed seven additional applications for emergency ex parte orders of custody. The majority of her applications alleged that, while the children were in the custody of their paternal grandmother, they had been sexually abused by either the defendant or the children's cousin, who was nine years old at the time. The court conducted multiple hearings in response to these allegations but ultimately denied each application.[4] Also during this time period, on December 29, 2020, the defendant filed a motion for the appointment of a psychologist to conduct a psychological evaluation of the plaintiff. On January 6, 2021, the court, *Ficeto*, *J.*, denied the motion without prejudice and, instead, referred the parties to family relations for a comprehensive evaluation,[5] which ultimately was not completed.[6]

[4] The court explained in its memorandum of decision that, "[i]n response to the plaintiff's allegations, the court took appropriate action. It conducted hearings or entered orders on [April 14, 2021, January 14, 2021, March 18, 24, 29 and 30, 2021, and May 4 and 6, 2021], and subsequent dates until trial on [July 20 and 22, 2021, an August 18, 2021 hearing, and trial continuation on September 3, 22 and 24, 2021]. These hearings were a concerted effort to investigate and uncover any truth underlying these very serious and extremely disturbing allegations."

[5] "A comprehensive evaluation is an in-depth, nonconfidential assessment of the family system by the Family Relations Counselor. The information gathered by the counselor, the assessment of the family, and the resulting recommended parenting plan is shared with the parents and attorneys. This recommendation may be used to form the basis of an agreement. At the conclusion of the process, a report with recommendations is filed with the court." *Lopes* v. *Ferrari*, 188 Conn. App. 387, 389 n.1, 204 A.3d 1254 (2019); see also State of Connecticut Judicial Branch, Family Services Programs, available at http://www.jud.ct.gov/Publications/FM211.pdf (last visited August 15, 2023).

[6] On April 1, 2023, Judge Ficeto issued an order "cancel[ing]" the comprehensive evaluation. In its memorandum of decision issued after trial, the

In what the court called "an attempt to impose order and curtail the repetitive applications for emergency ex parte applications," it scheduled hearings in March, 2021, for all the various outstanding motions. During those hearings, testimony was elicited from, among others, the plaintiff, the defendant, and the guardian ad litem, Attorney Jill E. Alward, who had been appointed by the court, *Ficeto*, *J.*, on February 17, 2021.[7] At the outset of the hearing, the court observed that no one from family relations would be testifying, and that the issue to be determined was whether imminent harm existed as to the children.

The plaintiff testified that her concerns first began when she discovered child pornography on the computer that she shared with the defendant in 2008. She testified that, on various occasions after the children were left with the defendant, particularly after they were left with him when she voluntarily committed herself into the hospital, she noticed physical and behavioral indicators that concerned her. She testified in detail about specific incidents that made her concerned that the children were being sexually abused, and she introduced photographic exhibits that she claimed documented those incidents. The plaintiff also testified about the medical care she sought for the children due to her concern about the alleged abuse. On cross-examination, the plaintiff confirmed that the Department of Children and Families (department) had

court, *Hon. Marylouise Schofield*, judge trial referee, explained that the comprehensive evaluation by family relations was not completed because of intervening ex parte applications filed by both parties, the court appointment of a guardian ad litem, a referral to the Department of Children and Families, and COVID-19 restrictions on court operations.

[7] It appears that testimony was also elicited from the Department of Children and Families, the children's therapist, and the paternal grandmother. However, a transcript from only the March 24, 2021 proceeding, at which the plaintiff, the defendant, and the guardian ad litem testified, was provided to this court.

twice investigated this issue and was unable to substantiate her claims of abuse.

The defendant testified that he had never touched or looked at the children inappropriately. He stated that, in response to the plaintiff's complaints to the police, the police department investigated and determined that it had insufficient evidence to proceed further. The defendant was asked about the incidents raised by the plaintiff, and he rejected her characterization of the incidents and testified that he did not behave inappropriately at any point. He stated that, during his parenting time following the September, 2020 shared custody order, on multiple occasions the plaintiff would come over to clean the children's vaginas and that "she had been doing it since they were two years old . . . ." He also stated that the plaintiff had forced the children to breastfeed within the past year despite the children being seven years old.

The guardian ad litem testified that she interviewed the defendant, the plaintiff, an individual with the department, and the children. She explained that she was concerned about all the changes that the children were experiencing by being moved around, having to switch therapists, changing schools, not seeing their father or grandmother, and being removed from the care of their lifelong pediatrician, who was aware of the children's skin sensitivities and history of vaginal infections. She stated that, "first and foremost," her recommendation was that "each of the parties, as well as both children, undergo a psychological evaluation, court-ordered psychological evaluation." She further recommended that the children be returned to their lifelong pediatrician and original school and continue to see their current therapists; that the plaintiff and the defendant attend therapy themselves; and that the paternal grandmother have temporary custody of the

children, and the plaintiff and the defendant have supervised visitation until the completion of the court-ordered evaluations.

The guardian ad litem explained that she was concerned that the plaintiff continued to attempt to breastfeed her seven year old children, and that the plaintiff admitted that she was recording the children and asking them questions about their vaginas, even though the police conducted an investigation and certain health care providers at Connecticut Children's Medical Center performed an evaluation of the children, which resulted in no findings demonstrating that the children had been sexually abused. She testified that she also was concerned that, if the children were not placed in the care of the paternal grandmother immediately after the hearing that day, the plaintiff could take the children out of the state of Connecticut. Finally, she stated that, if the court was not inclined to grant the grandmother temporary custody, she would request that the court order from the bench that the children be placed temporarily in the care of the Commissioner of Children and Families (commissioner).

The court, *Hon. Marylouise Schofield*, judge trial referee, ultimately entered an order that generally coincided with the guardian ad litem's recommendation. The court noted its concern regarding the plaintiff's "unhealthy preoccupation" with cleaning the children's vaginal areas. It stated: "There's something very wrong with this picture, and, at this stage of the game, I do not know exactly what it is. I tend to believe that we need to have more evaluations. I find that the [defendant's] inability to take control of part of the situation is disturbing to me. I find that the [plaintiff's] fixation on—and her preoccupation with this cleanliness and these issues is unhealthy. I believe that a court-ordered evaluation is necessary. It seems to—I need to have a—a very thorough, psychiatric evaluation of both of

the parents." The court therefore gave the parties the option of either the paternal grandmother or the commissioner having temporary custody. The plaintiff reluctantly agreed to the paternal grandmother having temporary custody, and, consequently, the court ordered that the children be placed with the grandmother temporarily, pending further review by the court. The court also terminated the prior referral to family relations that had been ordered in September, 2020, and, instead, ordered the parties and the children to participate in a psychological evaluation.[8] The guardian ad litem relayed to the court that she would "work on contacting—figuring out who is going to do the—the evaluation and have that report for the court."

Following the March, 2021 hearings, in April and May, 2021, the plaintiff filed a motion for modification of child support, custody, and visitation, a motion to remove the guardian ad litem, and a motion to disqualify the judicial authority. The court denied those motions and, on May 6, 2021, specifically restricted the plaintiff "from filing any new ex parte applications or motions based on allegations previously heard and adjudicated."

Trial was scheduled to begin on July 20, 2021. On July 2, 2021, the plaintiff moved for a continuance of the trial until October 5, 2021, stating that the court-ordered psychological evaluations had not been done. The court, *Ficeto*, *J.*, denied the motion. On July 16, 2021, the plaintiff filed another motion for a continuance in which she recited the same basis and argued that "[c]ustody cannot be determined when the fitness of each party has not been assessed by [psychological

[8] The court's order stated: "The parties will cooperate with a psychological evaluation, which will include [interaction] with [the plaintiff] and the children and [the defendant] and the children. The children will also participate in a full psychological evaluation. The parties will follow all recommendations of the psychological evaluation."

evaluations] that were ordered as a vital piece of resolving custody issues." Judge Ficeto denied this motion on the same day. Four days later, when the trial commenced, the plaintiff reported to Judge Schofield that, although she had been seeing a psychiatrist, she had not participated in a psychological evaluation.[9] The court subsequently indicated its concern "that the custody issues could not be resolved until the therapy previously ordered had progressed sufficiently to adequately address the underlying issues" and, as result, bifurcated the trial, with the intention of addressing the parties' financial issues first.

The court also indicated that it was "extremely troubled by the plaintiff's mental state and hoped to address once and forever her inability to accept the findings of no substantiation of sexual abuse [perpetrated by the defendant] by state agencies and court-appointed referrals." Therefore, the court "inquired whether the plaintiff would consent to a single issue evaluation, i.e., whether the plaintiff was ready to assume a joint custodial role in her children's lives." As the court later noted

[9] The following colloquy occurred between the court and the plaintiff:

"[The Court]: Thank you. Now, before we commence with a trial that was scheduled [for] today, I want to go over some preliminary matters from the last time we had a hearing. There were certain orders that were entered. One of the orders was a psychological evaluation. [The plaintiff], have you participated in a psychological evaluation?

"[The Plaintiff]: I have not. As far as I know, the [guardian ad litem] was supposed to organize them and they never were.

"[The Court]: Did you contact the [guardian ad litem] to . . . request a scheduling of a psychological evaluation?

"[The Plaintiff]: I did, multiple times, and what I was told [was], they're too expensive. I did ask her if the court was informed of this because those are expected in order to determine the best interest[s] of my children . . . . There are concerns about my mental health, obviously. So, I feel they're vital, and they just weren't ever arranged."

The guardian ad litem subsequently addressed the court and stated that she had contacted the Office of the Chief Public Defender and members of the department for assistance in obtaining the psychological evaluation. The guardian ad litem also informed the court that the parties were unable to pay for a psychological examination.

in its memorandum of decision, "[i]n order to make that assessment, family relations would have to (1) accept the limited evaluation assignment; (2) the plaintiff and the defendant needed to provide authorization for release of their psychiatric, medical and therapist records [releases]; and (3) both parties would [have to] agree to cooperate fully with family relations." The court explained in its memorandum of decision that this was a " 'last ditch attempt' " to "determine if the plaintiff was, however reluctantly, willing to accept that the defendant was not a sexual predator, a fact proven throughout the case by overwhelming evidence, thus setting the stage for an eventual joint custody order." (Emphasis omitted.)

At the start of the third day of trial on July 22, 2021, the court specifically inquired into whether the plaintiff would sign the releases necessary for family relations to obtain her mental health records to conduct that "very limited . . . issue related evaluation." The plaintiff initially agreed. The court subsequently repeated its intention to bifurcate the proceedings and stated its preference to defer a final resolution regarding the custody of the children until family relations completed the limited evaluation. During the guardian ad litem's testimony that day, the family relations supervisor entered the courtroom. The court explained that it hoped for an evaluation of the plaintiff's mental health to help with its determination of whether the plaintiff was "truly ready mentally to assume a custodial role, rather than supervised visitation." The court then recessed so that the plaintiff could sign the necessary releases.

Later that day, the family relations supervisor returned and reported to the court that the plaintiff had signed the various releases. The family relations supervisor confirmed with the court that the purpose of the evaluations of the plaintiff and the defendant

was to determine, based on their presenting issues, diagnosis, current status, and prognosis, whether the parties were fit to act as custodians of the children. The plaintiff expressly requested that the children also be assessed by a child psychologist, and the court responded: "Remember, I had ordered psychological evaluations; they were not able to be done because the cost was prohibitive and the state would not pay."

After the parties rested, the court stated: "[A]s I stated earlier, [I] sua sponte bifurcated this trial into two parts, the first . . . being the dissolution of the marriage with a property distribution. Judgment will enter in the first part of this bifurcation, pursuant to a written decision to follow after review of the transcripts, the financial affidavits, etc., and that will be within the statutory framework.

"The second part concern[s] the custody and the parenting plan of the parties' two minor children. In order to resolve those issues, as I stated previously in response to [the plaintiff's] question, the court has ordered the family relations division to conduct a general case management to collect collateral information from the [plaintiff's] and the [defendant's] health providers. Both parties were ordered to and did sign appropriate releases . . . .

"Until that assessment is completed, the court will enter . . . interim orders [regarding] custody and visitation. There is going to be—interim full custody is to . . . the paternal grandmother.

"That custody of the two minor children . . . will continue until and at such time that the [children's] therapist determines that it is appropriate for the . . . children to transition from the temporary custody of her, to a temporary custody at this time to the defendant . . . . So, [it] will go from the grandmother, temporary guardianship/custody to temporary guardianship, to

temporary custody of the defendant . . . [as the] primary residence." The court further ordered that the plaintiff have supervised visitation and iterated the interim nature of its custody orders.

On July 30, 2021, the defendant filed a motion for judgment. In that motion, he alleged that, although the plaintiff had testified earlier that month during trial that she no longer believed that he had sexually abused the children, she subsequently posted videos on social media reasserting her claims that the defendant had abused their children. He also filed (1) a motion for contempt on the ground that her "baseless and unfounded accusations" of abuse constituted a violation of the court's orders, as well as (2) an emergency motion to modify the court's custody orders to suspend the plaintiff's supervised in-person visitation and, instead, order that any visitation with the plaintiff be supervised and by video only. The defendant alleged in his emergency motion, inter alia, that the plaintiff had made numerous statements indicating that she was planning on disappearing with the children, and that the individual who was allegedly going to supervise the plaintiff's in-person visitations was unfit to do so and, moreover, had indicated to the guardian ad litem that he was unwilling to do so. On August 18, 2021, the court issued an order awarding the defendant temporary, sole physical custody of the minor children. It also suspended the plaintiff's visitation and contact with the children until further notice.

The court subsequently resumed the trial on September 17, 22 and 24, 2021. On September 17, 2021, the defendant's counsel represented to the court that, within one week of the conclusion of the hearings in July, 2021, the plaintiff had revoked her releases for family relations and for the guardian ad litem. The defendant's counsel argued that these actions "effectively [cut] off their ability to do what the court had

asked both of them to do with regards to custody matters." On September 24, 2021, the court stated on the record that the plaintiff's counsel[10] had revoked the releases previously signed by the plaintiff.

On October 8, 2021, the court issued its memorandum of decision. The court dissolved the parties' marriage on the basis of irretrievable breakdown. It further awarded the defendant sole legal and physical custody of the children. The court also awarded the plaintiff limited visitation, reasoning: "Due to the plaintiff's continued allegations of abuse and refusal to cooperate pursuant to court order, the court finds it is in the children's best interests concerning their physical safety and mental well-being to limit visitation with the plaintiff . . . to two video meetings per week, on consistent time and dates chosen by the [defendant]."

With respect to the financial issues, the court found that, although the plaintiff was unemployed at the time of trial, she had earned between $18,000 and $21,000 per year in the past. She was ordered, therefore, to pay weekly child support in the amount of $119 starting on December 1, 2021, which was calculated based on a gross weekly income of $480 based on the minimum wage. The court also ordered the defendant to pay annual alimony to the plaintiff in the amount of $1 for a period of five years. It reasoned that, "[w]hile this award is negligible, it recognizes the current financial reality of the parties, which is tottering on the brink of disastrous debt." Additionally, the court ordered that the defendant was to remain at the former marital residence, and he was directed to execute a new lease solely in his name. Last, the court divided the assets and

[10] During the pendency of this case, the plaintiff, at times, represented herself, and, at other times, counsel appeared and represented her. Specifically, she was represented by counsel during the September 14, 2020 and March, 2021 hearings discussed previously, as well as in the trial proceedings held in September, 2021.

liabilities of the parties. The defendant was awarded his retirement accounts "free and clear of any claim . . . by the plaintiff."

On October 13, 2021, the court issued a correction to its memorandum of decision. It ordered, sua sponte, the defendant to transfer one half of his retirement accounts to the plaintiff. On October 29, 2021, following a hearing, the court issued an addendum to its memorandum of decision. In the addendum, the court noted that the plaintiff had objected to the reservation of jurisdiction for an educational support order pursuant to General Statutes § 46b-56c, and, therefore, jurisdiction was not reserved. The court also decided the defendant's March 24, 2021 motion for fees and awarded him $1500 in attorney's fees and $1250 in expert witness fees. Finally, the court clarified and confirmed its decision to award both of the parties' vehicles to the defendant. This appeal followed.

I

The plaintiff first claims that the court improperly rendered judgment in the dissolution action before court-ordered evaluations[11] were completed. Specifically, she argues that, pursuant to General Statutes § 46b-7 and Practice Book §§ 25-60 and 25-60A,[12] after

[11] We interpret the plaintiff's appellate claim to include the January 6, 2021 referral to family relations for a comprehensive evaluation, the March 24, 2021 order that the parties and children undergo psychological evaluations, and the July 22, 2021 single issue evaluation by family relations arranged by the court.

[12] General Statutes § 46b-7 provides: "*Whenever*, *in any family relations matter*, including appeals from the Superior Court, *an investigation or evaluation has been ordered*, *the case shall not be disposed of until the report of the investigation or evaluation has been filed as hereinafter provided*, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard. Any report of an investigation or evaluation shall be filed with the clerk and mailed to counsel and self-represented parties of record." (Emphasis added.)

Practice Book § 25-60 (a) contains similar language and provides: "*Whenever*, *in any family matter*, *an evaluation or study has been ordered* pursuant to Section 25-60A or Section 25-61, or the court support services division

an investigation or evaluation has been ordered in any family relations matter, the case should not be disposed of until the report of the investigation or evaluation has been filed and counsel and the parties have had a reasonable opportunity to examine it, and that the court's failure to comply with this statute and rules of practice amounts to a due process violation. Additionally, she claims that the court abused its discretion in denying her motions for a continuance on the ground that the court-ordered evaluations had not been completed. The defendant counters that "the requirements of . . . § 46b-7 are irrelevant because there was no evaluation pending at the time the court issued its judgment." We decline to review the plaintiff's unpreserved constitutional claim[13] and conclude that the court did not abuse its discretion in denying her motions for a continuance of the dissolution trial.

A

We first consider the plaintiff's argument that the court violated § 46b-7 and Practice Book § 25-60 when it entered custody and access orders prior to any court-ordered evaluations having been filed with the court,

family services unit has been ordered to conduct mediation or to hold a conflict resolution conference pursuant to Section 25-61, *the case shall not be disposed of until the report has been filed as hereinafter provided*, and counsel and the parties have had a reasonable opportunity to examine it prior to the time the case is to be heard, unless the judicial authority orders that the case be heard before the report is filed." (Emphasis added.)

Practice Book § 25-60A sets forth various requirements for a court-ordered private evaluation of any party or any child in a family proceeding in which custody, visitation or parental access is at issue.

[13] Although the defendant has not argued that the plaintiff failed to preserve the due process claim she has advanced before this court, we conclude that it would be manifestly unjust to both the defendant and the trial court to permit her to pursue that claim in this appeal. See *Overley* v. *Overley*, 209 Conn. App. 504, 511–12, 268 A.3d 691 (2021), cert. denied, 343 Conn. 901, 272 A.3d 657 (2022).

resulting in a violation of her right to due process.[14] We decline to review this unpreserved claim.

At no point in the proceedings before the trial court did the plaintiff[15] raise the specific claim that she advances on appeal, namely, that the court's failure to comply with § 46b-7 and Practice Book § 25-60 constituted a due process violation. "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original; internal quotation marks omitted.) *Overley*

[14] Although the plaintiff's counsel asserted in her September 22, 2021 motion for a mistrial that the court had "failed to adhere to any of the statutory safeguards set [forth] in [General Statutes §§ 46b-6a and 46b-7] with respect to all orders relating to the custody and access of the minor child[ren] entered after January 6, 2021," the motion did not specifically claim that these purported failures amounted to a due process violation. Additionally, the plaintiff's counsel did not cite to Practice Book § 25-60 in this motion.

Additionally, we note that the trial court stated in its memorandum of decision that, "[o]n September 8, 2021, all counsel and parties were present. The plaintiff's counsel proceeded to obstreperously claim due process and constitutional violations of her client and her own due process rights, claiming conflict with a hearing previously scheduled in a different court." The plaintiff failed to provide this court with a transcript from the September 8, 2021 hearing, and, therefore, the record is inadequate to ascertain the specific due process claim mentioned by the plaintiff's counsel. See *J. M.* v. *E. M.*, 216 Conn. App. 814, 821–22, 286 A.3d 929 (2022) (appellant has responsibility to provide adequate record for appellate review, and absence of transcript leaves reviewing court to engage in speculation, which it cannot do).

[15] On appeal, the plaintiff has proceeded as a self-represented litigant. "We are mindful that [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022); accord *Gleason* v. *Durden*, 211 Conn. App. 416, 439–40, 272 A.3d 1129, cert. denied, 343 Conn. 921, 275 A.3d 211 (2022).

v. *Overley*, 209 Conn. App. 504, 511, 268 A.3d 691 (2021), cert. denied, 343 Conn. 901, 272 A.3d 657 (2022).

We conclude that it would be manifestly unjust to consider the plaintiff's claim of a due process violation after she failed to distinctly raise it before the trial court. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal. . . . We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [T]o 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." (Citations omitted; internal quotation marks omitted.) *Westry* v. *Litchfield Visitation Center*, 216 Conn. App. 869, 878–79, 287 A.3d 188 (2022); see *Grant* v. *Commissioner of Correction*, 345 Conn. 683, 701, 287 A.3d 124 (2022); see also *Overley* v. *Overley*, supra, 209 Conn. App. 513 (purpose of preservation requirement is to assure fair notice of party's claim to both trial court and opposing party, and hallmark of preservation is fair notice to trial court; determination of whether claim has been preserved properly will depend on careful review of record to ascertain whether claim on appeal was articulated below with sufficient clarity to place trial court on reasonable notice of that claim); see generally Practice Book § 60-5 (appellate court not bound to consider claim not distinctly raised at trial).

Furthermore, the plaintiff neither affirmatively requested review pursuant to *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), nor addressed its four prongs in her appellate brief.[16]

[16] "Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of

See *Taylor* v. *Pollner*, 210 Conn. App. 340, 347 n.4, 270 A.3d 213 (2022). As a result, we consider this unpreserved claim abandoned. Id.; see also *Guiliano* v. *Jefferson Radiology, P.C.*, 206 Conn. App. 603, 624, 261 A.3d 140 (2021). We therefore decline to review the plaintiff's claim regarding § 46b-7 and Practice Book § 25-60, and her claim of a due process violation.[17]

B

We next consider the plaintiff's argument that the court abused its discretion in denying her motions for

constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [party] of a fair trial; and (4) if subject to harmless error analysis, the [opposing party] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail." (Internal quotation marks omitted.) *Mention* v. *Kensington Square Apartments*, 214 Conn. App. 720, 738, 280 A.3d 1195 (2022); see also *In re Kylie P.*, 218 Conn. App. 85, 106 n.11, 291 A.3d 158, cert. denied, 346 Conn. 926, 295 A.3d 419 (2023).

[17] Even if we were to consider the arguments raised by the plaintiff, we would conclude that they are without merit. In the present case, the court found, based on the evidence, that the parties could not afford to pay for the psychological evaluations that were ordered on March 24, 2021. That finding has not been challenged on appeal. The court's initial referral to family relations was terminated by the court. The propriety of that decision has not been raised in this appeal by the plaintiff. The court's second referral to family relations for a determination of the fitness of the parties to act as custodians of the children was thwarted by the plaintiff's revocation of the releases, which prevented family relations from conducting this evaluation.

In *Perez* v. *Perez*, 212 Conn. 63, 76, 561 A.2d 907 (1989), our Supreme Court rejected the claim of the defendant grandparents that the trial court should not have disposed of a case without the filing of a previously ordered case study report pursuant to General Statutes §§ 46b-6 and 46b-7. In that case, the record demonstrated that a family relations officer began his investigation but had to discontinue it because the defendants fled Connecticut with the minor child. Id., 76–77. The court concluded that, because the defendants' flight from Connecticut precluded the completion or filing of the report, the trial court did not err in disposing of the case without the filing of the report. Id., 77.

Similarly, in the present case, the conduct of the plaintiff, namely, her revocation of the releases, prevented the completion of her evaluation by family relations, and, therefore, it was not improper for the court to issue its decision without the filing of the report. See also *Duve* v. *Duve*, 25 Conn. App. 262, 268, 594 A.2d 473 (not always necessary to have written study on file prior to hearing provided there is good reason to proceed and directives

a continuance, which is based on her claim that the court-ordered evaluations had not been completed. Specifically, she contends that she had timely filed motions for a continuance on July 2 and 15, 2021, which were denied improperly by Judge Ficeto.

The following standard of review and governing legal principles are applicable to the plaintiff's argument. "Appellate review of a trial court's denial of a motion for a continuance is governed by an abuse of discretion standard that, although not unreviewable, affords the trial court broad discretion in matters of continuances. . . . An abuse of discretion must be proven by the appellant by showing that the denial of the continuance was unreasonable or arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Citation omitted; internal quotation marks omitted.) *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 268, 242 A.3d 542 (2020); see also *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 168–69, 219 A.3d 400 (2019), aff'd, 337 Conn. 228, 253 A.3d 1 (2020).

We are cognizant that "[t]he trial court has a responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of justice. . . . In addition, matters involving judicial economy, docket management [and control of] courtroom proceedings . . . are particularly within the province of a trial court." (Internal quotation marks omitted.) *Yuille* v. *Parnoff*, 189 Conn. App. 124, 128, 206 A.3d 766, cert. denied, 332 Conn. 902, 208 A.3d 659

of statute and rules of practice have been followed), cert. denied, 220 Conn. 911, 597 A.2d 332 (1991), cert. denied, 502 U.S. 1114, 112 S. Ct. 1224, 117 L. Ed. 2d 460 (1992).

(2019). Furthermore, we note that "[a]mong the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; [and] the [movant's] personal responsibility for the timing of the request . . . ." (Internal quotation marks omitted.) *Mensah* v. *Mensah*, 167 Conn. App. 219, 223, 143 A.3d 622, cert. denied, 323 Conn. 923, 150 A.3d 1151 (2016).

The two motions for a continuance of the dissolution trial challenged on appeal by the plaintiff were filed in July, 2021.[18] Both were denied by Judge Ficeto without elaboration. The plaintiff commenced this action approximately one year earlier, on July 22, 2020. As previously noted, she filed numerous emergency ex parte motions for custody, and other pendente lite motions regarding custody and financial matters.

At the outset of the trial, on July 20, 2021, Judge Schofield asked the plaintiff if she had participated in a psychological evaluation. She replied that she had not done so due to the cost but that she had continued to see a psychiatrist and a therapist. The guardian ad litem also reported to the court the details of her attempts, albeit unsuccessful, to obtain a psychological evaluation for the parties by contacting the Office of the Chief Public Defender and the department. The court indicated that the plaintiff had failed to comply with the orders to file a financial affidavit and proposed orders,

[18] On March 12, 2021, the defendant filed a motion requesting that the court set a trial date and arguing that it was in the best interests of the children to proceed without delay and to address his claims that the plaintiff had violated the pendente lite orders. The court ordered that the trial begin on July 20, 2021.

to respond to the defendant's request for interrogatories and production, or to disclose her expert witness. The court also noted that the matter had been pending and scheduled for a period of four to five months at the time the plaintiff filed her motions for a continuance.

At the conclusion of this colloquy, the court stated: "I understand that you have to object, but this matter has been continued repeatedly. There have been numerous motions that have been filed. And we are going to at least proceed with the dissolution action. . . . I do have some tremendous reservations about proceeding with a final order in the custody matter due to the fact there have not been completed psychological evaluations. However, I am . . . considering and seriously believe that, at this moment in time, I will probably bifurcate the matter. . . . That means that I will hear the dissolution proceeding and enter financial orders today. I will hear some . . . limited matters concerning custody to help me decide whether or not it is really in the [children's] best interest[s] to proceed with a custody hearing today or whether it is in their best interest[s] that this matter be continued with a full custody evaluation . . . ." Two days later, the court arranged for the single issue evaluation by family relations, which ultimately did not occur due to the plaintiff's conduct in revoking her authorizations for the release of her medical information.

Our Supreme Court has stated that, "[t]o prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary." (Internal quotation marks omitted.) *In re Ivory W.*, 342 Conn. 692, 730, 271 A.3d 633 (2022); accord *State* v. *Coney*, 266 Conn. 787, 801, 835 A.2d 977 (2003); *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, 213 Conn. App. 739, 754, 280 A.3d 120, cert. granted, 345 Conn. 910, 283 A.3d 505 (2022). As noted by Judge Schofield, the plaintiff had several months to

prepare for trial, the matter had been pending for a period of time, and the issue of custody was not subject to a final resolution but, rather, was deferred so that family relations could conduct "a single issue evaluation, i.e., whether the plaintiff was ready to assume a joint custodial role in her children's lives."[19] On the basis of these facts and circumstances, we conclude that the court did not abuse its discretion in denying the July, 2021 motions for a continuance filed by the plaintiff.

II

The plaintiff next claims that the court erred in making certain financial orders, including those related to child support and alimony. Specifically, she argues that "[t]he record in this case is entirely unclear and impossible to follow with all aspects relating to the division of property and the financial orders," and that the court erred by not addressing certain factors and by failing to provide the bases for some of its determinations. We are not persuaded.

We begin with our standard of review and the legal principles relevant to financial orders in dissolution actions. "We review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it

[19] We further note that, "[i]n the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *Overley* v. *Overley*, supra, 209 Conn. App. 520. As a result of our conclusion that the court did not abuse its discretion in denying the continuances filed by the plaintiff, we need not reach the question of harm. See id., 523 n.10. We further note that the plaintiff failed to brief this issue. See, e.g., *McNamara* v. *McNamara*, 207 Conn. App. 849, 868, 263 A.3d 899 (2021). Therefore, even if we were to conclude that the court abused its discretion in denying the plaintiff's request for a continuance, we would be unable to conclude that the denial constituted reversible error.

did. . . . In determining whether the trial court's broad legal discretion is abused, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . We apply that standard of review because it reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties." (Citations omitted; internal quotation marks omitted.) *Fronsaglia* v. *Fronsaglia*, 202 Conn. App. 769, 775–76, 246 A.3d 1083 (2021); see also *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 464, 165 A.3d 1124 (2017).

With respect to the distribution of assets, "[General Statutes § 46b-81] authorizes the court to assign to either spouse all, or any part of, the estate of the other spouse. . . . In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. . . . Moreover, [w]e have iterated that there is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders." (Citation omitted; internal quotation marks omitted.) *Fronsaglia* v. *Fronsaglia*, supra, 202 Conn. App. 777.

Although the trial court must consider those factors delineated by § 46b-81 when distributing assets, "*no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case. . . .* [Additionally, the court] *need not give each factor equal weight . . . or recite the statutory criteria that it considered in making its decision or make express findings as to each statutory factor.*" (Emphasis added; internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 431–32, 175 A.3d 601 (2017).

Regarding alimony determinations specifically, it is well established that the trial court "must take into account all of the statutory factors enumerated in General Statutes § 46b-82 (a) . . . ."[20] (Footnote omitted.) *Oudheusden* v. *Oudheusden*, 338 Conn. 761, 768–69, 259 A.3d 598 (2021). Our Supreme Court recently has held, however, that, in doing so, "[t]he trial court does not need to give each factor equal weight or make express findings as to each factor . . . ." Id., 769.

Having set forth our standard of review and the relevant legal principles, we now turn to the merits of the plaintiff's claim that the court abused its discretion in making its financial orders. As we discussed previously in this opinion, the court awarded the defendant sole

[20] General Statutes § 46b-82 (a) provides in relevant part: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other . . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

legal and physical custody of the children and ordered that the plaintiff have video visitations. The court ordered that the defendant remain in the marital residence, which was a leased property. It further ordered that the plaintiff pay child support, which it calculated based on "a gross weekly income of $480 based on minimum wage, resulting in a guidelines computation of $119 [per] week . . . commencing December 1, 2021, providing the plaintiff ample time to secure employment." Additionally, the court ordered that the defendant continue to cover the children for medical insurance purposes, provided that the insurance is available at a reasonable cost, and that the parties will be responsible for their own insurance.

With respect to alimony, the court awarded the plaintiff "the sum of one dollar ($1) a year . . . for a period of five years." With respect to assets and liabilities, the court ordered that each party will be individually liable for the liabilities on their financial affidavits, and that they will "share equally . . . the total amount of debt described outstanding . . . in the tax warrant issued by the city of Waterbury." The court also ordered that the defendant retain both vehicles, and that each party will retain their savings accounts, checking accounts and, in the case of the plaintiff, her business sales account. Finally, although the court initially ordered that the defendant retain his retirement account and life insurance policies, in its October 12, 2021 correction to its memorandum of decision, it ordered the defendant to transfer to the plaintiff "one half of his Fidelity [Investments] 401 (k) and Millman pension . . . ."

In support of her claim, the plaintiff first argues that the court abused its discretion in making its financial orders without addressing the defendant's earning capacity, his vocational skills, his present earnings, or the inconsistencies between the two financial affidavits filed by the defendant. We are not persuaded. Although

the trial court was statutorily required to consider those factors, as we discussed, "[t]here is no . . . requirement that the court specifically state how it weighed these factors or explain in detail the importance it assigned to these factors." (Internal quotation marks omitted.) *Kammili* v. *Kammili*, 197 Conn. App. 656, 671, 232 A.3d 102, cert. denied, 335 Conn. 947, 238 A.3d 18 (2020). Moreover, making every reasonable presumption in favor of the correctness of the trial court's orders, as we are required to do; see *Fronsaglia* v. *Fronsaglia*, supra, 202 Conn. App. 775–76; we are satisfied that the court did consider these factors, even if it did not state with specificity how it weighed them. This conclusion is supported by comments made by the trial court throughout its financial orders, such as, "[h]aving considered the statutory criteria," and, "[t]he court has closely examined the parties' financial affidavits . . . ."

The plaintiff next argues that the court abused its discretion because it failed to discuss the origins of the parties' debt, yet divided it equally; awarded both automobiles to the defendant, despite testimony that the vehicle the plaintiff used was her only means of transportation when she engaged in her business as a seamstress; expressed concern about the plaintiff's mental health, yet did not consider her mental health as a possible impact on her ability to work; and did not provide a basis for its award of alimony. We, again, are not persuaded.

As we already have mentioned in this opinion, the court specifically acknowledged that the debt that would be shared by the parties was the debt that stemmed from a tax warrant issued by the city of Waterbury, and, therefore, the court did "discuss the origins of the . . . debt." Additionally, although the court did not explain why it awarded both vehicles to the defendant in its original memorandum of decision, it did

clarify in its October 29, 2021 addendum that "title to both vehicles was in [the] defendant's name," and that "[t]he vehicle used by the plaintiff is [unregistered, and] [b]oth vehicles are encumbered by significant debt/liens."

With respect to the plaintiff's contention that the court erred by not considering how her mental health impacted her ability to work, we note that it is not the function of this court to "review the evidence to determine whether a conclusion different from the one reached could have been reached. . . . Thus, [a] mere difference of opinion or judgment cannot justify our intervention." (Internal quotation marks omitted.) *Mitchell* v. *Bogonos*, 218 Conn. App. 59, 72, 290 A.3d 825 (2023). Finally, regarding the plaintiff's argument that the court erred by not providing a basis for requiring the defendant to pay one dollar per year for five years, we note that, in the section of the court's memorandum of decision discussing alimony, the court stated that it "considered the statutory criteria," "closely examined the parties' financial affidavits, scrutinizing line items," and that its negligible award "recognizes the current financial reality of the parties, which is tottering on the brink of disastrous debt." Thus, we are satisfied that the court did consider the factors outlined in § 46b-82 (a), and, again, we note that the court was not required to "give each factor equal weight or make express findings as to each factor . . . ." *Oudheusden* v. *Oudheusden*, supra, 338 Conn. 769.

In sum, after considering the plaintiff's argument and conducting a careful review of the record and the trial court's memorandum of decision, we conclude that the court's financial orders do not constitute an abuse of its discretion.

III

The plaintiff's final claim is that a new trial is necessary because she was unable to provide an adequate

record for appellate review as a result of the retirement of the trial judge. Specifically, she argues that the record is unclear as to the evidence on which the court relied in issuing its memorandum of decision, correction, and addendum and that she was prevented from obtaining an articulation due to the retirement of Judge Schofield.

The following additional facts are necessary for the resolution of this issue. The plaintiff filed the present appeal on November 4, 2021, and amended it on March 9, 2022. On March 28, 2022, the plaintiff moved for an articulation of the legal and factual bases for the court's decision. See Practice Book § 66-5.[21] The plaintiff set forth eighteen items that she requested the court to address. On May 24, 2022, Judge Ficeto denied the plaintiff's motion for articulation on the ground that Judge Schofield had retired.[22] On June 3, 2022, the plaintiff,

[21] Practice Book § 66-5 provides in relevant part: "A motion . . . seeking an articulation or further articulation of the decision of the trial court shall be called . . . a motion for articulation . . . . Any motion filed pursuant to this section shall state with particularity the relief sought and shall be filed with the appellate clerk. Any other party may oppose the motion by filing an opposition with the appellate clerk within ten days of the filing of the motion for . . . articulation. The trial court may, in its discretion, require assistance from the parties in providing an articulation. Such assistance may include, but is not limited to, provision of copies of transcripts and exhibits.

"The appellate clerk shall forward the motion for . . . articulation and the opposition, if any, to the trial judge who decided, or presided over, the subject matter of the motion for . . . articulation for a decision on the motion. If any party requests it and it is deemed necessary by the trial court, the trial court shall hold a hearing at which arguments may be heard, evidence taken or a stipulation of counsel received and approved. The trial court may make such corrections or additions as are necessary for the proper presentation of the issues. The clerk of the trial court shall list the decision on the trial court docket and shall send notice of the court's decision on the motion to the appellate clerk, and the appellate clerk shall issue notice of the decision to all counsel of record."

[22] General Statutes § 51-183g provides: "Any judge of the Superior Court may, after ceasing to hold office as such judge, settle and dispose of all matters relating to appeal cases, as well as any other unfinished matters pertaining to causes theretofore tried by him, as if he were still such judge."

In *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 392 n.4, 210 A.3d 620 (2019), we observed that "the mere fact that a retired jurist has continuing

pursuant to Practice Book § 66-6,[23] filed a motion for review with this court. Specifically, she requested that the denial of the motion for articulation be set aside and that the trial court be ordered to issue the requested articulation. We subsequently granted review but denied the relief requested.

In her principal appellate brief,[24] the plaintiff asserts that the trial court's orders during and after the trial were confusing and conflicted with the court's stated intention to bifurcate the proceedings by addressing the financial issues first and custody issues after psychological evaluations had occurred. She then claims that the present situation is similar to the facts of *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 210 A.3d 620 (2019). In *Zaniewski*, we determined that, "under the unique circumstances" of that case; id., 388; in which "the inadequacy of the record . . . [arose] not from any fault attributable to the [appellant], but from the trial court's issuance of a memorandum of decision that contained virtually no factual findings that would permit us to review appropriately the [appellant's] appellate claims"; id., 387–88; and where "[t]he trial

statutory authority to act does not solve the myriad of issues and impracticalities involved in forcing a retired jurist to return to service. The statute states only that a judge 'may' act after retirement; it does not mandate any action."

[23] Practice Book § 66-6 provides in relevant part: "The court may, on written motion for review stating the grounds for the relief sought, modify or vacate any order made by the trial court under Section 66-1 (a) . . . relating to the perfecting of the record for an appeal or the procedure of prosecuting or defending against an appeal . . . . Motions for review shall be filed within ten days from the issuance of notice of the order sought to be reviewed. . . ."

[24] In her reply brief, the plaintiff raised, for the first time, specific contentions regarding the adequacy of the court's memorandum of decision. We decline to consider them. It axiomatic that arguments cannot be raised for the first time in a reply brief. E.g., *Lowthert* v. *Freedom of Information Commission*, 220 Conn. App. 48, 58–59, 297 A.3d 218 (2023); see also *Benjamin* v. *Corasaniti*, 341 Conn. 463, 476 n.8, 267 A.3d 108 (2021); *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 822, 263 A.3d 972, cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

judge who authored the decision retired shortly after . . . rendering fruitless the [appellant's] proper and timely efforts to remedy the decision's lack of findings in order to secure appellate review of his claims"; id., 387; principles of equity required that the case be remanded for a new trial. Id., 388. In our view, the present case is distinguishable from *Zaniewski*, as the trial court issued a thorough memorandum of decision that set forth its factual findings and credibility determinations and demonstrated its consideration of the controlling legal principles and the various relevant factors relating to financial and custody matters.[25]

In *Zaniewski*, the trial court issued a four page memorandum of decision that consisted of a recitation of uncontested facts and a statement of general legal principles pertaining to a dissolution action. Id. The decision was "devoid of any relevant factual findings . . . . The court did not discuss the respective financial circumstances of the parties, including any findings regarding their income or earning potential. The court made no findings with respect to the value of any marital assets, and provided no analysis or rationale for its division of the marital property or its other financial orders. The court did not indicate whether either party was at fault for the breakdown of the marriage or shared fault. The court made no explicit credibility determinations regarding the testimony of witnesses. Although the plaintiff claims that completed child support guideline worksheets were provided to the court by the parties, she concedes that they were never made a part of the record. There are no completed child support guideline worksheets in the trial court file." Id., 388–89. The

[25] We acknowledge that, as in *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 386, the trial judge in the present case retired after issuing the memorandum of decision and before the plaintiff filed her motions for articulation and review, and that the plaintiff took all the steps that reasonably could be expected to obtain an articulation.

remainder of the decision listed the various orders. Id., 389. We ultimately concluded that it was "impossible to ascertain what path the court followed in crafting its support orders and dividing the marital assets without engaging in pure speculation." Id., 393.

In contrast to the facts and circumstances of *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 386, the trial court in the present case issued a twenty-eight page memorandum of decision that provided the bases for determining the reasoning underlying the court's orders. Specifically, the court set forth the parties' education, health, and employment histories. It also provided a summary of the relevant events of the marriage, including the repeated, unsubstantiated allegations of sexual abuse made by the plaintiff against the defendant, the plaintiff's mental health issues, and the educational struggles of the children. The court further detailed the procedural history of the complicated dissolution action and the efforts made to obtain psychological and other evaluations. The court summarized and credited the testimony of the guardian ad litem relating to the children, including their progress and well-being while in the custody of the paternal grandmother and their positive relationship with the defendant. Further, the court detailed the actions of the plaintiff that served to thwart the completion of the court's second referral to family relations for a determination of the fitness of the parties to act as custodians of the children. Finally, the court issued the custody and financial orders attendant to the dissolution of the parties' marriage, including references to the relevant statutory criteria.

For these reasons, we conclude that the plaintiff's reliance on *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 386, is misplaced. The court's memorandum of decision clearly sets forth the bases for its financial and custody orders. We conclude, therefore, that this

case does not fall within the unique circumstances of *Zaniewski*, and an order for a new trial is not required.

The judgment is affirmed.

In this opinion the other judges concurred.

AAA ADVANTAGE CARTING & DEMOLITION SERVICE, LLC *v.* JOSEPH CAPONE (AC 45318)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiff, a single-member limited liability company, sought to recover damages from the defendant for, inter alia, conversion and statutory theft in connection with a dispute involving the sale of the defendant's membership interest in the plaintiff. The defendant and B, who previously each owned a 50 percent membership interest in the plaintiff, executed a binding term sheet in August, 2012, which provided in relevant part that B would purchase the defendant's interest in the plaintiff for a certain sum and that their agreement would become enforceable on the date that the binding term sheet was signed. The morning after the defendant and B signed the binding term sheet, without providing notice to or receiving authorization from B, the defendant withdrew $17,000 from a corporate checking account belonging to the plaintiff. The defendant and B executed a settlement agreement several days later, and the defendant signed an assignment of his membership interest to B. In September, 2012, after learning of the $17,000 withdrawal, B commenced a civil action against the defendant, asserting claims of, inter alia, breach of contract, conversion, and statutory theft in violation of statute (§ 52-564). In February, 2017, the trial court rendered judgment for B on his claims of breach of contract and statutory theft, and awarded B $17,000, plus prejudgment interest, as to his breach of contract claim, and $34,000 as to his statutory theft claim. The court concluded that B's conversion claim was moot because damages for conversion and statutory theft cannot be separately awarded as to the same sum of money. The defendant appealed to this court, which concluded that B had standing to assert his breach of contract claim insofar as he alleged that the $17,000 withdrawal harmed him personally because of the diminution in value of the 50 percent interest in the plaintiff that the defendant had agreed to sell to him, but he lacked standing to pursue his statutory theft claim because damages suffered by a limited liability company

cannot be recovered by a member of the limited liability company bringing the case in an individual capacity, the plaintiff owned the checking account from which the money was taken, and B had not demonstrated a specific, personal and legal interest in the money separate from that of the plaintiff. This court reversed the judgment rendered for B on his statutory theft claim and directed the trial court on remand to render judgment dismissing that claim for lack of subject matter jurisdiction and to adjust the award for B's breach of contract claim from $17,000 to $8500 to account for the fact that B's contract with the defendant was to purchase only a 50 percent interest in the plaintiff. In May, 2019, the plaintiff commenced the present action against the defendant, asserting claims of conversion and statutory theft and alleging that it had commenced the present action pursuant to two savings statutes (§§ 52-591 and 52-592). The defendant filed a motion for summary judgment, claiming that the present action was time barred by the three year limitation period of the applicable statute (§ 52-577) and that § 52-592 was inapplicable. The trial court denied the defendant's motion for summary judgment, concluding that § 52-592 applied to save the present action, and the present action was subsequently tried to the court. The day of the trial, with leave of the court, the defendant amended his special defenses, asserting as special defenses that the present action was time barred pursuant to § 52-577 and barred pursuant to the doctrine of res judicata. The trial court rejected the defendant's defenses and rendered judgment for the plaintiff, awarding $17,000, plus prejudgment interest pursuant to statute (§ 37-3a), on its conversion claim and $17,000 on its statutory theft claim, which the court trebled to $51,000 pursuant to § 52-564. On the defendant's appeal to this court, *held*:

1. Contrary to the defendant's claim, the trial court properly determined that the action was not time barred pursuant to the statute of limitations because it was saved pursuant to § 52-591: § 52-591 expressly provides that, in order for the savings provision to apply, the prior action must have been commenced by a plaintiff suing in a representative character or for the benefit of third persons, and, because the object of B's 2012 action was to recover the funds withdrawn without authorization from the plaintiff's checking account, it could be viewed as having been brought for the benefit of a third person, the plaintiff, notwithstanding that B brought the 2012 action in his individual capacity and not derivatively; moreover, contrary to the defendant's assertion that § 52-591 was inapplicable because the 2012 action did not fail upon a mistake in the proper parties, this court, mindful of B's status as the sole member of the plaintiff when he commenced the 2012 action and bound by the Supreme Court's reasoning in *Saunders* v. *Briner* (334 Conn. 135), construed the judgment rendered on B's statutory theft claim in the 2012 action as having been reversed as a result of B's mistake with regard to the failure to assert that claim in the name of the proper party; furthermore, although the trial court in the 2012 action concluded that

B's conversion claim was moot and, strictly speaking, the judgment rendered on B's conversion claim was therefore not reversed on the ground of a mistake in the proper parties, in light of the overlap between B's statutory theft and conversion claims in the 2012 action, the same rationale necessarily would have applied to B's conversion claim, had that claim not been resolved on mootness grounds.

2. The defendant could not prevail on his claim that the trial court improperly concluded that the present action was not barred pursuant to the doctrine of res judicata: in the 2012 action, because B's statutory theft claim was dismissed for lack of standing and the trial court concluded that his conversion claim was moot, B's statutory theft and conversion claims were never actually litigated or determined in the 2012 action, and the defense of res judicata did not apply.

3. The defendant could not prevail on his claim that the trial court improperly rendered judgment for the plaintiff on the merits of the statutory theft claim: the court's finding that the defendant did not have a good faith basis to justify the $17,000 withdrawal was not clearly erroneous, the defendant having failed to sustain his burden of proving that the withdrawal was predicated on a good faith belief that he was owed the money he withdrew from the plaintiff's checking account and he was authorized to make the withdrawal, and the credible evidence of his conduct under the totality of the circumstances demonstrated that the defendant intentionally and without authorization withdrew the funds from the plaintiff's checking account with the intention to deprive the plaintiff of its funds for his personal benefit; moreover, to determine the plaintiff's value for the purposes of the purchase and sale transaction, B and the defendant took into account the plaintiff's assets, which included the $17,000 withdrawn by the defendant from the plaintiff's checking account, and the binding term sheet did not indicate that the defendant was to acquire any of the plaintiff's assets, including any funds in its checking account, as part of the sale of his membership interest in the plaintiff.

4. The trial court erred in its award of certain damages to the plaintiff:

a. The trial court improperly allowed the plaintiff to recover the full amount of damages on both its conversion and statutory theft claims, which were predicated on the same occurrence, namely, the $17,000 withdrawal, and failed to account for B's recovery of $8500 in damages on his breach of contract claim in the 2012 action: Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once and is not entitled to recover twice for harm growing out of the same transaction, occurrence or event, and, given the overlap between the plaintiff's claims of conversion and statutory theft, both of which were based on the $17,000 withdrawal, the plaintiff was compensated twice for the same loss as a result of the court permitting the plaintiff to recover the full amount of its damages on both its conversion and statutory theft claims; moreover,

B's recovery of $8500 on his breach of contract claim in the 2012 action capped the actual damages recoverable by the plaintiff on its conversion and statutory theft claims in the present action at $8500; moreover, although this court recognized that B and the plaintiff were distinct legal entities, B's status as the sole member of the plaintiff created a unique situation that prevented this court from completely separating the relief awarded to B in the 2012 action and the relief awarded to the plaintiff in the present action.

b. The trial court's award of prejudgment interest pursuant to § 37-3a with regard to the plaintiff's conversion claim was improper: although the trial court did not commit error in determining that prejudgment interest began to accrue on August 29, 2012, the date that the defendant had wrongfully withdrawn the $17,000 from the plaintiff's checking account, this court concluded that, because the plaintiff was entitled to $8500, rather than $17,000, on its conversion claim, it necessarily followed that the trial court should have calculated prejudgment interest on the principal amount of $8500, such that the trial court's award calculated on the principal amount of $17,000 could not stand.

Argued April 4—officially released August 22, 2023

Procedural History

Action to recover damages for, inter alia, conversion, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee; judgment for the plaintiff, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

Richard J. Rapice, with whom, on the brief, was *Peter V. Lathouris*, for the appellant (defendant).

James H. Lee, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, Joseph Capone, appeals from the judgment of the trial court rendered in favor of the plaintiff, AAA Advantage Carting & Demolition Service, LLC, on its amended complaint asserting claims of (1) conversion and (2) statutory theft in violation of General Statutes § 52-564. The defendant claims that the court (1) improperly concluded that two savings

statutes, General Statutes § 52-591 and/or General Statutes § 52-592, applied to save the present action from being time barred pursuant to the three year limitation period of General Statutes § 52-577, (2) improperly concluded that the plaintiff's claims were not barred pursuant to the doctrine of res judicata, (3) made a clearly erroneous factual finding in concluding that the defendant had committed statutory theft, and (4) erred in awarding damages, including prejudgment interest pursuant to General Statutes § 37-3a, to the plaintiff. We conclude that the trial court committed error only with respect to its award of damages to the plaintiff and, therefore, we reverse the judgment as to damages only.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. Prior to 2012, the defendant and Frank Bongiorno, who are brothers-in-law, each owned a 50 percent membership interest in the plaintiff. In 2012, the defendant and Bongiorno decided to terminate their business relationship as a result of their personal animosity toward one another and their inability to agree on the management of the plaintiff. On August 28, 2012, the defendant and Bongiorno executed a "binding term sheet," which immediately became operative and enforceable and which provided in relevant part that the defendant and Bongiorno would execute a "settlement agreement" no later than September 7, 2012, at which time the defendant would transfer his interest in the plaintiff to Bongiorno in exchange for $200,000. The defendant and Bongiorno understood that, following the execution of the binding term sheet, the defendant's involvement in the management of the plaintiff and his financial interest in the plaintiff would be "suspended," notwithstanding that the defendant would not surrender his membership interest in the plaintiff to Bongiorno until after the execution of the settlement agreement. The defendant and Bongiorno "also understood and

agreed that, except for certain personal property of [the defendant] that he was to remove from [the plaintiff's] premises by August 31, 2012, the assets of [the plaintiff] were to remain company assets as of the effective date of the binding term sheet, August 28, 2012."

On the morning of August 29, 2012, without providing notice to or receiving authorization from Bongiorno, the defendant withdrew $17,000 from a corporate checking account belonging to the plaintiff ($17,000 withdrawal). Later in the day, the defendant entered the plaintiff's offices to remove his personal items from his desk and to "wipe" his office computer.

On September 7, 2012, the defendant and Bongiorno executed the settlement agreement, which expressly incorporated the terms of the binding term sheet. The defendant further signed an assignment of his membership interest in the plaintiff, transferring his rights, title, and interest in the plaintiff to Bongiorno. At that time, Bongiorno was unaware of the $17,000 withdrawal. After the sale had closed, Bongiorno balanced the plaintiff's checkbook and reviewed its account records, whereupon Bongiorno discovered the $17,000 withdrawal.

On September 28, 2012, Bongiorno commenced a civil action against the defendant. See *Bongiorno* v. *Capone*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-12-6015733-S (2012 action). In his operative complaint filed in the 2012 action, Bongiorno asserted claims of (1) breach of contract, (2) conversion, and (3) statutory theft in violation of § 52-564, all of which were predicated on allegations that the defendant had made the $17,000 withdrawal without Bongiorno's permission or consent.[1] During the pendency of the 2012 action, the defendant filed a motion

[1] Bongiorno's operative complaint also set forth claims alleging a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., and a second breach of contract claim, but Bongiorno later withdrew those claims.

to dismiss Bongiorno's operative complaint for lack of subject matter jurisdiction, arguing in relevant part that Bongiorno, having filed the 2012 action in his individual capacity, lacked standing to claim harm stemming from the $17,000 withdrawal. The trial court, *Hon. Kevin Tierney*, judge trial referee, denied the defendant's motion to dismiss, concluding that Bongiorno had pleaded "a 'colorable claim of direct injury' " vis-à-vis the $17,000 withdrawal.

The 2012 action was referred to an attorney trial referee, who tried the matter in 2015. On February 27, 2017, the court accepted a second revised report[2] filed by the attorney trial referee, adopted the attorney trial referee's findings, and rendered judgment in accordance with the report. The court concluded that the attorney trial referee's findings, including that the defendant withdrew $17,000 from the plaintiff's checking account (1) without advising Bongiorno of his intention to withdraw said amount, (2) with the intent to deprive Bongiorno of said amount, and (3) without a legitimate basis, established that the defendant had breached the binding term sheet and had committed statutory theft.[3] Ostensibly in support of its adjudication of Bongiorno's statutory theft count, the court further found that "[t]he binding term sheet and [the] settlement agreement were entered into by [Bongiorno] and

[2] The court had declined to accept two prior reports filed by the attorney trial referee.

[3] The court found in favor of the defendant as to Bongiorno's conversion count on the basis of its conclusion that the conversion count was moot because "damages for conversion and [statutory] theft cannot be separately awarded as to the same sum of money." As we discuss subsequently in this opinion, we have reservations regarding the court's (1) conclusion that Bongiorno's conversion count was moot and (2) decision to find for the defendant on the conversion count on the basis of mootness. See part I of this opinion; see also footnotes 20 and 21 of this opinion.

In addition, as part of his breach of contract count, Bongiorno alleged that the defendant had failed to transfer to him two cell phone numbers of the plaintiff. The attorney trial referee found in favor of the defendant as to that discrete claim, and the trial court upheld that determination.

the defendant, and [those documents] passed title to the [plaintiff's] business assets from the defendant to [Bongiorno]." As relief, the court awarded Bongiorno a total of $58,659, exclusive of postjudgment interest and attorney's fees, which comprised (1) $17,000, plus prejudgment interest in the amount of $7659, as to his breach of contract count, and (2) $34,000 as to his statutory theft count.[4]

The defendant appealed from the judgment rendered in the 2012 action to this court. See *Bongiorno* v. *Capone*, 185 Conn. App. 176, 196 A.3d 1212, cert. denied, 330 Conn. 943, 195 A.3d 1134 (2018). On appeal, the defendant claimed that the trial court improperly had determined that Bongiorno had standing, in his individual capacity, to assert his breach of contract and statutory theft counts against the defendant.[5] Id., 194. This court concluded that Bongiorno (1) had standing to assert his breach of contract count insofar as he alleged that the $17,000 withdrawal harmed him personally because of the diminution in value of the 50 percent interest in the plaintiff that the defendant had agreed to sell to him;[6] id., 180; but (2) lacked standing to pursue

[4] The court calculated the damages on Bongiorno's statutory theft count by (1) trebling $17,000 to $51,000 pursuant to § 52-564 and (2) subtracting $17,000 from the trebled amount, which the court determined to be duplicative of the damages that were awarded and left undisturbed by the court on Bongiorno's breach of contract count.

[5] The defendant also claimed on appeal that the trial court had improperly rendered judgment for Bongiorno on his breach of contract count "without making conclusions of law as to the applicability of the waiver-of-suit provisions in the contractual documents." *Bongiorno* v. *Capone*, supra, 185 Conn. App. 202. This court declined to address that claim because the defendant had failed to preserve it. Id., 203.

[6] As to Bongiorno's breach of contract count, this court determined that "[Bongiorno] did not seek damages from the defendant for losses he allegedly caused to the [plaintiff] by making an unauthorized withdrawal of money from it, but rather sought damages for the resulting failure of the defendant to give him full consideration for the $200,000 he had paid for the defendant's 50 percent interest in the [plaintiff], with the understanding that the [plaintiff's] aggregate assets at the time of transfer would be those owned by the [plaintiff] on August 28, 2012. [Bongiorno and the defendant's] contract for

his statutory theft claim. Id., 194. Regarding Bongiorno's statutory theft count, this court stated that it "has repeatedly held that damages suffered by a limited liability company cannot be recovered by a member of the limited liability company bringing the case in an individual capacity. . . . In the present case, the statutory theft count is based entirely on the defendant's withdrawal of $17,000 from the [plaintiff's] checking account. The facts demonstrate that it is the [plaintiff], and not [Bongiorno], that would have standing to assert a statutory theft claim on the basis of the defendant's conduct. [Bongiorno] has not demonstrated a specific, personal and legal interest in the money separate from that of the [plaintiff]. The [plaintiff] owned the checking account from which the money was taken. The trial

the defendant to sell that membership interest to [Bongiorno] was a personal undertaking between them to which the [plaintiff] was not itself a party. The membership interest thereby purchased was personal property that the defendant had the right to sell to [Bongiorno], and [Bongiorno] had the right to receive, own, enjoy, and dispose of as he wished. . . . Therefore, if and to the extent that the defendant, by taking unilateral action to diminish the value of that membership interest before transferring it to [Bongiorno] in exchange for his agreed upon payment for it, denied [Bongiorno] the benefit of his bargain under the contract, [Bongiorno] had standing, in his individual capacity, to sue the defendant for breach of contract to recover compensatory damages for that lost benefit." (Citation omitted; footnote omitted.) *Bongiorno* v. *Capone*, supra, 185 Conn. App. 197. This court further determined that, "[b]ecause . . . [Bongiorno's] contract with the defendant was to purchase only a 50 percent interest in the [plaintiff], the loss of consideration suffered by [Bongiorno] due to the [plaintiff's] loss of $17,000 in aggregate value was only one half of that amount, or $8500. [Bongiorno's] damages for breach of contract must, therefore, be reduced to $8500." Id., 198. Moreover, this court determined that, insofar as Bongiorno alleged in his breach of contract count that he was entitled to compensatory damages as a result of the diminution of value of his own preexisting 50 percent interest in the plaintiff, that portion of the breach of contract count had to be dismissed for lack of subject matter jurisdiction. Id., 180. Accordingly, this court reversed the judgment on Bongiorno's breach of contract claim as to damages only and directed the trial court on remand "to render judgment for [Bongiorno] on his claim of breach of contract in the modified amount of $8500, plus prejudgment statutory interest on that sum from the time the settlement agreement was executed until the time of judgment, at the rate of 10 percent per annum . . . ." Id., 203.

court's finding that the [binding] term sheet and the settlement agreement passed title to the [plaintiff's] business assets from the defendant to [Bongiorno] is incorrect; only the defendant's membership interest in the [plaintiff] was thereby transferred. Under these allegations, the only injuries resulting from the defendant's conduct, as stated in [Bongiorno's] statutory theft count, were suffered by the [plaintiff], not by [Bongiorno] personally. The [plaintiff] is a limited liability company and is, therefore, a distinct legal entity from [Bongiorno], who is simply a member of that entity. Even after [Bongiorno] became the sole member of the [plaintiff], the [plaintiff] remained a distinct legal entity. Because a member of a limited liability company cannot recover for an injury allegedly suffered by the limited liability company, we conclude that [Bongiorno] lacked standing to pursue a claim of statutory theft in this case. Accordingly, we conclude that the trial court lacked subject matter jurisdiction over [Bongiorno's] statutory theft claim." (Citations omitted.) Id., 200–202. Accordingly, this court reversed the judgment rendered in Bongiorno's favor on his statutory theft count and directed the trial court on remand to render judgment dismissing that count for lack of subject matter jurisdiction. Id., 203.

On remand, the trial court, *Genuario*, *J.*, (1) dismissed Bongiorno's statutory theft count and (2) rendered judgment in Bongiorno's favor on his breach of contract count, awarding him $13,055.06 in damages, comprising $8500 plus prejudgment interest in the amount of $4555.06.[7] In addition, on remand, the plaintiff filed a motion to join the 2012 action because it asserted that it was a necessary party. The court denied that motion on February 7, 2019, on the basis that such relief was outside of the scope of this court's remand order.

[7] See footnote 6 of this opinion.

On May 14, 2019, the plaintiff commenced the present action against the defendant. In its original complaint, in one unlabeled count, the plaintiff asserted claims of conversion and statutory theft chiefly predicated on the allegation that the defendant had withdrawn $17,000 from the plaintiff's checking account without its permission or consent.[8] The plaintiff further alleged that it had commenced the present action pursuant to § 52-592,[9] the accidental failure of suit statute.

On July 18, 2019, the defendant filed a motion for summary judgment, claiming that (1) the present action was time barred by the three year limitation period of § 52-577[10] and (2) § 52-592 was inapplicable. On August 26, 2019, the plaintiff filed a memorandum of law in opposition to the defendant's motion for summary judgment, and, on October 17, 2019, the defendant filed a reply memorandum. On October 25, 2019, the court, *Krumeich*, *J.*, denied the defendant's motion for summary judgment, concluding that § 52-592 applied to save

[8] In his posttrial reply brief filed in the present action, the defendant argued that the plaintiff's operative complaint later filed, which was substantively similar to its original complaint, alleged one claim sounding in statutory theft only. The court rejected this argument, determining that the plaintiff had raised claims of statutory theft and conversion. The defendant, on appeal, does not challenge this determination.

[9] General Statutes § 52-592 (a) provides: "If any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff, or, if the plaintiff is dead and the action by law survives, his executor or administrator, may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment."

[10] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

the present action. On November 13, 2019, the defendant filed a motion for reargument and for reconsideration, which the court denied on November 19, 2019.

The present action was tried to the court, *Hon. Edward T. Krumeich II*, judge trial referee, on September 29, 2021. The court admitted exhibits into the record and heard testimony from Bongiorno;[11] the defendant did not testify. The same day, with leave of the court, the defendant filed an amended answer and special defenses, denying the material allegations of the plaintiff's original complaint and asserting as special defenses that the present action was (1) time barred pursuant to § 52-577 and (2) barred pursuant to the doctrine of res judicata.[12] On December 13, 2021, with leave of the court, the plaintiff filed an amended complaint (operative complaint), which was substantively similar to the original complaint except that it additionally alleged in relevant part that the plaintiff had commenced the present action pursuant to § 52-591, in addition to § 52-592.[13] Thereafter, the parties filed posttrial briefs and reply briefs.

[11] The only other witness to testify at trial was Frankie Bongiorno, who was an employee of the plaintiff. Any references to Bongiorno in this opinion are to Frank Bongiorno only.

[12] The defendant filed his original answer and special defenses on June 5, 2020, which asserted these two special defenses. On July 7, 2020, the plaintiff filed a reply denying the two special defenses. The plaintiff did not file a reply to the defendant's amended special defenses. See Practice Book § 10-61 ("[i]f the adverse party fails to plead further [following an amendment to a pleading], pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading").

In his amended answer and special defenses, the defendant asserted a third special defense alleging that, pursuant to the settlement agreement executed by Bongiorno and him, the plaintiff had waived and released its right to bring the present action. The third special defense was not addressed by the parties at trial, in their respective posttrial briefs, or in the court's decision adjudicating the plaintiff's operative complaint. Moreover, although the defendant notes in his principal appellate brief that he had asserted the third special defense, he does not raise any claim of error as to this defense. Accordingly, we consider it abandoned and do not discuss it further.

[13] On December 16, 2019, the defendant filed a motion to strike, inter alia, a portion of the prayer for relief in the plaintiff's original complaint requesting

On February 3, 2022, the court issued a memorandum of decision rendering judgment in favor of the plaintiff on its operative complaint. The court rejected the defendant's statute of limitations defense, concluding that the savings provisions of § 52-591 and/or § 52-592 applied to save the present action from otherwise being time barred pursuant to § 52-577. The court also rejected the defendant's res judicata defense, concluding that, "[b]ecause [this court in *Bongiorno* v. *Capone*, supra, 185 Conn. App. 176] held that Bongiorno lacked standing to raise a conversion or statutory theft claim on behalf of [the plaintiff], these claims were never actually litigated or determined in the [2012 action], so they are not subject to the [defense] of res judicata . . . ." As to the merits of the plaintiff's claims, the court determined that the plaintiff had met its burden to demonstrate that the $17,000 withdrawal constituted conversion and statutory theft by the defendant. As relief, the court awarded the plaintiff a total of $84,044.38, comprising (1) $17,000, plus $16,044.38 in prejudgment interest pursuant to § 37-3a, on its conversion claim and (2) $17,000 on its statutory theft claim, which the court trebled to $51,000 pursuant to § 52-564. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly concluded that the savings provisions of § 52-591

a declaratory judgment that the 2012 action had "failed accidentally as prescribed by . . . [§] 52-592." On February 3, 2020, the court, *Krumeich, J.*, granted in part the defendant's motion to strike, striking the plaintiff's request for a declaratory judgment.

Prior to the start of the evidentiary portion of trial on September 29, 2021, the defendant's counsel stated that the plaintiff had not filed an amended complaint following the court's granting of the defendant's motion to strike. The court, *Hon. Edward T. Krumeich II*, judge trial referee, then instructed the plaintiff to file an amended complaint. In addition, the court (1) noted that the defendant had filed an amended answer and special defenses directed to the plaintiff's original complaint and (2) stated that the defendant did

and/or § 52-592 applied to save the present action from being time barred pursuant to § 52-577. We conclude that the court properly determined that the present action was not time barred by the statute of limitations because it was saved pursuant to § 52-591.[14]

We begin by setting forth the applicable standard of review and relevant legal principles. We deem the standard of review governing claims concerning §§ 52-591 and 52-592 to be one and the same. Thus, a determination of the applicability of § 52-591 "depends on the particular nature of the conduct involved. . . . This requires the [trial] court to make factual findings, and

not need to file an amended responsive pleading directed to the amended complaint that the plaintiff would later file.

[14] Sections 52-591 and 52-592 are distinct statutes with independent savings provisions. In light of our conclusion that the court correctly determined that § 52-591 applied to save the present action, we need not address the merits of the defendant's separate claim that the court's analysis of § 52-592 was incorrect.

In its posttrial briefs, the plaintiff argued that both §§ 52-591 and 52-592 applied to save the present action. In its appellate brief, the plaintiff argues that the trial court properly concluded that the present action was saved pursuant to § 52-592; however, the plaintiff does not respond to the defendant's claim challenging the trial court's application of § 52-591. During oral argument before this court, the plaintiff's counsel agreed with the defendant that the trial court erred in concluding that § 52-591 applied to save the present action; however, counsel maintained that the error was harmless because the trial court correctly had concluded that the present action was saved pursuant to § 52-592. It is of no moment that both parties now share the position that the court's application of § 52-591 was flawed. "The general rule that a judgment, rendered by a court with jurisdiction, is presumed to be valid and not clearly erroneous until so demonstrated raises a presumption that the rendering court acted only after due consideration, in conformity with the law and in accordance with its duty. . . . The correctness of a judgment of a court of general jurisdiction is presumed in the absence of evidence to the contrary. [Our appellate courts] do not presume error. The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132, 74 A.3d 1225 (2013). As the appellant, the defendant must demonstrate that the court improperly concluded that § 52-591 applied to save the present action. We will not presume that the court committed error, even if both parties now submit that error occurred.

[a] finding of fact will not be disturbed unless it is clearly erroneous." (Internal quotation marks omitted.) *Riccio* v. *Bristol Hospital, Inc.*, 341 Conn. 772, 779, 267 A.3d 799 (2022). Whether the court properly applied § 52-591, however, "presents an issue of law over which our review is plenary." (Internal quotation marks omitted.) Id.

Moreover, we exercise plenary review when tasked with interpreting a statute. *Myers* v. *Commissioner of Correction*, 215 Conn. App. 592, 620–21, 284 A.3d 309 (2022), cert. denied, 346 Conn. 1021, 293 A.3d 897 (2023), and cert. denied, 346 Conn. 1021, 293 A.3d 897 (2023). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) Id., 621.

Section 52-591 provides: "When a judgment in favor of a plaintiff suing in a representative character, or for the benefit of third persons, has been reversed, on the ground of a mistake in the complaint or in the proper

parties thereto, and, while the action was pending, the time for bringing a new action has expired, the parties for whose special benefit the action was brought may commence a new action in their individual names at any time within one year after the reversal of the judgment, if the original action could have been so brought."

Like § 52-592, § 52-591 "is a savings statute that is intended to promote the strong policy favoring the adjudication of cases on their merits rather than the disposal of them on the grounds enumerated" in the statute. (Internal quotation marks omitted.) *Riccio* v. *Bristol Hospital, Inc.*, supra, 341 Conn. 780. Section 52-591 "is remedial in nature and, therefore, warrants a broad construction." *Ruddock* v. *Burrowes*, 243 Conn. 569, 575, 706 A.2d 967 (1998). In addition, because § 52-591 is a remedial statute, "any ambiguities should be resolved in a manner that furthers, rather than thwarts, the [statute's] remedial purposes." (Internal quotation marks omitted.) *Dunn* v. *Northeast Helicopters Flight Services, LLC*, 346 Conn. 360, 373, 290 A.3d 780 (2023). Nevertheless, although § 52-591 "is remedial in nature, passed to avoid hardships arising from an unbending enforcement of limitation statutes . . . it should not be construed so liberally as to render statutes of limitation[s] virtually meaningless." (Internal quotation marks omitted.) *Kinity* v. *US Bancorp*, 212 Conn. App. 791, 838, 277 A.3d 200 (2022).

In concluding that § 52-591 applied to save the present action, the court stated that, "[i]n the [2012 action], Bongiorno sued [the defendant] to recover for conversion and statutory theft from [the plaintiff's checking] account but failed to bring the suit in the name of the 'proper party' within the meaning of . . . § 52-591. [*Bongiorno* v. *Capone*, supra, 185 Conn. App. 180]. Although [Bongiorno] commenced suit [in the 2012 action] individually and not derivatively, the object of the [2012 action] was to recover the [$17,000 in] funds

withdrawn without authorization from the [plaintiff's checking] account and the penalty for statutory theft of [the plaintiff's] funds. For this reason, [the 2012 action] can be viewed as brought 'for the benefit of' a third person, [the plaintiff], although Bongiorno, as the [plaintiff's] sole member, was not the proper party and did not have standing to pursue claims of harm to [the plaintiff], as [this court] held [in *Bongiorno* v. *Capone*, supra, 176]. The judgment [in the 2012 action] finding [the defendant] liable for statutory theft was reversed by [this court] because Bongiorno in his individual capacity was not the 'proper party' to raise the claim."

The defendant contends that § 52-591 is inapplicable to save the present action because Bongiorno brought the 2012 action in his individual capacity only and did not assert a derivative claim on the plaintiff's behalf. Section 52-591, however, expressly provides that the prior action must have been commenced by "a plaintiff suing in a representative character, *or for the benefit of third persons* . . . ." (Emphasis added.) We construe the use of the disjunctive "or" to reflect that the legislature intended for § 52-591 to be applicable when the plaintiff in the prior action sued either (1) in a representative capacity *or* (2) for the benefit of another person or entity. See *State* v. *Dennis*, 150 Conn. 245, 248, 188 A.2d 65 (1963) ("[t]he use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative intent of separability"); see also *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 490, 218 A.3d 83 (2019) ("It is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [the statute] must be

construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant." (Internal quotation marks omitted.)). Accordingly, broadly construed, § 52-591 is applicable to save the present action if Bongiorno, notwithstanding having brought the 2012 action in his individual capacity only, sued "for the benefit of" the plaintiff in the 2012 action.

It is apparent that, through the 2012 action, Bongiorno sought the recovery of the $17,000 withdrawn by the defendant from the *plaintiff's* checking account. See *Bongiorno* v. *Capone*, supra, 185 Conn. App. 201 ("[i]n the [2012 action], [Bongiorno's] statutory theft count [was] based entirely on the defendant's withdrawal of $17,000 from the [plaintiff's] checking account"). Bongiorno was the sole member of the plaintiff at the time that he commenced the 2012 action. Although the plaintiff and Bongiorno are distinct legal entities; see id.; we cannot ignore the reality that, as a matter of law, since this court's 2018 decision in *Bongiorno* v. *Capone*, supra, 176, the ability of the sole member of a single-member limited liability company to bring a derivative claim as a direct action under certain circumstances has indeed changed.[15] See *Saunders* v. *Briner*, 334 Conn. 135, 167, 221 A.3d 1 (2019) (concluding "that, when the unique circumstance arises in which the sole member of a limited liability company seeks to remedy a harm suffered by it, a trial court may permit such a member to bring his claims in a direct action, as long as doing so does not implicate the policy justifications that underlie the distinct and separate injury requirement").[16] We are bound by *Saunders*, which, if it had

[15] The defendant notes that Bongiorno, in a memorandum of law in opposition to a motion to dismiss filed in the 2012 action, represented that "[t]he defendant . . . breached the binding term sheet . . . and stole [$17,000] *from . . . Bongiorno*." (Emphasis added.) We do not construe this representation to undermine our conclusion that Bongiorno's attempt to prosecute claims for conversion and statutory theft in the 2012 action was "for the benefit of" the plaintiff for purposes of the saving provision of § 52-591.

[16] Our Supreme Court further stated that "[a] trial court may permit the member of a single-member limited liability company to bring an action

been released at the time, likely would have compelled a different result in *Bongiorno* v. *Capone*, supra, 176, on the issue of Bongiorno's standing to claim harm caused to the plaintiff as a result of the $17,000 withdrawal. Under these unique circumstances, we conclude that the claims of statutory theft and conversion in the 2012 action in their essence were asserted "for the benefit of" the plaintiff notwithstanding that Bongiorno brought the 2012 action in his individual capacity only.[17] See *Bongiorno* v. *Capone*, supra, 201 ("[u]nder these allegations, the only injuries resulting from the defendant's conduct, as stated in [Bongiorno's] statutory theft count,[18] were suffered by the [plaintiff], not by [Bongiorno] personally" (footnote added)).

The defendant further asserts that § 52-591 is inapplicable because the 2012 action did not fail upon a " 'mistake in [the] proper parties.' " We are not persuaded. As the trial court noted, in *Bongiorno* v. *Capone*, supra, 185 Conn. App. 176, this court stated that "it is the

raising derivative claims as a direct action and may order an individual recovery if it finds that to do so will not (1) unfairly expose the company or defendants to a multiplicity of actions, (2) materially prejudice the interests of creditors of the company, or (3) negatively impact other owners or creditors of the company by interfering with a fair distribution of the recovery among all interested parties." *Saunders* v. *Briner*, supra, 334 Conn. 176.

[17] In his principal appellate brief, the defendant also asserts that § 52-591 cannot be applicable to save the present action because (1) § 52-591 requires the judgment in the prior action to have been reversed in toto and (2) the judgment in the 2012 action was rendered on the merits in favor of Bongiorno vis-à-vis his breach of contract claim, such that the judgment was not reversed in full. During oral argument before this court, however, the defendant's counsel modified this position, indicating that § 52-591 would be applicable if (1) Bongiorno had brought the statutory theft claim in a representative capacity, (2) the trial court had rendered judgment in Bongiorno's favor on the statutory theft claim, and (3) this court had reversed the judgment on the statutory theft claim for lack of standing. Thus, counsel appeared to acknowledge that § 52-591 could apply even if the prior judgment was reversed in part only, such that a total reversal of the 2012 action was not a necessary predicate for the application of § 52-591.

[18] Bongiorno's statutory theft and conversion claims were predicated on the same allegations.

[plaintiff], and not [Bongiorno], that would have standing to assert a statutory theft claim on the basis of the defendant's conduct"; id., 201; and, on that basis, this court reversed the judgment rendered in Bongiorno's favor on his statutory theft claim. Id., 202. Mindful of Bongiorno's status as the sole member of the plaintiff when he commenced the 2012 action, and bound by our Supreme Court's reasoning in *Saunders*, we construe the judgment rendered on Bongiorno's statutory theft claim in the 2012 action as having been reversed as a result of Bongiorno's "mistake"[19] vis-à-vis the failure to assert that claim in the name of the "proper party."

As noted in footnote 3 of this opinion, the trial court in the 2012 action concluded that Bongiorno's conversion count was moot because "damages for conversion and [statutory] theft cannot be separately awarded as to the same sum of money." Strictly speaking, the judgment rendered on Bongiorno's conversion count was not "reversed . . . on the ground of a mistake . . . in the proper parties . . . ." In light of the overlap between Bongiorno's statutory theft and conversion claims in the 2012 action, however, we conclude that the rationale set forth in the preceding paragraph necessarily would have applied to Bongiorno's conversion claim, had that claim not been resolved on mootness grounds.[20] Given

[19] We deem the term "mistake" in § 52-591 to be defined in accordance with its ordinary meaning, namely, " 'error, misunderstanding or misconception' "; *Freese* v. *Dept. of Social Services*, 176 Conn. App. 64, 82 n.13, 169 A.3d 237 (2017); which parallels our Supreme Court's interpretation of that term as used in General Statutes § 52-109. Id., citing *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 553 and n.21, 133 A.3d 140 (2016); see also General Statutes § 52-109 ("[w]hen any action has been commenced in the name of the wrong person as plaintiff, the court may, if satisfied that it was so commenced through *mistake*, and that it is necessary for the determination of the real matter in dispute so to do, allow any other person to be substituted or added as plaintiff" (emphasis added)).

[20] We express doubt as to the trial court's conclusion in the 2012 action that the prohibition against awarding damages for conversion and statutory theft with respect to the same sum of money rendered Bongiorno's conversion count moot; rather, the proper course for the court to follow would have been to render judgment for Bongiorno on the conversion count and

the unique circumstances of the present case, and mindful of the remedial nature of § 52-591, we deem the plaintiff's conversion claim to be within the scope of the saving provision of § 52-591.

In sum, we conclude that the court properly concluded that § 52-591 saved the present action from being time barred pursuant to § 52-577.

II

The defendant next claims that the trial court improperly concluded that the present action was not barred pursuant to the doctrine of res judicata. This claim merits little discussion.

"[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. . . . The doctrine of res judicata applies if the following elements are satisfied: the identity of the parties to the actions are the same; the same claim, demand or cause of action is at issue; the judgment in the first action was rendered on the merits; and the parties had an opportunity to litigate the issues fully. . . . Judgments based on the following reasons are not rendered on the merits: want of jurisdiction; pre-maturity; failure to prosecute; unavailable or inappropriate relief or remedy; lack of standing." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 626, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014). "The issue of whether the [doctrine] of res judicata . . . appl[ies] to the facts of this case presents

to adjust the damages awarded to him to avoid a double recovery. See part IV of this opinion. Had the trial court rendered judgment in Bongiorno's favor on the conversion count, it logically follows that this court in *Bongiorno* v. *Capone*, supra, 185 Conn. App. 176, would have reversed that portion of the judgment for lack of standing.

a question of law. Our review, therefore, is plenary." Id., 625.

In the 2012 action, Bongiorno's statutory theft claim was dismissed for lack of standing, and the trial court concluded that his conversion claim was moot.[21] Thus, we agree with the conclusion of the trial court in the present action that Bongiorno's statutory theft and conversion claims "were never actually litigated or determined in the [2012 action] . . . ." Accordingly, the

[21] The trial court in the present action stated that in *Bongiorno* v. *Capone*, supra, 185 Conn. App. 176, this court concluded that Bongiorno lacked standing to bring a statutory theft or a conversion claim in the 2012 action. As we set forth in this opinion, however, the trial court in the 2012 action concluded that Bongiorno's conversion claim was moot; thus, whether Bongiorno had standing to bring his conversion claim was not decided by this court. See footnote 3 of this opinion; see also *Bongiorno* v. *Capone*, supra, 185 Conn. App. 180 n.2 (rejecting defendant's contention that trial court improperly rendered judgment in Bongiorno's favor on his conversion claim on grounds that (1) defendant did not mention conversion claim in his argument and (2) trial court had determined that conversion claim was moot). Nevertheless, because mootness implicates a court's subject matter jurisdiction; see *In re Probate Appeal of Tunick*, 215 Conn. App. 551, 558, 284 A.3d 26 (2022); it necessarily follows that Bongiorno's conversion claim was not disposed of on the merits for purposes of the doctrine of res judicata. We note that, upon concluding that Bongiorno's conversion count was moot, the trial court in the 2012 action should have dismissed that count for lack of subject matter jurisdiction rather than resolving it in the defendant's favor. We do not construe this procedural discrepancy as to the form of the judgment to affect our analysis, as the trial court made clear that it had determined that Bongiorno's conversion count was moot.

In addition, as we explain in footnote 20 of this opinion, we question the propriety of the trial court's conclusion in the 2012 action that Bongiorno's conversion count was moot. If, instead of determining that Bongiorno's conversion count was moot, the trial court had found in Bongiorno's favor on that count and awarded damages to avoid a double recovery, then, necessarily, this court in *Bongiorno* v. *Capone*, supra, 185 Conn. App. 176, would have reversed that portion of the judgment on the basis that Bongiorno lacked standing. Had the history of the present case unfolded in this manner, the doctrine of res judicata would not bar the plaintiff's conversion claim for the same reason that it does not bar the plaintiff's statutory theft claim.

In short, regardless of which jurisdictional ground applied to dispose of Bongiorno's conversion count, the doctrine of res judicata is inapplicable to the plaintiff's conversion claim.

court correctly rejected the defendant's res judicata defense.[22]

III

The defendant next claims that the trial court improperly rendered judgment in the plaintiff's favor on the merits of its statutory theft claim.[23] The defendant contends that the court erred in finding that the $17,000 withdrawal was not predicated on a good faith belief that he was entitled to withdraw the funds. We disagree.

The following legal principles and standard of review govern our resolution of this claim. "The elements of a claim of statutory theft under § 52-564 provide that '[a]ny person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages.' [Our Supreme Court] has explained that '[s]tatutory theft under . . . § 52-564 is synonymous with larceny [as defined in] General Statutes § 53a-119 . . . .' " *Scholz* v. *Epstein*, 341 Conn. 1, 18, 266 A.3d 127 (2021). Section 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate

[22] The defendant argues that the trial court's rejection of his res judicata defense was inconsistent with its conclusion that § 52-592 applied to save the present action. As we explain in footnote 14 of this opinion, we need not consider whether the trial court's application of § 52-592 was proper. The defendant further argues that the trial court improperly relied on this court's decision in *Strazza Building & Construction, Inc.* v. *Harris*, 207 Conn. App. 649, 262 A.3d 996 (2021), aff'd, 346 Conn. 205, 288 A.3d 1017 (2023). Our review of the trial court's decision reveals that the court cited *Harris* for the purpose of setting forth the elements of the doctrine of res judicata. Thus, we do not discern any improper reliance on that case by the trial court.

We note that the court also concluded that the doctrine of collateral estoppel was not applicable to the present action. The defendant does not raise any claim of error on appeal regarding the court's collateral estoppel analysis. Accordingly, we need not discuss the court's determination regarding the doctrine of collateral estoppel further.

[23] The defendant does not claim on appeal that the court committed error vis-à-vis the merits of the plaintiff's conversion claim.

the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. . . .'"[24]

"Because statutory theft is synonymous with larceny . . . a good faith belief that one owns the property at issue will negate the required intent. One who takes property in good faith, under fair color of claim or title, honestly believing that . . . he has a right to take it, is not guilty of larceny even though he is mistaken in such belief, since in such case the felonious intent is lacking. . . .

"Our Supreme Court has stated that the term good faith has a well defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. . . . It has been well defined as meaning [a]n honest intention to abstain from taking an unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. . . . It is a subjective standard of honesty of fact in the conduct or transaction concerned, taking into account the person's state of mind, actual knowledge and motives. . . . Whether good faith exists is a question of fact to be determined from all the circumstances. . . . Accordingly, we apply the clearly erroneous standard to the court's fact-finding.

"The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence

[24] The $17,000 withdrawal occurred in 2012. Section 53a-119 was amended by No. 13-282, § 2, of the 2013 Public Acts, and by No. 14-199, § 4, of the 2014 Public Acts, both of which made changes to the statute that are not relevant to our analysis. Accordingly, our reference here is to the current revision of the statute.

and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed . . . .'' (Citations omitted; internal quotation marks omitted.) *Fernwood Realty, LLC* v. *AeroCision, LLC*, 166 Conn. App. 345, 367–69, 141 A.3d 965, cert. denied, 323 Conn. 912, 149 A.3d 981 (2016). It was the defendant's burden to prove that the $17,000 withdrawal was made in good faith. Id., 368.

At trial, Bongiorno testified in relevant part as follows. While Bongiorno and the defendant were both members of the plaintiff, they received compensation from the plaintiff in the form of distributions. Except when the plaintiff issued individual reimbursements for business expenses paid by one of them personally, Bongiorno and the defendant received distributions from the plaintiff in equal amounts, with the distributions disbursed upon their mutual authorization.[25] When the plaintiff had sufficient funds to allow for it, Bongiorno and the defendant each received weekly $1000 distributions; however, there were weeks when neither of them received a distribution, and there was no practice in place providing for retroactive payments for weeks when no distributions were disbursed. Prior to making the $17,000 withdrawal, the defendant did not inform

[25] As Bongiorno explained in his testimony, ''if a check was written out to [the defendant], there was a check to match for myself, unless . . . we had to buy something for the business and we had to be reimbursed . . . . [Except for reimbursements], it was always if [the defendant] got a check, I got a check. We would talk about it, we'd agree upon it, and [the defendant] would write out the check. . . . [I]f we needed a check, [the defendant] and I would discuss it, and, if we agreed, we would make out the check in equal amounts.''

Bongiorno that he believed that he was owed an arrearage for any unpaid weekly distributions. According to a document admitted into evidence at trial that reflected the plaintiff's distributions to Bongiorno and the defendant in 2012, the last weekly $1000 distribution disbursed to Bongiorno and the defendant occurred on June 29, 2012.

Bongiorno further testified that (1) in arriving at the $200,000 purchase price for the defendant's membership interest in the plaintiff, he and the defendant took into consideration the plaintiff's "accounts receivable, accounts payable, money in the checkbook, and assets," which included the plaintiff's checking account holding approximately $60,000, (2) the defendant never informed him of the defendant's intention to withdraw $17,000 from the plaintiff's checking account, (3) he did not authorize the defendant to do so, and (4) the defendant had ceased acting as a manager of the plaintiff on August 28, 2012, when the binding term sheet was executed.

In rendering judgment for the plaintiff on its statutory theft claim, the court stated in relevant part: "[The defendant] did not testify at trial and offered no direct evidence as to the reason for the [$17,000] withdrawal.[26] In his posttrial brief, the defendant sought to justify receipt of the funds as past due distributions to which he claimed to be entitled as a member [of the plaintiff] and noted that as of August 29, 2012, he was still a member of the [plaintiff] until September 7, 2012, and was authorized to withdraw funds from the [plaintiff's checking] account.

"The court finds that the [defendant's] withdrawal of $17,000 from the [plaintiff's checking] account was not

[26] "The defendant offered records related to the distributions by [the plaintiff] to its members that included weekly distributions of $1000 to each member through June 29, 2012, and no distributions thereafter before the sale closed on September 7, 2012."

authorized and [the defendant] intended to take funds to which he knew he was not entitled under the terms of his agreement with Bongiorno. The court finds that [the defendant] did not have a good faith belief he was entitled to receive distributions that were not provided in the binding term sheet, and he understood that the buyout price was set based on a valuation of [the plaintiff's] estimated assets as of August 28, 2012, includ[ing] the balance of the checking account from which he withdrew $17,000 the next day.

"The court credits the testimony of Bongiorno that the members' practice had been to withdraw $1000 per [week] each as compensation by matching checks to each member on the express authority of both members, who approved each withdrawal for compensation when funds were available and not needed for other purposes. There were weeks when no funds were withdrawn for members' compensation; there was not any agreement among the members for funds to be withdrawn automatically weekly or to repay arrears from weeks in which members' draw[s] [were] not taken. Both members understood and agreed that member compensation would only be withdrawn from the [plaintiff's checking] account when both members agreed to do so.

"As of August 28, 2012, neither Bongiorno nor [the defendant] understood that [the defendant] would receive any assets of [the plaintiff], and the only funds he was to receive by virtue of his membership were limited to the purchase price of his interest set in the binding term sheet. There was no agreement for [the plaintiff] to pay any past or future compensation to [the defendant] at the time of his de facto withdrawal from the management of the business on August 28, 2012, when the binding term sheet was executed.[27] Bongiorno

[27] "The evidence disclosed that [Bongiorno and the defendant] were at odds for a considerable period that culminated in the settlement reflected in the binding term sheet and subsequent settlement agreement. No member

did not discuss with [the defendant] any claim for compensation, and [the defendant] did not disclose his intention to take any funds out of the [plaintiff's checking] account, [which] balance had been considered during negotiation of the buyout for valuation of the corporate assets and setting the purchase price of [the defendant's] interest. The parties understood and agreed that [the defendant] would receive nothing for his interest in [the plaintiff] other than the agreed buyout price in the binding term sheet payable upon closing of the settlement. [The defendant] had no right to withdraw any funds from [the plaintiff's] checking account after the binding term sheet was executed.

"[The defendant] did not disclose his intention to take funds out of the [plaintiff's checking] account after the binding term sheet was executed because [the defendant] knew that Bongiorno would not authorize the withdrawal or would have adjusted the purchase price of [the defendant's] interest in [the plaintiff] accordingly to deduct the amount withdrawn. [The defendant's] plan was to keep the withdrawal secret from Bongiorno until after the buyout was closed and he received the $200,000 payment from him. The $17,000 withdrawn from the [plaintiff's checking] account was not withdrawn by [the defendant] for payment of any debts or obligations of [the plaintiff], including compensation owed by [the plaintiff], which compensation to [the defendant] was not authorized or permitted under the binding term sheet, but was withdrawn and kept by [the defendant] for his personal use without authority." (Footnotes in original.)

In summary, the court determined that "[a]ll the elements of a statutory theft claim are satisfied here . . .

compensation had been paid since June 29, 2012. The failure to continue the weekly compensation payments is evidence [Bongiorno and the defendant] did not agree on continuing the practice of weekly draws and had suspended members' compensation while the parties were in dispute and the buyout was in contemplation and negotiation."

based on [the defendant's] intentional and unauthorized withdrawal of $17,000 from [the plaintiff's] checking account that harmed the [plaintiff] by depriving it of specifically identified cash owned by [it] . . . . The court finds that [the defendant] did not withdraw the money based on a reasonable, good faith belief the funds were due [to] him but with the intention to deprive [the plaintiff] of its funds for his personal benefit. The burden was on [the defendant] to prove that he had a good faith belief he was owed the money he withdrew from [the plaintiff's checking] account and he was authorized to make the withdrawal. . . . The defendant chose not to testify and the credible evidence of his conduct under the totality of the circumstances indicated he did not withdraw the funds in good faith but did so to receive a benefit to which [the defendant] knew he was not entitled to receive under the buyout agreement." (Citations omitted; footnotes omitted.)

We conclude that the court's finding that the defendant did not have a good faith basis to justify the $17,000 withdrawal is not clearly erroneous. As the court reasonably determined, the binding term sheet, which was admitted into the record as a full exhibit, did not indicate that the defendant was to acquire any of the plaintiff's assets, including any funds in its checking account, as part of the sale of his membership interest in the plaintiff. In addition, Bongiorno's testimony, as credited by the court; see *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022) ("[i]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)); supports the court's subordinate findings that (1) to determine the plaintiff's value for the purposes of the purchase and sale transaction, Bongiorno and the defendant took into account the plaintiff's assets, which

included the $17,000 withdrawn by the defendant from the plaintiff's checking account, (2) authorization by both Bongiorno and the defendant was required for either individual to access the plaintiff's funds, and Bongiorno did not authorize the defendant to make the $17,000 withdrawal, (3) Bongiorno and the defendant were not guaranteed to receive weekly $1000 distributions from the plaintiff, and (4) there was no policy in effect that provided for retroactive payments of any weekly distributions that were not disbursed. The court's subordinate findings, as supported by the record, adequately buttress the court's finding that the defendant lacked a good faith basis to believe that he was entitled to the $17,000 that he withdrew from the plaintiff's checking account. Accordingly, we reject the defendant's claim.

IV

Last, the defendant claims that the trial court committed error in awarding certain damages, including prejudgment interest pursuant to § 37-3a, to the plaintiff. For the reasons that follow, we agree.

"Our standard of review applicable to challenges to damages awards is well settled. . . . [T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [If], however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary." (Internal quotation marks omitted.) *RCN Capital, LLC* v. *Chicago Title Ins. Co.*, 196 Conn. App. 518, 523, 230 A.3d 740 (2020).

The following additional procedural history is relevant to our resolution of the defendant's claim. In its posttrial briefs, the plaintiff requested the following relief vis-à-vis its operative complaint: (1) $17,000, plus prejudgment interest accrued dating back to August 29,

2012, on its conversion claim; and (2) $17,000, trebled to $51,000 pursuant to § 52-564, on its statutory theft claim. As the "[t]otal damage award requested" on its claims, however, the plaintiff sought $51,000, plus prejudgment interest accrued on the amount of $17,000. In other words, the plaintiff's request for relief recognized that the plaintiff could not recover $17,000 on its conversion claim in addition to that amount trebled on its statutory theft claim. In his posttrial briefs, the defendant argued that, in the event the court reached the issue of damages, the common-law rule against double recovery would limit the plaintiff's actual (i.e., pre-trebled) damages as to its statutory theft claim to $8500 because Bongiorno had recovered $8500 in damages on his breach of contract claim in the 2012 action, which represented one half of the $17,000 in actual damages sought by the plaintiff in the present action.[28]

The court awarded the plaintiff damages in the total amount of $84,044.38, which consisted of the following: (1) on the conversion count, $17,000, plus $16,044.38 in prejudgment interest pursuant to § 37-3a, which the court calculated at a rate of 10 percent per year from August 29, 2012, to the date of the judgment, and (2) on the statutory theft count, $17,000, which the court trebled to $51,000 pursuant to § 52-564. The court rejected the defendant's argument that Bongiorno's recovery of $8500 in damages on his breach of contract claim in the 2012 action had any bearing on the plaintiff's damages in the present action, explaining that "[t]he measure of compensatory damages imposed . . . on Bongiorno's breach of contract award [in the 2012 action] has no application to the damages awardable to [the plaintiff] for conversion and statutory theft [in the present action]. Bongiorno's claim that the interest

[28] At the time that he filed his posttrial briefs, the defendant maintained that the sole claim asserted by the plaintiff in the present action sounded in statutory theft. See footnote 8 of this opinion.

[in the plaintiff that] he purchased [from the defendant] was diminished by [the $17,000 withdrawal] is a separate claim from that asserted by [the plaintiff] in this case for conversion of its funds and a different measure of damages applies. Bongiorno was compensated for his loss caused by [the defendant's] breach of contract that reduced the value of the interest Bongiorno purchased from [the defendant]. Bongiorno's recovery was as an individual for his personal losses, not as an agent of the [plaintiff] or for losses to the [plaintiff] for which [this court] ruled he had no standing. [The plaintiff] has the right to recover the full amount of its losses, including interest, from funds withdrawn without authorization from [its checking account] and converted by [the defendant] and to treble those damages from the withdrawal under . . . § 52-564 . . . . Had these funds not been withdrawn, they would have been available to pay [the plaintiff's] debts and obligations, which would not have included any compensation to [the defendant]." (Footnote omitted.)

In a footnote, the court further stated that awarding the plaintiff damages without adjusting for Bongiorno's $8500 recovery in the 2012 action would not violate the common-law rule against double recovery "because the injuries are different, and the damages are not awarded to the same party. [The defendant] has cited no authority to offset the damages award to [the plaintiff] by payments he may have made to Bongiorno. Any windfall to Bongiorno as sole member of [the plaintiff] because he personally received funds to satisfy the judgment in the [2012] action, and assuming [the plaintiff] recovered the full amount withdrawn from its [checking] account awarded as damages in this action so he would benefit from the increase in [the plaintiff's] assets, is purely incidental to the damages awarded in separate actions for losses sustained by different parties. There are no equitable reasons [that] any payment to Bongiorno in

satisfaction of the judgment in his favor [in the 2012 action] should be set off against the recovery by [the plaintiff] in this action to benefit [the defendant], the wrongdoer found liable in both actions."

With respect to the court's damages award, the defendant claims that the court (1) violated the common-law rule against double recovery in (a) allowing the plaintiff to recover the full amount of damages on both its conversion and statutory theft claims, which were predicated on the same occurrence, namely, the $17,000 withdrawal, and (b) failing to account for Bongiorno's recovery of $8500 in damages on his breach of contract claim in the 2012 action, and (2) abused its discretion in calculating the prejudgment interest awarded pursuant to § 37-3a vis-à-vis the plaintiff's conversion claim. We address these claims in turn.

A

We first consider the defendant's claims predicated on the common-law rule against double recovery. "[T]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (Internal quotation marks omitted.) *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 663, 935 A.2d 1004 (2007). "Duplicate recoveries must not be awarded for the same underlying loss under different legal theories. . . . Although a plaintiff is entitled to allege alternative theories of liability in separate claims, he is not entitled

to recover twice for harm growing out of the same transaction, occurrence or event." (Citation omitted.) *Catalina* v. *Nicolelli*, 90 Conn. App. 219, 225, 876 A.2d 588 (2005).

We agree with the defendant that the plaintiff was compensated twice for the same loss as a result of the court permitting the plaintiff to recover the full amount of its damages on both its conversion and statutory theft claims.[29] "Our Supreme Court has distinguished the tort of conversion from statutory theft as follows: The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. . . . Thus, [c]onversion is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm. . . . Conversion can be distinguished from statutory theft as established by § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Internal quotation marks omitted.) *Hospital of Central Connecticut* v. *Neurosurgical Associates, P.C.*, 139 Conn. App. 778, 789–90, 57 A.3d 794 (2012). Given the overlap between the plaintiff's claims of conversion and statutory theft, both of which were

[29] The plaintiff does not address this issue in its appellate brief. During oral argument before this court, the plaintiff's counsel agreed with the defendant that the plaintiff should not have recovered damages on its conversion claim in addition to trebled damages vis-à-vis its statutory theft claim.

based on the $17,000 withdrawal, we conclude that the damages that the court awarded on these claims were duplicative.

We further agree with the defendant that Bongiorno's recovery of $8500 on his breach of contract claim in the 2012 action capped the actual damages recoverable by the plaintiff on its conversion and statutory theft claims in the present action at $8500. The $17,000 withdrawal was the crux of Bongiorno's breach of contract claim in the 2012 action, as well as the plaintiff's statutory theft and conversion claims in the present action. As we discussed in part I of this opinion, although we recognize that Bongiorno and the plaintiff are distinct legal entities; *Bongiorno* v. *Capone*, supra, 185 Conn. App. 201; Bongiorno's status as the sole member of the plaintiff creates a unique situation that prevents us from completely separating the relief awarded to Bongiorno in the 2012 action and the relief awarded to the plaintiff in the present action. See *Saunders* v. *Briner*, supra, 334 Conn. 174 ("the concept of a corporate injury that is distinct from any injury to [its sole member] approaches the fictional" (internal quotation marks omitted)). Applying the rationale of *Saunders* to the unique history and circumstances of the present case, the inescapable conclusion is that a windfall resulted from the court awarding the plaintiff $17,000 in actual damages on both its statutory theft and conversion claims in the present action, notwithstanding Bongiorno's recovery of $8500 on his breach of contract claim in the 2012 action.

Synthesizing the foregoing determinations, we conclude that the court improperly awarded the plaintiff $17,000 on its conversion claim and $51,000 in trebled damages on its statutory theft claim. Putting aside the court's award of prejudgment interest vis-à-vis the plaintiff's conversion claim, which we address in part IV B

of this opinion, we conclude that the plaintiff was entitled to (1) $8500 on its conversion claim and (2) $17,000 on its statutory theft claim, calculated by (a) trebling $8500 to $25,500 pursuant to § 52-564 and (b) subtracting $8500 from the trebled amount to avoid duplicative damages.

B

We next turn to the defendant's claim that the court abused its discretion in awarding the plaintiff prejudgment interest pursuant to § 37-3a on the plaintiff's conversion claim in the amount of $16,044.38, which the court calculated on the principal amount of $17,000 at a rate of 10 percent per year from August 29, 2012, to the judgment date. The defendant maintains that the court improperly (1) calculated prejudgment interest on the principal amount of $17,000 and (2) determined that prejudgment interest began to accrue on August 29, 2012, the date of the $17,000 withdrawal, rather than the date on which the plaintiff commenced the present action.[30] We address each claim in turn.

Section 37-3a (a) provides in relevant part that "interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . as damages for the detention of money after it becomes payable. . . ." "[A] court's determination [as to whether interest should be awarded under § 37-3a] should be made in view of the demands of justice rather than through the application of any arbitrary rule. . . .

[30] The defendant also asserts that "the plaintiff's dilatory actions in bringing suit caused the interest to grow exponentially," such that any award of prejudgment interest should "[factor] in the plaintiff's diligence in pursuing its claim." The defendant does not identify any dilatory conduct by the plaintiff in the record. Moreover, the plaintiff timely filed the present action pursuant to § 52-591. See General Statutes § 52-591 ("the parties for whose special benefit the action was brought may commence a new action in their individual names at any time within one year after the reversal of the judgment"). Thus, this assertion is unavailing.

Whether interest may be awarded depends on whether the money involved is payable . . . and whether the detention of the money is or is not wrongful under the circumstances. . . . [T]he primary purpose of § 37-3a . . . is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money." (Citations omitted; internal quotation marks omitted.) *Sosin* v. *Sosin*, 300 Conn. 205, 229–30, 14 A.3d 307 (2011).

"We review an award of prejudgment interest under the abuse of discretion standard. The allowance of prejudgment interest as an element of damages is an equitable determination and a matter lying within the discretion of the trial court. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Citation omitted; internal quotation marks omitted.) *Hamann* v. *Carl*, 196 Conn. App. 583, 601, 230 A.3d 803, cert. denied, 335 Conn. 949, 238 A.3d 22 (2020), and cert. denied, 335 Conn. 949, 238 A.3d 22 (2020).

In part IV A of this opinion, we concluded that the plaintiff was entitled to $8500, rather than $17,000, on its conversion claim. It necessarily follows that the trial court should have calculated prejudgment interest on the principal amount of $8500, such that the court's award of $16,044.38, calculated on the principal amount of $17,000, cannot stand.

We further conclude that the court did not commit error in determining that prejudgment interest began to accrue on August 29, 2012. "The date the interest begins to run pursuant to § 37-3a is factual because it necessarily involves a determination of when the

wrongful detention began." (Emphasis omitted.) *Paulus* v. *LaSala*, 56 Conn. App. 139, 150, 742 A.2d 379 (1999), cert. denied, 252 Conn. 928, 746 A.2d 789 (2000); see also *Patron* v. *Konover*, 35 Conn. App. 504, 517, 646 A.2d 901 ("Th[e] allowance [of prejudgment interest under § 37-3a] turns on whether the detention of the money is or is not wrongful under the circumstances. . . . If the trial court determines that one party has wrongfully detained funds, it must next determine the date the wrongful detention began." (Citations omitted; internal quotation marks omitted.)), cert. denied, 231 Conn. 929, 648 A.2d 879 (1994). In the present case, the court found that the defendant had wrongfully withheld the $17,000 since August 29, 2012, when he withdrew that amount from the plaintiff's checking account. Thus, we discern no error by the court in identifying August 29, 2012, as the date on which prejudgment interest began to accrue.[31]

In sum, we conclude that the court's award of damages, including the prejudgment interest awarded pursuant to § 37-3a vis-à-vis the plaintiff's conversion claim, is improper. On remand, the court is directed to award the plaintiff damages as follows. As to the plaintiff's conversion claim, the court shall award $8500, plus prejudgment interest calculated at a rate of 10 percent per year from August 29, 2012, to the date of judgment.[32] As to the plaintiff's statutory theft claim, the court shall award $17,000, comprising $25,500 ($8500 multiplied by

[31] The defendant contends that his "retention of [the] money could not be deemed 'wrongful' prior to [the plaintiff] making demand through the [present] action . . . ." We are not persuaded that the $17,000 withdrawal was not "wrongful" for purposes of § 37-3a until the commencement of the present action. See, e.g., *Patron* v. *Konover*, supra, 35 Conn. App. 517 ("[w]here the claim rests on a breach of contract, statutory interest [pursuant to § 37-3a] accrues from the date the contract was breached").

[32] "[P]ursuant to *Paulus* v. *LaSala*, [supra, 56 Conn. App. 150], § 37-3a provides interest to the date final judgment is rendered." *Bongiorno* v. *Capone*, supra, 185 Conn. App. 198 n.15.

three) in trebled damages pursuant to § 52-564 less the $8500 awarded on the plaintiff's conversion claim.

The judgment is reversed only as to damages and the case is remanded with direction to award the plaintiff damages consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CHARLES WILLIAMS *v.* COMMISSIONER OF CORRECTION (AC 45442)

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

Syllabus

The petitioner, who had been convicted of the crime of unlawful restraint in the first degree, sought a writ of habeas corpus, claiming, inter alia, that he had been deprived of his right to due process in violation of *Brady* v. *Maryland* (373 U.S. 83) when the state failed to disclose to him at his criminal trial a written, sworn statement the victim had given to the police in which she did not mention the incident that led to the petitioner's conviction. The petitioner allegedly had sexually assaulted the victim and, two weeks later, allegedly punched her in the face. Approximately two months after those incidents, the victim reported to the police the incident in which the petitioner allegedly punched her. At that time, she also gave the police the five page statement in which she identified the petitioner as her assailant and detailed the history of their relationship but did not mention the alleged sexual assault, which she did not report to the police until five months later. The petitioner was charged in connection with the first incident with two counts of sexual assault in the first degree and one count of unlawful restraint. A jury found him not guilty of the sexual assault charges. In his habeas petition, the petitioner claimed that the victim's undisclosed statement was material to his defense because the state's case against him rested entirely on the victim's testimony and credibility, the statement represented a comprehensive history of their relationship, and the not guilty verdicts on the sexual assault charges indicated that the jury had rejected portions of the victim's testimony. The habeas court rejected the petitioner's claim that the state violated *Brady* by failing to disclose the victim's statement. The court determined, and the respondent, the Commissioner of Correction, did not challenge on appeal, that the prosecution had suppressed the statement and that it was favorable to the petitioner.

The court further determined, however, that the petitioner failed to establish that the statement was material to his defense, reasoning that the statement would have been cumulative of information that was available to the petitioner at his criminal trial and would not have resulted in a different outcome. The court therefore denied the habeas petition and denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petitioner certification to appeal; the petitioner's *Brady* claim involved issues that were debatable among jurists of reason and that could have been resolved in a different manner.

2. The habeas court improperly determined that the petitioner failed to demonstrate that the victim's statement to the police was material under *Brady*: the state's case against the petitioner hinged entirely on the victim's testimony, which the statement could have significantly undermined had it been disclosed to the defense, as the statement was qualitatively different from and thus not cumulative of other impeachment material that was available to the defense in that it described incidents of abuse the petitioner had perpetrated on the victim during a six year period both prior to and after the alleged sexual assault, the defense had no similar statement during the criminal trial that set forth a comprehensive history of the victim's relationship with the petitioner, and, although the defense had other exhibits that detailed other specific incidents of abuse the victim had reported to the police, the utility of those exhibits to attack the victim's failure to report the sexual assault incident was less than the utility of the undisclosed statement; moreover, the petitioner's ability to attack the victim's credibility on other grounds did not undermine the importance of her omission of the sexual assault incident from her undisclosed statement, as, contrary to the respondent's assertion that the victim's statement was not material because the petitioner's counsel had argued to the jury that the victim's accusations were not credible, counsel's argument would have been materially enhanced had the jury known of the undisclosed statement; furthermore, despite the respondent's claim that the undisclosed statement was as inculpatory as it was exculpatory, the petitioner's criminal trial counsel testified that he would have cross-examined the victim only about her omission of the sexual assault incident had the victim's statement been disclosed to the defense; additionally, the jury's actions supported the conclusion that a reasonable probability existed that disclosure of the statement could have led to a different outcome for the petitioner, as the not guilty verdicts on the sexual assault charges indicated the jury's doubt about the victim's credibility, and the jury's note to the court during its deliberations asking whether unlawful restraint had to be related to the sexual assault charges indicated that the jury analyzed the victim's testimony closely as to each charge.

Argued April 26—officially released August 22, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Chaplin*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court; subsequently, the court, *Chaplin*, *J.*, issued an articulation of its decision. *Reversed*; *judgment directed*.

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Jo Anne Sulik*, senior assistant state's attorney, and *Juliana Waltersdorf*, assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. The petitioner, Charles Williams, appeals following the denial of his petition for certification to appeal from the habeas court's judgment denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion in denying his petition for certification to appeal, (2) improperly concluded that certain undisclosed impeachment evidence was not material under *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and (3) improperly concluded that the petitioner failed to prove that his trial counsel provided ineffective assistance. We agree with the petitioner's first two claims, and, accordingly, we reverse the judgment of the habeas court.[1]

[1] In light of our conclusion in part II of this opinion that the petitioner is entitled to a new criminal trial because habeas exhibit 2j was not disclosed by the state prior to his criminal trial, is favorable to the petitioner, and is material under *Brady*, we do not consider the petitioner's ineffective assistance of counsel claim.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. "The victim[2] and the [petitioner] met in 2001 and began dating in 2007. Over time, the [petitioner] became physically, verbally, and emotionally abusive. On some occasions, the victim reported the [petitioner's] abuse to the police, friends, or family, but, on other occasions, she did not report the abuse because she learned that she 'had to kind of pick [her] battles' with the [petitioner]. In April, 2012, the victim decided to end her relationship with the [petitioner]. The [petitioner] was upset and began stalking the victim. During this period, the victim and the [petitioner] filed police reports against each other, and, as a result of one of the [petitioner's] complaints, the victim was criminally charged.[3]

"The victim thereafter moved from Bloomfield to Hartford and changed her phone number on several occasions. Nevertheless, the [petitioner] continued to come to the victim's house and call her even though the victim told him that she did not want to be in a relationship with him and that she wanted him to stop contacting her. When confronting the victim, the [petitioner] would often threaten to call the police and make false reports so that she would be taken away from her family. During this period, the victim acquiesced on several occasions to having sexual intercourse with the

[2] 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.

[3] "In November, 2013, the state entered a nolle prosequi in the victim's case after a witness admitted to filing a false incident report and pleaded guilty to making a false statement." *State* v. *Williams*, 172 Conn. App. 820, 823 n.2, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017).

[petitioner] because she knew that he would leave her house afterward.

"On February 14, 2013, the victim was at home with her infant grandson (February 14 incident). The victim put her grandson down for his nap in her bedroom at 10 a.m. Sometime thereafter, while the victim's grandson was still napping, the [petitioner] arrived at her house and began yelling at her because he believed that she was sleeping with other men. The victim asked the [petitioner] to leave her house, but he continued to yell at her. The victim told the [petitioner] that she was not sleeping with anyone else and asked him to speak more quietly because her grandson was taking his nap. The [petitioner] demanded sexual intercourse and threatened to file a false police report against the victim if she did not have sexual intercourse with him.

"As the [petitioner] advanced on her, the victim backed away from the [petitioner] and into her bedroom. Following her into the bedroom, the [petitioner] pulled a knife out of his pocket and told the victim to 'stop acting up.' The victim again asked the [petitioner] to leave, but the [petitioner] told the victim to perform oral sex on him because it was Valentine's Day. When the victim continued to refuse, the [petitioner] grabbed the victim by her hair and threw her down on the bed, and the victim fell onto the floor.

"The victim began performing oral sex on the [petitioner]. When the victim began crying, the [petitioner] became angry and ordered her to stop crying because she was 'making [him] soft.' When the victim continued to cry, the [petitioner] threw her on the bed, pulled down her pants, and vaginally penetrated her from behind while holding her down on the bed by her arms. When the victim heard her grandson crying, she asked the [petitioner] to stop, but he continued to penetrate

her until he ejaculated. The [petitioner] complained that the victim 'ruined his sex' and then left her house.

"On February 28, 2013, the [petitioner] returned to the victim's house while she was there with her daughters and grandsons (February 28 incident). The [petitioner] demanded to know her new phone number and with whom she was having sexual intercourse. The situation escalated and the [petitioner] punched the victim in the face, breaking her nose. Thereafter, the [petitioner] left her house. The victim did not want to report the incident to the police, but one of her daughters called the police that same day. Although the victim spoke to the investigating officer and identified her assailant as a former boyfriend, she refused to provide the [petitioner's] name at that time because she was afraid of him.

"Following the February 28 incident, the victim began living in domestic violence shelters and stopped going to her house and telling people where she was living in an attempt to get away from the [petitioner]. During this period, the victim received medical and psychological treatment. Assisted by the psychological treatment she was receiving, in April, 2013, the victim decided to identify the [petitioner] as her assailant in the February 28 incident. In September, 2013, the victim further reported the February 14 incident to the police.

"The [petitioner] was arrested in connection with the February 14 incident and charged with two counts of sexual assault in the first degree and one count of unlawful restraint in the first degree. While the [petitioner] was incarcerated and awaiting trial, he frequently spoke about his case with Elon Henry, a fellow inmate with whom he was previously acquainted. On December 5, 2014, three days before the [petitioner's] trial was scheduled to commence, the [petitioner] told Henry that 'this girl [i.e., the victim] got me going

through it right now. I'm a kill this girl . . . with my bare hands, and if I don't kill her I'm a get close and I'm a make her give me head for like an hour this time.' The threatening manner in which the [petitioner] spoke concerned Henry, and he reported the [petitioner's] statement to a correctional officer that evening.

"Trial commenced on December 8, 2014. The [petitioner] presented an alibi defense, supported by his own testimony and the testimony of his mother, his sister, his nephew, and his girlfriend's cousin. The jury found the [petitioner] guilty of unlawful restraint in the first degree but not guilty of the two counts of sexual assault in the first degree. Following the jury verdict, the [petitioner] pleaded guilty to being a persistent serious felony offender. The [petitioner] was sentenced to ten years [of] imprisonment." (Footnotes omitted; footnote added; footnote in original.) *State* v. *Williams*, 172 Conn. App. 820, 823–26, 162 A.3d 84, cert. denied, 326 Conn. 913, 173 A.3d 389 (2017). Attorneys Walter Bansley and Jennifer Smith represented the petitioner in the criminal proceedings.

Following his conviction, the petitioner filed the operative amended petition for a writ of habeas corpus in this matter on August 16, 2019. The petitioner claimed that the state had violated *Brady* v. *Maryland*, supra, 373 U.S. 87, by failing to disclose material impeachment evidence, which included a statement that the victim made to the police on April 24, 2013, detailing the history of her relationship with the petitioner (exhibit 2j), and a police report concerning an alleged burglary of the victim's home by the petitioner on February 22, 2013 (exhibit 2k). Additionally, the petitioner claimed that Bansley[4] had rendered ineffective assistance during the

[4] In the operative petition, the petitioner alleged that both of his trial attorneys, Bansley and Smith, had rendered ineffective assistance, but on appeal he pursues this claim only as to Bansley.

criminal trial by failing to cross-examine the victim about the information in a police report pertaining to the February 28 incident (exhibit 2p).[5] The respondent, the Commissioner of Correction, filed a return on August 23, 2019, asserting a lack of sufficient information to admit or deny the petitioner's claims.[6]

The habeas court, *Chaplin*, *J.*, held a two day trial on the petition on March 10, 2020, and December 3, 2021, at which the petitioner presented the testimony of the victim, Bansley, and Detectives Phillip Fuschino and Cheryl Gogins of the Hartford Police Department. The petitioner submitted twenty-two exhibits, and the respondent submitted one exhibit, all of which the court admitted into evidence and considered in its decision. At the habeas trial, Bansley testified that his primary strategy of defense in the petitioner's case was to establish that the victim "was a liar" and "to impeach her with everything [he] could."

On March 4, 2022, the court issued a memorandum of decision in which it denied the petitioner's *Brady* claim, finding that, although the subject police report was suppressed and the information therein was favorable to the petitioner, it was not material because it was "cumulative of the information available to the petitioner at trial . . . ."[7] In addition, the court rejected the petitioner's ineffective assistance of counsel claim.

[5] The petitioner also alleged that his conviction and incarceration constituted due process violations, but he has abandoned these claims on appeal.

[6] The respondent also alleged, as to the petitioner's due process claims, that the petitioner had failed to state a claim upon which relief may be granted and that the claims were procedurally defaulted. The petitioner filed a reply on August 27, 2019, denying the respondent's allegations.

[7] On September 14, 2022, the petitioner filed a motion for articulation asking the habeas court "to articulate whether it considered the petitioner's exhibit 2k" in its *Brady* analysis and, if so, to articulate the effect of exhibit 2k on its conclusion that the withheld evidence was not material. The petitioner stated that, although the habeas court discussed exhibit 2j in its memorandum of decision, the court "did not mention" exhibit 2k.] The habeas court granted the petitioner's motion for articulation as to both requests, stating that it had considered exhibit 2k in making its decision

On March 9, 2022, the petitioner filed a petition for certification to appeal from the habeas court's judgment, which the habeas court denied. This appeal followed. Additional facts will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion by denying his petition for certification to appeal. We agree.

We begin by setting forth the applicable standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of

and explained that it "directly address[ed]" exhibit 2k when it referred to the petitioner's seeking "to introduce evidence that '[the victim] failed to provide surveillance footage for a second incident to *further* discredit her testimony.' " (Emphasis in original.)

the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 181 Conn. App. 572, 577–78, 187 A.3d 543, cert. denied, 329 Conn. 909, 186 A.3d 13 (2018).

As discussed in part II of this opinion, because the petitioner's *Brady* claim involves issues that are debatable among jurists of reason and that could have been resolved by a court in a different manner, we conclude that the habeas court abused its discretion in denying the petition for certification to appeal. See, e.g., *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 272–73, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019). Accordingly, we turn to the merits of the petitioner's *Brady* claim.

II

On appeal, the petitioner claims that the habeas court improperly concluded that a sworn statement that the victim gave to the police on April 24, 2013, as memorialized in habeas exhibit 2j, was not material under *Brady* v. *Maryland*, 373 U.S. 87. We agree.

We begin with the standard of review and legal principles that apply to *Brady* claims. "Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review. . . . Additionally, a trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review . . . . We will not disturb a habeas court's findings with respect

to the underlying historical facts or whether the evidence was suppressed unless the findings are clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 689, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

In *Brady* v. *Maryland*, supra, 373 U.S. 87, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The prosecution's duty to disclose under *Brady* applies not only to exculpatory evidence but also to impeachment evidence, which is evidence "having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (Internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370, 71 A.3d 512 (2013). To prove a *Brady* violation, "the petitioner must establish: (1) that the state suppressed evidence (2) that was favorable to the defense and (3) material either to guilt or to punishment. . . . If the petitioner fails to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." (Citation omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, supra, 170 Conn. App. 687–88.

In the present case, because the habeas court found, and the respondent does not challenge on appeal, that exhibit 2j was suppressed and was favorable to the defense, the dispositive issue is whether that evidence was material. "The test for materiality is whether the suppressed evidence in the context of the entire record creates a reasonable probability that, had the evidence

been disclosed to the defense, the result of the proceeding would have been different. . . . [T]he mere *possibility* that an item of undisclosed evidence *might* have helped the defense or *might* have affected the outcome of the trial, however, does not establish materiality in the constitutional sense. . . . The question [of materiality] is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 688. "[W]here there is no reasonable probability that disclosure of the exculpatory evidence would have affected the outcome, there is no constitutional violation under *Brady*." *State* v. *McIntyre*, 242 Conn. 318, 324, 699 A.2d 911 (1997).

In its memorandum of decision, the habeas court concluded that the petitioner had failed to establish that the evidence was material to his defense. In particular, the court reasoned "that, at the time of the underlying [criminal] trial, the defense was aware of [the victim's] delayed disclosure, the fact that she had numerous contacts with police between February 14, 2013, and September 20, 2013, and that she did not report the February 14 [incident] prior to September 20, 2013. The court also [found] that Attorney Bansley was aware of [the victim's] failure to provide corroborating evidence, including surveillance footage, for at least one alleged incident. . . . Attorney Bansley testified credibly that he strategically exercise[d] caution in formulating questions as a result of his targeted approach to questions to avoid using information that he [deemed] too prejudicial or information that would

[have opened] a door to uncharged misconduct of the petitioner being introduced at trial. Specifically, Attorney Bansley testified credibly that he would have avoided highlighting the fact that [the victim] did not call the police [after other incidents of misconduct]. The information in [exhibit 2j] would have added fodder for his execution of the trial strategy, but there was no evidence presented at [the habeas] trial demonstrating that he would have employed it directly by way of specific questions to [the victim], nor was there evidence to demonstrate any direct benefit such questions would have had for the defense to the unlawful restraint charge and, thereby, the verdict." Thus, the court determined that the suppressed evidence "would have been cumulative of the information available to the petitioner at trial, including the information [that] Attorney Bansley utilized to impeach [the victim's] credibility . . . ." Accordingly, the court was not persuaded "that the appropriate and timely disclosure of the subject report would have resulted in a different outcome for the petitioner at trial."

On appeal, the petitioner argues that the impeachment value of exhibit 2j "cannot be considered immaterial" because the state's case rested entirely on the victim's testimony and, hence, her credibility. He further argues that exhibit 2j was "qualitatively" different from the other impeachment evidence available to the petitioner during his criminal trial because it represented a comprehensive history of the victim's relationship with the petitioner, whereas the other police reports available to him during his criminal trial related to specific, discrete allegations of criminal conduct. According to the petitioner, although it might have been reasonable for the victim not to have mentioned the February 14 incident when reporting other discrete allegations, one would have expected her to include it in a comprehensive chronology of her relationship with

the petitioner. Finally, the petitioner argues that exhibit 2j was material because the jury's not guilty verdicts on the sexual assault charges indicated that "the jury had already rejected vast portions of [the victim's] testimony. Moreover, the jury's requests for further instruction on the charge of unlawful restraint were indicative of a degree of uncertainty on that charge as well."

In response, the respondent argues that exhibit 2j was not material because it was cumulative of other evidence of the victim's delayed reporting of the February 14 incident. According to the respondent, Bansley's cross-examination of the victim "gave the jury an array of reasons to distrust the report once she eventually made it, eclipsing any potential impact of additional evidence that she did not promptly report it," and exhibit 2j contained details of the petitioner's previous offenses against the victim such that "the prejudice from it might well have counterbalanced any benefit."

The following additional facts and procedural history are relevant to our resolution of this claim. The state's evidence against the petitioner at his criminal trial consisted principally of the victim's testimony. There were no other witnesses to the February 14 incident and no corroborating physical evidence. Furthermore, although the victim testified that the incident was recorded on a home surveillance system, she never provided the police with a copy of the video recording from that day. The only other evidence the state presented of the petitioner's guilt was the brief testimony of two witnesses, Janice Keeman and Henry.[8] Keeman, a social worker at Middlesex Hospital in Middletown, testified as a constancy of accusation witness that the victim reported to her on March 20, 2013, that her former

[8] The state called four other witnesses, all of whom testified briefly in response to Bansley's cross-examination of the victim in which he challenged her credibility and inquired about her motivation to lie.

boyfriend had sexually assaulted her on February 14, 2013. Henry, a prison inmate serving a sentence for conspiracy to commit robbery, testified to a conversation he had with the petitioner when they were housed near each other in the Cheshire Correctional Institution on December 5, 2014, just days prior to the petitioner's criminal trial. Henry testified that the petitioner discussed his pending sexual assault case with him and told Henry that he was going to kill the victim with his bare hands or make her perform oral sex on him "for like an hour this time."

The petitioner presented an alibi defense through five witnesses, including himself, his mother, his sister, his nephew, and his girlfriend's cousin. The petitioner testified that he was with his son all day, took his nephew to a shopping mall, and took his mother to and from a hospital on February 14, 2013. Each of his witnesses testified to seeing the petitioner at various times that day, which times conflicted with the victim's testimony as to when the petitioner was at her home, sexually assaulting her.

During its initial closing argument, the state relied exclusively on the victim's testimony and the constancy of accusation testimony from Keeman, contrasting the credibility of their testimony with that of the defense witnesses. In its rebuttal closing argument, the state again relied heavily on the victim's testimony and briefly discussed what it described as the "key statement" in Henry's testimony that the petitioner told Henry that he was going to make the victim perform oral sex on him "for an hour this time, this time."

During its deliberations, the jury delivered two notes to the court. First, on December 15, 2014, at 4:32 p.m. the jury foreperson wrote: "We are at a deadlock at this point. We need more explanation on reasonable doubt." The next morning, the court read again the

instruction it gave on reasonable doubt as part of its charge to the jury, and the jury resumed deliberations. Later that morning, the jury delivered a second note to the court, asking two questions. It read: "One, could we have clarification on count three and whether 'restraint' applies to what allegedly happened in count one and count two? The second request is, two, could we hear [the victim's] testimony of the February 28th assault?" As to the first part of the note, the court first told the jury that it must consider the elements of each charge separately in reaching a verdict. The court then explained: "the restraint, quote/unquote, doesn't necessarily have to apply to count one and count two. It may. Those particular counts may have a component of that, but it doesn't necessarily . . . have to apply to count one and count two. Again, each count needs to be evaluated separately based on whatever evidence you've heard, and you may use some evidence for one, some, or all of the counts." The court then played back for the jury the victim's testimony regarding the February 28, 2013 incident. The jury thereafter resumed its deliberations and returned its verdict at approximately 12:05 p.m. As previously noted, the jury found the petitioner not guilty of the two sexual assault charges in counts one and two and guilty of unlawful restraint in the first degree as charged in count three.

It is against this backdrop that we must consider the materiality of habeas exhibit 2j. Exhibit 2j is a five page sworn statement that the victim gave to Detective Phillip Fuschino of the Hartford Police Department on April 24, 2013, detailing various incidents of abusive behavior perpetrated on her by the petitioner during and after their dating relationship. The statement describes several incidents between 2007, when their dating relationship began, and 2013, several months after their relationship ended, in which the petitioner allegedly assaulted and/or threatened the victim, including an

alleged violent encounter on February 22, 2013. Exhibit 2j makes no mention of the February 14 incident. Accordingly, because the state failed to disclose exhibit 2j, the defense did not know that the victim had provided a sworn statement to the police on April 24, 2013, in which she detailed several incidents involving the petitioner, both before and after February 14, 2013, but failed to mention the February 14 incident.

On direct examination at the underlying criminal trial, the victim testified as follows regarding her reporting of the February 14 incident:

"[The Prosecutor]: And did you report [the February 14] incident between you and [the petitioner] to the police right away?

"[The Victim]: No.

"[The Prosecutor]: And why not?

"[The Victim]: Because I was afraid of him.

"[The Prosecutor]: You were afraid of him? Any other reason you chose why not to report—

"[The Victim]: Because I was afraid that he was going to do what he said and put a false statement—make a false case against me.

"[The Prosecutor]: Did you tell anybody about [the February 14 incident] right away?

"[The Victim]: No.

"[The Prosecutor]: And why not?

"[The Victim]: I was . . . so ashamed of what had happened. I just—I didn't—I felt like it was just, you know, my secret. Like, I didn't want nobody to know what he did to me.

* * *

"[The Prosecutor]: Now, you had said up to this point that you weren't going to call the police anymore on him and that you were scared. Why did you change your mind and go to the police in April of 2013 and tell the police about the [February 28 incident]?

"[The Victim]: Basically, because I was getting treatment and I was seeing a therapist and they were helping me to, like, cope with the stuff that [the petitioner] had [done] to me. And they were like, you need to tell the police what he did. They were encouraging me that I need to tell the things that he had [done] to me.

"[The Prosecutor]: Was the fact that you weren't living in Hartford—did that have anything to do with it anymore?

"[The Victim]: Yeah. It's like I felt safer, you know, where I was at.

"[The Prosecutor]: Now, after you told the police about the [February 28] assault where he punched you in the face and broke your nose, did you continue to get treatment?

"[The Victim]: Yes.

"[The Prosecutor]: And to this day, are you still getting treatment?

"[The Victim]: Yes. . . .

"[The Prosecutor]: . . . Why did it take you another seven months from the date of the sexual assault to go to the police and tell them about [the February 14 incident]?

"[The Victim]: Because at the time when I was in Hartford, I was in the middle of it, but when I was out of it and I was getting treatment and I was put on medication and I was being encouraged by my therapist

and the people around me to tell what he did to me and it just—I don't know. It just took time.

"[The Prosecutor]: What medication were you on?

"[The Victim]: Lexapro.

"[The Prosecutor]: And what's that for?

"[The Victim]: PTSD.

"[The Prosecutor]: Does it treat—what sort of symptoms do you have?

"[The Victim]: Anxiety.

"[The Prosecutor]: Anxiety. So, it treats your anxiety?

"[The Victim]: Yeah.

"[The Prosecutor]: So, explain the difference as to why you were able to tell the police within two months of an assault where someone punches you in the face, breaks your nose—you were able to tell them about that within two months.

"[The Victim]: Right.

"[The Prosecutor]: Okay. But then it takes you another five months to tell [the police] about what had happened a week and a half earlier, which is the sexual assault that you just described.

"[The Victim]: Right. And that was because, you know, in retrospect I look at it. I needed therapy. I needed to feel safe. I needed to feel that if I did tell, that, you know, I would be safe. So, through the medication and the therapy, you know, it just—it just—it took time. It took time. It wasn't something that I just wanted—I didn't want to talk about it.

"[The Prosecutor]: And in those months after, those seven months after the assault that you described, you

said that you were getting therapy and taking medication. Did [the petitioner] bother you in that—those—that seven months?

"[The Victim]: No.

"[The Prosecutor]: Were you still out of Hartford in a safe place?

"[The Victim]: Yes.

"[The Prosecutor]: And you weren't letting people know where you lived?

"[The Victim]: Right. Nobody knows where I live.

"[The Prosecutor]: So, [the petitioner] wasn't bothering you. You were taking medication and getting therapy.

"[The Victim]: Yes."

Bansley's cross-examination of the victim as to her delayed reporting of the February 14 incident was limited to suggesting that her report of that incident on September 20, 2013, was tied to her efforts to secure a favorable disposition of the charges then pending against her. Bansley did not question the victim about other contacts she had with the police about the petitioner between February 14 and September 20, 2013. Nevertheless, Bansley did have in his possession during the criminal trial a police report authored by Gogins, habeas exhibit 2p, which detailed four communications from the victim in May and June, 2013, alleging that the petitioner had made threatening comments directed toward the victim or her daughter.

At the outset, we note that our analysis of the petitioner's claim is significantly influenced by the fact that the victim's testimony was crucial to the state's case. We agree with the petitioner, and the respondent does not argue otherwise in his appellate brief, that the state's

case against the petitioner, especially as to the charge of unlawful restraint, relied entirely on the testimony of the victim. The only other evidence the state presented of the petitioner's commission of the charged crimes was the testimony of Keeman and Henry. Keeman testified only as a constancy of accusation witness as to the sexual assault charges. Similarly, the state relied on Henry's testimony only to the extent that the petitioner's statement about making the victim perform oral sex on him for one hour the next time he encountered her constituted an implied admission that he was guilty of having forced her to do so on February 14, 2013. The state relied on neither witness for the unlawful restraint conviction.

The importance of the victim's testimony is further demonstrated by both parties' closing arguments at the petitioner's criminal trial. As Bansley explained to the jury, "the only evidence you have with respect to February 14, 2013, is [the victim]. She is the only one that could get up here and testify about that, aside from the obvious rebuttal from [the petitioner] saying that this never happened. But it is not corroborated by anything. There is no physical evidence, forensic evidence, nobody else was there to come in and say I saw it, it happened. It's just her word." Similarly, the state exclusively relied on the victim's testimony to establish each element of the crime of unlawful restraint in the first degree, explaining to the jury, for example, that it was "obvious by [the victim's] testimony" that she had not consented to the petitioner's conduct.

That the petitioner's conviction was based entirely on the victim's testimony was confirmed by this court in the petitioner's direct appeal from his conviction. In *State* v. *Williams*, supra, 172 Conn. App. 826, the petitioner claimed, inter alia, that there was insufficient evidence to convict him of unlawful restraint in the first degree. In rejecting the petitioner's claim, this court

stated: "The dispositive question before this court is whether *the victim's testimony* provided the jury with a reasonable basis on which it could conclude that the state proved beyond a reasonable doubt each of the elements of [General Statutes] § 53a-95 (a) and, thus, provided the jury with a sufficient basis on which it could find the defendant guilty of that charge." (Emphasis added.) Id., 829.[9]

Our Supreme Court "has stated many times that when the prosecution's case hinges entirely on the testimony of certain witnesses, information affecting their credibility is material." *State* v. *White*, 229 Conn. 125, 136–37, 640 A.2d 572 (1994); see also *Demers* v. *State*, 209 Conn. 143, 161–62, 547 A.2d 28 (1988) ("where, as here, a conviction depends entirely [on] the testimony of certain witnesses . . . information affecting their credibility is material in the constitutional sense . . . since if they are not believed a reasonable doubt of guilt would be created" (citation omitted; internal quotation marks omitted)); *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 158, 10 A.3d 578 ("[i]t is well established that impeachment evidence may be crucial to a defense, especially when the state's case hinges entirely upon the credibility of certain key witnesses" (internal quotation marks omitted)), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011). "The purpose of requiring the state to disclose impeachment evidence to a criminal defendant is to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . . In determining whether impeachment evidence is material, the question is not whether the verdict might have been different without any of [the witness'] testimony,

[9] The state, in its appellate brief in *State* v. *Williams*, supra, 172 Conn. App. 820, relied solely on the victim's testimony as the evidentiary basis for the petitioner's unlawful restraint conviction. See *State* v. *Williams*, Conn. Appellate Court Briefs & Appendices, February Term, 2017, Appellee's Brief pp. 1–7.

but whether the verdict might have been different if [the witness'] testimony [was] further impeached by disclosure of the [impeachment material]. . . . The fact that the witness' testimony is corroborated by additional evidence supporting a guilty verdict also may be considered in determining whether the suppressed impeachment evidence was material." (Citations omitted; internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 744, 756 A.2d 799 (2000).

Furthermore, withheld impeachment evidence may not be material when the witness' "credibility and motives for testifying already had been impeached via defense counsel's comprehensive and skillful cross-examination . . . [and the witness'] testimony, while significant, was not dispositive . . . ." *State* v. *Ortiz*, 280 Conn. 686, 722, 911 A.2d 1055 (2006). "[T]he seminal test remains whether there exists a reasonable [probability] that the outcome of the proceeding would have been different had the evidence been disclosed to the defense. . . . If the evidence in question would not have provided the [petitioner] with any significant impeachment material that was not already available and used by him . . . it is immaterial under *Brady*. This is true even if the [evidence's] cumulative effect may have lent some additional support to the [petitioner's] attack on [a witness]." (Citations omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner*, supra, 170 Conn. App. 691.

Thus, the question before us is whether any use of exhibit 2j by the petitioner at his criminal trial would have been cumulative of his other attacks on the victim's credibility. Put another way, would the use of exhibit 2j have placed the evidence before the jury in such a different light that the state's failure to disclose exhibit 2j undermines our confidence in the outcome of the trial? We conclude, for the reasons argued by the petitioner, that the answer is yes.

First, as noted previously, the state's case against the petitioner relied entirely on the testimony of the victim. In almost every case in which either our Supreme Court or this court has found undisclosed impeachment evidence to be cumulative, and therefore not material, there was other evidence of the defendant's guilt. See, e.g., *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 596, 198 A.3d 562 (2019) ("[t]here was ample evidence presented at trial to show not only that the petitioner actively participated in the robbery, but that he also fired the shots that killed [the victim]"); *State* v. *Ortiz*, supra, 280 Conn. 722–23 (impeached witness' testimony "while significant, was not dispositive; the defendant's own statement to the police, admitted into evidence . . . as well as the gloves and matching walkie-talkie found in his car at the scene of the crime, further inculpate him in the planning of, and participation in, the attack on the victim, thus bolstering our confidence in the jury's verdict" (citation omitted)); *State* v. *Wilcox*, 254 Conn. 441, 459, 758 A.2d 824 (2000) ("the testimony of a number of witnesses corroborated the victim's testimony that the defendant had kidnapped and physically and sexually assaulted her"), overruled in part on other grounds by *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016); *State* v. *Floyd*, supra, 253 Conn. 746 ("Because the jury was apprised of [the witness'] motivation for testifying falsely for the state, the impeachment value of the suppressed evidence merely would have been incremental. Furthermore, [the witness'] testimony was corroborated by the other two eyewitnesses, lending additional credibility to his testimony."); *State* v. *Esposito*, 235 Conn. 802, 819, 670 A.2d 301 (1996) (there was "significant" other evidence that defendant was at scene of murder); *State* v. *Gant*, 231 Conn. 43, 53, 646 A.2d 835 (1994) ("abundant" other evidence supported court's probable cause finding), cert. denied, 514 U.S. 1038, 115

S. Ct. 1404, 131 L. Ed. 2d 291 (1995); *State* v. *Bryan*, 193 Conn. App. 285, 318, 219 A.3d 477 ("[e]ven if the defendant could have used the records to impeach [the witness'] credibility, there was overwhelming evidence adduced at trial supporting the defendant's conviction"), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019); *Peeler* v. *Commissioner of Correction*, supra, 170 Conn. App. 692 ("[A]lthough [the impeached witness'] testimony was significant, it was not dispositive. The other evidence inculpating the petitioner in the . . . murders further bolsters our confidence in the jury's verdict."); *State* v. *Falcon*, 90 Conn. App. 111, 123, 876 A.2d 547 ("in determining whether the late disclosure [of the impeachment evidence] deprived the defendant of a fair trial, we are mindful of the undisputed evidence of the victim's identification of the defendant"), cert. denied, 275 Conn. 926, 883 A.2d 1248 (2005).[10] Given the lack of other corroborating evidence of the petitioner's guilt in the present case, whether the undisclosed evidence truly was cumulative of other information available to the petitioner becomes much more important.

Second, we agree with the petitioner that exhibit 2j was qualitatively different from other impeachment material available to the defense and, therefore, was not cumulative. It is true, as the respondent argues, that Bansley attacked the victim's credibility on several grounds during cross-examination. He pointed out the

[10] We are aware of only one case in which undisclosed impeachment evidence was found to be cumulative, and therefore not material, in the absence of additional evidence of a defendant's guilt. See *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 300, 979 A.2d 507, cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009). In that case, however, "any effect the [impeachment] evidence would have had . . . would have been neutralized by the testimony" of another witness who did not testify at trial but did testify at an earlier suppression hearing. Id., 297. This court found that it was "clear that the state would have been able to rehabilitate the evidence that the petitioner claim[ed]" was material under *Brady* by calling that witness at the petitioner's criminal trial. Id.

victim's motives to fabricate the accusation, inconsistencies between her September 20, 2013 statement to the police and her testimony at trial—particularly as to the time at which the crimes occurred—and the fact that she never produced a video recording of the incident, despite claiming one existed and despite producing such a video of an event which occurred days earlier involving her daughter and her daughter's former boyfriend. Furthermore, the jury was aware from the victim's direct examination that she had not reported the February 14 incident to the police until September 20, 2013, even though she reported the February 28 incident in April, 2013, and regularly called the police about incidents between her and the petitioner as early as 2008. Bansley used this fact during his closing argument to argue that it was not credible that the victim would regularly, over a course of years, call the police to report relatively minor offenses but not timely report a violent sexual assault. We also acknowledge that the defense had other evidence in its possession, such as habeas court exhibits 2p and 2r, demonstrating that the victim continued to contact the police and to report various instances of misconduct by the petitioner between April and August, 2013, without mentioning the February 14 incident. Those exhibits show that the victim had met with Detective Gogins on April 16, 2013, to discuss the February 28 incident—reported in May, 2013—that the petitioner allegedly "put another fake charge against [her] daughter" and threatened to "get [her] on a home invasion,"; and reported in June, 2013, that the petitioner allegedly had sent a threatening letter to her daughter and slashed her cousin's tires.

If exhibit 2j was a discrete report of another crime committed against the victim by the petitioner on February 22, 2013, we would agree that it would be cumulative of the other evidence available to the defense. In particular, it would have been similar to the victim's report

of the February 28 incident, which, like the statement in exhibit 2j, was given to the police in April, 2013. Exhibit 2j, though, is much more than that. It is a five page sworn statement comprised of seventeen paragraphs describing various incidents of abuse perpetrated on the victim by the petitioner between 2007 and February 22, 2013. Only the final two paragraphs of the statement refer to the February 22, 2013 incident, which was a burglary that involved the petitioner having threatened the victim with a knife. The remaining paragraphs of the statement describe in varying detail incidents in which the petitioner assaulted the victim, verbally abused her, threatened her, damaged her property, harassed her, and stalked her over the course of six years. Yet, the victim made no mention of the February 14 incident. During the petitioner's criminal trial, the defense had no similar statement from the victim setting forth a comprehensive chronology of the petitioner's abuse of her. In particular, in exhibits 2p and 2r, which the defense did have during the criminal trial, the victim reported only specific events. Consequently, it would have been much easier for the jury to understand why the victim failed to mention the February 14 incident when reporting those discrete incidents. Therefore, the utility of those exhibits to attack the victim's failure to report the February 14 incident was far less than that of exhibit 2j.

Furthermore, the fact that Bansley was able to attack the victim's credibility on other grounds, including inconsistencies in her accounts of the incident and her motivations for making the accusation, does not undermine the importance of the victim's omission of the February 14 incident from her sworn statement reflected in exhibit 2j. "[A] prior critical omission can serve to impeach a witness, but only when the information was omitted under circumstances in which one would expect it to be provided." *State* v. *Esposito*,

supra, 235 Conn. 818. The recounting of the entire history of the petitioner's assaultive and controlling behavior against her in a sworn statement given in April, 2013, is precisely a circumstance in which one would expect the victim to report the February 14 incident. This is especially true because the victim, in exhibit 2j, reported acts the petitioner had committed both before and after February 14, 2013.

We also disagree with the respondent's argument that exhibit 2j was immaterial because Bansley had stated in his closing argument that the victim's accusations regarding the February 14 incident were not credible in light of the fact that she regularly called the police about other incidents and did not timely report this one. This argument ignores the probative force of exhibit 2j as a sworn statement given to the police within two months of the incident that purports to recount a history of criminal conduct by the petitioner. We conclude that, had the jury known of exhibit 2j, Bansley's closing argument regarding the credibility of the victim's accusations would have been materially enhanced.

We also are unpersuaded by the respondent's argument that exhibit 2j was not material because it was as inculpatory as it was exculpatory because it included descriptions of numerous incidents of uncharged misconduct by the petitioner. For this same reason, the habeas court and the respondent suggest that there was a possibility that Bansley may not have used exhibit 2j because, in addition to impeachment evidence, it contains information prejudicial to the petitioner. In particular, the habeas court and the respondent rely on Bansley's testimony at the habeas trial that he "would not want to highlight" that the victim repeatedly did not call the police or that he would avoid lines of questioning that might disclose the client's uncharged misconduct to the jury. Nonetheless, Bansley also testified that he could and would have cross-examined the victim

only about the fact that she had omitted the February 14 incident from her statement in exhibit 2j.[11] In assessing how the defense would have used exhibit 2j at trial generally, "we are cognizant of what adverse effect the nondisclosure may have had on the [petitioner's] preparation or presentation of [his] case and that we should act with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the [trial] . . . would have [otherwise] taken . . . ." (Internal quotation marks omitted.) *State* v. *White*, supra, 229 Conn. 137. To be sure, exhibit 2j documents several instances of uncharged misconduct

[11] In its memorandum of decision, the habeas court stated that "there was no evidence presented at trial demonstrating that [Bansley] would have employed [the information in exhibit 2j] directly by way of specific questions to [the victim], nor was there evidence to demonstrate any direct benefit such questions would have had for the defense to the unlawful restraint charge and, thereby, the verdict." The following exchange at the habeas trial between Bansley and Attorney Nicole P. Britt, the petitioner's habeas counsel, belies that conclusion:

"[Attorney Britt]: Would you ask about statements that [the victim] made before she reported the sexual assault that didn't include the sexual assault?

"[Attorney Bansley]: Not necessarily. That, you know, that could easily open a door to a whole line of things that kind of a, a battered wife syndrome type thing, so it just depends, unfortunately.

"[Attorney Britt]: Was part of your defense—you said earlier that part of your strategy was credibility?

"[Attorney Bansley]: Absolutely.

"[Attorney Britt]: Would cross-examining [the victim] about statements that she made before she reported the sexual assault where she never mentions the sexual assault go to credibility?

"[Attorney Bansley]: Not necessarily. If I asked her that the statement you showed me said, in 2008, in 2009, in 2010, but I didn't call the cops, I didn't call the cops, I didn't call the cops, I would not want to highlight that.

"[Attorney Britt]: Would—could you still cross-examine her just about the fact that she never brought up the sexual assault on—in her April 24, 2013 statement?

"[Attorney Bansley]: Absolutely.

"[Attorney Britt]: Would you have done that?

"[Attorney Bansley]: I would have."

Similarly, Smith testified that exhibit 2j would have been important to the petitioner's defense and "[a]bsolutely" useful in the cross-examination of the victim.

by the petitioner and showcases the victim's tendency to avoid calling the police to report the petitioner's abuse. Although we cannot predict with certainty how the defense would have used exhibit 2j, we also cannot discount the very real possibility that an experienced trial lawyer like Bansley would have used it in a manner that did not create an additional risk of prejudice to the petitioner. Indeed, by simply referring to the time line of events but not discussing the nature of the incidents documented in exhibit 2j, Bansley could have used the undisclosed information effectively to impeach the victim while keeping the details of the allegations contained in exhibit 2j from the jury. Moreover, even if the details of the uncharged misconduct were disclosed to the jury, the prejudice to the petitioner would have been minimal given the victim's direct testimony. As noted previously in this opinion, the victim testified about other abuse inflicted on her by the petitioner, both before and after the February 14 incident, including the February 28 incident, during which the petitioner had broken the victim's nose.[12] Consequently, it is unlikely that the other instances of misconduct mentioned in exhibit 2j would create additional prejudice sufficient to outweigh the impeachment value of that information.

Finally, we agree with the petitioner that the actions of the jury support a conclusion that there is a reasonable probability that the disclosure of exhibit 2j could have led to a different outcome. The not guilty verdicts delivered by the jury on counts one and two suggest that the jury had doubts about the victim's credibility, as she testified in detail about how she was twice violently sexually assaulted by the petitioner. Furthermore, her testimony regarding the sexual assaults was corroborated to some extent by Keeman and Henry. Nevertheless, the jury was not persuaded, beyond a reasonable

[12] At the petitioner's criminal trial, the victim generally testified that the petitioner subjected her to verbal, physical, and emotional abuse..

doubt, by the victim's testimony that the petitioner had sexually assaulted her. At the same time, given that the petitioner's defense was that he was elsewhere on February 14, 2013, the jury, by finding him guilty of unlawful restraint based solely on the victim's testimony, necessarily believed some of her testimony. Furthermore, the jury, during its deliberations, asked the court if the unlawful restraint had to be related to the alleged sexual assaults. This question and the resulting split verdict indicate that the jury was analyzing the victim's testimony closely with respect to each charge. We cannot discount the real probability that, had the defense had exhibit 2j and been able to use it to further undermine the victim's credibility, the jury would have concluded that the victim's testimony regarding the unlawful restraint also was not credible.

For the foregoing reasons, we disagree with the habeas court's conclusion that the petitioner did not meet his burden of demonstrating that exhibit 2j was material under *Brady*. We conclude that, because the petitioner's unlawful restraint conviction hinged entirely on the victim's testimony, and because exhibit 2j could have significantly undermined the victim's testimony on a critical issue in the case, there is a reasonable probability that, had the state disclosed exhibit 2j, the outcome of the petitioner's criminal trial would have been different. We therefore conclude that the habeas court improperly determined that exhibit 2j was not material under *Brady*.[13]

The judgment is reversed and the case is remanded with direction to grant the petition for a writ of habeas corpus, to vacate the petitioner's underlying convictions of unlawful restraint in the first degree and being

[13] In light of our conclusion regarding exhibit 2j, we need not address the petitioner's claim that the state's failure to disclose habeas exhibit 2k also was material.

a persistent dangerous felony offender, and to order a new trial.

In this opinion the other judges concurred.

NAIONNA HUGHES ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF WATERBURY ET AL.
(AC 45354)

Elgo, Cradle and Keller, Js.

Syllabus

The plaintiffs, H, a middle school student who attended public school in Waterbury, and her mother, sought to recover damages from the defendants, the city of Waterbury, its board of education, V, a teacher at H's school, and G, a counselor at H's school, for damages incurred as a result of the defendants' alleged negligent failure to prevent an incident from occurring between H and A, another student, while the two were at school. In their complaint, the plaintiffs alleged that the defendants allowed A and H, at different times, to leave V's classroom unsupervised. A entered a room that was typically used by G, where he remained alone and unsupervised. Thereafter, H also entered G's room without supervision. A, who had aggressive tendencies toward H, then used a "dangerous metal object," which he had found in G's room, to strike H. The plaintiffs alleged that the defendants' actions were negligent because, inter alia, they failed to supervise A and H and they allowed the metal object to be in G's room within reach of the students. The defendants moved to strike all nine counts of the plaintiffs' complaint, alleging that the plaintiffs had failed to state a claim for which relief could be granted because their claims were barred by the doctrine of governmental immunity and, although the plaintiffs had invoked the identifiable victim subject to imminent harm exception to governmental immunity, they failed to plead facts that would bring their claims within the scope of that exception. The trial court granted the defendants' motion, and, after the plaintiffs failed to replead their case, as was permitted pursuant to the applicable rule of practice (§ 10-44), the trial court granted the defendants' motion for judgment. On the plaintiffs' appeal to this court, *held* that the trial court did not err in granting the defendants' motion to strike: because the conduct at issue, namely, the supervision of schoolchildren, was discretionary in nature, the defendants were entitled to governmental immunity pursuant to the applicable statute (§ 52-557n) unless an exception to the doctrine applied; moreover, contrary to the plaintiffs' assertions, the identifiable victim subject to imminent harm exception to governmental immunity did not apply

to their claims because, although H was an identifiable victim as a public school student, the plaintiffs failed to allege facts sufficient to demonstrate that it was apparent to the defendants that their failure to provide adequate supervision of the students would subject H to imminent harm, the risk of which was so great that the defendants had a clear and unequivocal duty to act immediately to prevent it, as the complaint did not include detailed factual allegations regarding the manner in which the incident unfolded, including the specific nature of the metal object, and the apparentness of imminent harm to the defendants; furthermore, following the granting of the motion to strike, the plaintiffs did not avail themselves of the opportunity to revise their complaint to allege facts that would bring the complained of acts within the identifiable victim subject to imminent harm exception, as was permitted pursuant to Practice Book § 10-44.

Argued March 20—officially released August 22, 2023

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Roraback*, *J.*, granted the defendants' motion to strike the plaintiffs' complaint; thereafter, the court, *Pierson*, *J.*, granted the defendants' motion for judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

John Serrano, for the appellants (plaintiffs).

Daniel J. Foster, corporation counsel, for the appellees (defendants).

Opinion

ELGO, J. The plaintiffs, Naionna Hughes and her mother, Juanita Jones,[1] appeal from the judgment of the trial court rendered in favor of the defendants, the Board of Education of the City of Waterbury (board),

[1] Juanita Jones commenced this action in both her individual capacity and as parent and next friend of Naionna Hughes, her minor child. For clarity, we refer to Hughes and Jones individually by name and collectively as the plaintiffs.

the city of Waterbury (city), Irena Varecka, and Jessica Giorgi. On appeal, the plaintiffs claim that the court improperly granted the defendants' motion to strike their complaint on the ground of governmental immunity. More specifically, they contend that the court improperly concluded that the identifiable victim subject to imminent harm exception to governmental immunity did not apply. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiffs' complaint; see *Picco* v. *Voluntown*, 295 Conn. 141, 144 n.5, 989 A.2d 593 (2010); are relevant to our resolution of this appeal. At all relevant times, Hughes was a resident of Waterbury who attended West Side Middle School (school), a public school under the control of the board. Varecka and Giorgi were employed by the board as a teacher and a counselor, respectively, at the school.

The present action concerns what transpired in a room at the school normally used by Giorgi (Giorgi's room) at approximately 12:30 p.m. on March 6, 2018.[2] The material allegations are as follows: "[The defendants] allowed [Hughes] to leave [Varecka's] classroom alone, unprotected and unsupervised. . . . [The defendants] allowed [Hughes] to be unprotected and unsupervised in [Giorgi's room]. . . . [The defendants] allowed

[2] The plaintiffs' complaint contains nine counts. The first eight counts sound in negligence and were brought pursuant to General Statutes § 52-557n. Counts one through four were brought by Hughes against the board, the city, Varecka, and Giorgi. Counts five through eight contain largely identical allegations brought by Jones against those same defendants and additionally allege that, as the proximate result of the defendants' actions, Jones incurred medical expenses on behalf of Hughes. In count nine, Jones sought indemnification for negligence from the board and the city pursuant to General Statutes §§ 7-465 and 10-235. That indemnification claim was derivative of the aforementioned negligence claims. See, e.g., *Daley* v. *Kashmanian*, 344 Conn. 464, 470 n.4, 280 A.3d 68 (2022) ("in the absence of a [viable] common-law negligence claim . . . there would be no basis for a statutory indemnification claim against the [municipality] pursuant to § 7-465" (internal quotation marks omitted)).

a student hereafter referred to as 'Alex' to leave [Varecka's] classroom unsupervised. . . . [The defendants] allowed Alex to remain alone and unsupervised in [Giorgi's room] and they allowed him to be present and unsupervised in that room when [Hughes] arrived there. . . . [The defendants] allowed a dangerous metal object to be located in [Giorgi's room] within the reach of students, including Alex. . . . [The defendants] allowed Alex and [Hughes] to be unsupervised and alone together when the board and its agents, servants and employees, including [Varecka] and [Giorgi], knew or should have known that Alex had aggressive tendencies, including aggressive tendencies toward [Hughes]. . . . Varecka and [Giorgi] failed to communicate with each other, and/or with other agents, employees or servants of the board, to make sure that [Hughes] and Alex would not be alone together and unsupervised. . . . [T]heir failure to supervise [Hughes] and . . . Alex allowed Alex to strike [Hughes] with the metal object. . . . [T]hey did not warn [Hughes] that she would find herself alone and unsupervised with Alex in [Giorgi's room]." The complaint further alleged that Hughes sustained "physical, emotional and psychological injuries, including facial lacerations and scarring, pain and shock" as a result thereof.

In each of the nine counts, the plaintiffs also alleged that the foregoing allegations "(A) [r]endered [Hughes] an identifiable person subject to imminent and foreseeable harm; (B) [w]ere apparent to [the defendants] or, in the exercise of reasonable due care and proper diligence . . . were discoverable and should have been apparent to [them]; (C) [w]ere likely to have caused [Hughes] the harm that she sustained; (D) [p]resented a probable likelihood of harm to [Hughes] which was sufficient to place upon the [defendants] a clear, unequivocal duty to alleviate the dangerous conditions

and circumstances; and (E) [r]equired immediate action by the [defendants] to prevent the harm which [Hughes] sustained."

Approximately six months after this action was commenced, the defendants moved to strike all nine counts of the complaint, alleging that the plaintiffs had "failed to state a claim for which relief can be granted because, as a matter of law, any duty allegedly breached by the defendants . . . was discretionary." The plaintiffs filed an objection to that motion, in which they maintained that the identifiable victim subject to imminent harm exception to governmental immunity applied. In its November 24, 2021 memorandum of decision, the court disagreed with the plaintiffs and concluded that they had not alleged facts sufficient to implicate that exception. The court thus granted the defendants' motion to strike the complaint in its entirety. When the plaintiffs failed to replead their case, as permitted under our rules of practice; see *Tracy* v. *New Milford Public Schools*, 101 Conn. App. 560, 566, 922 A.2d 280 (2007); the defendants filed a motion for judgment, which the court granted on February 28, 2022, and this appeal followed.

On appeal, the plaintiffs claim that the court improperly granted the motion to strike their complaint because the facts alleged therein sufficiently implicate the identifiable victim subject to imminent harm exception to discretionary governmental immunity. We disagree.

At the outset, we note the well established standard that governs our review. "[B]ecause a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary." (Internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019). "For the purpose of ruling upon a motion to strike, the facts alleged in

a complaint, though not the legal conclusions it may contain, are deemed to be admitted." (Internal quotation marks omitted.) *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 476, 823 A.2d 1202 (2003). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, 303 Conn. 205, 213, 32 A.3d 296 (2011). Furthermore, "where it is apparent from the face of the complaint that [a] municipality was engaging in a governmental function while performing the acts and omissions complained of by the plaintiff, the defendant is not required to plead governmental immunity as a special defense and may attack the legal sufficiency of the complaint through a motion to strike." *Doe* v. *Board of Education*, 76 Conn. App. 296, 299 n.6, 819 A.2d 289 (2003); see also *Violano* v. *Fernandez*, 280 Conn. 310, 326, 907 A.2d 1188 (2006) (expressly declining "the plaintiffs' invitation to abandon our well established practice permitting resolution of the issue of governmental immunity by a motion to strike").

Municipalities in this state generally are "immune from liability unless the legislature has enacted a statute abrogating such immunity."[3] *Gaudino* v. *East Hartford*, 87 Conn. App. 353, 355, 865 A.2d 470 (2005). The tort liability of a municipality is codified at General Statutes § 52-557n, which "abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties.

[3] "Town boards of education, although they are agents of the state responsible for education in the towns, are also agents of the towns and subject to the laws governing municipalities." *Cahill* v. *Board of Education*, 187 Conn. 94, 101, 444 A.2d 907 (1982).

. . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018). As our Supreme Court has explained, "a municipality may be held liable for the negligent performance of a duty only if 'the official's duty is *clearly* ministerial.' " (Emphasis in original.) *Northrup* v. *Witkowski*, 332 Conn. 158, 188, 210 A.3d 29 (2019); see also *Doe* v. *New Haven*, 214 Conn. App. 553, 564, 281 A.3d 480 (2022) ("a municipality may be held liable for its employee's negligently performed ministerial acts but is . . . entitled to immunity for the performance of discretionary governmental acts"). At no time have the plaintiffs alleged that the conduct at issue in this case, which concerns the supervision of schoolchildren, is ministerial in nature. Because that conduct indisputably is discretionary in nature; see, e.g., *Costa* v. *Board of Education*, 175 Conn. App. 402, 407–408, 167 A.3d 1152, cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); the defendants are entitled to governmental immunity unless an exception to that doctrine applies.

The protection extended to discretionary governmental acts is qualified by a "very limited" exception that "applies when the circumstances make it apparent to the [municipal] officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . If the plaintiffs fail to establish any one of the three prongs, this failure will

be fatal to their claim that they come within the imminent harm exception." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 573–74, 148 A.3d 1011 (2016). "[P]ublic schoolchildren are 'an identifiable class of beneficiaries' of a school system's duty of care for purposes of the imminent harm to identifiable persons exception." *Martinez* v. *New Haven*, supra, 328 Conn. 8–9. The defendants here concede that Hughes was an identifiable victim because she was a public school student at school during school hours when the alleged incident transpired.

The issue, then, is whether the plaintiffs alleged facts sufficient to establish the existence of an imminent harm to Hughes that was apparent to the defendants. To meet that burden, the plaintiffs "must satisfy a four-pronged test. First, the dangerous condition alleged by the plaintiff must be apparent to the municipal defendant. . . . We interpret this to mean that the dangerous condition must not be latent or otherwise undiscoverable by a reasonably objective person in the position and with the knowledge of the defendant. Second, the alleged dangerous condition must be likely to have caused the harm suffered by the plaintiff. A dangerous condition that is unrelated to the cause of the harm is insufficient . . . . Third, the likelihood of the harm must be sufficient to place upon the municipal defendant a clear and unequivocal duty . . . to alleviate the dangerous condition. . . . [W]e consider a clear and unequivocal duty . . . to be one that arises when the probability that harm will occur from the dangerous condition is high enough to *necessitate* that the defendant act to alleviate the defect. Finally, the probability that harm will occur must be so high as to require the defendant to act *immediately* to prevent the harm." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 705–706, 124

A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017).

The allegations set forth in the plaintiffs' complaint do not meet that demanding standard. Although the plaintiffs allege that the defendants were negligent in allowing Hughes and Alex to leave Varecka's classroom unsupervised, they do not allege that Hughes and Alex were permitted to do so at the same time.[4] Rather, their allegation that the defendants negligently "allowed Alex to remain alone and unsupervised" in Giorgi's room prior to Hughes' arrival necessarily indicates that the two students were not together at all times. Moreover, although the plaintiffs allege in their complaint that the defendants "allowed a dangerous metal object to be located in [Giorgi's room]," they failed to specify what that object was, where it was located, or how long it had been there. Was it a pencil sharpener affixed to a wall, a paperweight on a desk, a hammer inadvertently left in the room by maintenance staff? The nature of the object, as well as its location and duration in the room, bears directly on the question of whether it presented an imminent harm to Hughes. See, e.g., *Martinez* v. *New Haven*, supra, 328 Conn. 11–12 (imminent harm exception did not apply in case where "there [was] no evidence that possessing safety scissors in the auditorium violated any school policy" and defendants "had no reasonable way to anticipate" plaintiff's injuries); *Haynes* v. *Middletown*, 314 Conn. 303, 325–26, 101 A.3d 249 (2014) (imminent harm exception applied in case where school locker "was in a dangerous condition and . . . had been in that condition since the beginning of the school year, seven months before the [plaintiff's]

[4] The complaint does not specify why Hughes and Alex were permitted to leave Varecka's classroom, such as for a bathroom break or some other purpose. The complaint also does not allege that either student was permitted to leave Varecka's classroom for the purpose of visiting Giorgi or her room.

injury occurred"); *Bacote* v. *New Haven*, Superior Court, judicial district of New Haven, Docket No. CV-06-5005855-S (April 16, 2010) (imminent harm exception applied in case where "there was a dangerous post [on the school playground] protruding from the ground and said post was present for a sufficient time so that the defendants had notice of the dangerous condition").

To implicate the identifiable victim subject to imminent harm exception to governmental immunity, it is not enough to allege "that a harm may reasonably be anticipated." (Internal quotation marks omitted.) *Haynes* v. *Middletown*, supra, 314 Conn. 314–15 n.6. Rather, a plaintiff must allege the existence of "a specific imminent harm"; *Doe* v. *Petersen*, 279 Conn. 607, 620–21, 903 A.2d 191 (2006); the risk of which "must be so great that the municipal defendant[s] had a clear and unequivocal duty to act immediately to prevent it." *Haynes* v. *Middletown*, supra, 315 n.6. The allegations contained in the plaintiffs' complaint lack that requisite specificity. The plaintiffs allege that the defendants were negligent in permitting Hughes and Alex, at differing times, to depart Varecka's classroom unsupervised. They further allege that that the defendants knew or should have known that, after departing that classroom, Hughes would head to Giorgi's room, where Alex already would be present and alone, and that Alex would then strike Hughes in the face with an unidentified metal object. Those allegations do not suffice to satisfy "the demanding imminent harm standard"; id., 321; which imposes a clear duty on the defendants to act immediately in the face of a dangerous condition that was apparent to the defendants and was "so likely to cause harm . . . ." *Martinez* v. *New Haven*, supra, 328 Conn. 11; see also *Doe* v. *New Haven*, supra, 214 Conn. App. 580 ("[f]or purposes of determining whether a plaintiff was subject to imminent harm, [i]mminent does not simply mean a foreseeable event at some

unspecified point in the not too distant future" (internal quotation marks omitted)).

A motion to strike does not admit merely conclusory language contained in a complaint. See *Novametrix Medical Systems, Inc.* v. *BOC Group, Inc.*, 224 Conn. 210, 215, 618 A.2d 25 (1992). The plaintiffs' complaint does not set forth detailed factual allegations as to the manner in which the incident in question unfolded and the apparentness of imminent harm to school officials.[5] There is no allegation that, when Hughes left Varecka's classroom, school officials knew or should have known that she would end up in Giorgi's room or that they knew or should have known that Alex would be in that room when she arrived. "In order to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the [municipal] agent

[5] See, e.g., *Doe* v. *Madison*, 340 Conn 1, 26 n.24, 34, 262 A.3d 752 (2021) (plaintiff identified "seventeen facts" that "render[ed] him a person subject to imminent harm, with the likelihood of that harm apparent to the defendants as public officials"); *Lopez* v. *Bridgeport*, Superior Court, judicial district of Fairfield, Docket No. CV-15-6051932-S (June 27, 2016) (62 Conn. L. Rptr. 593, 600) ("[T]he facts alleged are compelling. The allegations show that the school had a policy, enacted to ensure the safety of special needs students, that prohibited more than one person to use the restroom at a time. There are also allegations that the individual defendants knew that [the plaintiff] and the other students required focused supervision when transitioning from the classroom to the cafeteria, knew that [the plaintiff] was unable to protect himself from sexual and physical assault, and knew that [the plaintiff] would be exposed to danger if left unsupervised. Furthermore, the special education teachers and paraprofessionals observed a practice of staggering the paraprofessionals throughout the line of students when they left the classroom to go to lunch. Finally, there are allegations that the defendants were aware of the ages, disabilities, and predispositions of the students in the class. In sum, the defendants adopted, but did not follow, measures to prevent students from being injured in specific ways; the magnitude of the risk was great and the probability that harm would occur was high."); *Doe* v. *Board of Education*, Superior Court, judicial district of New Haven, Docket No. CV-10-5033148-S (June 15, 2011) (plaintiffs alleged that defendant teachers were negligent in "fail[ing] to heed the request of [the plaintiff] that his perpetrator not be permitted to leave the classroom with him, for a bathroom break" (internal quotation marks omitted)).

aware that his or her acts or omissions would likely have subjected the victim to imminent harm. . . . This is an objective test pursuant to which we consider the information available to the [municipal] agent at the time of [his or] her discretionary act or omission. . . . We do not consider what the [municipal] agent could have discovered after engaging in additional inquiry." (Citations omitted; footnote omitted.) *Edgerton* v. *Clinton*, 311 Conn. 217, 231, 86 A.3d 437 (2014); see also *Ahern* v. *Board of Education*, 219 Conn. App. 404, 424, 295 A.3d 496 (2023) ("it is the specific harm that befell the plaintiff that must be apparent to satisfy the apparentness prong of the [imminent harm] exception" (emphasis omitted; internal quotation marks omitted)). In the present case, the facts alleged in the plaintiffs' complaint are insufficient to establish that it was apparent to the defendants that the risk of harm was so great when Hughes departed Varecka's classroom that their "duty to act immediately to prevent the harm was clear and unequivocal." *Haynes* v. *Middletown*, supra, 314 Conn. 322 n.14.

At oral argument before this court, counsel for the plaintiffs acknowledged that, following the granting of the defendants' motion to strike, the plaintiffs did not avail themselves of the opportunity to revise their complaint to allege facts that would bring the complained of acts within the imminent harm exception to governmental immunity, as permitted under our rules of practice. See Practice Book § 10-44 ("[w]ithin fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading"); *Silver Hill Hospital, Inc.* v. *Kessler*, 200 Conn. App. 742, 750 n.5, 240 A.3d 740 (2020) ("our rules of practice allow a litigant to replead to cure the deficiencies"). Counsel also stated that he had hoped to ascertain additional factual details of the incident in question through subsequent discovery. As our Supreme Court

has noted, however, "nothing in the rules of practice prevented the plaintiffs from requesting the trial court to stay temporarily the motion to strike pending limited discovery . . . ." *Violano* v. *Fernandez*, supra, 280 Conn. 325; see also id. ("the plaintiffs . . . were able to take two depositions, including one of [the defendant], prior to the trial court's ruling on the motion to strike").

In light of the foregoing, we conclude that the plaintiffs failed to allege facts sufficient to demonstrate that it was apparent to the defendants that their failure to provide adequate supervision on March 6, 2018, likely would subject Hughes to imminent harm. Accordingly, the court properly granted the defendants' motion to strike.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES E. BARBARA ET AL. *v.* COLONIAL SURETY COMPANY
(AC 44836)

COLONIAL SURETY COMPANY *v.* PHOENIX CONTRACTING GROUP ET AL.
(AC 45267)

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

Syllabus

In two separate actions arising out of a hotel construction project in New York, C Co., a commercial surety company, in one action, sought to enforce an indemnity agreement against P Co. and its individual principals, J and L, and, in a second action, the individual principals sought to invalidate the indemnity agreement, asserting breach of contract and bad faith claims. P Co., as a subcontractor, executed a trade subcontract with G Co., the general contractor for the hotel project, to supply and install exterior window walls for the building. The individual principals and P Co. executed the general indemnity agreement in favor of C Co. as consideration for the issuance of payment and performance bonds for the hotel project on behalf of P Co., as principal, and in favor of G

Co., as obligee. Pursuant to the indemnity agreement, P Co. and the individual principals agreed to indemnify C Co. for any losses that C Co. might incur from issuing the bonds on behalf of P Co., granted C Co. the authority to settle any claims on the bonds, assigned to C Co. all their rights in and to the subcontract, and appointed C Co. as their attorney-in-fact with the right to exercise all of the rights assigned to C Co. in the indemnity agreement. Soon after construction began, issues arose with the hotel project, and G Co. and P Co. both denied responsibility for the resulting delay. P Co. ultimately completed the subcontract work, and shortly thereafter G Co. terminated the subcontract, citing P Co.'s failure to pay costs associated with the delay in installing the window walls and for work performed by P Co.'s sub-subcontractors. G Co. subsequently brought an action against C Co. and P Co. in New York, alleging that P Co. breached the subcontract and that C Co. breached the performance bond, and C Co. brought its action in Connecticut to enforce the indemnity agreement. Approximately three months after the litigation began, C Co. demanded, pursuant to the indemnity agreement, that P Co. and the individual principals indemnify C Co. for the expenses it had incurred in defending against G Co.'s claims and that they deposit collateral security in the amount of $2 million with C Co. In response, L, on behalf of P Co. and the individual principals, sent C Co. a letter stating that they did not have the financial resources to meet C Co.'s demands. C Co. then notified P Co. and the individual principals that their refusal to indemnify C Co. and to deposit collateral in the amount requested constituted a breach of the indemnity agreement. C Co. subsequently entered into a settlement agreement with G Co. and the third-party defendants in the New York action, in which all parties agreed to release all pending claims in the New York action, including claims asserted by P Co. in its counterclaims and third-party complaints. C Co. then filed a motion to enforce the settlement agreement, and P Co. filed a memorandum in opposition, arguing that C Co. settled the action in bad faith. The New York court granted the motion to enforce the settlement over P Co.'s objection. The individual principals then brought their action against C Co. in Connecticut in connection with its handling of the New York action. C Co. filed a motion for summary judgment in its indemnity action, in which P Co. had been defaulted for failing to appear, claiming that there was no genuine issue of material fact that P Co. and the individual principals executed and then breached the indemnity agreement by failing and refusing to indemnify C Co. and that C Co. had suffered damages due to the breach. C Co. later moved for summary judgment in the individual principals' action, asserting that their claims were barred by the doctrines of res judicata and collateral estoppel. After a hearing, the trial court granted C Co.'s motion for summary judgment in the indemnity action but denied C Co.'s motion for summary judgment in the individual principals' action,

and the individual principals and C Co. filed separate appeals to this court. *Held*:

1. The individual principals could not prevail on their claim that the trial court improperly rendered summary judgment for C Co. on its claim for contractual indemnification: because C Co. satisfied the prima facie evidence and right-to-settle provisions of the indemnity agreement by submitting an affidavit from its president that included an itemized statement of the losses, costs and expenses incurred by C Co. in connection with the bonds, the burden shifted to the individual principals to raise a genuine issue of material fact as to whether C Co. had acted in bad faith in incurring those expenses and/or settling the New York action, and, although the individual principals argued that a fair and reasonable fact finder could find that it was unreasonable for C Co. to incur significant expenses without first testing G Co.'s claims through a motion to dismiss in the New York action and that C Co. settled the New York action solely to protect its own self-interest, in light of the existence of issues of fact surrounding the performance bond conditions and the individual principals' admitted insolvency in their letter refusing C Co.'s demand for collateral, the individual principals failed to demonstrate that C Co.'s decision to settle the New York action, rather than moving to dismiss it, was an unreasonable exercise of the discretion C Co. was afforded under the indemnity agreement; moreover, the individual principals introduced no evidence of an improper motive or a dishonest purpose with regard to C Co.'s self-interested settlement of the performance bond claim in New York, that settlement having protected both C Co. and P Co. from the possibility of a substantially larger judgment and further litigation costs, and self-interest is not itself evidence of an improper motive and does not necessarily constitute a per se violation of the implied covenant of good faith and fair dealing; furthermore, the individual principals had the option under the indemnity agreement to notify C Co. that they wanted it to defend the claims against the bonds and simultaneously deposit collateral with C Co. sufficient to cover those claims, but they failed to do so.
2. C Co. could not prevail on its claim that the trial court improperly denied its motion for summary judgment and improperly concluded that the individual principals' claims were not precluded by the doctrines of res judicata and collateral estoppel: this court concluded that res judicata did not apply because the proceeding in the New York action did not provide the proper forum for the individual principals to adequately litigate their bad faith claims, it was clear that the New York court ignored the defenses related to C Co.'s separate right to indemnification, to which issues of bad faith may be relevant, and, thus, whether C Co. acted in good faith in settling the New York action was irrelevant to the New York court's determination as to whether C Co. had the authority to do so; moreover, because C Co.'s indemnity action was pending in Connecticut when C Co. sought to enforce the settlement agreement in

the New York action, there was no question that there was another, more appropriate forum in which P Co. could have raised its claims related to C Co.'s right to indemnification; furthermore, the doctrine of collateral estoppel did not preclude the individual principals' claims in their separate action, as this court, having concluded that the individual principals did not have an adequate opportunity to litigate their bad faith claims in the New York action, also concluded that it necessarily followed that those issues were not actually decided in that proceeding.

Argued April 3—officially released August 22, 2023

Procedural History

Action, in the first case, to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, and action, in the second case, for, inter alia, indemnification, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the named defendant was defaulted for failure to appear; thereafter, both cases were transferred to the Superior Court in the judicial district of Waterbury, Complex Litigation Docket, where the court, *Bellis, J.*, denied the motion for summary judgment filed by the defendant in the first case and granted the motion for summary judgment filed by the plaintiff in the second case and rendered judgments thereon, from which the defendant in the first case and the defendant Lina T. Barbara et al. in the second case filed separate appeals to this court. *Affirmed.*

Steven Lapp, with whom was *Karen L. Dowd*, for the appellant in Docket No. AC 44836 (defendant) and the appellee in Docket No. AC 45267 (plaintiff).

Christopher G. Brown, for the appellants in Docket No. AC 45267 (defendant Lina T. Barbara et al.) and the appellees in Docket No. AC 44836 (plaintiffs).

Opinion

BRIGHT, C. J. These two appeals involve separate actions arising from the construction of a hotel in New

York (hotel project). James E. Barbara and Lina T. Barbara (Barbaras) and their company Phoenix Contracting Group, Inc. (Phoenix), executed a general indemnity agreement (indemnity agreement) in favor of Colonial Surety Company (Colonial) as consideration for the issuance of surety bonds for the hotel project, on which Phoenix was a subcontractor.[1] The general contractor of the hotel project made claims on the bonds against Colonial in New York based on Phoenix's alleged failure to perform (New York action), and Colonial brought an action against Phoenix and the Barbaras in Connecticut to enforce the indemnity agreement (indemnity action). Colonial ultimately settled all claims in the New York action over Phoenix's objection, and the Barbaras brought an action against Colonial in Connecticut, asserting breach of contract and bad faith claims against Colonial in connection with its handling of the New York action and seeking to invalidate the indemnity agreement (Barbaras' action).

In Docket No. AC 44836, Colonial appeals from the denial of its motion for summary judgment in the Barbaras' action, in which it asserted that the Barbaras' claims were precluded pursuant to the doctrines of res judicata and collateral estoppel.[2] In Docket No. AC 45267, the Barbaras appeal from the judgment of the trial court rendered following the granting of Colonial's motion for summary judgment in the indemnity action.[3] On

[1] The parties are transposed as plaintiffs and defendants in the two underlying cases. For the sake of clarity, we refer to the parties by name rather than as plaintiff or defendant.

[2] In light of the grounds raised in Colonial's motion for summary judgment, we consider the denial of the motion for summary judgment to be an appealable final judgment. "Because one purpose of the doctrines of res judicata and collateral estoppel is to avoid unnecessary and duplicative litigation, we treat the denial of a motion for summary judgment based on the doctrines of collateral estoppel or res judicata as a final judgment for appeal purposes." *Girolametti* v. *Michael Horton Associates, Inc.*, 173 Conn. App. 630, 648, 164 A.3d 731 (2017), aff'd, 332 Conn. 67, 208 A.3d 1223 (2019).

[3] Phoenix was defaulted for failing to appear in the indemnity action and is not participating in the Barbaras' appeal.

appeal, Colonial claims that the court improperly concluded that the Barbaras' action is not precluded by the doctrines of res judicata and/or collateral estoppel, and the Barbaras claim that the court improperly concluded that they failed to raise a genuine issue of material fact with respect to their allegations that Colonial acted in bad faith in settling the New York action. We affirm the judgments of the trial court.

The records reveal the following facts, viewed in the light most favorable to the Barbaras as the nonmoving parties, and procedural history. Colonial is a commercial surety company that issues payment and performance bonds on behalf of contractors and subcontractors for construction projects. In 2007, Phoenix, as a subcontractor, executed a trade subcontract with Gotham Greenwich Construction Co., LLC (Gotham), the general contractor for the hotel project, to supply and install exterior window walls for the building (subcontract). On May 1, 2008, the Barbaras, both individually and on behalf of Phoenix, executed the indemnity agreement in favor of Colonial.[4] On May 20, 2008, Colonial, as surety, issued performance and payment bonds[5] on behalf of Phoenix, as principal, and in favor of Gotham, as obligee, to secure Phoenix's obligations under its subcontract with Gotham (Gotham bonds).

[4] Lina Barbara signed the indemnity agreement on behalf of Phoenix as its president and as the individual indemnitor, and James Barbara signed as spouse indemnitor.

[5] "Under a performance bond, the surety is liable for a default in performance by the principal of its contract obligations . . . . [The performance bond] provides available funds to complete the principal's contract should the latter be in default of the performance it owes the obligee. . . . In contrast, a payment bond is intended to [protect] subcontractors, suppliers, and those providing labor to a principal under a contract of construction and assures that a financially responsible party, the surety, is committed to paying these . . . claimants should the principal fail to do so." (Citation omitted; internal quotation marks omitted.) *U.S. Fidelity & Guaranty Co.* v. *Arch Ins. Co.*, 578 F.3d 45, 48 n.2 (1st Cir. 2009).

Pursuant to the indemnity agreement, Phoenix and the Barbaras (1) agreed to indemnify Colonial for any losses that Colonial might incur from issuing the Gotham bonds on behalf of Phoenix, (2) granted Colonial the authority to settle any claims on the Gotham bonds and assigned to Colonial all their rights in and to the subcontract, and (3) appointed Colonial as their attorney-in-fact "with the right but not the obligation, to exercise all of the rights assigned" to Colonial in the indemnity agreement.[6]

[6] The indemnity agreement provides in relevant part: "Indemnitor and your successors agree to perform all the conditions of each Bond and Contract and to indemnify and save harmless Surety from and against any and all (i) demands, liabilities, losses, costs, damages or expenses of whatever nature or kind, including all fees of attorneys and all other expenses, including but not limited to costs and fees of investigation, adjustment of claims, procuring or attempting to procure the discharge of Bonds, enforcement of any Contract with Indemnitor, and in attempting to recover losses or expenses from Indemnitor, or third parties, whether or not Surety shall have paid out any or all of such sums, (ii) amounts sufficient to discharge any claim made against Surety on any Bond, which amounts may be used by Surety to pay such claim, or may be held by Surety as collateral security against any loss on any Bond, and (iii) any premiums due on Bonds issued by the Surety on behalf of the Principal (hereinafter the 'Indemnity'). . . .

"In furtherance of the Indemnity hereunder . . . Surety shall have the right in its sole discretion to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed. . . . Surety shall have the right to incur such expenses in handling a claim as it deems necessary or advisable . . . and Surety's good faith determination as to the necessity or advisability of any such expense shall be final and conclusive upon Indemnitor. . . . Surety shall have the foregoing rights, irrespective of the fact that Indemnitor may have assumed, or offered to assume, the defense of Surety upon such claim. . . . In any claim or suit hereunder, an itemized statement of the aforesaid loss and expense, sworn to by an officer of Surety, or the vouchers or other evidence of disbursement by Surety, shall be prima facie evidence of the fact and extent of the liability hereunder of Indemnitor. . . . Surety shall have the right to reimbursement of its expenses, premiums and attorneys' fees hereunder, irrespective of whether any Bond loss payment has been made by Surety. Surety may recover from Indemnitor its expenses and attorneys' fees incurred in prosecuting or defending any action arising out of or relating to this Agreement or other Contract with Indemnitor. Indemnitor's duty to reimburse the Company for fees and expenses that it incurs shall arise upon the receipt of any claim by Colonial. . . .

"Indemnitor shall be in Default with respect to a Contract if any of the

Soon after construction began, issues arose with the hotel project, and Phoenix was unable to begin its work until the spring of 2009. Gotham and Phoenix both denied responsibility for the resulting delay. In August, 2009, Gotham notified Phoenix and Colonial that it was considering declaring Phoenix in default under the subcontract because Phoenix had failed to perform the work as scheduled. Phoenix, in turn, claimed that Gotham had breached the subcontract and that any delay in Phoenix's performance was attributable to site conditions caused by Gotham's other subcontractors. In a letter dated September 1, 2009, and addressed to James Barbara, Gotham identified several issues with Phoenix's performance under the subcontract, stating that the issues "amplify the failures exhibited by Phoenix in all aspects of the work and these failures are continuing and delaying the overall construction of the

following occur . . . . Any beneficiary of a Bond or obligee of a Contract declares Principal to be in default. . . . Principal or any Indemnitor breaches any provision of this Agreement or Contract with Surety. . . .

"In the event of Default . . . Surety may at its option and sole discretion . . . file an immediate suit to enforce any or all of the provisions of this Agreement. . . .

"As security for the performance of all of the provisions of this Agreement each Indemnitor hereby . . . assigns, transfers, pledges and conveys to Surety any and all claims of such Indemnitor against, or any sums due and owing to such Indemnitor by, the Principal and (effective as of the date of each Bond) all rights in connection with any Contract, including but not limited to . . . all subcontracts made in connection with a Contract and such subcontractors Surety bonds . . . [and] all accounts receivable, including any and all sums due or which may thereafter become due under a Contract and all sums due or to become due on all other contracts, bonded or unbonded, in which any Indemnitor has an interest . . . .

"The [Indemnitor] hereby irrevocably nominate[s], constitute[s], appoint[s] and designate[s] the Company or its designee as their attorney-in-fact with the right but not the obligation, to exercise all of the rights assigned, transferred and set over to Surety by the [Indemnitor] in this Agreement . . . . The [Indemnitor] hereby ratifies and affirms all acts and actions taken and done by the Surety or its designee as attorney-in-fact. This power of attorney is irrevocable and is coupled with an Interest and shall survive the subsequent disability or legal incapacity of any [Indemnitor]. . . ." (Emphasis omitted.)

project." Colonial, through its president, Wayne Nunziata, responded to Gotham in a letter dated September 10, 2009, explaining that "there is no default by [Phoenix], and Colonial is not volunteering to take over the project. Moreover, it is Colonial's understanding that Phoenix . . . acknowledges that additional manpower and installation expertise is now required because of the material changes and resulting problems . . . ."

A few months later, in a letter dated January 13, 2010, Gotham stated that "[t]he defaults are continuing. . . . This letter constitutes further notice of Gotham's intention to terminate your right to complete the [s]ubcontract." In a letter dated February 17, 2010, Gotham notified Colonial and Phoenix that it was considering declaring Phoenix in default and requested a conference to discuss the subcontract and performance bond. In addition, in March, 2010, one of Phoenix's subcontractors, United Iron, Inc. (United Iron), notified Colonial that it was making a claim against the payment bond in the amount of $112,688.37.

Phoenix ultimately completed the subcontract work in August, 2010. Shortly thereafter, in a letter dated September 7, 2010, Gotham terminated the subcontract, citing Phoenix's failure to pay costs associated with the delay in installing the window walls and for work performed by Phoenix's sub-subcontractors.

On October 28, 2010, Colonial filed the indemnity action against Phoenix and the Barbaras in Connecticut. On November 5, 2010, Gotham filed the New York action against Phoenix and Colonial seeking more than $1 million in damages. Gotham alleged that Phoenix breached the subcontract and that Colonial breached the performance bond. Shortly thereafter, Colonial filed an answer and asserted various affirmative defenses in the New York action. On November 19, 2010, United Iron filed a separate action in New York against Phoenix

and Colonial, seeking $37,877.50 under the payment bond (United Iron action).

Approximately three months after the litigation began, Colonial sent Phoenix and the Barbaras a letter dated February 8, 2011, demanding that they indemnify Colonial for the expenses it had incurred in defending against Gotham's claims against the Gotham bonds and, pursuant to paragraph 7 of the indemnity agreement, that they deposit collateral security in the amount of $2 million with Colonial. Paragraph 7 of the indemnity agreement provides in relevant part: "If a claim is made against [Colonial], or if [Colonial] deems it necessary to establish a reserve for potential claims, and upon demand from [Colonial], Indemnitor shall deposit with [Colonial] cash or other property acceptable to [Colonial], as collateral security, to protect [Colonial] with respect to such claim or potential claims and any anticipated expense and attorneys' fees. Such collateral security shall be in such amount as [Colonial] in its sole discretion deems appropriate. Such collateral may be held by [Colonial] until it has received satisfactory evidence of its complete discharge from such claim or potential claims, and until it has been fully reimbursed for all losses, expenses, fees, and paid all premiums due. . . ."

Lina Barbara, on behalf of the Barbaras and Phoenix, responded by letter dated February 18, 2011, stating that "we don't have the financial resources to meet your demands."[7] Colonial replied to Phoenix and the Barbaras in a letter dated March 8, 2011, notifying them

[7] In the indemnity action, Colonial filed an application for a prejudgment remedy against Phoenix and the Barbaras, which the court, *Hon. William L. Hadden, Jr.*, judge trial referee, granted on April 17, 2012, in the amount of $90,000. On August 7, 2012, Colonial moved to modify the prejudgment remedy to reflect the additional costs and expenses it had incurred. The court granted the motion, increasing the amount of the prejudgment remedy to $360,291.08.

that their refusal to indemnify Colonial and to deposit collateral in the amount requested constituted a breach of the indemnity agreement.

In May, 2011, after Gotham amended its complaint in the New York action to increase its claim to $3.5 million, Phoenix, through its attorney Lina Barbara, who is licensed to practice law in New York under the name Lina Tang, filed an answer and asserted counterclaims against Gotham. In September, 2011, Phoenix filed third-party complaints against Gotham's surety, Travelers Casualty & Surety Company of America (Travelers), Gotham's parent company, Gotham Construction Company, LLC (Gotham Construction), and the owner of the hotel project, Sochin Downtown Realty, LLC (Sochin) (collectively, third-party defendants). On December 18, 2012, the United Iron action was discontinued by stipulation of the parties.[8]

Meanwhile, in the indemnity action, Phoenix was defaulted for failing to appear on August 28, 2011, and Colonial filed its operative amended complaint on September 9, 2011. The Barbaras filed an answer and asserted several special defenses, but the court, *B. Fischer*, *J.*, granted Colonial's motions to strike their special defenses.[9]

[8] The stipulation was signed by Lina Barbara, as Phoenix's attorney.

[9] In October, 2013, the Barbaras asserted the following special defenses in the indemnity action: Colonial demanded payment under the Gotham bonds for costs incurred prior to the lawsuit being commenced; Colonial failed to mitigate its damages because it had not moved to dismiss the New York action; the indemnification was premature because all of the damages had not occurred at the time Colonial brought the action; and Colonial's demand for collateral was unreasonable because Colonial was unlikely to lose in the New York action. Colonial moved to strike those special defenses on October 25, 2013.

In November, 2013, the Barbaras amended their answer and asserted the following amended special defenses: Colonial "breached the implied covenant of good faith"; Colonial failed to mitigate its damages because it had not moved to dismiss the New York action; the indemnity action was premature because all of the damages had not occurred at the time Colonial brought the action; and Colonial's demand for collateral was unreasonable

In April, 2015, Colonial, for itself and as attorney-in-fact for Phoenix, entered into a "settlement and release agreement" with Gotham and the third-party defendants (settlement agreement). Pursuant to the settlement agreement, Colonial agreed to pay Gotham $100,000 "as full and final resolution and satisfaction of any and all claims" arising from the hotel project, Phoenix's subcontract, and/or the Gotham bonds. All parties agreed to release all pending claims in the New York action, including those claims asserted by Phoenix in its counterclaims and third-party complaints.

Shortly thereafter, in the New York action, Colonial filed a motion to enforce the settlement agreement and to discontinue the New York action with prejudice (motion to enforce the settlement), as well as a supporting memorandum of law. Phoenix filed a memorandum of law in opposition to Colonial's motion to enforce the settlement, arguing that Colonial settled the action in bad faith. Colonial filed a reply to Phoenix's opposition, denying Phoenix's claims. On July 28, 2015, the New York court granted Colonial's motion to enforce the settlement over Phoenix's objection. Phoenix did not appeal from the judgment in the New York action.

In the indemnity action, on June 21, 2016, the Barbaras, pursuant to Practice Book § 10-60 (a) (3), filed a request for leave to reopen the pleadings,[10] amend their answer, add affirmative defenses and counterclaims, and to allow for discovery in the indemnity action. In their request, the Barbaras stated that they had not sought discovery previously in the indemnity action

because Colonial was unlikely to lose in the New York action. Colonial filed a motion to strike the amended special defenses on December 3, 2013.

On March 31, 2014, the court, *B. Fischer, J.*, granted Colonial's October 25, 2013 motion to strike the Barbaras' special defenses. On December 2, 2014, the court granted Colonial's December 3, 2013 motion to strike.

[10] On April 2, 2014, Colonial filed a certificate of closed pleadings and a claim for the trial list.

because Phoenix and Colonial had conducted a joint defense in the New York action and engaging in discovery could have "given [Gotham] an advantage over Colonial. Now that [the Barbaras] are aware of Colonial's bad faith and improper motive, [the Barbaras seek] . . . to add affirmative defenses and counterclaims." The Barbaras requested "permission to open up the pleadings, amend [their] answer to add affirmative defenses and to allow [them] the opportunity to counterclaim against [Colonial] for a declaration that the [indemnity agreement] and the [Gotham] bonds are void as a result of [Colonial's] material breaches of both documents and its bad faith actions and that [they] be awarded damages accordingly."

On that same date, the parties appeared before the court, *Hon. Bruce W. Thompson*, judge trial referee, for a pretrial conference. During that proceeding, Colonial requested an extension of time in which to file an objection to the Barbaras' request to open the pleadings, which the court granted on the record. On July 22, 2016, Colonial filed an objection to the Barbaras' request, arguing, among other things, that the court should deny the request as untimely. Colonial noted that the Barbaras were aware of the settlement agreement in the New York action as of July 28, 2015, and that, although the Barbaras indicated that they would amend their pleadings in the indemnity action to assert counterclaims against Colonial during a pretrial conference on December 17, 2015, they failed to do so for the ensuing six months until the June 21, 2016 pretrial conference. On December 19, 2016, the court, *A. Robinson, J.*, denied the Barbaras' request and sustained Colonial's objection thereto without comment.[11] In April, 2017, the Barbaras'

[11] On January 11, 2017, the Barbaras filed a joint appeal challenging the court's orders denying their request for leave and sustaining Colonial's objection thereto. On March 22, 2017, this court granted Colonial's motion to dismiss that appeal for lack of a final judgment.

action was filed, seeking damages for breach of the indemnity agreement and a declaratory judgment that the indemnity agreement is void.

In the indemnity action, on December 22, 2017, Colonial filed a motion for summary judgment and accompanying memorandum of law as to its indemnification claim along with several documentary exhibits.[12] Colonial claimed that there is no genuine issue of material fact that the Barbaras executed and then breached the indemnity agreement by failing and refusing to indemnify Colonial and that Colonial has suffered damages due to the breach. On February 13, 2018, the Barbaras moved to stay the indemnity action pending a final

[12] Specifically, Colonial submitted the following evidence: an affidavit by Attorney Steven Lapp, excerpts from the Barbaras' complaint against Colonial, an affidavit by Nunziata, and the indemnity agreement (Exhibit 1); the Gotham bonds (Exhibit 2); the subcontract (Exhibit 3); four letters from Gotham to Phoenix (Exhibits 4, 5, 6 and 8); United Iron's notice of claim to Colonial (Exhibit 7); a letter from Gotham to Colonial (Exhibit 9); the amended complaint in the United Iron action (Exhibit 10); the stipulation of discontinuance of the United Iron action (Exhibit 11); the amended complaint in the New York action (Exhibit 12); Colonial's amended answer and affirmative defenses to Gotham's amended complaint in the New York action (Exhibit 13); Phoenix's answer to Gotham's amended complaint with counterclaims against Gotham (Exhibit 14); Phoenix's third-party summons and third-party complaint against Travelers (Exhibit 15); Phoenix's first amended second third-party complaint against Gotham Construction and Sochin (Exhibit 16); a letter with attachments from Colonial to Phoenix and the Barbaras (Exhibit 17); a letter from the Barbaras to Colonial (Exhibit 18); a letter from Colonial to Phoenix and the Barbaras (Exhibit 19); Gotham's responses to Phoenix's amended first demand for interrogatories in the New York action (Exhibit 20); the settlement agreement in the New York action (Exhibit 21); Phoenix's memorandum of law in opposition to Colonial's motion to enforce the settlement (Exhibit 22); the Barbaras' affirmation and affidavit in opposition to Colonial's motion to enforce the settlement (Exhibits 23 and 24); Colonial's reply memorandum in response to Phoenix's opposition to the motion to enforce the settlement (Exhibit 25); a supplemental affidavit by Nunziata in support of Colonial's motion to enforce the settlement (Exhibit 26); the transcript of the July 28, 2015 hearing in the New York action (Exhibit 27); the August 20, 2015 court order issued in the New York action (Exhibit 28); and the notice of entry of the August 20, 2015 court order (Exhibit 29).

judgment in the Barbaras' action, and Colonial filed an objection thereto in March, 2018.

In April, 2018, Colonial moved to dismiss the Barbaras' action pursuant to the prior pending action doctrine[13] or, in the alternative, to stay the Barbaras' action pending a final judgment in the indemnity action. Colonial argued that the Barbaras were attempting to avoid the effect of the court's rulings in the indemnity action striking their special defenses and denying their request for leave to amend their answers and to assert counterclaims. Alternatively, Colonial argued that the court should stay the Barbaras' action "to facilitate the interests of judicial economy, consistency and finality . . . ."

On September 24, 2018, while Colonial's motion to dismiss the Barbaras' action was pending, the court, *Abrams*, *J.*, granted the Barbaras' motion to stay the indemnity action through November 26, 2018. On October 30, 2018, the court, *Stevens*, *J.*, denied Colonial's motion to dismiss the Barbaras' action, concluding that "the reasonable exercise of the court's discretion warrants a denial of [Colonial's] motion to dismiss under the prior pending action doctrine."[14] The court also

[13] "[T]he prior pending action doctrine permits the court to dismiss a second case that raises issues currently pending before the court. The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious. This is a rule of justice and equity, generally applicable, and always, where the two suits are virtually alike, and in the same jurisdiction. . . . The policy behind the doctrine is to prevent unnecessary litigation that places a burden on crowded court dockets." (Citations omitted; internal quotation marks omitted.) *Kleinman* v. *Chapnick*, 140 Conn. App. 500, 505, 59 A.3d 373 (2013).

[14] The court reasoned that "the basis for [the Barbaras'] bad faith claims against [Colonial] did [not] arise until after [Colonial] entered into the settlement with Gotham, releasing Phoenix's affirmative claims against Gotham and paying Gotham $100,000 for which the [Barbaras] must indemnify [Colonial] pursuant to the [indemnity] agreement. . . . [T]he prior pending action doctrine is a rule of justice and equity to avoid circumstances where duplica-

determined that "the granting of a stay . . . would be inappropriate and not judicious for similar reasons justifying the denial of the motion to dismiss."

On November 19, 2018, Colonial filed an application to transfer the Barbaras' action to the Complex Litigation Docket. On November 20, 2018, the Barbaras filed their operative amended complaint, which included four counts. In the first three counts, the Barbaras alleged that Colonial breached (1) the indemnity agreement, (2) the implied covenant of good faith and fair dealing, and (3) the performance bond. In the fourth count, they sought a declaratory judgment that the indemnity agreement is void.

On December 6, 2018, the court, *Abrams*, *J.*, ordered that the Barbaras' action be transferred to the judicial district of New Haven and consolidated with the indemnity action. On December 19, 2018, Judge Abrams designated the Barbaras' action and the indemnity action as complex litigation cases and ordered them transferred to the Complex Litigation Docket in the judicial district of Waterbury.

On August 12, 2019, the Barbaras filed affidavits and several supporting exhibits in opposition to Colonial's December 22, 2017 motion for summary judgment in the indemnity action.[15] The Barbaras claimed that Colonial

tive litigation is oppressive and vexatious and to prevent unnecessary litigation that places a burden on our state's already crowded court dockets. . . . The application of the prior pending action doctrine in the manner asserted by [Colonial] here cannot be viewed as being consistent with any notion of justice and equity, particularly under the circumstances where adjudication of the [Barbaras'] claims can only be assured by the prosecution of the present action in light of the timing of [Colonial's] institution of the indemnity [action] vis-à-vis when its alleged wrongful acts occurred." (Citation omitted; internal quotation marks omitted.)

[15] The Barbaras submitted the following evidence: excerpts of the subcontract between Phoenix and Gotham (Exhibit A); the indemnity agreement (Exhibit B); a photograph of the embeds in the concrete at the hotel project and emails relating to the embeds (Exhibit C); the Gotham bonds (Exhibit D); excerpts of the hotel project's Guaranteed Maximum Price Submission (Exhibit E); specifications for the hotel project and an email from Gotham

incurred the expenses and losses for which it sought indemnification in bad faith because "Colonial engaged in years of discovery, incurring substantial legal fees . . . and expenses unnecessarily defending the New York action." According to the Barbaras, "Colonial knew right from the start of the New York [action] that it had no liability to [Gotham] under the performance bond, yet it remained in the New York [action] instead of making a pre-answer motion for dismissal because it wanted to cut a deal with Gotham for future business." The Barbaras further claimed that, given that Colonial could have moved to dismiss the New York action, the only possible explanation for its failure to do so "is that Colonial had something else to gain [by remaining] in [the New York] action. . . . Colonial must have gotten a very lucrative deal with Gotham."

On August 22, 2019, Colonial moved for summary judgment in the Barbaras' action, asserting that the Barbaras' claims were barred by the doctrines of res judicata and collateral estoppel. Colonial submitted affidavits from Nunziata and Attorney Steven Lapp, with accompanying exhibits.[16] On October 15, 2019, the Barbaras filed their opposition to Colonial's motion for

to Phoenix (Exhibit F); documents relating to Phoenix's request to Gotham for revision of the hat channel (Exhibit G); additional specifications for the hotel project and surveys by Gotham's surveyor (Exhibit H); a letter from Colonial to Gotham (Exhibit I); a letter from Phoenix to Gotham with attachments (Exhibit J); Gotham's notices to Phoenix regarding termination of the subcontract (Exhibit K); Colonial's answer in the New York action (Exhibit L); New York case law (Exhibit M); invoices from Beacon Consulting Group, Inc. (Beacon Consulting), to Colonial (Exhibit N); emails between Beacon Consulting and Phoenix (Exhibit O); Gotham's responses to Phoenix's demand for interrogatories in the New York action (Exhibit P); Colonial's amended answer and affirmative defenses to Gotham's amended complaint in the New York action (Exhibit Q); and a letter from Gotham to Sochin and an email from Gotham Construction to its general counsel (Exhibit R).

[16] Nunziata's affidavit included the following exhibits: the indemnity agreement (Exhibit 1); the Gotham bonds (Exhibit 2); the subcontract (Exhibit 3); a September 20, 2010 letter from Gotham to Phoenix (Exhibit 4); Gotham's summons and complaint in the New York action (Exhibit 5); letters from

summary judgment in the Barbaras' action. They argued, among other things, that they "were unable to fully and fairly litigate Phoenix's claims about Colonial's bad faith actions because when Colonial finally settled the New York [action], Phoenix had no method of obtaining discovery to prove Colonial's bad faith."

On November 8, 2019, Colonial filed its reply memorandum, arguing that "[t]he record establishe[d], beyond dispute, that Phoenix and the Barbaras did, in fact, oppose the motion [to enforce the settlement] by asserting bad faith and breach of contract claims against

Colonial to Phoenix and the Barbaras (Exhibits 6 and 7); Gotham's responses to Phoenix's interrogatories in the New York action (Exhibit 8); the settlement agreement (Exhibit 9); the transcript of the July 28, 2015 court proceeding in the New York action (Exhibit 10); and a copy of the court's judgment in the New York action (Exhibit 11).

Lapp's affidavit included the following exhibits: excerpts from Lina Barbara's response to Colonial's first set of interrogatories and requests for production in the Barbaras' action (Exhibit 1); Gotham's summons and complaint in the New York action (Exhibit 2); Colonial's proposed order to show cause filed in the New York action (Exhibit 3); the proposed order granting the motion to enforce the settlement (Exhibit 4); Colonial's memorandum of law in support of its motion to enforce the settlement (Exhibit 5); Nunziata's affidavit in support of Colonial's motion to enforce the settlement (Exhibit 6); the exhibits that were attached to Nunziata's affidavit in support of the motion to enforce the settlement (Exhibits 7 through 19); the order to show cause issued by the court in the New York action (Exhibit 20); Phoenix's memorandum of law in opposition to Colonial's motion to enforce the settlement (Exhibit 21); the Barbaras' affirmation and affidavit in opposition to the motion to enforce the settlement (Exhibits 22 and 23); exhibits A through R to the Barbaras' oppositions to the motion to enforce the settlement (Exhibit 24); the affirmation of service by Lina Barbara in the New York action (Exhibit 25); Colonial's memorandum of law in response to Phoenix's opposition to the motion to enforce the settlement (Exhibit 26); Nunziata's supplemental affidavit in support of Colonial's motion to enforce the settlement with selected exhibits (Exhibit 27); an affidavit by Attorney Frederick R. Rohn with exhibit A to Rohn's affidavit filed on behalf of Gotham, Gotham Construction, and Travelers in the New York action (Exhibit 28); Christopher Jaskiewicz' reply affidavit with exhibits A through I filed on behalf of Gotham, Gotham Construction, and Travelers in the New York action (Exhibit 29); the transcript of the July 28, 2015 New York court proceeding (Exhibit 30); the court's judgment in the New York action (Exhibit 31); and the notice of judgment in the New York action (Exhibit 32).

Colonial and litigating the same through adversarial and contested court proceedings, in which they submitted extensive evidence to support their opposition to the motion [to enforce the settlement]." Colonial also argued that, "despite [the Barbaras'] argument that they and Phoenix had no avenue or method to pursue discovery of evidence to support their opposition to the motion [to enforce the settlement] . . . the Barbaras provide absolutely no evidence that they and Phoenix actually made any attempt in the [New York action] to pursue discovery through any of the [available] procedures and were then refused the opportunity to do so by the court. . . . Accordingly, the opportunity was present, yet Phoenix and the Barbaras made no attempt to use that opportunity to obtain discovery to support the bad faith and breach of contract claims which Phoenix and the Barbaras did, in fact, raise and litigate—albeit unsuccessfully—in opposition to the motion [to enforce the settlement]." (Emphasis omitted; internal quotation marks omitted.)

On February 24, 2020, Colonial filed a reply memorandum in the indemnity action. In support of its reply, Colonial submitted another affidavit from Lapp, as well as the exhibits it had submitted in support of its motion for summary judgment in the Barbaras' action. Colonial repeated its claims that the Barbaras' bad faith defense was precluded by the doctrines of res judicata and/or collateral estoppel and, alternatively, that the Barbaras' " 'bad faith' theories and arguments . . . amount to nothing more than speculative, conjectural and conclusory accusations that are illogical and frivolous on their face, are not supported by any competent and admissible evidence, are meritless under Connecticut law and the decisions of courts of other jurisdictions, and are precluded by the provisions of the indemnity agreement itself."

The court held a hearing on Colonial's motions for summary judgment on March 8, 2021. The court granted Colonial's motion in the indemnity action on June 23, 2021, and it denied Colonial's motion in the Barbaras' action on June 28, 2021.

In the indemnity action, the court concluded that, because Colonial satisfied the prima facie evidence provision in the indemnity agreement by submitting Nunziata's affidavit, which included an itemized statement of Colonial's losses and the expenses it incurred in connection with the Gotham bonds, the burden shifted to the Barbaras to raise a genuine issue of material fact as to Colonial's lack of good faith in making the payments for which it sought indemnification. The court, however, rejected Colonial's claim that the Barbaras were precluded by the doctrines of res judicata and collateral estoppel from asserting bad faith.[17]

[17] The court reasoned that "[r]es judicata does not apply to the [Barbaras'] claims in the present matter because [u]nder the doctrine of res judicata, a final judgment, when rendered on the merits, is an absolute bar to a *subsequent action* . . . between the same parties or those in privity with them, upon the same claim. . . . This matter does not involve a subsequent action brought by the [Barbaras]." (Citation omitted; emphasis in original; internal quotation marks omitted.) The court also determined that collateral estoppel did not apply, reasoning that, although the Barbaras were in privity with Phoenix, the issue regarding Colonial's good faith "was not in fact determined or necessarily determined in the [New York action] because whether Colonial made good faith determinations as to the necessity and advisability of expenses incurred in connection with claims arising from the Gotham bonds was not essential to the court's decision whether to approve the settlement agreement. The statements of the [New York court] on the record, during the July 28, 2015 court proceeding and the August 20, 2015 order, do not address this issue. . . .

"[The court] approved the settlement agreement because 'it [was] undisputed by the parties that Phoenix failed to deposit with Colonial cash or collateral sufficient to cover [Gotham's] claims . . . [and] [t]herefore, under paragraph 10 (V) [of the indemnity agreement] . . . Colonial had the sole and exclusive right to settle the instant claims against Phoenix.' The court also recognized Colonial's 'ability to execute and negotiate' the settlement agreement on Phoenix's behalf as its attorney-in-fact under the indemnity agreement. Similarly, the court's August 20, 2015 order stated: '[Colonial] is authorized and empowered to settle the [New York action], including

The court then considered the merits of the Barbaras' opposition to Colonial's motion for summary judgment and concluded that they failed to establish a genuine issue of material fact as to their bad faith defense. Colonial subsequently withdrew the remaining counts of its operative complaint and filed a motion for award of interest and entry of judgment on the first count of its complaint. Colonial sought both prejudgment and postjudgment interest. On January 10, 2022, the court granted the motion, rendered judgment for Colonial in the amount of $2,946,959.26, including $1,308,134.87 in prejudgment interest, and awarded Colonial postjudgment interest at the rate of 10 percent per annum. On January 31, 2022, the Barbaras appealed from the judgment in the indemnity action.

In the Barbaras' action, the court denied Colonial's motion for summary judgment, concluding that neither collateral estoppel nor res judicata applied. Colonial's appeal followed. Additional facts will be set forth as necessary.

Before turning to the parties' claims, we first set forth the applicable standard of review. "Our standard of review as to a trial court's decision to grant a motion for summary judgment is well settled. 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

counterclaims made by [Phoenix], as third-party plaintiff, against [Travelers, Gotham Construction, and Sochin], as third-party defendants, in full settlement of all such claims and defenses made in the [New York action] . . . .'

"The [New York action], therefore, did not address the broader issue of whether Colonial's determination of the necessity and advisability of expenses that it incurred in connection with the Gotham bonds, under the indemnity agreement, lacked good faith. Collateral estoppel, therefore, does not preclude the [Barbaras] from asserting bad faith against Colonial in the [Barbaras'] action."

for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact . . . . [T]he party moving for summary judgment is held to a strict standard. [The moving party] must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . A material fact is a fact that will make a difference in the result of the case. . . . Because the court's decision on a motion for summary judgment is a legal determination, our review on appeal is plenary. . . . [W]e must [therefore] decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stewart* v. *Old Republic National Title Ins. Co.*, 218 Conn. App. 226, 237–38, 291 A.3d 1051 (2023).

In addition, to the extent that we are required to construe the indemnity agreement, we conclude, and the parties agree, that the contract is unambiguous, and, therefore, "the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 290, 838 A.2d 135 (2004).

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On appeal in the indemnity action, the Barbaras claim that the court improperly rendered summary judgment for Colonial on its claim for contractual indemnification. Specifically, the Barbaras contend that there is a genuine issue of material fact as to whether Colonial acted in bad faith in defending and settling the New York action. We disagree.

The following legal principles regarding indemnity agreements are relevant to the Barbaras' claim. Our Supreme Court has determined that the "application of the implied covenant of good faith and fair dealing to surety indemnity agreements is consistent with our good faith jurisprudence." *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 302. Accordingly, although the standard right-to-settle provision in an indemnity agreement grants a surety broad discretion in settling claims on a bond, "[a] surety is entitled to indemnification only for payments that were made in good faith." Id., 300. When, as in the present case, the indemnity agreement includes a prima facie evidence provision, "upon a finding that a surety has made a payment to a claimant upon a bond, the burden of proof shifts to the indemnitor to prove that the surety had not made the payment in good faith." Id., 293.

Bad faith in this context requires "an 'improper motive' or 'dishonest purpose' on the part of the surety. This standard is in substantial accord with our definition of bad faith in other contexts. . . . Additionally, this standard preserves a proper balance between affording the surety the wide discretion to settle that it requires, while ensuring that the principal is protected against serious and wilful transgression." (Citation omitted.) Id., 304–305.

After adopting this standard, our Supreme Court explained that bad faith does not require "the improper motive to rise to the level of fraud" and "that, although [it was] not interpreting good faith to mean reasonableness . . . whether a surety's actions were reasonable properly may be considered when analyzing bad faith. Unreasonable conduct can be evidence of improper motive and is a proper consideration where parties are bound by a contract that gives unmitigated discretion to one party." (Citation omitted.) Id., 305.

In the present case, the indemnity agreement includes the following right-to-settle and prima facie evidence[18] provisions: "[Colonial] shall have the right in its sole discretion to determine whether any claims shall be paid, compromised, defended, prosecuted or appealed. . . . [Colonial] shall have the right to incur such expenses in handling a claim as it deems necessary or advisable . . . and [Colonial's] good faith determination as to the necessity or advisability of any such expense shall be final and conclusive upon Indemnitor. . . . [Colonial] shall have the foregoing rights, irrespective of the fact that Indemnitor may have assumed, or offered to assume, the defense of [Colonial] upon such claim. . . . In any claim or suit hereunder, an itemized statement of the aforesaid loss and expense, sworn to by an officer of [Colonial], or the vouchers or other evidence of disbursement by [Colonial], shall be prima facie evidence of the fact and extent of the liability hereunder of Indemnitor. . . . [Colonial] shall have the right to reimbursement of its expenses, premiums and attorneys' fees hereunder, irrespective of whether any Bond loss payment has been made by [Colonial]." Thus, Colonial's duty of good faith in handling any claims on the Gotham bonds is expressly stated in the indemnity agreement.

Although Colonial is afforded broad discretion in handling any claims against the Gotham bonds, the Barbaras had the right to assert control over the litigation

[18] "Right-to-settle clauses . . . generally are enforced according to their terms. In other words, in the face of such a provision, a surety typically has wide discretion in settling claims made upon a bond, even where the principal is not liable for the underlying claim. . . . The surety's discretion to make settlement payments is not unfettered, however, and most jurisdictions have held that the surety is entitled to indemnification only for payments that were made in good faith. . . .

"The purpose of [prima facie evidence] clauses . . . is to facilitate the handling of settlements by sureties and obviate unnecessary and costly litigation." (Citations omitted; internal quotation marks omitted.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 292–93.

pursuant to paragraph 10 (V) of the indemnity agreement, which provides in relevant part: "If the Undersigned desire that a claim or demand against [Colonial] shall be defended, the Undersigned shall (i) give written notice to [Colonial] to this effect and (ii) simultaneously deposit with [Colonial] cash or collateral satisfactory to [Colonial] in an amount sufficient to cover the claim or demand, interest, and other exposure thereon, to the probable date of disposition. Otherwise, [Colonial] shall have the sole and exclusive right to pay or settle any such claim or demand, and such payment or compromise shall be binding upon the Undersigned and included as a liability, loss, or expense covered by the Undersigned's indemnity obligations." Accordingly, the Barbaras had the option of notifying Colonial that they wanted Colonial to defend the claims against the Gotham bonds and simultaneously deposit collateral with Colonial sufficient to cover those claims, but they failed to do so.

Colonial satisfied the prima facie evidence and right-to-settle provisions by submitting an affidavit from Nunziata that included an itemized statement of the losses, costs and expenses incurred by Colonial in connection with the Gotham bonds. Nunziata explained that Colonial, during its investigation, sought discovery from dozens of entities involved in the hotel project, deposed twenty-one witnesses, and hired a consultant with expertise in construction delay claims and a forensic accounting firm to assist in analyzing and evaluating the various claims in the New York action. Nunziata averred that, "[g]iven the conflicting evidence as to [Gotham's], Phoenix's and Colonial's respective claims and defenses following discovery, the uncertainty as to whether . . . Colonial would prevail on its defenses if there was a trial in the [New York action], and the failure and confessed inability of Phoenix and [the Barbaras] to indemnify Colonial or provide collateral security to

protect against liability on the performance bond, it was advisable for Colonial to participate in mediation in the [New York action] and determine whether it was possible [to] obtain the discharge of its potential liability under the performance bond through settlement." With respect to the decision to settle the New York action, Nunziata asserted that "Colonial had a good faith belief that absent indemnity and collateral security from Phoenix or [the Barbaras], settlement by Colonial, for itself and on behalf of Phoenix, would be the only way for Colonial to ensure against a large adverse judgment against it while bringing an end to the ongoing loss and damage it was incurring as a result of having to continue its defense in the [New York action], resulting from Phoenix's and [the Barbaras'] failure to provide collateral security and their failure to indemnify Colonial."

Accordingly, the burden shifted to the Barbaras to raise a genuine issue of material fact as to whether Colonial acted in bad faith in incurring those expenses and/or settling the New York action. In opposing summary judgment, the Barbaras conceded that they failed to post collateral in accordance with paragraph 10 (V) of the indemnity agreement but claimed that Colonial acted in bad faith by unreasonably incurring expenses in the New York action and by settling both Gotham's claims and Phoenix's affirmative claims out of self-interest for the sole purpose of garnering future business from Gotham.

In rendering summary judgment for Colonial, the court reasoned as follows. First, "Colonial's alleged awareness of all of the potential defenses that the [Barbaras] have listed, including Gotham's breach of the subcontract and failure to meet conditions precedent in the performance bond, do not impact Colonial's right to reimbursement of good faith expenses it incurred in connection with the Gotham bonds.

"Second, a series of provisions in the indemnity agreement, to which the [Barbaras] agreed to be subject when they executed [it], preclude the [Barbaras] from challenging Colonial's discretion to determine how the claims in the [New York action] should have been handled. . . . The indemnity agreement gave the [Barbaras] the option of posting collateral and determining for themselves whether the claims in the [New York action] should have been litigated. . . . Colonial attached a copy of a letter that it sent to Phoenix and the [Barbaras] . . . in which it demanded reimbursement, indemnification, and collateral security as a result of, among other things, the [New York action]. . . . [T]he [Barbaras] refused to indemnify Colonial and deposit collateral security on the ground that they lacked the financial resources to meet Colonial's demands. The undisputed evidence demonstrates that the [Barbaras], thus, failed to take advantage of [their rights under] the indemnity agreement." (Footnotes omitted.)

Finally, after reviewing the representations regarding Colonial's good faith by Nunziata, the court, in rendering summary judgment for Colonial, concluded that the Barbaras had "not provided admissible evidence substantiating their assertion that Colonial, in bad faith, failed to file a pre-answer motion to dismiss and settled the [New York action] to obtain future business with Gotham, beyond conclusory and speculative statements in their affidavits. Further, this assertion is not based on [their] personal knowledge as required by Practice Book § 17-46. The [Barbaras], therefore, have failed to submit evidence to demonstrate a genuine issue of material fact that Colonial acted with an improper motive or dishonest purpose in its handling of the claims in the [New York action]. Accordingly, the [Barbaras] have failed to raise a genuine issue of material fact as to Colonial's good faith determination of the advisability

and necessity of expenses it incurred in connection with the Gotham bonds."

On appeal, the Barbaras claim that there is a genuine issue of material fact as to whether "Colonial incurred expenses unreasonably and settled out of self-interest." During oral argument before this court, however, counsel for the Barbaras acknowledged that there is no evidence in the record suggesting, as they had argued in the trial court, that Colonial settled the New York action to garner future business from Gotham. For that reason, the Barbaras have abandoned their claim as to that alleged improper motive and, instead, argue that "[a] fair and reasonable fact finder" could find "that it was unreasonable for Colonial to incur [almost $1.5 million in expenses] without first testing [Gotham's] claims through a motion to dismiss for failure to satisfy the [performance] bond's conditions precedent" and "that Colonial settled the New York [action] solely to protect its own self-interest because it surrendered claims to Phoenix and then later took them back solely because [Gotham] told Colonial that it would not settle its performance bond claim without them." Therefore, according to the Barbaras, Colonial's self-interested settlement coupled with its unreasonable conduct in failing to move to dismiss the New York action was sufficient to create a genuine issue of material fact as to whether Colonial acted in bad faith in settling the New York action. We are not persuaded.[19]

[19] Colonial argues that the Barbaras' claim that Colonial settled the New York action "solely to protect its own self-interest because it surrendered claims to Phoenix and then later took them back" is unpreserved and, therefore, unreviewable. (Internal quotation marks omitted.) The Barbaras respond that "this court properly can review [their] argument because it is an *argument*, not a *claim*." (Emphasis in original; internal quotation marks omitted.) We need not decide whether the Barbaras' claim is properly characterized as a claim or argument because we conclude that they cannot prevail on the merits of it. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 158 n.28, 84 A.3d 840 (2014) (review of unpreserved claim is appropriate when party who raised claim cannot prevail "because it cannot prejudice the opposing party").

Our Supreme Court's decision in *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 279, is instructive. In that case, a surety sought indemnification from a bond principal for payments the surety made to a claimant in accordance with a settlement agreement, pursuant to which the surety obtained a release of the claimant's bad faith and Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., claims against it but did not obtain a release of the claims against the principal. Id., 283, 287–88. The principal denied liability and asserted, both as a special defense and in its counter cross complaint against the surety, that the surety breached the implied covenant of good faith and fair dealing. Id., 288. On the first day of the trial, the principal settled with the claimant, and the trial proceeded on the surety's indemnification claim and the principal's counter cross complaint. Id.

After trial, the jury returned a verdict for the principal on both matters, and the surety filed, inter alia, a motion for a directed verdict, claiming that the principal failed to prove its special defense and its counterclaim. Id., 288, 296–97. "The trial court denied [the surety's] motions, in part, because, on the basis of the evidence presented, the jury reasonably could have found that [the surety] had made payments to [the claimant] to settle [the claimant's] bad faith and CUTPA claims rather than its claims against the payment bond." Id., 297.

On appeal, the surety claimed that the court improperly denied its motion for a directed verdict on its claim for indemnification. Id., 296. Our Supreme Court concluded that "a surety's failure to conduct an adequate investigation of a claim upon a payment bond, when accompanied by other evidence, reflecting an improper motive, properly *may* be considered as evidence of the surety's bad faith." (Emphasis in original.) Id., 310.

Similarly, the court concluded "that a self-interested settlement, when accompanied by other evidence of improper motive, can constitute bad faith." Id., 318. Ultimately, our Supreme Court held that the court properly denied the surety's motion for a directed verdict on its indemnification claim because "the jury reasonably could have determined that [the surety] breached the implied covenant of good faith and fair dealing based upon all the evidence supporting [the principal's] claims that [the surety], inconsistent with justified expectations and unfaithful to its duty under the implied covenant, both failed to investigate adequately *and* improperly settled [the claimant's bad faith and CUTPA] claims solely out of self-interest." (Emphasis in original.) Id.

In so holding, the court noted that "a surety is not acting in bad faith in seeking indemnification from a principal simply because the principal objected to and raised colorable defenses to payments made by the surety to the claimant. . . . This is true because, under an indemnity agreement, it is not essential that a principal be liable for the claims upon which the surety seeks to be indemnified." (Citations omitted.) Id., 313 n.15. Although the principal in *PSE Consulting, Inc.*, had raised defenses to the surety against the claimant's recovery under the bond, our Supreme Court explained that its conclusion regarding bad faith in that case did "not turn on that mere assertion, but involve[d] additional specific claims of bad faith and evidence in support thereof." Id.

With regard to the principal's claim as to the self-interested settlement, the court reasoned that the jury could have inferred an improper motive from evidence showing that the surety initially supported the principal's defense against the claimant's claim but changed course "only after [the claimant] had filed a complaint with the [I]nsurance [C]ommissioner and had threatened litigation against [the surety] based upon bad faith

and CUTPA claims . . . .'' Id., 316. The court also highlighted the following evidence from which the jury reasonably could have concluded that the surety performed an inadequate investigation: (1) the surety failed to respond to the claimant's claim within forty-five days and to identify those portions of the claim that were undisputed, as required by the payment bond; (2) the surety's claims analyst never reviewed the principal's project records and lacked the experience necessary to conduct an adequate assessment of the claimant's claim; and (3) the surety waited almost two years before having an engineer evaluate the claim and provide a valuation of the work performed. Id., 306–307. Accordingly, the court reasoned that ''the self-interested settlement . . . was not cloaked in good faith garb, but, rather, was tainted by a confluence of circumstances from which a jury could properly have inferred improper motive.'' Id., 316. Finally, and of particular significance in the present case, our Supreme Court observed that ''allowing potentially suspect claims to control or interfere with the contract obligations between a principal and its surety''; id., 318; ''is particularly problematic when the indemnity agreement . . . did not give the principal the option of posting collateral and determining for itself whether suspect claims should be litigated.'' Id., 318 n.17.

The circumstances involved in the present case are markedly different. The evidence in the record establishes that, after conducting an extensive investigation of the parties' respective claims in the New York action, Colonial determined that it was prudent to settle Gotham's claim against the performance bond by paying $100,000 to Gotham, which was less than 3 percent of the $3.5 million Gotham claimed as damages. Indeed, the Barbaras do not claim that Colonial's investigation was inadequate; to the contrary, they contend that the investigation was excessive in light of Gotham's alleged

failure to satisfy conditions precedent to Colonial's liability under the performance bond. Thus, the Barbaras' claim of bad faith is based on Colonial over litigating the New York action, rather than filing what the Barbaras view as a dispositive motion to dismiss on which Colonial would have prevailed.

With regard to Colonial's failure to file a motion to dismiss in the New York action, the Barbaras contend that Gotham failed to satisfy certain conditions precedent in paragraph 3 of the performance bond.[20] According to the Barbaras, Phoenix's August 26, 2009 and October 18, 2010 letters to Gotham, in which Phoenix alleged that owner default had delayed Phoenix's work and in which Phoenix submitted change order requests for $4.9 million, provided sufficient evidence to support "a preemptive motion to dismiss" for Gotham's failure to satisfy the "no-owner-default condition precedent." Next, they contend that, because Phoenix completed all the subcontract work more than one month before Gotham's September 7, 2010 letter terminating the subcontract, Gotham's purported termination of the subcontract was ineffective under New York's substantial

[20] Paragraph 3 of the performance bond provides: "If there is no Owner Default, the Surety's obligation under this Bond shall arise after: 3.1 The Owner has notified the Contractor and the Surety at its address described in Paragraph 10 below that the Owner is considering declaring a Contractor Default and has requested and attempted to arrange a conference with the Contractor and the Surety to be held not later than fifteen days after receipt of such notice to discuss methods of performing the Construction Contract. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default; and 3.2 The Owner has declared a Contractor Default and formally terminated the Contractor's right to complete the contract. Such Contractor Default shall not be declared earlier than twenty days after the Contractor and the Surety have received notice as provided in Subparagaraph 3.1; and 3.3 The Owner has agreed to pay the Balance of the Contract Price to the Surety in accordance with the terms of the Construction Contract or to a contractor selected to perform the Construction Contract in accordance with the terms of the contract with the Owner."

performance rule, and, therefore, Gotham had not formally terminated Phoenix's right to complete the subcontract under subparagraph 3.2 of the performance bond. See, e.g., *845 UN Ltd. Partnership* v. *Flour City Architectural Metals, Inc.*, 28 App. Div. 3d 271, 272, 813 N.Y.S.2d 404 (2006) ("[t]he substantial performance rule precludes contract termination and limits a contracting party to a specific damage remedy"). Last, the Barbaras contend that Gotham failed to satisfy subparagraph 3.3 of the performance bond because it did not agree to pay the balance of the subcontract price to Colonial. As apparent support for their own assessment of the merits of these issues, the Barbaras note that Colonial had asserted Gotham's failure to satisfy these conditions in Colonial's affirmative defenses in the New York action.

Colonial responds that the merits of the defenses to Gotham's claim on the performance bond are irrelevant to Colonial's right to indemnification, as a surety does not necessarily act in bad faith when it settles a bond claim simply because the principal raised colorable defenses to the bond claim. See *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 313 n.15. Nevertheless, Colonial also contends that the fact that the Barbaras "can only speculate that Colonial would have prevailed had it pursued a motion to dismiss" the New York action demonstrates "why Colonial not doing so cannot be a basis for bad faith." Colonial argues that the Barbaras "cannot satisfy their burden [to show bad faith] by pointing to a discretionary decision early in the [New York action], indisputably within Colonial's rights under the indemnity agreement, with which they disagree. [The Barbaras] had to present more than speculation in order to defeat summary judgment. They did not." (Footnote omitted.) We agree with Colonial.

Although the Barbaras insist that Colonial had ample evidence to move to dismiss the New York action based on Gotham's alleged owner default, Gotham disputed Phoenix's allegations, which is in accord with Colonial's position that filing a motion to dismiss on the basis of alleged owner default was not advisable due to disputed factual issues. Similarly, although the Barbaras contend that Gotham was unable to terminate the subcontract under New York's substantial performance rule, as Phoenix had substantially performed the subcontract work, Colonial contends that, because the alleged default involved Phoenix's failure to pay costs associated with Phoenix's delay in performing and to pay Phoenix's sub-subcontractors, "[w]hether Gotham could lawfully declare Phoenix in default, and whether Phoenix had substantially performed its subcontract obligations, were factual issues . . . ." Finally, although the Barbaras maintain that it was undisputed that Gotham failed to pay the balance of the contract price to Colonial, Colonial contends that "[w]hether there was a 'balance of the contract price,' and what monies were owed to whom between Gotham and Phoenix, were, again, factual issues . . . ."

Given the existence of issues of fact surrounding the performance bond conditions, and in light of the Barbaras' admitted insolvency in their letter refusing Colonial's demand for collateral, the Barbaras have failed to demonstrate that Colonial's decision to settle the New York action, rather than moving to dismiss it, was an unreasonable exercise of the discretion Colonial is afforded under the indemnity agreement. See, e.g., *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 317 (recognizing that indemnity agreements "make it possible for a surety to compensate unpaid subcontractors and vendors or to complete a project in response to a performance bond claim without having to await the adjudication of every possible

defense by the principal"); see also id., 313 n.15 ("a surety is not acting in bad faith in seeking indemnification from a principal simply because the principal objected to and raised colorable defenses to payments made by the surety"); *General Accident Ins. Co. of America* v. *Merritt-Meridian Construction Corp.*, 975 F. Supp. 511, 518 (S.D.N.Y. 1997) (surety did not settle bond claims in bad faith despite possible defenses asserted by principal). Further undermining the Barbaras' claim is the fact that they failed to present any evidence of a possible motivation that Colonial had to incur hundreds of thousands of dollars in unnecessary defense costs in the New York action if it thought a preemptive motion to dismiss would have been successful.

Likewise, with regard to Colonial's self-interested settlement, there is no evidence of an improper motive or a dishonest purpose. Unlike in *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 311, Gotham did not raise bad faith or CUTPA claims against Colonial, and Colonial's settlement of the performance bond claims included a release of all claims brought against Phoenix in the New York action. See id. (evidence established that surety settled with claimant in order to avoid bad faith counts against it and that "timing and circumstances" of settlement "was suspect"). Thus, Colonial's settlement of the performance bond claim protected both itself and Phoenix from the possibility of a substantially larger judgment and further litigation costs. Compare *Auto-Owners Ins. Co.* v. *Southeast Floating Docks, Inc.*, 571 F.3d 1143, 1147 (11th Cir. 2009) (principal argued that surety paid claimant full amount of bond after performing unreasonable investigation of claim and "with the self-interested motive of releasing itself from [the claimant's] bad faith claim"), with *Fidelity & Deposit Co. of Maryland* v. *C.E. Hall Construction, Inc.*, 627 Fed. Appx. 793, 796

(11th Cir. 2015) (affirming summary judgment for surety in which District Court rejected principals' bad faith defense based on their defenses to underlying bond claims because surety's "exercise of a contractual right, without more, cannot form the basis for bad faith"). Furthermore, unlike the principal in *PSE Consulting, Inc.*, the Barbaras had the option of posting collateral and instructing Colonial to defend the claims in the New York action but failed to do so. See *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 318 n.17 (significant factor in court's analysis was that indemnity agreement did not allow principal to demand defense and post collateral).

In arguing that Colonial's decision to release Phoenix's affirmative claims to settle the New York action was evidence that Colonial settled solely out of self-interest, the Barbaras fail to recognize that self-interest is not itself evidence of an improper motive. As one court has observed, "it is doubtful that any surety would find it sensible to accept a contractual right to settle that did not include the authority to settle a subcontractor's counterclaim. Without such authority, a surety's right to settle would often be ineffective because a prime contractor would likely be unwilling to settle its claims against the surety without also settling any counterclaim the subcontractor has against the prime." *Bell BCI Co.* v. *Old Dominion Demolition Corp.*, 294 F. Supp. 2d 807, 814 (E.D. Va. 2003) (*Bell*). Thus, although Colonial's decision to exercise its rights under the indemnity agreement was motivated by self-interest, "it does not follow that the self-interested exercise of rights under a contract *necessarily* constitutes a per se violation of the implied covenant of good faith and fair dealing." (Emphasis in original.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 317. Indeed, there must be something more than a self-interested settlement, but the "other evidence of improper

motive" presented in *PSE Consulting, Inc.*, is absent in the present case. See id., 318; see also *Engbrock* v. *Federal Ins. Co.*, 370 F.2d 784, 787 (5th Cir. 1967) ("improper motive . . . is an essential element of bad faith").

In sum, the Barbaras introduced no evidence to support their allegations that Colonial acted with an improper motive or dishonest purpose in the New York action. The Barbaras presented no evidence that Colonial's decision to settle the New York action, rather than attempting to have it dismissed, was made in bad faith. Accordingly, the court properly rendered summary judgment for Colonial on its indemnification claim.[21] See, e.g., *Transamerica Ins. Co.* v. *Avenell*, 66 F.3d 715, 721 (5th Cir. 1995) (affirming summary judgment for surety because there was no factual support for principal's bad faith defense).

II

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In its appeal from the judgment in the Barbaras' action, Colonial claims that the trial court improperly determined that the Barbaras' claims are not precluded by the doctrines of res judicata and collateral estoppel. We are not persuaded.

The following additional facts regarding the New York action are relevant to Colonial's claim. In their memorandum in opposition to Colonial's motion to enforce the settlement, Phoenix claimed that New York law recognizes a principal's bad faith defense to a surety's indemnification claim and argued that, "since Colonial can only recover the settlement amount from Phoenix if it was made in good faith and was reasonable, it

[21] In light of our conclusion, we do not address Colonial's alternative grounds for affirming the judgment based on the application of the doctrines of res judicata and collateral estoppel.

follows that Colonial may not make a settlement unless it is in good faith and reasonable. Since Colonial would have won a motion to dismiss [the New York action], it was unreasonable and in bad faith to settle the action paying [Gotham] monies and discontinuing Phoenix's affirmative claims and such settlement should not be permitted." In addition, Phoenix submitted an "affirmation in opposition" signed by Lina Barbara and an "affidavit in opposition" signed by James Barbara, in which the Barbaras averred that Colonial breached the indemnity agreement by engaging in protracted and costly discovery rather than moving to dismiss the New York action.

In its memorandum of law in response to Phoenix's opposition, Colonial argued that the assignment and attorney-in-fact provisions in the indemnity agreement "expressly authorize settlements of the exact nature of the settlement agreement, in which Colonial exercises the discretion granted to it by Phoenix and the [Barbaras] to fully and finally resolve bond claims for itself and as assignee and attorney-in-fact for Phoenix. . . . Furthermore, as assignee of all rights in connection with the subcontract, Colonial is entitled to settle and release all of these assigned claims asserted by Phoenix. . . . [B]ecause [Phoenix] assigned all its rights in connection with the subcontract to Colonial, Phoenix is no longer the real party in interest with regard to such claims. It is Colonial, not Phoenix, who owns the affirmative claims asserted by Phoenix in [the New York action], and . . . Phoenix has no right to prosecute such claims and compel further litigation [in the New York action]. . . . Phoenix will not suffer prejudice from discontinuance of this lawsuit because only Colonial, as the real party in interest with respect to such claims, has the right to pursue recovery thereon." (Citations omitted; emphasis omitted; footnotes omitted.)

In its oral decision granting Colonial's motion to enforce the settlement, the New York court explained: "Gotham . . . filed this action to recover payment for costs incurred as a result of the untimely performance of the window wall work by Phoenix. Gotham . . . sued Phoenix for breach of the subcontract and sued Colonial for breach of its obligations under the performance bond. . . . Colonial now brings a motion to enforce [the] settlement agreement . . . . Colonial negotiated the settlement as the attorney-in-fact for Phoenix.

* * *

"Here, it is undisputed by the parties that Phoenix failed to deposit with Colonial cash or collateral sufficient to cover [Gotham's] claim in [the New York] action. Therefore, under paragraph 10 (V) [of the indemnity agreement] . . . Colonial had the sole and exclusive right to settle the instant claims against Phoenix. Phoenix objects to the settlement agreement on the grounds that it purportedly had meritorious defenses against Gotham . . . that were not pursued to Phoenix's liking by Colonial. However, the language [in the] indemnity agreement moots this objection [because], by not posting cash or collateral, Colonial gained the sole and exclusive right to pay or defend the claims against Phoenix in [the New York action]. Moreover, consistent with the agreement, Colonial was authorized to enter into the settlement agreement on Phoenix's behalf as its attorney-in-fact. Therefore, Colonial's ability to negotiate and execute the . . . settlement agreement is clear. By resolving this dispute between the parties, the court can give effect to the settling parties' intent to resolve this matter in its entirety. . . . Based on my review of the papers, I found nothing objectionable with the settlement agreement. Therefore, the court will sign it and will also dismiss this case with prejudice.

"Of course, by not answering, Phoenix is put in the position that, should there be a desire on the part of Colonial to go against Phoenix for the $100,000 it's about to pay, that is between [Phoenix] and Colonial . . . ." On August 20, 2015, the court issued a written order consistent with its oral decision.

The Barbaras filed their operative revised complaint against Colonial on November 20, 2018. In the four count complaint, they allege that Colonial breached (1) paragraph 4 (B) of the indemnity agreement by incurring expenses in bad faith, (2) the implied covenant of good faith and fair dealing under the indemnity agreement in its handling of the New York action, and (3) the performance bond by failing to move to dismiss the New York action on the basis of Gotham's failure to satisfy conditions precedent to Colonial's liability. In the fourth count, the Barbaras sought a declaratory judgment that "Colonial's bad faith behavior and continuous breaches of the [indemnity agreement] were of such magnitude that the [indemnity agreement] should be declared void."

In denying Colonial's motion for summary judgment in the Barbaras' action, the court reasoned that, although Colonial submitted extensive evidence regarding the New York action, there was no "evidence of any claim(s) asserted by Phoenix against Colonial in the [New York action]. The 'claims' that [Colonial] argues [the Barbaras are] precluded from bringing in the [Barbaras'] action were arguments raised by Phoenix in opposition to [Colonial's] motion [to enforce] the settlement . . . in the [New York action]. . . . Res judicata, therefore, does not apply in the [Barbaras'] action.

"As to the applicability of collateral estoppel, this court has already determined in the consolidated action that the issue of whether [Colonial's] determination of

the necessity and advisability of expenses that it incurred in connection with the Gotham bonds was made in bad faith and, thus, in breach of section 4 (B) of the indemnity agreement was not necessarily determined by the court in the [New York action] for its judgment finding the settlement agreement enforceable. . . . For the same reasons, collateral estoppel does not preclude the determination of the issue as to [Colonial's] alleged bad faith under the indemnity agreement in the [Barbaras'] action. Similarly, the issue of whether [Colonial] breached the performance bond was not actually or necessarily determined by the court in the [New York action]." (Citations omitted; footnotes omitted.)

Colonial first claims that the court improperly concluded that the Barbaras' action is not precluded by the doctrine of res judicata. We disagree.

The following legal principles are relevant to our analysis. "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to *any other admissible matter which might have been offered for that purpose.* . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it. . . . In order for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue." (Emphasis in original; internal quotation marks

omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019).

"Res judicata, as a judicial doctrine . . . should be applied as necessary to promote its underlying purposes. These purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being [harassed] by vexatious litigation. . . . But by the same token, the internal needs of the judicial system do not outweigh its essential function in providing litigants a legal forum to redress their grievances. Courts exist for the purpose of trying lawsuits. If the courts are too busy to decide cases fairly and on the merits, something is wrong. . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest. The doctrines of preclusion, however, should be flexible and must give way when their mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies. . . .

"We review the doctrine of res judicata to emphasize that its purposes must inform the decision to foreclose future litigation. The conservation of judicial resources is of paramount importance as our trial dockets are deluged with new cases daily. We further emphasize that where a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding. But the scope of matters precluded necessarily depends on what has

occurred in the former adjudication." (Internal quotation marks omitted.) *Bruno* v. *Geller*, 136 Conn. App. 707, 722–23, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

On appeal, Colonial argues that the four elements necessary for application of res judicata are met and that the doctrine's underlying policies require its application in the present case. Specifically, Colonial argues that (1) the judgment in the New York action granting its motion to enforce the settlement was rendered on the merits by a court of competent jurisdiction, (2) the Barbaras are in privity with Phoenix, (3) Phoenix had an adequate opportunity to litigate its claims when it opposed the settlement agreement, and (4) the Barbaras allege the same cause of action in the present case as Phoenix asserted in opposing the settlement agreement. In response, the Barbaras do not dispute that they are in privity with Phoenix and that the same underlying claims are at issue. Instead, they argue that the judgment granting Colonial's motion to enforce the settlement was not on the merits of their claims[22] and that the New York action did not afford them an adequate opportunity to litigate those claims. We conclude that

[22] The Barbaras claim that "the New York court found that the indemnity agreement mooted Phoenix's objection to the settlement" and argue that "it is well settled in New York that a trial court's disposition of a claim on mootness grounds is not a disposition on the merits . . . ." According to the Barbaras, "there can be no dispute that . . . the New York [court's] decision finding Phoenix's objections moot was not a decision on the merits of the Barbaras' claims of bad faith and litigation mishandling and, therefore, is not res judicata of any claim that they assert in this action."

We are not persuaded by the Barbaras' assertion that the New York court determined that Phoenix's objections were moot in the jurisdictional sense. It is apparent from the New York court's discussion at the hearing that, when it stated that Phoenix's objections were moot, it did not mean that it could not grant Phoenix any practical relief. Instead, the court concluded that Phoenix's objections had no practical significance, i.e., no merit, in light of the express provisions in the indemnity agreement. Accordingly, we disagree with the Barbaras that the New York court's decision granting Colonial's motion to enforce the settlement was not on the merits.

res judicata does not apply in the present case because the proceedings in the New York action did not provide the proper forum for the Barbaras to adequately litigate their bad faith claims.[23]

As to whether Phoenix had an adequate opportunity to litigate their bad faith claims in the context of Colonial's motion to enforce the settlement in the New York action, we note that, "although parties are not *required* to resolve all disputes during a . . . proceeding, when a party had the opportunity to raise the claim and the . . . *proceeding provided the proper forum for the resolution of that claim*, res judicata may bar litigation of a subsequent action." (Emphasis altered.) *Weiss* v. *Weiss*, 297 Conn. 446, 464, 998 A.2d 766 (2010).

Colonial argues that its motion to enforce the settlement "was a fully contested matter, in which Phoenix and [the Barbaras] directly and fully participated, and which resulted in the [New York] judgment. Phoenix could have, but consciously decided not to appeal [from that] judgment. . . . As Phoenix and [the Barbaras] *did* fully litigate Phoenix's claims in opposition to the

[23] We note that our reasoning is different from that of the trial court. The trial court concluded that res judicata does not apply because "[t]he 'claims' that [Colonial] argues [the Barbaras are] precluded from bringing in the [Barbaras'] action were arguments raised by Phoenix in opposition to [Colonial's] . . . motion [to enforce the settlement] in the [New York action]." In our plenary review of the court's ruling, we, however, agree with Colonial that a "claim" for purposes of res judicata is not defined so narrowly. See, e.g., *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 159, 129 A.3d 677 (2016) (Our Supreme Court "has adopted the transactional test. . . . Under the transactional test, res judicata extinguishes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." (Citation omitted; internal quotation marks omitted.)). Nevertheless, because we conclude that the Barbaras did not have an adequate opportunity to litigate their claims, we affirm the judgment of the trial court on that basis. See, e.g., *Silano* v. *Cooney*, 189 Conn. App. 235, 241 n.6, 207 A.3d 84 (2019) ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)).

motion [to enforce the settlement], they necessarily had an adequate *opportunity* to do so." (Citation omitted; emphasis in original.) Although the Barbaras acknowledge that their claims in the present case were asserted in the New York action in opposition to Colonial's motion to enforce the settlement, they argue that "the limited scope of the [New York Civil Practice Law and Rules 2104 (CPLR 2104)][24] motion [to enforce the settlement] did not afford [them] an adequate opportunity to litigate their claims that Colonial damaged them by acting in bad faith and otherwise mishandling the New York litigation in breach of the indemnity agreement and performance bond. As shown, and as the New York court determined by finding them moot, those matters are beyond the office [of] a CPLR 2104 proceeding." (Footnote added.) We agree with the Barbaras.

The crux of the parties' disagreement is whether the New York action was the proper forum in which the Barbaras could assert their bad faith and breach of contract claims. Although there are no Connecticut cases directly on point, *Safeco Ins. Co. of America* v. *Hirani/MES, JV*, 480 Fed. Appx. 606 (2d Cir. 2012) (*Safeco*), is instructive. In that case, two bond principals appealed from the orders of the United States District Court for the Eastern District of New York granting the surety's motion for partial summary judgment and

[24] "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk." N.Y. C.P.L.R. 2104 (McKinney 2023).

Thus, pursuant to CPLR 2104, a settlement agreement must be in writing and signed by the attorneys for the parties, and "a settlement agreement signed by an attorney may bind a client even where it exceeds the attorney's actual authority, if the attorney had apparent authority to enter into the agreement . . . ." (Citations omitted.) *Servider* v. *New York*, 212 App. Div. 3d 475, 476, 179 N.Y.S.3d 897 (2023).

ordering the principals to provide the surety with sufficient collateral security to cover expected costs and expenses pursuant to the indemnity agreements executed by the parties. Id., 607–608.

The District Court relied on *Bell BCI Co.* v. *Old Dominion Demolition Corp.*, supra, 294 F. Supp. 2d 807. See *Safeco Ins. Co. of America* v. *M.E.S., Inc.*, Docket No. 09-CV-3312 (ARR) (ALC), 2010 WL 5437208, *14 (E.D.N.Y. December 17, 2010). In *Bell*, a surety settled its principal's counterclaim against a bond obligee as part of its settlement of the obligee's claims against performance bonds. *Bell BCI Co.* v. *Old Dominion Demolition Corp.*, supra, 810–11. The surety moved to enforce the settlement agreement with the obligee and to dismiss the principal's counterclaim. Id., 811. The United States District Court for the Eastern District of Virginia rejected the principal's argument "that the settlement agreement should not be enforced because the [s]urety did not settle its counterclaim in good faith." Id., 814. The court reasoned that "this is not the proper forum for [the principal] to make its 'bad faith' argument. . . . [E]ven assuming arguendo that [the principal's] bad faith argument is valid, such an argument is properly asserted as a defense to the [s]urety's claim against [the principal] for indemnification. It appears that the [s]urety has filed just such a suit in Alexandria Circuit Court. . . . Therefore, [the principal] may properly assert the bad faith defense there and, should it prevail, [the principal] may avoid paying $275,000 indemnity to the [s]urety. Indeed, [the principal] in that suit may be able to recover from the [s]urety the value of its counterclaim if it establishes not only the [s]urety's bad faith in settling the counterclaim, but also the merits of the counterclaim."[25] (Citation omitted.) Id., 815.

[25] Notably, Colonial cited *Bell BCI Co.* v. *Old Dominion Demolition Corp.*, supra, 294 F. Supp. 2d 807, in support of its motion to enforce the settlement in the New York action.

In *Safeco Ins. Co. of America* v. *Hirani/MES, JV*, supra, 480 Fed. Appx. 608, the principals appealed, claiming "that summary judgment was improper because the District Court failed to consider certain equitable defenses, most of which relate[d] to allegations that [the surety] acted in bad faith." In affirming the judgment, the United States Court of Appeals for the Second Circuit, applying New York law, reasoned that, under the indemnity agreements, the "[principals] agreed to give [the surety] enough collateral security to 'discharge any claim made against [the surety]' and to 'cover all exposure under . . . [the] bonds.' [The principals did] not challenge the validity of the agreements or the substance of the collateral security provisions. Nor d[id] they dispute that they were declared to be in default on the contracts covered by [the surety's] bonds and that, as a result, [the surety] was exposed to liability and began incurring expenses under the bonds. Under the plain, unambiguous language of the contracts, [the principals] were required to provide collateral security upon demand . . . and, therefore, [the surety] was entitled to partial summary judgment as to its right to collateral security." Id.

In rejecting the principals' argument as to the relevancy of their bad faith defense, the court explained that the "principals conflate collateral security with an award of indemnification. . . . The District Court was entitled to award [the surety] specific performance on its contractual right to collateral security and ignore the defenses related to [the surety's] separate right to indemnification, as to which issues of bad faith may be relevant. . . . [Furthermore], the provisions of the contract that [the principals] contend required [the surety] to act in good faith are unrelated to the provisions obligating them to provide [the surety] with collateral security." Id., 608–609. Accordingly, the court held that, "[b]ecause [the principals'] allegations of bad faith

do not implicate [the surety's] right to the interim remedy of collateral security, the District Court did not err in granting partial summary judgment." Id., 609.

The United States Court of Appeals for the Sixth Circuit considered the import of *Safeco* and *Bell* in *Great American Ins. Co.* v. *E.L. Bailey & Co., Inc.*, 841 F.3d 439, 444 (6th Cir. 2016), explaining that, "[i]n both *Bell* and *Safeco*, the alleged bad faith of particular settlements was irrelevant to determining whether the surety agreements authorized the sureties to settle, and therefore those courts held off adjudication of bad faith until the sureties brought indemnification claims to recover the settlement payments. This procedure makes sense in most cases challenging surety settlements, where the disputed settlement requires the surety to *make* a payment on the principal's behalf, for which the surety then seeks indemnification. The principal can argue bad faith as an affirmative defense in the follow-up indemnity action." (Emphasis in original.) Therefore, the court concluded, "whether a principal can raise bad faith should depend on fairness: if there is not another, more appropriate forum where the principal can raise the issue, then the court should consider it in a declaratory judgment action. Adjudicating bad faith is especially appropriate . . . where the declaratory judgment claim is already joined with an indemnification claim against the same principal, because payments might well offset one another." Id., 445.

In the present case, Colonial's motion to enforce the settlement in the New York action is akin to the declaratory judgment action in *Safeco*, as Colonial sought to confirm its rights under the indemnity agreement to settle Phoenix's affirmative claims pursuant to the assignment and attorney-in-fact provisions of the indemnity agreement. In granting the motion, the New York court stated that "the language [in the] indemnity agreement moots [Phoenix's] objection because], by

not posting cash or collateral, Colonial gained the sole and exclusive right to pay or defend the claims against Phoenix in [the New York action]. Moreover, consistent with the agreement, Colonial was authorized to enter into the settlement agreement on Phoenix's behalf as its attorney-in-fact. Therefore, Colonial's ability to negotiate and execute the . . . settlement agreement is clear. . . . Of course, by not answering, Phoenix is put in the position that, should there be a desire on the part of Colonial to go against Phoenix for the $100,000 it's about to pay, that is between [Phoenix] and Colonial . . . ." That reasoning is consistent with the Second Circuit's holding in *Safeco*, as it is clear that the New York court "ignore[d] the defenses related to [Colonial's] separate right to indemnification, as to which issues of bad faith may be relevant." *Safeco Ins. Co. of America* v. *Hirani/MES, JV*, supra, 480 Fed. Appx. 608. Thus, whether Colonial acted in good faith in settling the New York action was irrelevant to the New York court's determination as to whether Colonial had the authority to do so. Moreover, because Colonial's indemnity action remained pending in Connecticut when Colonial sought to enforce the settlement agreement in the New York action, there is no question that there was "another, more appropriate forum" in which Phoenix could raise its claims related to Colonial's right to indemnification. *Great American Ins. Co.* v. *E.L. Bailey & Co., Inc.*, supra, 841 F.3d 445. Accordingly, we conclude that the proceedings on Colonial's motion to enforce the settlement in the New York action did not provide a proper forum for Phoenix's bad faith claims.

In sum, because the proceedings on Colonial's motion to enforce the settlement in the New York action did not provide a proper forum in which Phoenix could raise its bad faith and breach of contract claims concerning Colonial's right to indemnification, we conclude that the Barbaras did not have an adequate opportunity

to litigate their claims against Colonial.[26] Accordingly, the trial court properly determined that res judicata did not apply to the Barbaras' claims.

Our conclusion as to the application of res judicata also disposes of Colonial's claim that collateral estoppel precludes the Barbaras' claims in the present case. "For collateral estoppel to apply, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. . . . Further, [t]he [party seeking estoppel] has the burden of showing that the issue whose relitigation he seeks to foreclose was *actually decided* in the first proceeding." (Citation omitted; emphasis added; internal quotation marks omitted.) *Windsor Locks Associates* v. *Planning & Zoning Commission*, 90 Conn. App. 242, 252, 876 A.2d 614 (2005). Given that we conclude that the Barbaras did not have an adequate opportunity to litigate their bad faith claims in the New York action, it necessarily follows that the issues were not actually decided in that proceeding.

The judgments are affirmed.

In this opinion the other judges concurred.

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[26] Of course, we recognize that, because the Barbaras' bad faith claims were litigated and decided adversely to the Barbaras in the indemnity action, on remand, Colonial may move for summary judgment in the Barbaras' action on the basis of the preclusive effect of the judgment in the indemnity action.