CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE NA-KI J. ET AL.*
(AC 46336)

Alvord, Clark and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to three of her minor children. The mother did not appear in court for the termination trial. She was represented by counsel, who indicated that the mother was unable to attend the proceeding because she was at a hospital with two of her other children who were ill. The mother's counsel requested to continue her portion of the trial. The trial court denied the request, noting that the mother had missed multiple pretrial hearings and conferences for purported reasons of illness. The trial proceeded, and the mother's counsel cross-examined the witnesses of the petitioner, the Commissioner of Children and Families, and presented a closing argument. The court found by clear and convincing evidence that, inter alia, the Department of Children and Families had made reasonable efforts to reunify the children with the mother and that termination of the mother's parental rights was in the children's best interests. *Held*:

1. The respondent mother's claim that the trial court violated her due process rights when it denied her request for a continuance failed because she did not show that a constitutional violation existed: because her counsel did not frame the request for a continuance as a matter of due process,

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

the mother's claim was an unpreserved constitutional claim that this court reviewed under the three-prong test set forth in *State* v. *Golding* (213 Conn. 233); moreover, assuming that the mother's claim was reviewable under the first two prongs of *Golding*, in that the record was adequate and the claim was of constitutional magnitude, it did not satisfy the requirement of the third prong of *Golding* because the mother failed to establish that the denial of her motion for a continuance rendered the termination proceeding fundamentally unfair under the balancing test set forth in *Mathews* v. *Eldridge* (424 U.S. 319), as, although she had an important, constitutionally protected interest in preserving her parental rights, the granting of the continuance to provide the mother with another opportunity to be present and to testify would not have meaningfully reduced the risk of an erroneous determination regarding the termination of her parental rights, as her counsel was present throughout the hearing and adequately represented her interests in her absence and the mother failed to specify what additional evidence or testimony she would have introduced that would have rebutted the petitioner's evidence had the continuance been granted; furthermore, delaying the trial would have resulted in economic and administrative burdens on resources and would have undermined the state's important interest in protecting the welfare of children, as the department had had extensive and prolonged involvement with the minor children over the course of almost seven years.

2. The respondent mother could not prevail on her alternative claim that the trial court abused its discretion in denying her motion for a continuance: this court reviewed the record and various factors in reaching its conclusion, including the age and complexity of the case, the trial court's granting of other continuances in the past, the impact of the delay on the litigants, witnesses, opposing counsel and the court, the failure of mother's counsel to specify the length of the requested continuance, and the fact that the request for a continuance was made on the morning of trial, for which all other parties, counsel, and witnesses had appeared; moreover, the trial court reasonably could have determined that the mother's unsubstantiated excuse for her absence was inadequate, as the court had previously informed her that she would not be excused from any further court appearances without written documentation that she was prevented from attending due to a medical issue.

Argued September 19—officially released October 16, 2023**

Procedural History

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

** October 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 children, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and tried to the court, *Maronich, J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

Joan M. Andrews, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

David Schneider, for the minor children.

Opinion

ALVORD, J. The respondent mother, Nakia M., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her children, N, M, and T.[1] On appeal, the respondent claims that the court (1) violated her due process rights to be present and to testify at her termination of parental rights trial when it denied her request for a continuance, and (2) abused its discretion in denying her request for a continuance.[2] We disagree and, accordingly, affirm the judgments of the trial court.

The following facts and procedural history are relevant to our consideration of the respondent's appeal. The respondent has six children. The three children at issue in this appeal are N, who was born in January, 2012, M, who was born in September, 2013, and T, who

[1] The court also terminated the parental rights of Michael J., the father of N and M. Tyrome S., the father of T, consented to the termination of his parental rights. Because neither father is participating in this appeal, we refer in this opinion to the respondent mother as the respondent.

[2] The attorney for the minor children has filed a statement adopting the appellate brief of the petitioner.

was born in April, 2016 (collectively, minor children). The respondent has one older child, J, and two younger children, who are not at issue in this appeal. The Department of Children and Families (department) became involved with the minor children on April 28, 2016, when they, along with J, were removed from the respondent's care. The minor children returned to the respondent's care on May 30, 2017, under protective supervision. On December 18, 2017, the department received a report that the respondent had tested positive for cocaine, amphetamine, and benzodiazepine. During a subsequent home visit, the department observed the home to be "in deplorable condition," the minor children were "behind with routine medical care," and, N, who was school-age, was "chronically truant from school . . . ."

On January 25, 2018, the petitioner filed neglect petitions as to the minor children and obtained ex parte orders of temporary custody. The minor children were adjudicated neglected and committed to the petitioner's custody on April 4, 2018. On April 9, 2021, the petitioner filed petitions to terminate the respondent's parental rights with respect to the minor children.

A trial on the termination of parental rights was held on January 10, 2023, before the court, *Maronich*, *J*. At the start of the trial, the following colloquy occurred:

"[The Respondent's Counsel]: Your Honor, Diane Beltz-Jacobson representing respondent mother . . . who is this morning at the Bridgeport Hospital with her younger children.

"The Court: Mm-hmm.

"[The Respondent's Counsel]: She said they have high fevers and been vomiting all night. She had no one to take them to the hospital. So, she's there with them now.

"The Court: All right. The court with regard to that, the court will note on the record, I have reviewed the

clerk's notes. And I note that in the past, on January 8, 2019, [the respondent] was not at court. The reason given by counsel was that [the respondent] was sick. She could not make it to court. On October 10, 2019, she failed to appear at a case status conference with no excuse.

"On June 22, 2022, she again was not present in court. The excuse given was that she was ill. On October 12, 2022, at a judicial pretrial, she failed to appear in court. The excuse given was that she was ill and unable to come to court. What are you requesting for today?

"[The Respondent's Counsel]: Your Honor, I'm requesting if we can continue her portion of the trial.

"The Court: Denied. Okay. I will note for the record that [Tyrome] S. offered his consent to the court this morning. And it was taken and recorded. So, we're prepared to proceed. So, call your first witness."

The petitioner introduced documentary evidence and presented the testimony of Ralph Balducci, a forensic psychologist; Nicole Finch, a therapeutic foster care social worker; Renee Brown, a visitation supervisor; and Donna Blaine, a department social worker. Cross-examination was conducted by the respondent's counsel. Michael J. also testified. See footnote 1 of this opinion.

On January 17, 2023, the court issued its memorandum of decision, in which it terminated the respondent's parental rights. The court stated: "[The respondent] did not attend her trial. She told her attorney she was busy with her twin daughters, that they were sick, and she had too much to do. [The respondent] has a history of failing to attend court hearings. She failed to attend a case status conference on January 8, 2019, and told her attorney she was 'sick.' She failed to show at a rescheduled case status conference on October 10,

2019, without any explanation. She failed to attend another conference without explanation on June 22, 2022. She failed to attend a judicial pretrial on October 12, 2022, and claimed she was at the hospital. [The respondent's] counsel was advised that [the respondent] would not be excused from any further court appearances without written documentation that she was prevented from attending because of a medical issue."

The court found by clear and convincing evidence that the department had made reasonable efforts to reunify the minor children with the respondent. It next found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and needs of the minor children, she could assume a responsible position in their lives. Specifically, the court found that "[t]he [minor] children, except for a brief return to [the respondent's] care from May, 2017, through January, 2018, have now been in [the department's] care for almost seven years. [The respondent] has only marginally engaged in mental health and substance abuse treatment and has not benefited from the treatment in which she has engaged. If the [minor children] were returned to her care, she would have to manage six children ranging in ages from two through fourteen in a one bedroom apartment. She has not been involved in services and treatment for an appreciable length of time. She misses more visits with the [minor children than] she attends, and she is chronically late when she does attend. She is chronically absent from scheduled court appearances, and she failed to appear and participate in the trial before this court. There is no reasonable prospect that given additional time [the respondent] could assume a responsible position in the lives of [the minor children] given their ages and needs."

In the dispositional phase of the proceedings, the court made findings as to each of the criteria set forth in General Statutes § 17a-112 (k) and concluded that the termination of the respondent's parental rights was in the minor children's best interests. Accordingly, the court rendered judgments terminating the respondent's parental rights and appointing the petitioner as the minor children's statutory parent. This appeal followed.

I

On appeal, the respondent first claims that the court's denial of her motion for a continuance deprived her of her due process rights to be present and to testify at the trial. Acknowledging that her counsel did not frame the request for a continuance as a matter of due process, the respondent requests review of her unpreserved constitutional claim 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).

"The test set forth in *Golding* applies in civil as well as criminal cases. . . . Pursuant to the *Golding* doctrine, we may review an unpreserved claim 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 constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Citations omitted; emphasis in original; internal quotation marks omitted.) *In re Kiara Liz V.*, 203 Conn. App. 613, 621–22, 248 A.3d 813, cert. denied, 337 Conn. 904, 252 A.3d 364 (2021). We

assume, without deciding, that the respondent's claim is reviewable under the first two prongs of *Golding*; see *In re Shane P.*, 58 Conn. App. 244, 254, 754 A.2d 169 (2000); and we proceed to determine whether the respondent has met the third requirement of *Golding*, i.e., that a constitutional violation exists and deprived her of a fair trial.

"The United States Supreme Court established a three-pronged balancing test in *Mathews* [v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)] to determine what safeguards the federal constitution requires to satisfy procedural due process. Courts apply that balancing test when the state seeks to terminate parental rights. . . . The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements." (Internal quotation marks omitted.) *In re Adrian K.*, 191 Conn. App. 397, 412, 215 A.3d 1271 (2019). "The bottom-line question is whether the denial rendered the [proceeding] fundamentally unfair in view of the *Mathews* factors." (Internal quotation marks omitted.) *In re Matthew P.*, 153 Conn. App. 667, 676, 102 A.3d 1127, cert. denied, 315 Conn. 902, 104 A.3d 106 (2014). Our balancing of the three *Mathews* factors leads us to conclude that the denial of the respondent's motion for a continuance did not render the termination proceeding fundamentally unfair.

As to the first factor of the *Mathews* balancing test, "the respondent has an important, constitutionally protected interest in preserving [her] parental rights." *In re Lukas K.*, 300 Conn. 463, 469–70, 14 A.3d 990 (2011); see also *In re Adrian K.*, supra, 191 Conn. App. 412.

Accordingly, the first factor weighs in favor of the respondent.

The second factor of *Mathews* addresses the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards. Thus, we must determine whether, under the facts and circumstances of this case, granting a continuance to provide the respondent another opportunity to be present and to testify would have meaningfully reduced the risk of an erroneous determination regarding the termination of the respondent's parental rights. The respondent contends that the present case involves a complete deprivation, in that "[t]he respondent missed the entire proceeding and was unable to participate or testify on her own behalf." She argues that her representation by counsel was not sufficient to protect her interests. The petitioner responds that the respondent's representation by counsel, who cross-examined witnesses and offered "an effective closing argument," "assured that [the respondent's] interests were protected at trial."

We first note that the court did not render a default judgment against the respondent. Rather, the court held a trial on the merits, requiring the petitioner to prove by clear and convincing evidence not only the ground for termination, but that it was in the minor children's best interests for the respondent's parental rights to be terminated. See *In re Candids E.*, 111 Conn. App. 210, 217, 958 A.2d 229 (2008) (no due process violation where court adhered to all applicable procedural safeguards, which included, inter alia, requiring "the petitioner to prove by clear and convincing evidence not only the ground for termination, but that it was in the child's best interest for the respondent's parental rights to be terminated").

Moreover, on appeal, the respondent argues vaguely and summarily that her inability to testify "influenced

both" the court's adjudicative and dispositional determinations. She further maintains that the petitioner "cannot prove beyond a reasonable doubt, without resorting to speculation, that the respondent's testimony would not have been persuasive that she had, in fact, rehabilitated as her willingness to miss a termination hearing in order to remain with her younger children in the hospital demonstrated." The respondent, however, fails to explain with any specificity what additional evidence or testimony she would have introduced had the continuance been granted that would have rebutted the petitioner's evidence. See *In re Lukas K.*, supra, 300 Conn. 473–74 ("[p]erhaps more significantly, [the respondent] has not identified on appeal any additional evidence or arguments that he could have presented if the trial court had granted his request for a transcript and a continuance"). Nor does the respondent claim on appeal that the court's findings of fact were clearly erroneous. She also does not challenge the court's conclusions that a ground for termination of her parental rights existed and that such termination was in the minor children's best interests.

The record reveals that the respondent's counsel was present throughout the hearing and adequately represented her interests in her absence. See *In re Candids E.*, supra, 111 Conn. App. 217 ("This court has stated that [i]t is in the interest of justice to ensure that any parent caught in the throes of a termination proceeding be present, *or at least represented by counsel*, from the beginning of the hearing. . . . There can be, however, circumstances in a termination hearing in which the mere presence, alone, of a respondent's counsel, is not sufficient for a court to proceed in the respondent's absence. . . . This is no such circumstance." (Citations omitted; emphasis in original; internal quotation marks omitted.)). The respondent's counsel cross-examined both Dr. Balducci, eliciting his testimony that

the respondent had demonstrated effective parenting during the interactional session he conducted, and Blaine, eliciting testimony that the minor children call the respondent "mom" and that the respondent greets the minor children with affection at the beginning of visits. The respondent's counsel also delivered a closing argument in which she highlighted the relevant testimony elicited on cross-examination.

The respondent also contends that "no attempt at accommodations were offered by the trial court" and contrasts the present case with those in which alternative procedural safeguards were implemented.[3] The record, however, is devoid of any indication that the respondent's counsel sought procedures that would have allowed her to testify. The respondent did not request to provide testimony telephonically or request permission to review the transcript of the proceedings for purposes of potentially recalling witnesses on a later date. Nor did she submit any documentation to the court regarding her absence from the trial. Under these facts, we conclude that the second factor of the *Mathews* balancing test weighs in favor of the petitioner.

The final factor to be considered is "the government's interest in the termination proceeding, which is twofold. First, the state has a fiscal and administrative interest in lessening the cost involved in termination proceedings. . . . Second, as parens patriae, the state is also

[3] The cases relied on by the respondent involve different circumstances. In both *In re Lukas K.*, supra, 300 Conn. 476, and *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 443, 446 A.2d 808 (1982), the respondent parent was incarcerated. In *In re Matthew P.*, supra, 153 Conn. App. 673, the respondent reviewed the transcripts and recalled certain witnesses on a later date. As noted by the petitioner, in the present case, "[t]he trial concluded on January 10, 2023, and a decision issued on January 17, 2023. In the intervening days, counsel never filed a request for a further hearing date, submitted written documentation about [the respondent's] absence, or made any offer of proof about what might have happened differently if [the respondent] had been present."

interested in the accurate and speedy resolution of termination litigation in order to promote the welfare of the affected child." (Internal quotation marks omitted.) *In re Matthew P.*, supra, 153 Conn. App. 679.

The respondent argues that the "third factor is mixed." Acknowledging the compelling interest in the accurate and speedy resolution of litigation involving the termination of parental rights, the respondent contends that "[t]he respondent's stated reason for missing the termination trial, if verified, [was] sufficient to warrant a continuance and, unlike requests made for a continuance by incarcerated parents, the continuance requested by the respondent was not indefinite." She argues that "the state cannot be said to have an interest in forcing a respondent mother to make the choice between leaving her two young children alone in the hospital or forgoing her protected rights to appear and give testimony in a termination hearing." The petitioner responds that the third *Mathews* factor weighs heavily in her favor. We are not persuaded by the respondent's arguments.

We first note that delaying the trial "would have resulted in the very economic and administrative burdens on resources considered by this prong"; *In re Candids E.*, supra, 111 Conn. App. 218; in light of the fact that the other parties, their counsel, the attorney for the minor children, and the four witnesses for the petitioner all were present for trial. See *In re Matthew P.*, supra, 153 Conn. App. 680 ("[i]n light of the fact that all party representatives and the petitioner's witnesses were present on the first day of trial, we conclude that delaying the proceeding by granting the continuance would have resulted in the very economic and administrative burdens on resources considered by this prong").

More importantly, however, "because of the psychological effects of prolonged termination proceedings on

young children, time is of the essence. Any significant delay would undermine the state's important interest in protecting the welfare of children. This cost, and the state's interest in avoiding it, would rise as the delay increased. Accordingly, we recognize that the state has a vital interest in expediting the termination proceedings . . . ." (Internal quotation marks omitted.) *In re Candids E.*, supra, 111 Conn. App. 218. "In assessing this prong . . . we do not consider in isolation the delay that the requested continuance would have caused. Rather, we consider the delay that would result from granting the continuance in the context of the age and complexity of the termination proceedings . . . ." *In re Matthew P.*, supra, 153 Conn. App. 681.

In the present case, the department's extensive and prolonged involvement with the minor children, over the course of almost seven years, causes the third *Mathews* factor to weigh heavily in favor of the petitioner. See id., 681–82. As the trial court found, the department first became involved with the family in April, 2016, when the minor children were four years old, three years old, and five days old. At the time of trial, the minor children were almost eleven years old, nine years old, and almost seven years old. The minor children had been in the care of the department since April, 2016, except for a brief period of time from May, 2017, until January, 2018.

Moreover, the respondent's actions in failing to appear for scheduled court dates has contributed to the protracted nature of the proceedings. See id., 682 (considering protracted nature of proceedings under third prong of *Mathews*). As the trial court recounted, the respondent did not appear in court on January 8, 2019. The reason given by her counsel was that she was sick. The respondent again did not appear in court on October 10, 2019. The file does not reflect any proffered reason for her failure to appear on that date. On

October 12, 2022, the respondent failed to appear in court for a judicial pretrial. The excuse given was that she was ill and unable to attend court. In addition to the dates identified by the court, the file also reflects that the respondent was not present in court on November 9, 2022, and her counsel reported that she was ill and at the hospital.[4] Given the number of absences, the respondent's counsel had been notified that the respondent "would not be excused from any further court appearances without written documentation that she was prevented from attending because of a medical issue."[5] Further delaying the matter by granting the respondent's requested continuance, which was unsupported by documentation despite the trial court's previous notification, "would have placed an unnecessary burden on the state's interest in providing permanency and stability" to the minor children. *In re Matthew P.*, supra, 153 Conn. App. 682. Accordingly, the third prong of *Mathews* favors the petitioner.

As applied to the specific facts of this case, the *Mathews* balancing test does not support the respondent's due process claim. Accordingly, because we cannot conclude that the court's denial of the respondent's request for a continuance rendered the trial fundamentally unfair, the respondent has not shown that a constitutional violation exists. Thus, her claim fails under the third prong of *Golding*.

[4] The respondent's failure to appear was not limited to court proceedings. As the trial court found, "[m]ore often than not, [the respondent] misses visits [with the minor children] entirely and does not call to cancel. At that point the [minor children] have all been transported to the visit and are deeply disappointed by [the respondent's] failure to be there." As a result, each minor child "acts out upon their return to the foster home and in school the following day."

[5] During oral argument before this court, the respondent's counsel was asked whether the respondent disputes the court's finding that the court previously had advised her counsel that any future absence would require corroboration by written documentation. The respondent's counsel responded that she does not challenge that finding.

II

The respondent claims in the alternative that the court abused its discretion when it denied her motion for a continuance. The petitioner responds that "[t]he trial court properly exercised its discretion to deny the continuance request on the day of the trial given its skepticism of counsel's stated reason for [the respondent's] failure to appear, her numerous prior missed court dates, the age of the case and the length of time the [minor] children had been in [the department's] care, and the negative impact of any further delay on the permanency and stability of the [minor] children." We agree with the petitioner.

"The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . . A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To 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). "[Our Supreme Court has] articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: 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 [party's] personal responsibility for the timing

of the request . . . .'' (Internal quotation marks omitted.) *State* v. *Coney*, 266 Conn. 787, 801–802, 835 A.2d 977 (2003).

On the basis of our review of the record and the factors articulated by our Supreme Court, we conclude that the court did not abuse its discretion when it denied the respondent's motion for a continuance. ''[T]he age and complexity of the case; the granting of other continuances in the past; [and] the impact of delay on the litigants, witnesses, opposing counsel and the court''; id., 802; were all discussed at length in part I of this opinion. That discussion need not be repeated, although we incorporate it here. As to the remaining factors, the request for a continuance was made on the morning of the trial, for which all other parties, counsel, and witnesses had appeared.[6] ''We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial.'' (Internal quotation marks omitted.) *State* v. *Victor C.*, 145 Conn. App. 54, 69, 75 A.3d 48, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). The length of the requested continuance was unspecified. As to the perceived legitimacy of the reason proffered in support of the request, although illness could form a legitimate reason for a continuance, the respondent's counsel previously had been advised that the respondent would not be excused from any further court appearances without written documentation that she was prevented from attending because of a medical issue. Given that the respondent failed to proffer any documentation, either at the time

[6] We note that the file reflects that the court previously had expressed the importance of proceeding on the scheduled trial date. On December 22, 2022, the court denied the motion to withdraw filed by Tyrome S.'s attorney. See footnote 1 of this opinion. The file indicates that the ''[t]rial has been delayed several times. Several delays caused by [the respondent].'' After denying the motion to withdraw, the court advised Tyrome S. that he could retain his own counsel ''but said counsel must be ready to go to trial on January 11, 2023.''

of the absence from trial or any time thereafter, the court reasonably could have determined the unsubstantiated excuse to be inadequate. On the basis of the foregoing, we conclude that the court's denial of the respondent's motion for a continuance was not an abuse of its discretion.

The judgments are affirmed.

In this opinion the other judges concurred.

CITY OF BRIDGEPORT ET AL. *v.* FREEDOM OF INFORMATION COMMISSION
(AC 45287)

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

Syllabus

Pursuant to statute (§ 1-206 (a)), "[a]ny denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request . . . . Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial."

Pursuant further to statute (§ 1-210), "(b) [n]othing in the Freedom of Information Act shall be construed to require disclosure of . . . (3) [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of (A) the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known . . . ."

The defendant Freedom of Information Commission appealed to this court from the judgment of the trial court sustaining the appeal filed by the plaintiffs, the Chief of Police of the Bridgeport Police Department, the Bridgeport Police Department, and the City of Bridgeport, from a final decision of the commission in connection with a complaint filed by D, who had been convicted of murder and was incarcerated. The final decision found that the plaintiffs violated the Freedom of Information Act (§ 1-200 et seq.) in handling D's request for records and ordered the plaintiffs to provide D with the requested records without certain redactions and to search for additional responsive records. In a letter

dated August 6, 2019, D had requested, pursuant to statute (§ 1-212), copies of records in the police department's possession related to the criminal investigation of D and his criminal murder case. D's letter also requested that the plaintiffs respond to his request within fourteen days. By letter dated August 19, 2019, D filed a "notice of appeal" complaint with the commission, pursuant to statute (§ 1-206 (b) (1)), that the plaintiffs had not complied with his request of August 6, 2019. The complaint was received by the commission on August 20, 2019. By letter dated August 19, 2019, the Office of the City Attorney for the city responded to D's August 6, 2019 request, notifying him that they had received his August 6, 2019 request and would contact him in writing once the documents were available. On September 26, 2019, the plaintiffs filed an answer to D's complaint with the commission, asserting that the city attorney received D's request on August 19, 2019, and sent a letter to D acknowledging receipt the same day. The plaintiffs also noted in their answer to D's complaint that they were in the process of complying with D's request and would finish reviewing the documents for material exempt from disclosure by October 10, 2019. On November 13, 2019, the city attorney sent D's attorney the requested records. At a commission hearing on the merits of D's complaint, D informed the hearing officer that his attorney had received responsive documents from the plaintiffs but that the documents contained extensive redactions throughout. The hearing was continued to allow the plaintiffs to present testimony from a witness, J, a detective with the police department, regarding the plaintiffs' claimed exemptions from disclosure of the material that had been redacted. After the second hearing on the merits of the complaint, the hearing officer concluded that the plaintiffs violated the act by, inter alia, failing to conduct a thorough search for records responsive to D's request and redacting certain information. The hearing officer also concluded that the plaintiffs' failure to respond to D's request by August 12, 2019, constituted a constructive denial of the request by operation of § 1-206 (a). The commission approved the hearing officer's decision, and the plaintiffs filed their administrative appeal with the trial court. The trial court concluded that the commission improperly determined that it had jurisdiction pursuant to § 1-206 (a) because no denial of D's request existed before August 26, 2019, at its earliest, as D's request directed the plaintiffs to respond within fourteen business days, and, because the plaintiffs did not receive D's request until August 19, 2019, the request could not have been deemed denied when D's complaint was received by the commission on August 20, 2019. In so concluding, the trial court interpreted the phrase "within four business days of such request" in § 1-206 (a) to mean four business days from the date that the request was received by the public agency. *Held*:

1. The trial court exceeded the scope of judicial review when it concluded that the commission lacked jurisdiction over D's complaint on the unpreserved issue regarding D's purported waiver of the four day response

period set forth in § 1-206 (a), which was neither raised by the plaintiffs nor considered by the commission: because D alleged in his complaint a violation of the act, his complaint presented a claim that was within the class of cases that the commission had the authority and competence to decide; moreover, whether a complainant has been denied a right under the act went to the merits of every complaint before the commission and, thus, the denial of a request, either in fact or pursuant to § 1-206 (a), was an essential fact that went to the merits of the complaint before the commission and implicated the commission's authority to grant a complainant relief under the act, consequently, because the unpreserved issue regarding D's purported waiver of the four days to respond requirement did not implicate the commission's subject matter jurisdiction, the court improperly raised it on its own motion.

2. The commission could not prevail on its claim that its interpretation of § 1-206 (a) as authorizing an individual to file a complaint four business days after the date a request had been made was consistent with the plain language of the statute and was time-tested and reasonable: the commission's interpretation of § 1-206 (a) was not time-tested and had not been subject to judicial scrutiny and, thus, was not entitled to deference, as a review of the commission's published decisions revealed that its construction of the statute has varied and has been inconsistently applied, and, because the statute was silent as to whether a request made by mail and received on a later date would be considered denied four business days after the request was sent or after it was received, as opposed to a request made by a phone call or fax, which would be received the same day, the statute was ambiguous; moreover, the trial court's interpretation of § 1-206 (a) was proper because construing § 1-206 (a) to require that an agency receive a request before the four day period commences was consistent with the statute's emphasis on the agency's response, or lack thereof, to a request for public records; furthermore, this court concluded that, for purposes of determining whether a request sent by mail has been deemed denied pursuant to § 1-206 (a), the operative date is the date that the request was received by the public agency.

3. The trial court improperly sustained the plaintiffs' administrative appeal because the commission's finding that D's request was deemed denied pursuant to § 1-206 (a) before he filed his complaint on August 19, 2019, was reasonably supported by substantial evidence in the record: although the plaintiffs asserted that they did not receive D's request until August 19, 2019, they presented no evidence before the commission to rebut the presumption that D's request was received more than four business days before he filed his complaint with the commission, and, despite this lack of evidence, the trial court rejected the commission's conclusion that D's request was deemed denied on August 12, 2019, a conclusion the commission was entitled to make based on the presumption that a properly addressed letter had been delivered in a reasonable

amount of time; moreover, the trial court, in reasoning that the commission's conclusion ignored the fact that the plaintiffs claimed that it did not receive D's request until August 19, 2019, relied on its understanding of mail from prisons and engaged in fact finding, as evidence of prison mail systems was not before the commission, and, thus, the trial court improperly substituted its assessment of the factual record for that of the commission, thereby exceeding the proper scope of judicial review.

4. The plaintiffs could not prevail on any of their alternative grounds for affirming the judgment of the trial court:

a. The plaintiffs could not prevail on their claim that the executive director of the commission violated the applicable statute (§ 1-206 (b) (2)) by failing to seek and obtain leave of the commission before scheduling a hearing on D's complaint; the executive director's decision to schedule a hearing on D's complaint was eminently reasonable, and the commission acted within the confines of its statutory authority by proceeding to investigate and adjudicate D's complaint, which was within the commission's jurisdiction, as the complaint alleged that the plaintiffs failed to comply with D's request; moreover, § 1-206 (a) required compliance with a request for public records, not merely assurances that the public agency would comply at some point in the future, and, in the present case, the plaintiffs conceded in their answer that they had not yet complied with D's request, not only at the time he filed his complaint, but also more than one month thereafter when the plaintiffs filed their answer, and the plaintiffs did not provide D's attorney with any responsive records until nearly three months after their August 19, 2019 letter acknowledging D's request, accordingly, under those circumstances, there was no basis for the executive director to question the commission's jurisdiction or to believe that docketing the complaint would perpetrate an injustice or constitute an abuse of the commission's administrative process, as set forth in § 1-206 (b) (2), as D still had not been provided copies of the records he sought at the time the plaintiffs filed their answer.

b. Contrary to the plaintiffs' claim, the commission did not abuse its discretion in failing to dismiss D's complaint without an evidentiary hearing; the plaintiffs' claim that, even if the commission correctly assessed its jurisdiction to hear D's complaint, § 1-206 (b) (4) and substantial commission precedent would have justified dismissing the matter without a full evidentiary hearing, was unavailing, as the commission acted well within the confines of its authority by proceeding to investigate and adjudicate D's complaint.

c. The plaintiffs could not prevail on their claim that the commission should have refused to consider the propriety of the plaintiffs' claimed exemptions under the act: the fact that the plaintiffs believed that they had complied with D's request by providing redacted copies of the responsive records did not resolve D's complaint that the plaintiffs had not complied with his request, as the plaintiffs' bore the burden of proving

the propriety of the claimed exemptions to establish that they had complied with D's request, and, thus, D had no obligation to amend his complaint to allege that the plaintiffs violated the act by redacting portions of the responsive records, as such a claim was encompassed within the allegation that the plaintiffs had failed to comply with his request for all responsive records; moreover, because the plaintiffs bore the burden of proof as to any claimed exemption, they were not prejudiced by the commission's consideration of those exemptions as part of its consideration of D's complaint, especially as the hearing officer continued the hearing to another date to give the plaintiffs an opportunity to present evidence in support of their claimed exemptions.

d. The plaintiffs could not prevail on their claim that the administrative record clearly demonstrated that they had proved beyond a preponderance of the evidence that they appropriately redacted names and other identifiers of witnesses not known to the public in the responsive records and the commission's factual findings to the contrary were clearly erroneous and not reasonably supported by the evidence in the record: the commission's finding that the plaintiffs failed to prove that their redactions were proper pursuant to § 1-210 (b) (3) (A) was reasonably supported by substantial evidence in the record, as J, the plaintiffs' sole witness in support of the claimed exemptions, conceded that she was unaware of who testified at D's criminal trial and that she had no reason to believe that the identities of the witnesses were known, which flatly contradicted D's request for information regarding a specific witness that D identified by name; moreover, J's testimony provided nothing more than a generalized claim of possible safety risks if the redacted information were disclosed and was essentially a reiteration of department policy, and, as such, did not support a finding that disclosure of the names of specific witnesses in D's case would subject such witnesses to threat or harm, and the burden of proving the applicability of the exemption required the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel.

Argued May 18—officially released October 24, 2023

Procedural History

Appeal from the decision of the defendant determining that the plaintiffs had violated the requirements of the Freedom of Information Act and ordering that they comply with those requirements by disclosing certain records to the complainant, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Cordani, J.*; judgment sustaining the appeal,

from which the defendant appealed to this court. *Reversed*; *judgment directed*.

Daniel L. McGee, commission counsel, with whom, on the brief, was *Colleen M. Murphy*, for the appellant (defendant).

Dina A. Scalo, with whom, on the brief, was *Michael C. Jankovsky*, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. The defendant, the Freedom of Information Commission (commission), appeals from the judgment of the Superior Court sustaining the administrative appeal filed by the plaintiffs, the Chief of Police of the Bridgeport Police Department, the Bridgeport Police Department (department), and the city of Bridgeport (city), from a final decision of the commission regarding the complaint filed by Marlando Daley.[1] In its final decision, the commission found that the plaintiffs violated the Freedom of Information Act (act), General Statutes § 1-200 et seq., in handling Daley's request for records and ordered the plaintiffs to provide Daley with the requested records without certain redactions and to search for additional responsive records. On appeal, the commission claims that the court (1) exceeded the scope of judicial review when it sustained the plaintiffs' appeal on a ground neither raised by the plaintiffs nor considered by the commission, (2) misconstrued General Statutes § 1-206 (a) in concluding that Daley's request was not deemed denied pursuant to the statute until four business days after the request was received by the plaintiffs, and (3) improperly found that the plaintiffs received Daley's request on August 19, 2019.

The plaintiffs disagree with the commission's claims and contend that the judgment may be affirmed on the

[1] The plaintiffs did not name Daley as a party in their administrative appeal, and he is not a party to the present appeal.

alternative grounds that the commission (1) violated § 1-206 (b) (2) by failing to seek leave of the commission before scheduling a hearing on Daley's complaint, (2) should have dismissed the appeal pursuant to § 1-206 (b) (4), (3) improperly decided issues not raised in Daley's complaint, and (4) improperly concluded that the plaintiffs failed to meet their burden of establishing that certain information in the records was exempt from disclosure pursuant to General Statutes § 1-210. We agree with the commission's first and third claims and reject the plaintiffs' alternative grounds for affirming the judgment. Accordingly, we reverse the judgment of the Superior Court.

The following facts, either as found by the hearing officer or undisputed in the record, and procedural history are relevant to the parties' claims. In October, 2011, Daley was convicted of murder and sentenced to forty years of incarceration in connection with the 2010 shooting death of a man in Bridgeport. See *State* v. *Daley*, 161 Conn. App. 861, 863, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016). In a letter dated August 6, 2019, and addressed to "Chie[f] o[f] Police Armando Perez," Daley requested, pursuant to General Statutes § 1-212,[2] copies of any and all

[2] General Statutes § 1-212 (a) provides in relevant part: "Any person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record. The type of copy provided shall be within the discretion of the public agency, except (1) the agency shall provide a certified copy whenever requested, and (2) if the applicant does not have access to a computer or facsimile machine, the public agency shall not send the applicant an electronic or facsimile copy. . . ."

General Statutes § 1-210 (a) provides in relevant part: "Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212. Any agency rule or regulation, or part thereof, that conflicts with the provisions of this subsection or diminishes or curtails in any way the rights granted by this subsection shall be void. . . ."

records in the department's possession related to the criminal investigation of Daley and his criminal murder case. At the end of the letter, Daley stated: "Please respond to my request within (14) work days and/or to ask for additional time to respond. The info requested herein is vital to justic[e] in the matter, so I thank you in advance for your time, effort, and assistance."

By letter dated August 19, 2019, Daley filed a "notice of appeal" (complaint) with the commission pursuant to § 1-206 (b) (1),[3] which was received by the commission on August 20, 2019. In the complaint, Daley claimed that the plaintiffs had not complied with his "freedom of information request dated August 6, 2019, to the [department] at 300 Congress Street, Bridgeport" and requested "that a civil penalty be applied due to non-compliance [with] the above dated request . . . ." The commission docketed the complaint and, thereafter, forwarded it to the plaintiffs on September 19, 2019. Also by letter dated August 19, 2019, the Office of the City Attorney for the city (city attorney) responded to

Although § 1-210 was the subject of technical amendments since the events giving rise to the present appeal; see Public Acts 2019, No. 19-43, § 1; Public Acts 2019, No. 19-123, § 3; Public Acts 2021, No. 21-120, § 6; Public Acts 2023, No. 23-197, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] General Statutes § 1-206 (b) (1) provides in relevant part: "Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the [act] may appeal therefrom to the [commission], by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial . . . . Upon receipt of such notice, the commission shall serve upon all parties, by certified or registered mail or by electronic transmission, a copy of such notice together with any other notice or order of such commission. . . ."

Although § 1-206 was the subject of technical amendments since the events giving rise to the present appeal; see Public Acts 2019, No. 19-64, § 14; Public Acts 2021, No. 21-2, § 148; Public Acts 2023, No. 23-200, § 1; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

Daley's August 6, 2019 request, notifying Daley that the plaintiffs had received his request and that they would contact him in writing when the documents were available.

The plaintiffs filed an answer to Daley's complaint with the commission on September 26, 2019, in which they asserted that the city attorney received Daley's request on August 19, 2019, and that the city attorney sent Daley a letter acknowledging receipt of his request that same day. The plaintiffs also noted that the department had located the requested records and would finish reviewing them for information exempt from disclosure under the act by October 10, 2019. Thus, the plaintiffs asserted that, "pursuant to . . . § 1-206 (b) (1), [the commission] does not have jurisdiction to hear [Daley's] complaint, as the [plaintiffs have] not denied [Daley] the right for a copy of the requested records. The [plaintiffs] respectfully [request] dismissal of [Daley's] complaint." By letter dated October 3, 2019, Daley acknowledged the plaintiffs' answer and requested that all responsive records be sent to the attorney representing him in connection with his petition for a writ of habeas corpus.

In a letter dated November 12, 2019, the commission notified Daley and the plaintiffs that a hearing officer would hold a hearing on the merits of Daley's complaint on December 6, 2019. On November 13, 2019, the city attorney sent Daley's attorney the requested records, noting that only "one [compact disc] record has been withheld pursuant to . . . § 1-210 (b) (3) (C)."[4]

[4] General Statutes § 1-210 (b) provides in relevant part: "Nothing in the [act] shall be construed to require disclosure of . . . (3) Records of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . (C) signed statements of witnesses . . . ."

At the December 6, 2019 hearing, Daley informed the hearing officer that his attorney had received responsive documents from the plaintiffs but complained about the extensive redactions throughout the materials. When the hearing officer asked counsel for the plaintiffs, Attorney Dina A. Scalo, if the records were redacted, Scalo responded that the plaintiffs had redacted the names of witnesses and other personal identifying information. The following exchange then occurred between the hearing officer and Scalo:

"[The Hearing Officer]: So, at this point there's not much I can do. You don't have a witness and you're going to need to submit the records for in camera inspection. . . .

"[Scalo]: The complaint was that he had not received the records. We received the complaint—actually, the complaint was dated the same day that we had received his request. So, as of now, we have sent all the records, we have been diligent in sending the records, we've been efficient in sending the records. We have utilized the ombudsman program. We've spoken with Attorney Harmon and she's been speaking, I'm assuming, with Mr. Daley to rectify this. No mention was made that the redactions were at issue here. The only issue is whether he had received the documents as far as I understand. . . . So, at this point, the city was in full compliance. We provided the documents free of cost as soon as we could. We gave them to the person that Mr. Daley wanted us to give them to. The redactions or what was redacted was never brought to the city attorney's office by Attorney Gallucci or Mr. Daley or Attorney Harmon working as ombudsman with Mr. Daley. So, as of now, we've not been given notice that the redactions were at issue. The complaint itself says he hasn't received copies of the records. So—

"[The Hearing Officer]: If you want me to continue the hearing you now have notice. I think it's implied—

"[Scalo]: Sure.

"[The Hearing Officer]: —when someone files an appeal here that they're saying I haven't gotten all the records. You might think you've complied but, in fact, you may have overredacted the records, which means that I could find that you violated [the act].

"[Scalo]: Okay.

"[The Hearing Officer]: So, why don't we continue the hearing. We will come back, I expect that you bring the records, I'll issue an order. You can bring the records with you. You should have a completed index and you should have a witness who is—can testify as to the redactions to the extent that you need a witness. So, if there's signed witness statements, they're exempt, and I don't need a witness to tell me that, but to the extent you're claiming other exemptions and you need a witness, you should bring a witness.

"[Scalo]: Okay."

The parties returned for another hearing on January 19, 2020, during which the plaintiffs presented testimony from Detective Joette Devan of the department regarding the claimed exemptions from disclosure. Following the hearing, the hearing officer issued a proposed final decision dated March 5, 2020. In that decision, the hearing officer concluded that the plaintiffs violated the act by failing to conduct a thorough search for records responsive to Daley's request, by redacting certain information, and by withholding certain responsive records. The hearing officer did not address the plaintiffs' claim that the commission lacked jurisdiction over Daley's complaint, and the plaintiffs noted that omission in their memorandum of law to the commission. When the commission considered the hearing officer's proposed decision at a meeting on September 9,

2020, Scalo outlined the plaintiffs' jurisdictional claim as follows:

"So, the factual set up for this is set up in the proposed final decision in paragraph 2 through 4 I believe, but [Daley's] original . . . request is dated August 6, [2019], and it was received by the [plaintiffs] on August 19, [2019]. But the same day that the [city] received Daley's request, Daley filed a . . . complaint alleging noncompliance [with his] request. So, you know, at this point, it was clear under the act that, at the time the complaint was made, certainly there was no denial of the right. The city sent its acknowledgement letter indicating that it had received the request in compliance with the act. And then afterwards, the [plaintiffs] filed an answer with the commission pursuant to § 1-206 (b) (4) of the . . . act, specifically setting out these facts and indicating that the . . . records were being retrieved and reviewed and requesting that therefore [Daley's] complaint [be dismissed]; this answer wasn't acknowledged or ruled on and, as far as I can see, was not noted in the proposed final decision. So . . . it was really an instance of the [plaintiffs] being asked to defend against a complaint that, you know, again, at the time of the complaint, did not really allege any violation because no violation had then taken place. . . .

"But again, you know, at the time of the first hearing, the [plaintiffs] had complied as much as possible and, to that date, had not really been informed of the specific violation. I don't believe there was an amended complaint that was added into the record. So just the practical implications of requiring [an agency] to fairly and adequately prepare a defense for an original complaint that didn't allege a violation and then a violation that was alleged at the hearing, it doesn't make a lot of sense. . . . So . . . it's not quite expedient for any of us, for the [commission] and also the hearing officer

to be asked to sustain the complaint that didn't allege a violation.

"So, our relief for that would be asking that [the proposed finding and decision] be . . . replaced with a finding from the hearing officer laying out the facts that [Daley's] complaint is dismissed pursuant to the answer that was originally filed."

After Scalo concluded her argument, the commission invited the hearing officer to respond. After noting that the plaintiffs did not raise their jurisdictional claim during either of the hearings, the hearing officer explained "that the reason there is jurisdiction in this case is because there's something called a constructive denial in the [act]. So, I'm looking at the calendar from August of 2019, the request was made, it [is dated] August 6th, which was a Tuesday. So, assuming a couple of days to get to the [plaintiffs], there would have been a constructive denial of this request prior to August 19, which was [the date] that the [plaintiffs] responded. So, anyway, perhaps that was overlooked, but, in my opinion, there was a constructive denial of this request. So, the commission has jurisdiction over the matter."

The commission remanded the matter to the hearing officer to address the plaintiffs' claim that the commission lacked jurisdiction over Daley's complaint. In a proposed final decision dated October 13, 2020, the hearing officer found that the plaintiffs' failure to respond to Daley's August 6, 2019 request by August 12, 2019, constituted a constructive denial of the request by operation of § 1-206 (a). Accordingly, the hearing officer concluded that the commission had jurisdiction over Daley's complaint, as it was filed within thirty days of the constructive denial pursuant to § 1-206 (b) (1). As to the merits of the complaint, the hearing officer found that the plaintiffs violated §§ 1-210 (a) and 1-212 (a) by failing to conduct a thorough search of records

in response to the complainant's request and by withholding and redacting responsive records. The hearing officer recommended that the commission order that the plaintiffs search for additional responsive records and redact only addresses, dates of birth, and phone numbers contained in those records.

The commission held another hearing to consider the new proposed final decision on November 18, 2020. At that hearing, the plaintiffs' counsel argued that, for purposes of determining whether a request has been constructively denied, "[i]t doesn't really make procedural sense to start the clock on the date that the request is written or that it is mailed out if it has not been received by the agency either due to mail delays or issues like that, issues outside of the control of the agency. It doesn't make procedural sense for an agency to have been deemed to violate the act before they've even been made aware of the request . . . or . . . received the request. There is a difference between jurisdiction to file the complaint, which seems to be what this § 1-206 (a) four day limit is for, it's for the complainant to be able to file the complaint, versus hearing a complaint on the merits when there has really been no substantive violation of the act, even considering this constructive denial theory, [on] the date that the complaint was filed. . . . So it's just not credible or practical to allow a complaint submitted on the very day that an agency received a request to go forward to a hearing on the merits, and, in this case, the hearing officer did have discretion to find . . . that there was no substantive denial. . . .

"So, accordingly, as to the jurisdiction issue, the [plaintiffs] ask that the proposed final decision be overturned in full with the finding that [Daley's] August 19th complaint is dismissed either due to lack of subject matter jurisdiction altogether or lack of a meaningful substantive denial or violation of the act at the time of

the complaint." The commission, however, approved the hearing officer's amended decision at the conclusion of the hearing and issued a final decision dated November 18, 2020.[5] The plaintiffs filed an administrative appeal in the Superior Court pursuant to General Statutes § 4-183.

In the plaintiffs' brief in support of their administrative appeal, they claimed: (1) the commission "had a duty to refrain from scheduling a hearing unless or until leave of the commission was granted" pursuant to § 1-206 (b) (2); (2) that, "even if by the letter of the law [Daley] had not received a response in four business days, given the circumstances of this case, there was no reasonable justification for the commission to hold a hearing on this matter, much less two full hearings and an in camera inspection"; (3) "the commission's decision to expand the scope of the issues before it in this matter to those not fairly and timely raised in [Daley's complaint] constitutes an arbitrary and capricious abuse of discretion"; and (4) "the commission's finding that redaction of witness identifiers was improper is not supported by the evidence in the record."

In its brief in opposition to the plaintiffs' appeal, the commission argued that, on its face, Daley's complaint was sufficient to establish the commission's jurisdiction, and the plaintiffs' answer further supported that conclusion. The commission also argued that the hearing officer did not expand the scope of the issues raised in Daley's complaint because "the plaintiffs' decision to withhold several records from disclosure does not warrant a separate and distinct allegation. Rather, it is a defense to nondisclosure, which must necessarily be

[5] The final decision again failed to address the plaintiffs' jurisdictional claim. After the plaintiffs filed their administrative appeal, the court remanded the matter to the commission to correct the final decision in that respect. The commission issued a corrected final decision on April 7, 2021, which also is dated November 18, 2020.

considered by the hearing officer in order to determine whether the plaintiffs have violated the . . . act." Finally, the commission argued that the evidence in the record supports its conclusion that the plaintiffs failed to prove the applicability of the exemption set forth in § 1-210 (b) (3) (A).

The plaintiffs filed a reply brief in which they argued that, assuming that the commission is correct that Daley's request was denied pursuant to statute when he did not receive a response to his request within four days after it was sent, their "compliance thereafter cured any supposed technical violation of the [act] such that there was no justifiable reason for considering the merits of [Daley's complaint] at two separate hearings."

The court held a hearing on January 20, 2022. Although the plaintiffs had not argued that Daley's request affording the plaintiffs fourteen business days to respond rendered the "deemed denied" provision of § 1-206 (a) ineffective, the court queried whether Daley's request could be deemed denied under § 1-206 (a) before those fourteen days had passed. Counsel for the commission, Attorney Danielle L. McGee, responded in the affirmative and engaged in the following exchange with the court:

"The Court: Really?

"[McGee]: Certainly here, [Daley] is saying, I really need these records presumably within fourteen working days.

"The Court: Yeah. . . . Ask for more time if you need it.

"[McGee]: Right. And, then, in this case, based on the number of days that transpired, I believe he waited thirteen days, thirteen calendar days, and then, on [August] 14, he filed his appeal in this case. So, I think he—

"The Court: Which is before the fourteen business days, you realize that. . . .

"[McGee]: I would acknowledge that [Daley filed the complaint before the fourteen business days had passed]. Sure. . . . But, under the statute, he did have the right by that fifth business day statutorily to file his appeal. Now, by the time we get to the hearing, if that was something to be raised by the plaintiffs, they certainly could have done so, and I think [the plaintiffs' counsel] already alluded to this, there was no questioning about the number of days that had transpired in terms of the mail, did he actually mail it on [August 6, 2019], I mean those are the kinds of questions that the [plaintiffs] are supposed to be asking during the evidentiary hearing to tease out whether there really is . . . a jurisdictional issue, which didn't happen in this case.

"So, based on the timeline, the commission had jurisdiction to open the case. We did receive the . . . answer from the plaintiffs, it's part of the record. An answer is essentially—it's a responsive pleading. It's not evidence. [The plaintiffs] can say we haven't denied the request; we're working on it. Is there a substantive denial or a decision about a substantive denial at that point on part of the commission? No. That's for the evidentiary hearing.

"Now, is it deemed denied by virtue of the appeal? Yes. For purposes of jurisdiction, it's deemed denied. So, from the perspective of the timeline, what was alleged in the complaint, and what was indicated in the answer that they were working on it, [the plaintiffs] hadn't fully complied, but they were working on it, certainly the commission had jurisdiction to move forward."

On January 21, 2022, the court issued a memorandum of decision sustaining the plaintiffs' appeal, vacating

the commission's final decision, and remanding the matter to the commission with direction to dismiss Daley's complaint. The court concluded that the commission improperly determined that it had jurisdiction pursuant to § 1-206 (a) for two reasons. The court first concluded that, because the request for records directed the plaintiffs to respond within fourteen business days, "no denial could exist, and therefore no statutory jurisdiction could exist, before August 26, 2019, at the earliest." In the alternative, the court concluded that, because the plaintiffs did not receive Daley's request until August 19, 2019, the request could not have been deemed denied when Daley's complaint was received by the commission on August 20, 2019. In so concluding, the court interpreted the phrase "within four business days of such request" in § 1-206 (a) to mean four business days from the date that the request is received by the public agency. The court reasoned that "[n]o case and controversy can exist, and no denial deemed, until the agency has at least four business days to actually consider the request." This appeal followed.

As a preliminary matter, we first set forth the well established standard of review in administrative appeals. We are "guided by the limited scope of judicial review afforded by the Uniform Administrative Procedure Act; General Statutes § 4-166 et seq.; to the determinations made by an administrative agency. [W]e must decide, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily or illegally, or abused its discretion. . . . Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and

logically follow from such facts. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [administrative agency]." (Citation omitted; internal quotation marks omitted.) *Aronow* v. *Freedom of Information Commission*, 189 Conn. App. 842, 858, 209 A.3d 695, cert. denied, 332 Conn. 910, 210 A.3d 566 (2019).

I

The commission first claims that the court exceeded the scope of judicial review when it concluded that the commission lacked jurisdiction over Daley's complaint on a ground neither raised by the plaintiffs nor considered by the commission. We agree.

The following principles regarding reviewability of unpreserved claims are relevant to the commission's claim. Our Supreme Court recently explained that "there is a difference between bypassing an administrative procedure on the ground that the agency has no jurisdiction over the matter, which raises an exhaustion issue, and failing, within the context of an administrative proceeding, to preserve for review a claim that the agency has no jurisdiction. When [as in the present case] a party has failed to preserve a claim before an administrative agency, the exhaustion doctrine does not apply; instead, we apply the ordinary rules governing appellate review of unpreserved claims." *Board of Education* v. *Commission on Human Rights & Opportunities*, 344 Conn. 603, 622–23, 280 A.3d 424 (2022).

"[I]t is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . This rule applies to appeals from administrative proceedings as

well. . . . A party to an administrative proceeding cannot be allowed to participate fully at hearings and then, on appeal, raise claims that were not asserted before the board [or agency]. . . . [T]o allow a court to set aside an agency's determination [on] a ground not theretofore presented . . . deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." (Citations omitted; internal quotation marks omitted.) *Direct Energy Services, LLC* v. *Public Utilities Regulatory Authority*, 347 Conn. 101, 148, 296 A.3d 795 (2023).

"[W]ith respect to unpreserved issues that do not involve subject matter jurisdiction, plain error or constitutional error, if the reviewing court would have the discretion to review the issue if raised by a party because important considerations of justice outweigh the interest in enforcing procedural rules governing the preservation of claims and adversarial principles, the court may raise the claim sua sponte, as long as it provides an opportunity for all parties to be heard on the issue. In other words, if an exceptional circumstance exists that would justify review of an unpreserved claim if raised by a party, the reviewing court may raise the issue sua sponte. Of course . . . if a party objecting to the reviewing court's sua sponte consideration of the claim can demonstrate that it would be unfairly prejudiced by such consideration, it would be inappropriate for the [reviewing court] to consider such a claim. . . . Although . . . all of the circumstances in which a reviewing court may raise an issue sua sponte cannot be catalogued, we also reiterate that our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived." (Footnotes omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 162–64, 84 A.3d 840 (2014).

In the present case, the plaintiffs never argued before the commission that the "deemed denied" provision of § 1-206 (a) did not apply due to Daley's request for a response within fourteen business days. Thus, the commission did not address, as the Superior Court did, whether Daley's request for a response within fourteen business days rendered the four day period set forth in § 1-206 (a) ineffective. The plaintiffs also did not raise that issue in their administrative appeal. Instead, they argued that, "even if the plaintiffs grant that a constructive denial ought to be treated as a denial for jurisdiction purposes (which, in instances where the agency has not yet received/processed a request, such as in this case, the plaintiffs believe it should not), the commission conflates the statutory ability to file a complaint with the entitlement to a hearing on the merits of that complaint. . . . [E]ven if by the letter of the law [Daley] had not received a response in four business days, given the circumstances of this case, there was no reasonable justification for the commission to hold a hearing on this matter, much less two full hearings and an in camera inspection."

Nevertheless, the Superior Court raised the issue, sua sponte, at oral argument on the plaintiffs' administrative appeal and sustained the appeal on that ground. Although the court did not identify any exceptional circumstances justifying its sua sponte consideration of the unpreserved issue, it determined that the issue implicated the commission's subject matter jurisdiction. Consequently, whether the court properly raised that issue sua sponte turns on whether the issue implicates the commission's subject matter jurisdiction.[6] See

[6] In support of their claim that the court properly found that Daley had waived the application of § 1-206 (a), the plaintiffs argue that the deemed denied provision is not jurisdictional and, therefore, "that the four day rule can be waived by the requester." In the present case, because the alleged waiver of the four day period would not confer jurisdiction on the commission, Daley could waive his statutory right to file a complaint with the commission, even assuming that the deemed denied provision is jurisdic-

Blumberg Associates Worldwide, Inc. v. *Brown & Brown of Connecticut, Inc.*, supra, 311 Conn. 161 ("reviewing court not only can but must address an issue implicating subject matter jurisdiction whenever it arises, regardless of how the issue comes to the court's attention"); see also *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 753, 754, 150 A.3d 1109 (2016) ("[a] defendant's right to assert a defense based on a jurisdictional statutory time limit cannot be waived," but "a defendant's right to a defense under an ordinary statute of limitations may be waived").

tional. See *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338 Conn. 651, 662, 258 A.3d 1244 (2021) ("subject matter jurisdiction, *if lacking, may not be conferred by the parties*" (emphasis added; internal quotation marks omitted)). Indeed, there is no question that "federal and state constitutional and statutory rights can be waived . . . ." (Internal quotation marks omitted.) *State* v. *Morel-Vargas*, 343 Conn. 247, 259, 273 A.3d 661 (2022).

We note that, in response to the plaintiffs' argument that the deemed denied provision is subject to waiver, the commission argues in its reply brief that it has "consistently interpreted . . . § 1-206 as jurisdictional" and "consistently dismisses complaints that are not filed within the time limitations set forth in . . . § 1-206." It also contends that "there is ample authority that supports the proposition that the statutory time limitations set forth in the [act] are jurisdictional" and cite, inter alia, *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 262 n.5, 588 A.2d 1368 (1991) (noting that "the thirty day period for filing a notice of appeal with the [commission] . . . relates to the subject matter jurisdiction of the [commission]").

Given that the issue raised by the court does not involve the thirty day time limitation set forth in § 1-206 (b), our Supreme Court's observation in *West Hartford* v. *Freedom of Information Commission*, supra, 218 Conn. 256, does not resolve the issue presented in the present case. In other words, whether the thirty day appeal period set forth in § 1-206 (b) is jurisdictional is a separate issue from whether a request has been deemed denied pursuant to § 1-206 (a). During oral argument before this court, counsel for the commission recognized this distinction. When asked how the commission knew that Daley's request was sent on August 6, 2019, counsel responded: "Well, we don't know that because the question wasn't asked, Your Honor. But *I still don't believe that it impacts the commission's jurisdiction based on the language of the statute.*" (Emphasis added.) Counsel for the commission also noted that, although the date that the plaintiffs received the request could have impacted the merits of the complaint, there was no evidence of that date. Considering the commission's position at oral argument before

Our Supreme Court recently discussed an analogous issue in *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 344 Conn. 603. In that case, the New Haven Board of Education (board) claimed that the Commission on Human Rights and Opportunities (CHRO) lacked jurisdiction over a claim for discriminatory public accommodations practices in violation of General Statutes § 46a-64 because a public school is not a place of public accommodation. Id., 632. The Superior Court declined to consider the claim, and the board appealed. On appeal, the board conceded that its claim was unpreserved, as it did not raise the claim before the CHRO, but it argued that the court was required to address it "because it was jurisdictional, and a jurisdictional claim may be raised at any time." Id., 632–33.

In rejecting that claim, our Supreme Court first noted "the ongoing confusion as to whether the failure to plead or prove an essential fact [for purposes of invoking a statutory remedy] implicates the [tribunal's] subject matter jurisdiction or its statutory authority." (Internal quotation marks omitted.) Id., 633. The court explained that, "[o]nce it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . [T]he question of whether the action belongs to the class of cases that the tribunal has authority to decide is [s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act. . . . A challenge to the tribunal's statutory authority raises a claim of statutory construction that is not jurisdictional. . . . [A] claim that a party has failed to allege or to establish

this court, we are not persuaded by its reliance on its prior decisions to support its argument that the deemed denied provision is jurisdictional.

an element of a statutory remedy implicates the tribunal's statutory authority and the legal sufficiency of the complaint, not the tribunal's subject matter jurisdiction." (Citations omitted; internal quotation marks omitted.) Id., 633–34.

Applying those principles, the court reasoned that "the complaint alleged that the board had violated § 46a-64 by discriminating against [a student] on the basis of his disabilities in a place of public accommodation. Such a claim is within the class of cases that the [CHRO] has authority or competence to decide. . . . [T]herefore . . . the [CHRO] had subject matter jurisdiction to entertain the complaint. . . .

"In support of its claim to the contrary, the board essentially contends that, because a public school is *not* a place of public accommodation *as a matter of law*, the [CHRO] lacked subject matter jurisdiction. We disagree. In the cases . . . regarding the distinction between statutory authority and subject matter jurisdiction, the alleged jurisdictional deficiencies also involved questions of law. We concluded that the trial court's jurisdiction was not implicated in any of these cases, but, instead, the claims implicated the trial court's statutory authority and the legal sufficiency of the complaints. . . . We conclude, therefore, that the board's claim that the trial referee incorrectly determined that a public school is a place of public accommodation is not reviewable because it does not implicate the commission's subject matter jurisdiction." (Citations omitted; emphasis in original; footnote omitted.) Id., 634–35.

The same reasoning applies in the present case. Pursuant to General Statutes § 1-205 (d), the "commission shall have the power to investigate all alleged violations of said [act] and may for the purpose of investigating any violation hold a hearing . . . and to require the

production for examination of any books and papers which the commission deems relevant in any matter under investigation or in question."[7] Daley's complaint, which was received by the commission on August 19, 2019, alleged that the plaintiffs violated the act by failing to comply with his August 6, 2019 request. Accordingly, because Daley alleged a violation of the act, there is no question that his complaint presented a claim that is within the class of cases that the commission has the authority and competence to decide. See *Board of Education* v. *Commission on Human Rights & Opportunities*, supra, 344 Conn. 634. Furthermore, the issue raised by the Superior Court in the present case—whether Daley's request was deemed denied pursuant to § 1-206 (a)—is "a claim that a party has failed to allege or to establish an element of a statutory remedy [which] implicates the [commission's] statutory authority and the legal sufficiency of the complaint." Id., 633–34. Indeed, whether a complainant has been denied a right under the act goes to the merits of every complaint before the commission. See General Statutes § 1-205 (d) (commission has authority "to investigate all *alleged violations of* [*the*] *act*" (emphasis added)). Thus, a denial of a request, either in fact or pursuant to § 1-206 (a), is an essential fact that goes to the merits of a complaint before the commission. Whether that fact has been established does not implicate the commission's jurisdiction, as it would be a "bizarre result that the failure to prove an essential fact at trial deprives the [tribunal] of subject matter jurisdiction." *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012). Instead, it implicates the commission's authority to grant a complainant relief under the act. Consequently, because the unpreserved

[7] Although § 1-205 (d) was amended since the events giving rise to the present appeal; see Public Acts 2019, No. 19-64, § 22; this amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

issue regarding Daley's purported waiver of the requirement to respond within four days does not implicate the commission's subject matter jurisdiction, the court improperly raised it on its own motion.[8] See *Brownstone Exploration & Discovery Park, LLC* v. *Borodkin*,

[8] The plaintiffs claim that their "argument that the [commission] erred in considering [Daley's complaint] due to [the] lack of a denial was well preserved before both the [commission] and the [Superior Court], and the . . . court's reliance upon uncontested evidence in the record to substantiate that claim is squarely within the scope of its judicial review." According to the plaintiffs, "the doctrine of waiver is well established and readily applicable to the facts of this case." The commission responds that, in light of the plaintiffs' failure to raise the issue before the commission, "there is no evidence in the record upon which the . . . court could have relied to reach its conclusion that Daley waived his right to appeal from a constructive denial . . . ." We agree with the commission.

The record reflects that the plaintiffs claimed that they had not denied Daley's request because they responded to it on the same day that they received it and informed him that they were reviewing the requested records. That claim is distinct from the issue raised by the court involving waiver of the deemed denied provision in § 1-206 (a). Accordingly, we disagree with the plaintiffs' contention that the issue of waiver was subsumed within their argument to the commission that they had not denied Daley's request when he filed his complaint with the commission.

Moreover, because the issue was not raised before the commission, no evidence was presented regarding it and, therefore, the evidence in the record does not support a finding of waiver. "It is well established that [w]aiver is a question of fact." (Internal quotation marks omitted.) *Worth Construction Co.* v. *Dept. of Public Works*, 139 Conn. App. 65, 68, 54 A.3d 627 (2012). "[W]aiver is the intentional relinquishment or abandonment of a known right or privilege. . . . [A] necessary element to waiver is the requisite knowledge of the right. . . . It must be shown that the party understood its rights and voluntarily relinquished them anyway." (Citations omitted; internal quotation marks omitted.) Id., 70–71. Thus, "[t]he basic conception of a waiver is that it is intentional; it cannot be established by a consent given under a mistake of fact." (Internal quotation marks omitted.) Id., 71.

In the present case, the only evidence of waiver relied on by the court was Daley's request providing the plaintiffs with fourteen business days to respond to his request. Although Daley's request may be understood to provide the plaintiffs with more time than the act allows, there is no indication that Daley waived his right to file a complaint with the commission if the plaintiffs did not comply with his request within four business days. Indeed, there is no evidence regarding Daley's knowledge of § 1-206 (a) or what rights he intended to relinquish by giving the plaintiffs fourteen busi-

220 Conn. App. 806, 820, 299 A.3d 1189 (2023) ("a trial court generally acts in excess of its authority when it raises and considers, sua sponte, issues not raised or briefed by the parties"); *Greene* v. *Keating*, 156 Conn. App. 854, 861, 115 A.3d 512 (2015) (concluding "that the [trial] court acted in excess of its authority when it raised and considered, sua sponte, a ground for summary judgment not raised or briefed by the parties").

Therefore, we agree with the commission that the court exceeded the scope of judicial review and "improperly traveled a different path rather than determining whether the [commission] properly trod on the stepping stones of the path it took." (Internal quotation marks omitted.) *Dortenzio* v. *Freedom of Information Commission*, 42 Conn. App. 402, 409, 67 A.2d 978 (1996).

II

As to the court's alternative basis for sustaining the plaintiffs' appeal, the commission claims that the court misconstrued § 1-206 (a) in concluding that a request may not be deemed denied until four business days after the agency received the request. The commission argues that its interpretation of § 1-206 (a) as authorizing an individual to file a complaint with the commission after four business days from the date the request was made is consistent with the plain language of the statute and "is also time-tested, reasonable, and does not yield absurd or unworkable results." In contrast, the plaintiffs contend that the statute is ambiguous, as demonstrated by the competing interpretations advanced by the commission and the Superior Court, and that the present case demonstrates "how inefficient and impractical the [commission's] interpretation can be when applied to a real-world case." We conclude that the court properly construed § 1-206 (a) as requiring that a public agency

ness days to respond to his request. Accordingly, we are not persuaded by the plaintiffs' contentions.

receive a request for public records before that request can be deemed denied.

We begin with the applicable standard of review. "Although the interpretation of statutes is ultimately a question of law . . . it is the well established practice of this court to accord great deference to the construction given [a] statute by the agency charged with its enforcement." (Internal quotation marks omitted.) *Nettleton* v. *C & L Diners, LLC*, 219 Conn. App. 648, 664, 296 A.3d 173 (2023).

"[T]he traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Conversely, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. . . . Deference is warranted in such circumstances because a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation. Moreover, in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute. . . . For these reasons, this court long has adhered to the principle that when a governmental agency's time-tested interpretation [of a statute] is reasonable it should be accorded great weight by the courts." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 547, 93 A.3d 1142 (2014); see also *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 422–23, 72 A.3d 13 (2013). "A consideration of whether an interpretation is time-tested takes into account both the

length of time since it first was articulated and the number of formal decisions applying that interpretation." *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 611 n.20, 89 A.3d 841 (2014).

In the present case, the commission's interpretation of § 1-206 (a) is not time-tested, as a review of the commission's published decisions reveals that its construction of the statute has varied. Compare *Weinstein* v. *Assistant Attorney General*, Freedom of Information Commission, Docket No. FIC 1999-494 (May 10, 2000) ("[s]ection 1-206 . . . does not require that a requester wait four business days following the receipt of a request by an agency before filing an appeal"), with *Peak* v. *Superintendent of Schools*, Freedom of Information Commission, Docket No. FIC 2019-0598 (August 12, 2020) p. 3 ("[I]f during the four business days *following the public agency's receipt of such request*, a requestor does not receive a written acknowledgment from the public agency, the requestor may file a complaint with the [c]ommission on the fifth business day. In effect, this provision deems a public agency's silence during the four business days *following receipt of a public records request to be a constructive denial of such request*." (Emphasis added.)). In fact, the commission has routinely dismissed complaints when it finds that a request was never received by a respondent. See, e.g., *Gawlik* v. *Quiros*, Freedom of Information Commission, Docket No. FIC 2021-0345 (February 8, 2023) p. 2 (commission found "that at the time of the complaint, the respondents had not received the . . . request and therefore had not denied the complainant's request for records" and dismissed complaint based on conclusions "that the complainant had no right to appeal under § 1-206 (b) (1) . . . and that the respondents did not violate the [act]"); *Kaminski* v. *Commissioner of Correction*, Freedom of Information Commission, Docket No. FIC 2021-0567 (September 14, 2022)

p. 2 (same); *Carattini* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2020-0141 (March 23, 2022) pp. 2–3 (commission dismissed complaint because respondents had not received request until after complaint was filed with commission and, therefore, "had not denied the complainant's request for records, or denied any other right under the [act]"); *Wright* v. *Chairperson, Board of Pardons & Paroles*, Freedom of Information Commission, Docket No. FIC 2020-0213 (October 27, 2021) p. 3 (commission found that respondents had not received complainant's request until after complaint was filed with commission and, therefore, dismissed complaint because "the respondents had not denied the complainant's request for records or denied any other right under the [act] . . . at the time the complaint . . . was filed"); *Bracken* v. *Osanitsch*, Freedom of Information Commission, Docket No. FIC 2019-0083 (June 26, 2019) p. 2 ("[b]ecause it is found that the respondents did not receive the complainant's . . . request letters for the records . . . it is concluded that the respondents did not violate the [act]"); *Lane* v. *Chief, Police Dept.*, Freedom of Information Commission, Docket No. FIC 2017-0747 (June 27, 2018) p. 2 (commission found that respondents first became aware of request after complaint was filed with commission but also found that respondents did not violate act because they did not maintain records requested by complainant); but see *Dixon* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2016-0427 (April 12, 2017) pp. 2–8 (although counsel for respondents claimed that respondents did not receive complainant's request until after complaint was filed with commission, commission held evidentiary hearing and considered objections to claimed exemptions). Accordingly, the commission's interpretation of § 1-206 (a) as allowing a complaint to be filed four business days after a request is sent by a complainant to a public agency—as opposed to four business

days after a request is received by the public agency—cannot be considered time-tested, as it has not been consistently applied.

In addition, we disagree with the commission's claim that its interpretation of § 1-206 (a) has been subjected to judicial scrutiny based on various Superior Court decisions. See *Sedensky* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-13-6022849-S (November 26, 2013) ("[§ 1-206 (a)] provides that a request for information under the [act] is constructively denied if there is no response from the public agency within four business days of the request"); *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-12-5015684-S (June 7, 2013) (court rejected contention that agency had only four days to respond to request pursuant to § 1-206 (a) because that provision "does not resolve whether a response is prompt" but, rather, "merely allows a complainant to file a complaint with the [commission] after four days by deeming that a denial has occurred"), aff'd, *Smith* v. *Freedom of Information Commission*, 146 Conn. App. 909, 78 A.3d 307 (2013); *Smith* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-11-5015510-S (August 30, 2012) (54 Conn. L. Rptr. 614, 616) (noting that § 1-206 (a) allows requester to appeal to commission "without having to wait indefinitely for compliance that may never be forthcoming" (internal quotation marks omitted)). Although those decisions discuss the statute, none of those cases involved a request for documents mailed to a public agency, and, instead, involved requests for documents that were received by the agency on the same date that they were made. See *Sedensky* v. *Freedom of Information Commission*, supra (initial written request for records submitted via facsimile, and complainant renewed that written request

by leaving voicemail messages); *Smith* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-12-5015684-S (written request hand delivered to agency); *Smith* v. *Freedom of Information Commission*, supra, Superior Court, Docket No. CV-11-5015510-S (written request was dated October 19, 2010, and respondent responded by telephone that same date). Accordingly, the present issue has not been subjected to judicial scrutiny.

Thus, because the commission's interpretation of § 1-206 (a) is not time-tested and has not been subjected to judicial scrutiny, it is not entitled to deference, and, therefore, our review is plenary. See *Dept. of Public Safety* v. *State Board of Labor Relations*, 296 Conn. 594, 601, 996 A.2d 729 (2010) (when agency had interpreted statute only twice and neither decision had been subjected to judicial scrutiny, agency's interpretation was not entitled to deference and court's review is plenary). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . 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.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, supra, 312 Conn. 527.

We begin with the language of the statute. Section 1-206 provides in relevant part: “(a) Any denial of the right to inspect or copy records provided for under section 1-210 shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request . . . . Failure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial.

“(b) (1) Any person denied the right to inspect or copy records under section 1-210 . . . or denied any other right conferred by the [act] may appeal therefrom to the [commission], by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial . . . . For purposes of this subsection, such notice of appeal shall be deemed to be filed on the date it is received by said commission or on the date it is postmarked, if received more than thirty days after the date of the denial from which such appeal is taken.”

Our Supreme Court previously has construed § 1-206[9] and concluded that it “merely ensures an expedient

[9] In *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 588 A.2d 1368 (1991), the court construed General Statutes (Rev. to 1987) § 1-21i, which was recodified at § 1-206 in 1999. General Statutes (Rev. to 1987) § 1-21i provided in relevant part: “Any denial of the right to inspect or copy [public] records provided for under section 1-19 shall be made to the person requesting such right . . . within four business days of such request. Failure to comply with a request to so inspect or copy such public record within such four business day period shall be deemed to be a denial.

“(b) Any person denied the right to inspect or copy records under section 1-19 . . . may appeal therefrom to the freedom of information commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed within thirty days after such denial. . . .”

right of appeal for those who do not desire to await a written denial. Although written denial of a request for disclosure of public records is required . . . there is no statutory recourse against a public agency for failure to comply with this requirement. Without the statutory denial provision, therefore, if a public agency failed to respond to a request, the person seeking disclosure would have no further recourse because the right of appeal to the [commission] in § [1-206 (b)] is the right to appeal a denial. . . . [Section 1-206 (b)] affords a right to appeal to the [commission] any denial, whether written or statutory, of a request for disclosure of public records." (Citation omitted.) *West Hartford* v. *Freedom of Information Commission*, 218 Conn. 256, 261–62, 588 A.2d 1368 (1991).

Because the request in that case was received on the same date that it was made, the court did not address the issue presented here—whether the four day deemed denied period is calculated from the mailing of a request or the receipt thereof.[10] This issue is unique to requests

[10] To be clear, the question of when an appeal can be filed is distinct from the question of whether the agency violated the act. See *Gemmell* v. *Hodge*, Freedom of Information Commission, Docket No. FIC 2006-433 (August 22, 2007) ("§ 1-206 (a) . . . does not establish a time limit by which a public agency must respond to a records request but rather that section provides a definite time period beyond which a requester may invoke the right to appeal to [the] commission pursuant to § 1-206 (b) (1)"); *Fletcher* v. *Taylor*, Freedom of Information Commission, Docket No. FIC 2001-534 (May 22, 2002) ("the denial provisions in § 1-206 (a) . . . do not create a right for which the commission can find a violation of the [act], but rather that section provides a definite time period beyond which a requester may invoke the right to appeal to [the] commission"); *Groten* v. *Goshen Assessor*, Freedom of Information Commission, Docket No. FIC 92-235 (March 10, 1993) p. 4 (concluding that § 1-206 (a) "does not define a four-day response as either prompt or not prompt, but rather sets a time limit for the agency to issue a denial, after the expiration of which time limit the request is deemed denied and an appeal may be taken"). Consequently, the act does not mandate that a public agency's failure to disclose requested records within four business days after receiving a records request constitutes a violation of the act. See, e.g., *Smith* v. *Freedom of Information Commission*, supra, Superior Court Docket No. CV-12-5015684-S (court rejected contention that public agency had only four days to respond to request pursuant to § 1-206 (a) because that provision "does not resolve whether a response is prompt" but, rather,

made by mail because when a request is made in-person, by phone, or by email during normal business hours, it will be received on the same date that it is made, whereas requests sent by mail will be received on a later date. With regard to the use of the mail, although § 1-206 (b) specifies that a notice of appeal will be deemed filed either when it is received by the commission or when it is postmarked, subsection (a) does not specify whether a request will be deemed denied four business days after the request was sent or after it was received. Because the statute is silent on this point, "we read the statute in context to determine whether the language is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Hicks* v. *State*, 297 Conn. 798, 802, 1 A.3d 39 (2010).

In construing § 1-206 (a) in the present case, the court reasoned that, "'[w]ith such a tight time frame of four business days, the meaning of the statutory words 'within four business days of such request' . . . means

"merely allows a complainant to file a complaint with the [commission] after four days by deeming that a denial has occurred"). Rather, the act requires "prompt" access, which is not reduced to a number of days. See General Statutes § 1-210 ("every person shall have the right to . . . inspect such records *promptly* during regular office or business hours" (emphasis added)); General Statutes §1-212 (a) ("[a]ny person applying in writing shall receive, *promptly upon request*, a . . . copy of any public record" (emphasis added)); *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 521 n.7, 14 A.3d 998 (2011) (court emphasized its "agreement with [this court's] conclusion that the commission's imposition of a two week time limit for compliance with a freedom of information request was an arbitrary limitation").

As the commission has explained, the issue of promptness "is a particularly fact-based question" involving the consideration of various factors, including "the volume of records requested; the time and personnel required to comply with a request; the time by which the person requesting records needs them; the time constraints under which the agency must complete its other work; the importance of the records to the requester, if ascertainable; and the importance to the public of completing the other agency business without the loss of the personnel time involved in complying with the request." (Internal quotation marks omitted.) *Lucarelli* v. *Chief, Police Dept.*, Freedom of Information Commission, Docket No. FIC 2008-631 (July 22, 2009).

four business days from the date that the request is received or filed, for if § 1-206 (a) does not mean the foregoing, then we will continually have 'deemed denials' before the request is actually received and considered by the agency." In contrast, the commission argues that "§ 1-206 (a) can only reasonably be interpreted to mean that a person may appeal four business days from the date the request is made." We conclude that the statute is ambiguous, as both interpretations are plausible. See *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68–69, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language . . . is ambiguous").

Neither party directs our attention to any relevant extratextual evidence of the meaning of § 1-206 (a) as to the precise issue before us, and our own review of the legislative history has revealed none.[11] Nevertheless, we conclude that, when § 1-206 (a) is read in context, the Superior Court's interpretation is the more reasonable one. See *Clark* v. *Waterford, Cohanzie Fire Dept.*, 346 Conn. 711, 728, 295 A.3d 889 (2023) ("[w]hen statutory language, even if ambiguous for purposes of § 1-2z, provides greater support for an interpretation of the statute than does the legislative history, we must yield to the implications of the statutory language, particularly when the legislative history is more general in

[11] In its reply brief, the commission notes that "the legislative history suggests that our legislature intended to afford requesters swift access to public records and an almost immediate right to review of a denial by the commission." It highlights general statements from the legislative history that an appeal to the commission would be a " 'simple' " and " 'speedy process' " and that the act would provide for " 'an immediate method of appeal' to the commission." (Emphasis omitted.). These general references to the simplicity and speediness of the appeals process provide little insight as to whether the four day period begins after a request is received or after it is sent. Indeed, under either interpretation, the process is simple and expeditious, and a complainant will be able to file a complaint with the commission in a matter of days after submitting a request.

nature and does not furnish any evidence of legislative intent with respect to the specific point of law at issue").

The references to a request in § 1-206 (a) involve an agency's *response* to a request under the act, which necessarily requires receipt of the request. Specifically, the statute provides that a denial "shall be made to the person requesting such right by the public agency official who has custody or control of the public record, in writing, within four business days of such request" and that "[f]ailure to comply with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial." General Statutes § 1-206 (a). Because an agency can neither deny nor comply with a request it has not received, construing § 1-206 (a) as requiring that an agency receive a request before the four day period commences is consistent with the statute's emphasis on the agency's response, or lack thereof, to a request for public records.

Our Supreme Court applied similar reasoning in *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 91, 282 A.3d 1253 (2022), in which the court concluded that "the word 'submit' in [General Statutes] § 12-63c (a) unambiguously requires that the income and expense information be received by the assessor by June 1." The court reasoned that interpreting the statute as requiring receipt "produce[d] a more harmonious result with our existing case law. See *PJM & Associates, LC* v. *Bridgeport*, [292 Conn. 125, 142, 971 A.2d 24 (2009)] ('[u]nder . . . [§ 12-63c (d)], a penalty may be imposed if the required information never reaches the assessor because the property owner does not provide the information'); see also, e.g., *State* v. *Jones*, 314 Conn. 410, 418–19, 102 A.3d 694 (2014) (holding that phrase 'shall *submit* to the jury . . . [a]ll exhibits received in evidence' not only requires that trial court 'send' exhibits

to jury but also that jury has 'a meaningful opportunity to study and consider an exhibit during its deliberations' . . .)). Although *PJM & Associates, LC*, did not specifically address the meaning of the word 'submit' in § 12-63c (a), the underlying premise of that case is that it is the lack of receipt of the information that triggers the penalty. . . . This case law constitutes persuasive authority that the common usage of the word 'submit' contemplates not only transmission but also receipt. . . . [T]he assessor is not in a position to study and consider income expense information until it is received, not merely postmarked." (Citation omitted; emphasis in original; footnote omitted.) *Seramonte Associates, LLC* v. *Hamden*, supra, 87–88.

Likewise, in the present case, an agency is not able to deny or comply with a request "until it is received, not merely postmarked." Id., 88. Thus, because § 1-206 (a) concerns a public agency's response to a request for public records, which can only be triggered by the receipt of such request, we conclude that the statutory language provides greater support for interpreting the statute as requiring that a request is received before the four day period begins. We are not persuaded by the commission's arguments to the contrary.

First, the commission argues that "[t]he plain language of the statute does *not* provide that a person may only appeal from a statutory denial four business days *from the date a public agency receives or files the request*, as determined by the [Superior] [C]ourt." (Emphasis in original; internal quotation marks omitted.) Given that the statute is silent as to whether it is the mailing or the receipt of a request that triggers the four day period for a public agency to respond, the commission's proffered interpretation is susceptible to the same challenge. Moreover, although not stated expressly, requiring that a request be received before measuring an agency's response is consistent with the

language used in the statute, which concerns the agency's response to a request.

Second, the commission argues that requiring receipt of a request is impractical because an individual "may have no way of knowing when the public agency has received . . . his request" and because "the commission could not determine jurisdiction."[12] The commission further argues that "it would be illogical and fundamentally unfair to require a requester to wait indefinitely for the public agency to notify them that a request has been received or filed, when such notification may never come." The commission's concerns are unfounded, as both this court and our Supreme Court have recognized that "the mailing of a properly addressed letter creates a presumption of timely notice unless contrary evidence is presented." *Daniels* v. *Statewide Grievance Committee*, 72 Conn. App. 203, 211, 804 A.2d 1027 (2002); see also *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418–19, 880 A.2d 882 (2005) ("a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received"); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 532–33, 457 A.2d 656 (1983) (holding that trial court "was justified in presuming that the confirmation slip was received in the due course of mail"); *Console* v. *Torchinsky*, 97 Conn. 353, 356, 116 A. 613 (1922) (recognizing "presumption of due delivery and receipt arising from the mailing of a properly-addressed letter"). Thus, an individual is entitled to presume that a properly addressed request for records sent by mail will be received within a few days after it is mailed, and, in the absence of

[12] As we concluded in part I of this opinion, however, whether a request has been denied pursuant to § 1-206 (a) does not implicate the commission's jurisdiction. Instead, a denial of a request for public records is an essential fact as to the commission's authority under the act.

evidence to the contrary, the commission may presume the same. In fact, the hearing officer in the present case did precisely that when she stated: "So, I'm looking at the calendar from August of 2019, the request was made, it [is dated] August 6th, which was a Tuesday. So, *assuming a couple of days to get to the* [*plaintiffs*], there would have been a constructive denial of this request prior to August 19, which was [the date] that the [plaintiffs] responded." (Emphasis added.)

Furthermore, as noted previously in this opinion, the commission has applied this interpretation of the statute and determined that a complaint was premature when the underlying request was not received by a respondent at the time the complaint was filed with the commission. See, e.g., *Weathers* v. *Perez*, Freedom of Information Commission, Docket No. FIC 2019-0677 (August 11, 2021) pp. 2–3 (after ordering respondents to produce evidence of when they received request, commission concluded that complaint was filed before request was received and, therefore, respondents did not violate act). Accordingly, we are not persuaded that our construction of the statute is impractical, as the commission has applied it previously, or that it is fundamentally unfair to require that a request be received before it can be deemed denied.

Finally, the commission argues that the court's interpretation of the statute is contrary to both the legislative policy of allowing all individuals prompt access to public records and the presumption that records maintained by public agencies are publicly available. We disagree. "[T]he overarching legislative policy of [the act] is one that favors the open conduct of government and free public access to government records." (Internal quotation marks omitted.) *Clerk of the Common Council* v. *Freedom of Information Commission*, 215 Conn. App. 404, 413, 283 A.3d 1 (2022). To require that a request be received by a public agency before it is

deemed to be denied by that agency in no way undermines the purpose of the act; it simply requires that an agency be made aware of a request for access. The same legislative policy is served, as individuals are not denied prompt access to records due to a requirement that a request for such access be received by the agency.

In sum, when the statute is read in context, the language used supports construing § 1-206 (a) as requiring that a request be received by the agency before the request may be deemed denied by operation of the statute. Therefore, we conclude that, for purposes of determining whether a request sent by mail has been deemed denied pursuant to § 1-206 (a), the operative date is the date that the request was received by the public agency.

III

Last, the commission claims that, "even assuming arguendo that the trial court's interpretation of . . . § 1-206 (a) is correct . . . there is no evidence in the record upon which the commission or the trial court could have relied to conclude that the plaintiffs did not receive Daley's request until August 19, 2019." We agree.

In applying § 1-206 (a), the hearing officer found that Daley's request had been deemed denied by the time that he filed his complaint with the commission. The plaintiffs argued before the Superior Court that such a conclusion was not possible because the department did not receive Daley's request until the very day that Daley mailed his complaint to the commission. Although the plaintiffs asserted before the commission that they did not receive Daley's request until August 19, 2019, when the city attorney acknowledged receipt of the request, they presented no evidence of when the request actually was received by the department. The plaintiffs presented a single witness, who testified solely about the plaintiffs' claimed exemptions from

disclosure. The only discussion about when Daley's request was received is found in the representations made by Scalo before the hearing officer and the commission. Such representations by counsel, however, are not evidence. See *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 761, 916 A.2d 114 (2007) ("[E]vidence . . . is the means by which alleged matters of fact are properly submitted to the trier of fact for the purpose of proving a fact in issue. . . . It is well settled that representations of counsel are not, legally speaking, evidence." (Internal quotation marks omitted.)).

Despite this lack of evidence before the commission supporting the plaintiffs' contention, the court, in sustaining the plaintiffs' administrative appeal, rejected the commission's conclusion that Daley's request was deemed denied on August 12, 2019, reasoning that such a conclusion "ignores the fact that the plaintiffs did not receive [Daley's] request until August 19, 2019." The court also found that, "[i]n view of the complainant's incarceration, it is not surprising that the plaintiffs did not receive the August 6, 2019 . . . request until August 19, 2019. Mail from prisons is generally known to be delayed because of prison procedures. The foregoing fact is, or should have been, known by the [commission]."

Thus, the court engaged in its own fact finding, and did so, in part, based on its own understanding of mail delivery from prisons, evidence of which was not before the commission. By doing so, the court substituted its assessment of the factual record for that of the commission and thereby exceeded the proper scope of judicial review. See General Statutes § 4-183 (j) ("[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact"). Instead, the court should have reviewed the record before the commission to determine whether there was

substantial evidence in the record to support the commission's conclusion that Daley's request was deemed denied before he filed his complaint with the commission. See *Strong* v. *Conservation Commission*, 28 Conn. App. 435, 440, 611 A.2d 427 (1992) ("The [Superior Court's] standard of review in an administrative appeal is to determine whether there is substantial evidence in the record that reasonably supports the administrative decision. . . . If the record provides such substantial evidence, the court should not substitute its judgment for that of the agency." (Citation omitted.)), appeal dismissed, 226 Conn. 227, 627 A.2d 431 (1993). On the basis of our review of the record, we conclude that there was.

Like the Superior Court, our review "is limited to determining whether the agency's findings are supported by substantial and competent evidence and whether the agency's decision exceeds its statutory authority or constitutes an abuse of discretion. . . . [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . In determining whether an administrative finding is supported by substantial evidence, the reviewing court must defer to the agency's assessment of the credibility of the witnesses and to the agency's right to believe or disbelieve the evidence presented by any witness . . . . As with any administrative appeal, our role is not to reexamine the evidence presented to the [commission] or to substitute our judgment for the agency's expertise, but, rather, to determine whether there was substantial evidence to support its conclusions. . . . If the decision of the agency is reasonably supported by the evidence in the record, it must be sustained." (Citations omitted; internal quotation marks omitted.) *Board of Education* v. *Commission on Human Rights & Opportunities*, 212 Conn.

App. 578, 586–87, 276 A.3d 447, cert. denied, 345 Conn. 902, 282 A.3d 466 (2022).

The commission argues that "[t]he record is devoid of evidence of the date that the [department] (the agency to [which] the request was directed and [the agency] responsible for compliance) received the request." According to the commission, "[a]bsent such evidence, it is reasonable to infer that Daley's request was received by the [department] within days of August 6, 2019, and that the [department] received, reviewed, and forwarded Daley's request to its attorneys (that is, the [city attorney])." The commission further contends that "Daley should not be deprived of his right to appeal to the [commission] when the plaintiffs failed to present evidence on this issue." The plaintiffs respond that their "alleged failure to develop the administrative record is a direct result of the [commission's] choice not to make any substantive findings of fact as to the receipt of the request, because it had already determined that, in light of the date of the [request] and [complaint], no further investigation was required." We agree with the commission.

As we concluded in part I of this opinion, the denial of a request for public records is an essential fact for purposes of invoking the commission's authority pursuant to § 1-206 (b) (1). In the present case, Daley's complaint, which was dated August 19, 2019, and received by the commission on August 20, 2019, alleged that the plaintiffs had failed to comply with his request dated August 6, 2019. In their answer, the plaintiffs claimed that Daley's request had not been denied because the department did not receive the request until August 19, 2019, when they immediately responded to it. Although such a claim is a defense to an alleged violation of the act, the plaintiffs failed to offer any evidence in support of their allegation. Accordingly, Daley sufficiently alleged the essential fact that his request had been

denied, as he alleged that, as of August 19, 2019, the plaintiffs had not complied with his August 6, 2019 request. As we explained in part II of this opinion, in the absence of evidence to the contrary, the commission was entitled to presume that a properly addressed letter was delivered within a reasonable amount of time. The hearing officer in the present case reasoned that a reasonable time for Daley's request to be received by the plaintiffs was "a couple of days" and, therefore, concluded that "there would have been a constructive denial of this request prior to August 19 [2019] . . . ."

The propriety of that presumption in the present case is supported by the evidence in the record. In particular, the commission notes that the plaintiffs introduced a copy of Daley's response to their answer, which was dated Thursday, October 3, 2019, and was stamped "received" Tuesday, October 8, 2019, the third business day after it presumably was sent. In addition, Daley's complaint was dated August 19, 2019, and was received by the commission on August 20, 2019. Given how many days passed between when those letters were dated and when they were received and considering the absence of any evidence of when the department actually received Daley's request, the hearing officer reasonably may have presumed that Daley's request had been received by the plaintiffs more than four business days before Daley filed his complaint. Consequently, because the plaintiffs failed to offer any evidence as to when the department received Daley's request, they failed to rebut the presumption that Daley's request was received more than four business days before he filed his complaint with the commission. Thus, we conclude that the commission's finding that Daley's request was deemed denied pursuant to § 1-206 (a) before he filed his complaint on August 19, 2019, is reasonably supported by substantial evidence in the record. Accordingly, the

court improperly sustained the plaintiffs' administrative appeal.

IV

Because we conclude that the court improperly sustained the plaintiffs' administrative appeal, we consider the plaintiffs' alternative grounds for affirming the judgment of the Superior Court.

A

The plaintiffs first claim that the executive director of the commission violated § 1-206 (b) (2) by failing to seek leave of the commission before scheduling a hearing on Daley's complaint. We disagree.

Section 1-206 (b) (2) provides in relevant part: "If the executive director of the commission has reason to believe an appeal under subdivision (1) of this subsection or subsection (c) of this section (A) presents a claim beyond the commission's jurisdiction; (B) would perpetrate an injustice; or (C) would constitute an abuse of the commission's administrative process, the executive director shall not schedule the appeal for hearing without first seeking and obtaining leave of the commission. The commission shall provide due notice to the parties and review affidavits and written argument that the parties may submit and grant or deny such leave summarily at its next regular meeting. The commission shall grant such leave unless it finds that the appeal: (i) Does not present a claim within the commission's jurisdiction; (ii) would perpetrate an injustice; or (iii) would constitute an abuse of the commission's administrative process."

In support of their claim, the plaintiffs note that, prior to the first scheduled hearing, they filed their answer confirming "that [Daley's] request was in progress, not denied" and argue that "given the assurances by the [plaintiffs] that they fully intended to respond to Daley's

request and produce nonexempt records, there was [a] basis for the [commission] to conclude that proceeding with an evidentiary hearing would work an injustice against the [plaintiffs], or would constitute an abuse of the administrative process. The [executive director's] decision not to refrain from scheduling a hearing in light of these facts, and instead to schedule multiple evidentiary hearings with a full examination of all claims of exemption is definitionally outside the statutory authority of the [commission] as set forth in the . . . act." We are not persuaded.

As previously noted in part I of this opinion, there is no question that a complaint alleging a violation of the act is within the commission's jurisdiction, and Daley's complaint alleged that the plaintiffs had failed to comply with his August 6, 2019 request. Section 1-206 (a) provides that "[f]ailure to *comply* with a request to so inspect or copy such public record within the applicable number of business days shall be deemed to be a denial."[13] (Emphasis added.) Because, for purposes of filing a complaint with the commission, the act requires *compliance* with a request for public records—not simply "assurances" that the agency will comply at some point in the future—the plaintiffs conceded in their answer that they had not complied with Daley's request, not only at the time that he filed his complaint, but also more than one month thereafter when the plaintiffs filed their answer. In fact, the plaintiffs did not provide Daley's attorney with any responsive records until November 13, 2019, nearly three months after their August 19, 2019 letter acknowledging Daley's request. Accordingly, under those circumstances, there was no basis for the executive director to question the commission's jurisdiction or to believe that docketing the complaint would perpetrate an injustice or constitute an abuse of the administrative process, as Daley still had

[13] See footnote 10 of this opinion.

not been provided copies of the records he sought at the time the plaintiffs filed their answer. Consequently, we conclude that the executive director's decision to schedule the matter for an evidentiary hearing was eminently reasonable, and the commission acted well within the confines of its statutory authority by proceeding to investigate and adjudicate Daley's complaint. See General Statutes § 1-205.

B

The plaintiffs next claim that, "even if the [commission] correctly assessed that it had jurisdiction to consider Daley's complaint . . . § 1-206 (b) (4) and substantial [commission] precedent would have justified dismissing the matter without a full evidentiary hearing." Again, we are not persuaded.

Section 1-206 (b) (4) provides: "Notwithstanding any provision of this subsection to the contrary, in the case of an appeal to the commission of a denial by a public agency, the commission may, upon motion of such agency, confirm the action of the agency and dismiss the appeal without a hearing if it finds, after examining the notice of appeal and construing all allegations most favorably to the appellant, that (A) the agency has not violated the [act], or (B) the agency has committed a technical violation of the [act] that constitutes a harmless error that does not infringe the appellant's rights under said act."

The plaintiffs simply repeat their argument regarding § 1-206 (b) (2) in support of their claim that the commission abused its discretion in failing to dismiss Daley's complaint without an evidentiary hearing pursuant to § 1-206 (b) (4). They again argue that, on the basis of the allegation in Daley's complaint and the facts alleged in the plaintiffs' answer, the commission "had ample information before it to justify choosing not to schedule an evidentiary hearing, either because the complaint

did not sufficiently allege that the [plaintiffs] violated the . . . act, or, even assuming that a constructive denial was appropriately found, the [plaintiffs'] assurances that the request was in progress evidenced at most a technical violation of the . . . act which obviated the need to hold a full evidentiary hearing."

For the same reasons stated in part IV A of this opinion, we are not persuaded that the commission abused its discretion by declining to dismiss Daley's complaint without an evidentiary hearing.

C

The plaintiffs also claim that the commission "should have limited the scope of its inquiry to the facts and allegations that existed at the time of the complaint, and the failure to do so evidences procedural errors and abuses of discretion that further [justify] vacating the final decision." According to the plaintiffs, "[a]ny contentions raised by [Daley] at the hearing, specifically with respect to the disputed redactions, should not have been considered by the hearing officer due to being outside the scope of the complaint, consistent with commission precedent." They argue that "[l]imiting a fact-finding investigation to those issues fairly raised in the complaint is one of the most fundamental principles of jurisprudence, and its importance is rooted in the need for the other party to have sufficient notice of the issues in dispute." We are not persuaded.

The plaintiffs cite three of the commission's decisions in which, according to the plaintiffs, the commission limited the scope of its inquiry to the issues raised in the complaint. See *Hennessy* v. *Hunt*, Freedom of Information Commission, Docket No. FIC 2020-0576 (August 10, 2022) p. 4 (commission concluded that complaint alleging that agency violated act by failing to take vote and "give some indication of the specific topic to be addressed [in] the executive session" did not fairly

raise "improper purpose executive session allegation"); *Book* v. *Mayor, City of Bridgeport*, Freedom of Information Commission, Docket No. FIC 2019-0499 (November 13, 2019) p. 3 (commission declined to make findings regarding promptness of respondents' response to request because "alleged lack of promptness not fairly raised in" complaint); *Morton* v. *First Selectman*, Freedom of Information Commission, Docket No. FIC 2015-326 (January 13, 2016) p. 2 (commission declined to make findings regarding allegations made during hearing concerning respondents' actions related to separate complaint pending before commission). Notably, however, those cases did not involve a respondent's failure to comply fully with a request based on claimed exemptions from disclosure under the act.

The act "makes disclosure of public records the statutory norm. . . . [I]t is well established that the general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it." (Internal quotation marks omitted.) *Lewin* v. *Freedom of Information Commission*, 91 Conn. App. 521, 526, 881 A.2d 519, cert. denied, 276 Conn. 921, 888 A.2d 88 (2005).

In the present case, in which Daley alleged that the plaintiffs failed to comply with his request, the fact that the plaintiffs believed that they complied by providing redacted copies of the responsive records did not resolve Daley's complaint that the plaintiffs had not complied with his request. Indeed, the plaintiffs bore the burden of proving the propriety of the exemptions they claimed to establish that they had complied with Daley's request. Thus, Daley had no obligation to amend his complaint to allege that the plaintiffs violated the act by redacting portions of the responsive records, as

such a claim is encompassed within the allegation that the plaintiffs failed to comply with his request for *all* responsive records. Furthermore, because the plaintiffs bore the burden of proof as to any claimed exemption, they were not prejudiced by the commission's consideration of those exemptions as part of its consideration of Daley's complaint. This is particularly true in the present case, in which the hearing officer continued the hearing to another date to give the plaintiffs an opportunity to present evidence in support of their claimed exemptions.

Accordingly, we disagree with the plaintiffs' contention that the commission should have refused to consider the propriety of the plaintiffs' claimed exemptions under the act.

D

Finally, the plaintiffs claim that "the administrative record clearly demonstrates that the [plaintiffs] proved beyond a preponderance of the evidence that, among other things, the [the plaintiffs] appropriately redacted names and other identifiers of witnesses not known to the public; the [commission's] factual findings to the contrary are clearly erroneous and not reasonably supported by the evidence in the record." We disagree.

"[T]he present case involves applying the well settled meaning of [the exemptions laid out in] § 1-210 (b) . . . to the facts of this particular case. The appropriate standard of judicial review, therefore, is whether the commission's factual determinations are reasonably supported by substantial evidence in the record taken as a whole." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 187, 874 A.2d 785 (2005).

The following additional facts are relevant to the plaintiffs' claim. The plaintiffs redacted the names,

addresses, dates of birth, phone numbers and photographs of witnesses in the responsive records. The plaintiffs claimed that the information was exempt from disclosure pursuant to § 1-210 (b) (3) (A), which provides in relevant part: "Nothing in the [act] shall be construed to require disclosure of . . . [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of . . . the identity of informants not otherwise known or the identity of witnesses not otherwise known whose safety would be endangered or who would be subject to threat or intimidation if their identity was made known . . . ." As previously noted in this opinion, the plaintiffs presented a single witness, Detective Devan, who testified in support of the claimed exemptions. In its final decision, the commission made the following findings with regard to Devan's testimony in support of the application of § 1-210: "The [plaintiffs'] witness, a detective with the department, testified that, generally, the department strives to keep the names of witnesses confidential for their protection and so that witnesses will come forward. It is found that the [plaintiffs] failed to prove that the identity of the specific witnesses at issue are not otherwise known; and further failed to prove that the safety of these specific witnesses would be endangered, or that they would be subject to threat or intimidation if their identities were disclosed."

On appeal, the plaintiffs argue that the commission's findings in this regard "fail to accurately represent the scope of . . . Devan's testimony." The plaintiffs rely on Devan's testimony that, based on her knowledge of the case and what was available to the department, she had no reason to believe that the identities of the witnesses are otherwise known and that "[i]n this case

as well as any other case the possibility [that the witnesses at issue would be subject to threat or intimidation if their identities were known] exists. . . .'' Leaving aside that Devan's testimony is stated in general terms, the probative force of her testimony was diminished due to her testimony that, ''based on what I saw in the police reports, I have no way of knowing who testified at trial.'' The plaintiffs' counsel further undermined the plaintiffs' position when she explained to the hearing officer that, ''based on the information that we have available to us we are operating under the assumption that all witnesses are unknown unless given information to the contrary. So, we don't have access to all of the prosecutorial information or what happened at trial.'' Cf. *Lewin* v. *Freedom of Information Commission*, supra, 91 Conn. App. 526 (''[T]he general rule under the [act] is disclosure, and any exception to that rule will be narrowly construed in light of the general policy of openness expressed in the [act]. . . . [Thus] [t]he burden of proving the applicability of an exception [to disclosure under the act] rests upon the party claiming it.'' (Internal quotation marks omitted.)). Moreover, Daley explained during the hearing that he was looking for information regarding a specific witness and, although that witness did not testify at his criminal trial, Daley referred to the witness by name. Thus, Devan's testimony that the witnesses' identities were not otherwise known was flatly contradicted by Daley's testimony identifying at least one of the witnesses by name.

Finally, Devan's testimony is stated in general terms, as she expressed nothing more than a department policy of not disclosing names of witnesses due to general concerns for witness safety in *all cases*, which does not support a finding that disclosure of the names of specific witnesses in Daley's case would subject such witnesses to threat or harm. The burden of proving the applicability of an exemption under the act ''requires

the claimant of the exemption to provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested." (Internal quotation marks omitted.) *Director*, *Dept. of Information Technology* v. *Freedom of Information Commission*, supra, 274 Conn. 191–92. For this reason, "generalized claims of a possible safety risk do not satisfy the [plaintiffs'] burden of proving the applicability of an exemption from disclosure under the act." Id., 193; see also *New Haven* v. *Freedom of Information Commission*, 205 Conn. 767, 776, 535 A.2d 1297 (1988) ("[T]he claimant of the exemption [must] provide more than conclusory language, generalized allegations or mere arguments of counsel. Rather, a sufficiently detailed record must reflect the reasons why an exemption applies to the materials requested.").

Accordingly, given that the plaintiffs' only witness in support of the redactions of the names of witnesses conceded that she was unaware of who testified at trial and was unable to provide anything more than a generalized claim of possible safety risks if the information was disclosed, the commission's finding that the plaintiffs failed to prove the applicability of § 1-210 (b) (3) (A) is reasonably supported by substantial evidence in the record.

The judgment is reversed and the case is remanded with direction to dismiss the plaintiffs' administrative appeal.

In this opinion the other judges concurred.

HAROLD DUSTO ET AL. *v.* ROGERS CORPORATION ET AL.
(AC 45341)

Prescott, Moll and Cradle, Js.*

Syllabus

The plaintiff, the executor of the estate of the decedent, sought in her operative complaint to recover damages for, inter alia, the wrongful death of the decedent, alleging that the defendants R Co. and S Co. negligently exposed the decedent to asbestos containing products. The plaintiff alleged that the decedent was employed by R Co. from approximately 1970 until 2002 and that, throughout the course of his employment, he was exposed to dust and particles of asbestos fibers from asbestos materials supplied to R Co. by S Co., which caused him to develop malignant mesothelioma and eventually die. S Co., a Wisconsin corporation, filed a bankruptcy petition in 2004, and a bankruptcy plan was confirmed by a bankruptcy court in 2006, at which time S Co. had no operations, its corporate assets had been sold, and the only remaining assets from which claims against it might have been paid were its liability insurance policies. In 2012, S Co. was administratively dissolved, and, in 2014, attorneys representing S Co.'s insurers published a notice of dissolution. R Co. filed a motion for summary judgment, arguing that the plaintiff's claims against it were precluded by the exclusivity provision (§ 31-284) of the Workers' Compensation Act (§ 31-275). The trial court granted R Co.'s motion for summary judgment, concluding that the plaintiff failed to demonstrate a genuine issue of material fact as to whether she had satisfied the substantial certainty exception to § 31-284. The court also granted S Co.'s motion to dismiss the plaintiff's claims against it on the ground that the court did not have subject matter jurisdiction over it because it was a dissolved corporation and the plaintiff's claims were time barred because they were not brought within the two year statutory time frame for asserting claims against a dissolved corporation pursuant to Wisconsin law. From the judgment rendered thereon, the plaintiff appealed to this court. Thereafter, L, the executor of the estates of the plaintiff and the decedent, was substituted as the plaintiff. *Held*:

1. The trial court improperly rendered summary judgment in favor of R Co. on the ground that the plaintiff's claims were barred by § 31-284 because, after considering the circumstances in light of the factors set forth by our Supreme Court in *Lucenti* v. *Laviero* (327 Conn. 764) and viewing

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

the evidence in the light most favorable to the plaintiff, this court concluded that the plaintiff demonstrated the existence of a genuine issue of material fact as to whether R Co. subjectively believed that its conduct was substantially certain to result in injury to its employees: as to the first *Lucenti* factor, an inquiry into prior similar accidents related to the conduct at issue, the plaintiff submitted a list generated by R Co. of asbestos related workers' compensation claims filed by employees at both of its facilities indicating that forty-three R Co. employees submitted asbestos related claims and, although only one of the claims at R Co.'s Manchester facility, where the decedent worked, was filed by 1986, at least twenty more employees at its other facility had filed claims by that time, and a fact finder could have attributed knowledge to R Co. regarding the likelihood of injury to its employees on the basis of prior employee asbestos related claims from both facilities, and, as early as 1979, several R Co. employees, when screened for asbestos exposure, presented with abnormal chest X-rays or abnormal lung function, thus, a fact finder could reasonably have attributed to R Co. knowledge that several of its employees were suffering the effects of asbestos exposure in the 1970s, at the beginning of the decedent's career with R Co.; moreover, under the second *Lucenti* factor, whether there was deliberate deceit on the part of R Co. with respect to the existence of the dangerous condition at issue, the plaintiff submitted voluminous documentation in opposition to R Co.'s motion for summary judgment evincing R Co.'s knowledge of the hazards of asbestos and its intimate familiarity with the medical literature pertaining to the hazards of asbestos, knowledge that R Co. did not share with its employees, including the decedent, and the plaintiff submitted evidence that R Co. misled the decedent, the decedent's union, its customers and the public as to the safety of its facilities and its compliance with Occupational Safety and Health Administration (OSHA) standards, evidence from which the trial court concluded that, although "some evidence" indicated that R Co. may not have been entirely forthcoming with respect to the dangers of asbestos, other evidence demonstrated that it implemented safety measures in the 1970s, demonstrating that the court did not view the evidence in the light most favorable to the plaintiff, as required on a motion for summary judgment but, instead, improperly weighed that evidence; furthermore, with respect to the third *Lucenti* factor, intentional and persistent violations of safety regulations over a lengthy period of time, the plaintiff presented in opposition to R Co.'s motion for summary judgment voluminous evidence of R Co.'s failures to meet OSHA standards pertaining to asbestos exposure levels over several years, as well as documentation revealing that R Co. was formally cited by OSHA four times for asbestos related violations, including evidence that R Co. violated OSHA requirements regarding the establishment of a respirator program.

2. The trial court properly dismissed the plaintiff's claims against S Co. for lack of subject matter jurisdiction on the ground that the plaintiff did not file her claims within two years of the date of the publication of the notice of S Co.'s dissolution: under Wisconsin law, claims against a dissolved corporation must be brought within two years of the date of the publication of the notice, and this action was filed in 2019, three years beyond the 2016 deadline that was effectuated by the 2014 publication of the notice; moreover, although the applicable Wisconsin statute ((Rev. to 2013–2014) § 180.1407) referred to publication by the corporation, it did not expressly state that a corporate officer or director must publish the notice and, in the absence of such an explicit requirement, this court declined to read such a requirement into that statute; furthermore, because § 180.1407 applies only to dissolved corporations, it was reasonable to infer that a party authorized by the dissolved corporation, such as an insurer, may publish the notice, and it was clear, based on S Co.'s bankruptcy plan and S Co.'s reliance on its insurers after it was administratively dissolved, that the insurers were acting as agents of S Co. because, under the bankruptcy plan, S Co. was only a shell through which claims against it passed to its insurers, which were authorized and obligated to defend or settle claims against it, nothing in the plan precluded the insurers from publishing the notice as a way of exercising the authority afforded by the plan to defend claims brought against S Co. by establishing a time limitation for the filing of those claims, and, as agents of S Co., they were permitted to act in furtherance of winding up S. Co.'s affairs; additionally, contrary to the plaintiff's claim, the bankruptcy plan did not contemplate S Co.'s infinite existence or intend to allow for claims in perpetuity.

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

Argued March 7—officially released October 24, 2023

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged negligence in exposing the named plaintiff to asbestos, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where Anita Dusto, executor of the estate of Harold Dusto, was substituted as the named plaintiff; thereafter, the action was withdrawn as to the defendant Union Carbide Corporation et al.; subsequently, the court, *Bellis*, *J.*, granted the named defendant's motion for summary judgment and the motion to dismiss filed by the defendant Special Electric Company, Inc., and rendered judgment thereon, from which the substitute plaintiff et al.

appealed to this court; thereafter, Lana Kelly, executor of the estates of Harold Dusto and Anita Dusto, was substituted as the plaintiff. *Reversed in part*; *further proceedings*.

Christopher Meisenkothen, for the appellant (substitute plaintiff Lana Kelly).

Melissa M. Malloy, pro hac vice, with whom were *Mark J. Hoover*, and, on the brief, *Judith A. Perritano*, for the appellee (named defendant).

Cristin E. Sheehan, with whom was *Robert S. Bystrowski*, for the appellee (defendant Special Electric Corporation, Inc.).

Audrey Perlman Raphael and *Amber Long*, pro hac vice, filed a brief on behalf of the Connecticut Trial Lawyers Association as amicus curiae.

Dana M. Hrelic, *Monte E. Frank*, and *Meagan A. Cauda*, filed a brief on behalf of the Connecticut Business and Industry Association and the Insurance Association of Connecticut as amici curiae.

Kelly E. Petter and *Linda Feeney* filed a brief on behalf of the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

CRADLE, J. The plaintiff, Lana Kelly, acting in her capacity as executor of the estates of Harold Dusto and his wife, Anita Dusto,[1] appeals from the summary judgment rendered in favor of Harold Dusto's employer,

[1] This action was commenced by Harold Dusto and Anita Dusto on June 11, 2019. On November 11, 2019, Harold Dusto died, and Anita Dusto, as executor of his estate, subsequently was substituted as a party plaintiff. During the pendency of this appeal, Anita Dusto died on September 12, 2022. Lana Kelly thereafter was appointed executor of both estates and was substituted as the party plaintiff in this action. Any reference herein to Dusto refers to Harold Dusto only. For convenience, we will refer to Kelly as the plaintiff.

Rogers Corporation (Rogers), and the judgment of dismissal rendered in favor of Special Electric Company, Inc. (Special Electric), which sold asbestos materials to Rogers.[2] On appeal, the plaintiff claims that the court improperly (1) rendered summary judgment in favor of Rogers on the ground that her claims against Rogers were barred by the exclusivity provision of the Workers' Compensation Act (act), General Statutes § 31-275 et seq., and (2) dismissed her claims against Special Electric for lack of subject matter jurisdiction. We agree with the plaintiff that a genuine issue of material fact exists as to whether her claims against Rogers satisfied the substantial certainty exception to the exclusivity provision of the act, and we therefore reverse the summary judgment rendered in favor of Rogers. We affirm the dismissal of the plaintiff's claims against Special Electric.

The following procedural history is relevant to the plaintiff's challenges to the judgments on appeal. On June 11, 2019, Harold Dusto and Anita Dusto commenced this action. In the plaintiff's operative complaint, the plaintiff alleged that Dusto was employed by Rogers, an asbestos product manufacturer, at its facility in Manchester from approximately 1970 until 2002, and that, throughout the course of his employment at Rogers, Dusto was exposed to dust and particles of asbestos fibers, from asbestos materials supplied to Rogers by Special Electric, which caused him to develop malignant mesothelioma and eventually die. The plaintiff alleged, inter alia, that the defendants intentionally created a dangerous condition that they knew would make injuries to Rogers' employees substantially certain to occur.

[2] Union Carbide Corporation, Metropolitan Life Insurance Company, Seegott Holdings, Inc., Seegott, Inc., GTE Corporation, and Strathmore Paper Company initially were named as defendants in this action. The plaintiff withdrew the action as to all defendants other than Rogers and Special Electric.

On September 28, 2021, Rogers filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law because the plaintiff's claims against it were precluded by the exclusivity provision of the act. The plaintiff filed a memorandum of law in opposition to Rogers' motion, arguing that a genuine issue of material fact existed as to whether the plaintiff's claims satisfied the substantial certainty exception to the exclusivity provision of the act. On December 30, 2021, the court filed a memorandum of decision wherein it concluded that, after the burden shifted to the plaintiff, she failed to demonstrate the existence of a genuine issue of material fact that she had satisfied the substantial certainty exception and, consequently, that the plaintiff's claims against Rogers were barred by the exclusivity provision of the act. Accordingly, the court granted Rogers' motion for summary judgment. On January 18, 2022, the plaintiff filed a motion for reargument and/or reconsideration of the court's decision on Rogers' motion for summary judgment on the grounds that the court "plainly misapplied the 'substantial certainty' legal standard here at the summary judgment stage, misapprehended key facts, and impermissibly invaded the province of the jury in weighing evidence and drawing its own inferences from the evidence." On February 9, 2022, the court denied the plaintiff's motion, issuing the following order: "Although the court's decision incorrectly indicates that there was only evidence presented of one [Occupational Safety and Health Administration (OSHA)] citation (as opposed to one OSHA violation), the court's decision is the same . . . ."

On October 26, 2021, Special Electric filed a motion to dismiss the plaintiff's claims against it on the ground that the court did not have subject matter jurisdiction over it because it is a dissolved corporation and the plaintiff's claims were time barred because they were not brought within the statutory time frame for asserting

claims against a dissolved corporation pursuant to Wisconsin law.[3] On November 3, 2021, the plaintiff filed an objection to the motion to dismiss. On February 18, 2022, the court filed a memorandum of decision wherein it granted Special Electric's motion to dismiss on the ground that the court lacked subject matter jurisdiction over the plaintiff's claim against Special Electric because the claim was not filed within the two year period during which all claims against a dissolved corporation must be brought pursuant to Wisconsin law. The plaintiff's appeal from the granting of summary judgment to Rogers and the dismissal of her claims against Special Electric followed.

We address the plaintiff's challenge to the judgment with respect to each motion in turn.

I

The plaintiff first claims that the court erred in concluding that, after the burden shifted to her, she failed to provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact as to whether she satisfied the substantial certainty exception to the exclusivity provision of the act. We agree.

This court recently has recounted the following relevant history of the development of the substantial certainty exception. "[T]he exclusive remedy provision of our workers' compensation scheme, [General Statutes] § 31-284 (a) . . . provides in relevant part: An employer who complies with the requirements of subsection (b) of this section shall not be liable for any

[3] Special Electric initially moved to dismiss the plaintiff's claims against it on July 31, 2019, on the ground that the court did not have subject matter or personal jurisdiction over it. On October 19, 2021, the court summarily denied Special Electric's motion as untimely as to the issue of personal jurisdiction. The court ordered the parties to "rebrief the issue of subject matter jurisdiction as follows: the motion to dismiss is to be filed on or before October 26, 2021, the objection is to be filed on or before November 2, 2021, and the reply is to be filed on or before November 9, 2021."

action for damages on account of personal injury sustained by an employee arising out of and in the course of his employment . . . . Our Supreme Court consistently has interpreted the exclusivity provision of the act . . . as a total bar to [common-law] actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in wilful or serious misconduct. *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 106, 639 A.2d 507 (1994) (*Suarez I*).

"The exclusivity provision represents a balancing of interest, insofar as the purpose of the act is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer. . . . The act is to be broadly construed to effectuate the purpose of providing compensation for an injury arising out of and in the course of the employment regardless of fault. . . . Under typical workers' compensation statutes, employers are barred from presenting certain defenses to the claim for compensation, the employee's burden of proof is relatively light, and recovery should be expeditious. In a word, these statutes compromise an employee's right to a [common-law] tort action for [work-related] injuries in return for relatively quick and certain compensation. . . . *Lucenti* v. *Laviero*, [327 Conn. 764, 774, 176 A.3d 1 (2018)]; *Mingachos* v. *CBS, Inc.*, 196 Conn. 91, 106, 491 A.2d 368 (1985) (same). A damage suit as an alternative or additional source of compensation, becomes permissible only by carving a judicial exception in an uncarved statute. . . . Neither moral aversion to the employer's act nor the shiny prospect of a large damage verdict justifies interference with what is essentially a policy choice of the [l]egislature. . . . Id. The principle of exclusivity is not eroded,

[however] . . . when the plaintiff alleges an intentional tort, in which case an employee is permitted to pursue remedies beyond those contemplated by the act. *Suarez* [v. *Dickmont Plastics Corp.*], supra, 229 Conn. 115.

"Our Supreme Court first recognized the narrow intentional tort exception to the act's exclusivity in *Jett* v. *Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979). In *Jett*, the court exempted from the exclusivity provision of the act an employer's tortious act of intentionally directing or authorizing another employee to assault the injured party. Id., 218–19. In *Mingachos* v. *CBS*, *Inc.*, supra, 196 Conn. 100–101, the court declined to extend [the] intentional tort exception to [the] act's exclusivity provision to situations in which an injury resulted from the employer's intentional, wilful, or reckless violations of safety standards as established pursuant to federal or state laws. *Lucenti* v. *Laviero*, supra, 327 Conn. 775. To bypass the exclusivity of the act, the intentional or deliberate . . . conduct alleged must have been designed to cause the injury that resulted. *Mingachos* v. *CBS*, *Inc.*, supra, 196 Conn. 102. [T]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. . . . Id., 103. Reckless misconduct differs from intentional misconduct, and an employee must establish that the employer *knew* that injury was substantially certain to follow its deliberate course of action. Id.

"Our Supreme Court elaborated on the contours of this substantial certainty standard as an alternative method of proving intent in *Suarez I* and [*Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 698 A.2d 838 (1997) (*Suarez II*)], which arose from amputation injuries suffered by an employee who claimed that his foreman had forced him to clean out plastic molding machines while those machines were still running, and forbade him and other employees from using safer

cleaning methods under threat of termination of their employment, despite the risk of injury to their hands. *Lucenti* v. *Laviero*, supra, 327 Conn. 775.

"In *Suarez I*, the trial court granted the employer's motion for summary judgment on the ground that the exclusivity provision of the act barred his claim, because he had introduced no evidence that the employer intended to injure him. Id., 776. The employee appealed and our Supreme Court further defined the substantial certainty exception, concluding that intent refers to the consequences of an act . . . [and] denote[s] that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to flow from it. . . . A result is intended if the act is done for the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue. . . . An intended or wilful injury does not necessarily involve the ill will or malevolence shown in express malice, but it is insufficient to constitute such an [intended] injury that the act . . . was the voluntary action of the person involved. . . . Both the action producing the injury and the resulting injury must be intentional. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . The intentional injury aspect may be satisfied if the resultant bodily harm was the direct and natural consequence of the intended act. . . . The known danger involved must go from being a foreseeable risk which a reasonable man would avoid and become a substantial certainty. . . . Id. The court reversed the summary judgment and remanded the case for further proceedings, concluding that it was a question for the jury to determine whether the employer's intentional conduct permitted an inference that the employer knew that there was a substantial certainty

an injury would occur. Id., 777; *Suarez* [v. *Dickmont Plastics Corp.*], supra, 229 Conn. 119.

"On remand, the jury returned a verdict in favor of the employee under the actual intent standard, rather than under the substantial certainty exception; the employer appealed. *Lucenti* v. *Laviero*, supra, 327 Conn. 777. In *Suarez II*, our Supreme Court restated the substantial certainty test to emphasize that the employer must be shown *actually to believe that the injury would occur* . . . . Id. The court described its decision in *Suarez I* as establishing an exception to workers' compensation exclusivity if the employee can prove either that the employer actually intended to injure the [employee] or that the employer intentionally created a dangerous condition that made the [employee's] injuries substantially certain to occur . . . . Id., 777–78. The court stated that [p]ermitting an employee to sue an employer for injuries intentionally caused to him constitutes a narrow exception to the exclusivity of the act. . . . Since the legal justification for the common-law action is the nonaccidental character of the injury from the . . . employer's standpoint, the common-law liability of the employer cannot . . . be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer *short of a conscious and deliberate intent directed to the purpose of inflicting an injury. . . . What is being tested is not the degree of gravity of the employer's conduct, but, rather, the narrow issue of intentional versus accidental conduct.* . . . Id., 778–79.

"In *Lucenti*, the Supreme Court noted that it is now well established under Connecticut law that proof of the employer's intent with respect to the substantial certainty exception demands a purely subjective

inquiry. . . . Put differently, satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees. . . . Id., 779. The court, however, noted that intent is a question of fact ordinarily inferred from one's conduct or acts under the circumstances of the particular case. . . . Id., 780. Historically, there was a substantial body of Connecticut law rejecting an employee's claim of entitlement to the substantial certainty exception, but no decision described the kind of evidence that would allow for an inference that an employer subjectively believed that employee injury was substantially certain to follow its actions. Id. The court, therefore, looked to other jurisdictions in which the substantial certainty exception was a common feature of workers' compensation law and found New Jersey law instructive. Id.; see *Millison* v. *E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 178–79, 501 A.2d 505 (1985) (New Jersey's leading decision articulating substantial certainty test).

"New Jersey courts engage in a [two step] analysis. First, a court considers the conduct prong, examining the employer's conduct in the setting of the particular case. . . . Second, a court analyzes the context prong, considering whether the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of industrial employment, or whether it is plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the [New Jersey Workers' Compensation Act]. . . . *Lucenti* v. *Laviero*, supra, 327 Conn. 780–81.[4]

[4] In *Lucenti*, our Supreme Court declined to adopt New Jersey's context prong. Accordingly, we need not address it in this case. *Lucenti* v. *Laviero*, supra, 327 Conn. 781 n.7.

"The New Jersey conduct prong of the substantial certainty test is closely akin to the factual inquiry Connecticut courts undertake in determining whether the employer knew of a substantial certainty of employee harm . . . . Id., 781–82. An employer's mere knowledge that a workplace is dangerous does not equate to an intentional wrong. . . . [T]he dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework . . . is not circumvented simply because a known risk later blossoms into reality. [Courts] must demand virtual certainty. . . . Id., 782. In considering whether the totality of the circumstances indicates that the conduct prong is satisfied, New Jersey courts consider factors such as: (1) prior similar accidents related to the conduct at issue that have resulted in employee injury, death, or a near-miss, (2) deliberate deceit on the part of the employer with respect to the existence of the dangerous condition, (3) intentional and persistent violations of safety regulations over a lengthy period of time, and (4) affirmative disabling of safety devices." (Emphasis in original; footnote added; footnote omitted; internal quotation marks omitted.) *Hassiem* v. *O & G Industries, Inc.*, 197 Conn. App. 631, 637–43, 232 A.3d 1139, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020). In *Lucenti* v. *Laviero*, supra, 327 Conn. 791, our Supreme Court adopted those four factors (*Lucenti* factors) for consideration in determining whether a plaintiff has satisfied the substantial certainty test.

With the foregoing legal principles in mind, we set forth the following additional procedural history. In its memorandum in support of its motion for summary judgment, Rogers argued that "the evidence shows that Rogers' ensuing conduct after it learned of the potential hazards of asbestos made it such that Rogers believed

it was taking all necessary precautions to further protect its employees from the hazards of asbestos. In other words, Rogers was acting in effort to try and ensure that injuries to its employees would not occur. Some examples of Rogers' conduct included the mandatory use of respirators and masks by its employees, personal and area monitoring for asbestos exposure to ensure the environment in the plant was below the applicable OSHA standards and medical screenings for its employees." (Emphasis omitted.) Rogers further argued: "The plaintiffs offer no evidence from which one might rationally infer that Rogers believed that its use of asbestos in its production facility's controlled environment would lead to the development of mesothelioma in . . . Dusto, where he routinely wore an approved respirator, worked on a product line that utilized relatively limited amounts of asbestos, was only monitored above the OSHA [permissible exposure limit (PEL)] three times throughout his career, and spent over half of his career working in a product line that utilized no asbestos."

In its memorandum in opposition to Rogers' motion for summary judgment, the plaintiff argued that Rogers intentionally created a dangerous condition that it knew would make its employees' injuries substantially certain to occur.[5] She argued that, viewing the evidence in the light most favorable to her, a reasonable trier of fact could conclude that Rogers "intentionally deceived workers by telling them that asbestos was only a 'nuisance dust'; intentionally deceived the workers' union representatives to cover up OSHA violations and hazardous conditions; knew by 1960 that asbestos was a serious health hazard but actively participated in a scheme to suppress knowledge of the hazard; intentionally deceived customers about its own effort and ability

[5] The plaintiff did not claim before the trial court in opposing Rogers' motion for summary judgment, and does not claim on appeal, that Rogers intended to injure its employees.

to control asbestos exposures in its plants; intentionally failed to comply with federal law, which required that Rogers notify employees of overexposures; intentionally failed to enforce occupational safety standards that were specifically meant to safeguard against the hazards of asbestos; intentionally ignored damning information about asbestos and mesothelioma hazards obtained over a period of years from various sources; [and] 'was a real mess.' "[6]

In granting Rogers' motion for summary judgment, the trial court concluded, after shifting the burden to the plaintiff, that the plaintiff failed to establish a genuine issue of material fact as to whether she could satisfy the substantial certainty exception. In so doing, the court noted that the plaintiff had offered voluminous exhibits in opposition to Rogers' motion for summary judgment but that, "even if read in a light most favorable to her as the nonmoving party, [the plaintiff's evidence] could only establish that: (1) Rogers had some knowledge that asbestos was hazardous prior to Dusto commencing employment; (2) there were some instances where tests revealed that the asbestos levels were above OSHA standards in the Rogers plants; (3) some Rogers employees had made asbestos related workers' compensation claims; (4) representatives from Rogers may have downplayed and/or concealed the significance of the potential health consequences of asbestos; (5) the plant may not have completely complied with federal law with respect to employee health and safety requirements; (6) Rogers may not have used best practices with respect to its housekeeping procedures; and (7) in general, the Rogers Manchester plant was a 'real mess.' " The court concluded that "such evidence could

[6] Rogers and the plaintiff submitted voluminous documentary evidence in support of their respective arguments in support of, and in opposition to, Rogers' motion for summary judgment.

be used to support an inference that Rogers acted negligently or even recklessly" but did not "rise to the level of the exceedingly high substantial certainty standard."

The court then applied the *Lucenti* factors to the evidence presented in support of and in opposition to Rogers' motion for summary judgment. The court explained: "With respect to the first factor, prior similar accidents, the summary judgment record reveals that there were only nine known asbestos related workers' compensation claims in the Manchester facility. One occurred in 1986, and two others happened in 1995 and 1996. The others all occurred in the period between 2000 and 2011, with Dusto's claim being made in 2005. Based on this record, a fact finder could not reasonably determine that Rogers had knowledge of similar accidents during the 1970s and early 1980s when Dusto worked most closely with asbestos. The second factor is deliberate deceit on the part of the employer with respect to the dangerous condition. Although there is some evidence in the record indicating that Rogers may not have been entirely forthcoming with respect to the potential dangers of asbestos, there also is other evidence demonstrating that it began to implement safety measures in the 1970s. Therefore, a fact finder could not conclude that Rogers engaged in deliberate deceit such that it was a substantial certainty that its employees would be injured. Regarding the third factor, persistent safety violations, the plaintiff only provides evidence demonstrating that one OSHA violation occurred at the Manchester plant in 1975. Finally, the plaintiff essentially admits that the fourth factor, affirmative disabling of safety devices, does not apply to the present case. . . . Accordingly, following a fair application of the *Lucenti* factors, the court concludes that the plaintiff has failed to raise a genuine issue of material fact regarding the substantial certainty exception to workers' compensation exclusivity." (Footnote omitted.) On

the basis of the foregoing, the court found that Rogers was entitled to judgment as a matter of law. This appeal followed.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016). "The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *State Farm Fire & Casualty Co.* v. *Tully*, 322 Conn. 566, 573, 142 A.3d 1079 (2016). "A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 310, 94 A.3d 553 (2014). "Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, supra, 645.

On appeal, the plaintiff claims that the trial court erred in concluding that she failed to demonstrate the existence of a genuine issue of material fact as to

whether Rogers subjectively believed that it was substantially certain that its employees would be injured by the dangerous environment that it intentionally created. To resolve the plaintiff's claim, we, like the trial court, consider the *Lucenti* factors set forth herein. Our consideration of the totality of the circumstances in light of those factors, however, leads us to a different conclusion.

The first *Lucenti* factor presents an inquiry into "prior similar accidents related to the conduct at issue that have resulted in employee injury, death, or a near-miss . . . ." *Lucenti* v. *Laviero*, supra, 327 Conn. 782. In considering this factor, the trial court noted that "there were only nine asbestos related workers' compensation claims in the Manchester facility. One occurred in 1986, and two others happened in 1995 and 1996. The others all occurred in the period between 2000 and 2011, with Dusto's claim being made in 2005. Based on this record, a fact finder could not reasonably determine that Rogers had knowledge of similar accidents during the 1970s and early 1980s when Dusto worked most closely with asbestos." In opposition to Rogers' motion for summary judgment, the plaintiff submitted a list, generated by Rogers, of asbestos related workers' compensation claims filed by employees at both of its facilities. That list indicates that forty-three Rogers employees—ten employees from the Manchester facility and thirty-three from the facility located in Rogers, Connecticut—submitted asbestos related claims. Although the trial court correctly noted that only one of the claims at the Manchester facility was filed by 1986, at least twenty more employees at the Rogers facility had filed such claims by that same date. Although Dusto worked only at the Manchester facility, a fact finder could attribute knowledge to Rogers regarding the likelihood of injury to its employees on the basis of prior employee asbestos related claims from both facilities.

Moreover, in *Lucenti*, the court noted: "We emphasize that proof of prior injuries or deaths is not necessary, and do not suggest that there is the equivalent of a one free bite rule in the context of workers' compensation exclusivity. The appreciation of danger can be obtained in a myriad of ways other than personal knowledge or previous injuries. Simply because people are not injured, maimed or killed every time they encounter a device or procedure is not solely determinative of the question of whether that procedure or device is dangerous and unsafe. . . . Requiring an actual accident or injury would be tantamount to giving every employer one free injury for every decision, procedure or device it decided to use, regardless of the knowledge or substantial certainty of the danger that the employer's decision entailed. . . . It is not incumbent that a person be burned before one knows *not* to play with fire." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Lucenti* v. *Laviero*, supra, 327 Conn. 782 n.8.[7] Although none of its employees had yet died from asbestos exposure in the 1970s or early 1980s, the record reflects that, as early as 1979, several Rogers employees, when screened for asbestos exposure, presented with abnormal chest X-rays or abnormal lung function. Accordingly, viewing this information in the light most favorable to the plaintiff, a fact finder could reasonably attribute to Rogers knowledge that several of its employees were suffering the effects of asbestos exposure in the 1970s, at the beginning of Dusto's career with Rogers.

We next turn to the second *Lucenti* factor, whether there was deliberate deceit on the part of Rogers with respect to the existence of the dangerous condition at

[7] It is important to note that the substantial certainty exception requires only that a defendant be substantially certain that the consequences of his actions will occur, not that they will occur 100 percent of the time. See *Suarez* [v. *Dickmont Plastics Corp.*], supra, 229 Conn. 111.

issue, namely, asbestos exposure. *Lucenti* v. *Laviero*, supra, 327 Conn. 782. We first note that, in opposition to Rogers' motion for summary judgment, the plaintiff submitted voluminous documentation evincing Rogers' knowledge of the hazards of asbestos. For example, the plaintiff submitted a document dated January 25, 1979, titled "Rogers Corporation Commentary [U]pon Proposed Standards within the State Implementation Plan for Air Quality," wherein Rogers expressed "its serious concern over the proposed asbestos emission and ambient standard portion of the State Implementation Plan for Air Quality." In that document, Rogers noted that it "does not minimize the known health hazards associated with the use of asbestos" but, nevertheless, challenged the "cornerstones" of the proposed standards, specifically, the purported "sharp rise in mesothelioma within Connecticut during a ten-year period between 1960–1969 . . . ." Rogers challenged the premise that "asbestos is *the* cause of mesothelioma incidence within Connecticut" and, instead, contended that there is evidence, based on various studies throughout the world, that there are many causes of mesothelioma unrelated to asbestos. In that same document, however, Rogers acknowledged that "no threshold level has been found, below which asbestos does not create lung cancer . . . ." (Emphasis in original.) This document demonstrates an intimate familiarity by Rogers with the medical literature pertaining to the health hazards of asbestos exposure.

Despite knowing the risks associated with exposure to high levels of asbestos, Rogers did not share that knowledge with its employees. At his depositions,[8]

[8] Dusto described his experience at Rogers during his depositions. Over the course of his career at Rogers, Dusto worked in several capacities. Dusto was hired initially as an extrusion operator. In that capacity, he worked on an extruder machine, which was located in the center of the facility, around the corner from the kneader room, where mixes were made. Although there was a wall between these two areas, there was an opening for a door, but no door. During each shift that he worked, Dusto used a

Dusto testified, inter alia, that Rogers never told him that it knew that asbestos exposure could cause mesothelioma and, ultimately, death. Rogers never told him that crocidolite, a type of asbestos that was frequently used at its facility and to which Dusto was exposed, caused the highest rate of mesothelioma in people who are exposed to it. Dusto further testified that he was always told by Rogers that, in performing air quality tests,[9] they were testing for "nuisance dust," but he was never notified of the results of any of those tests, or, more specifically, that the results of those tests revealed levels of asbestos that exceeded OSHA standards. The summary judgment record reflects that Dusto had sampling performed on his person repeatedly and those tests revealed exposure levels in excess of the OSHA

forklift to bring twelve to sixteen fifty-five gallon drums of mixes, consisting of rocks and dust, often containing asbestos, into his department from the kneader room and then dump them into the extruder machine. He also would routinely have to change the collection barrels in the dust collector on the roof of the building. Most of the dust collected came from the kneader room. He would have to move the full barrels, which were not covered, from the dust collector to the kneader room. Dust would sometimes spill out over the sides of the barrels. Dusto also unloaded bags of asbestos from freight cars and stacked them on pallets. Sometimes, the bags had holes in them from where they had been punctured by a forklift.

After about one and one-half years, Dusto became a premix operator in the mill area and made mixes of all powders for the mill. The raw materials he mixed included fiberglass, resin, asbestos and other filler materials. As a premix operator, Dusto wore a dust mask that had a plastic cartridge where a filter would be placed inside. The filters were replaceable and only lasted one shift. Dusto only wore the mask when mixing and took it off when not mixing. Dusto indicated that Rogers did not care if he wore the mask and he was never reprimanded for not wearing it. In the premix area, Rogers had a dust collection system known as Dustex. When the Dustex blew dust back into the shop, Dusto went outside to empty it. Dusto did not wear any protective equipment when working around the Dustex machine or picking up the barrels.

Dusto eventually transferred to a blender operator position for approximately one year, where he blended material from the premix. He loaded the blender using a vacuum that sucked the premix material up to the top of the blender. He did not wear a mask as a blender operator. As a blender operator, he continued to empty the Dustex.

[9] The air sampling tests were conducted by York Research Corporation, an outside consultant retained by Rogers in 1975.

asbestos standard ceiling concentration of 10 fibers per cubic centimeter of air (f/cc) at least three times. Dusto was never informed of the results of any of the tests.

As further evidence that Rogers intentionally concealed the high levels of asbestos in its facilities, the plaintiff also presented, in opposing Rogers' motion for summary judgment, a letter dated March 11, 1976, from R. L. Smith, Rogers' vice president, to Charles F. Reilly, the union representative for Rogers employees. In that letter, which was written in response to an inquiry from the union raising questions concerning safety and health precautions for employees who work with asbestos, Smith explained that Rogers had used asbestos in its Manchester plant since 1936 and in its Rogers plant since 1951, but that it was "not aware of any potentially serious health hazard from [its] use of [asbestos] until 1972."[10] The plaintiff contends that, in that letter, Smith first misled Reilly in stating that Rogers did not become aware of the potentially serious health hazards of working with asbestos until 1972. Rogers' stated lack of knowledge of the dangers of asbestos exposure is belied by the voluminous documentation presented by the plaintiff. For example, the plaintiff submitted documents from The Asbestos Technical and Standards Committee of the Society of the Plastics Industry, Inc., of which Rogers was a member, dating back to at least 1960, in which the risks of working with various types of asbestos were discussed. The plaintiff also submitted correspondence to Rogers from H. A. Boisclair, dated

[10] In July, 1972, OSHA made permanent the 5 f/cc PEL and the 10 f/cc ceiling limit and mandated a future reduction of the PEL to 2 f/cc by July 1, 1976. See generally 29 C.F.R. 1910 (1972) OSHA explained, inter alia: "In view of the undisputed grave consequences from exposure to asbestos fibers, it is essential that the exposure be regulated now, on the basis of the best evidence available now, even though it may not be as good as scientifically desirable. An asbestos standard can be [reevaluated] in the light of the results of ongoing studies, and future studies, but cannot wait for them. Lives of employees are at stake. . . ." Id.

December 30, 1968, which included a copy of an article published in The New Yorker on October 12, 1968, which discussed at length the risks associated with asbestos exposure, including mesothelioma. The letter also stressed the necessity of employing a dust control system with a "high efficiency dust collector to prevent external atmospheric dust contamination."

In Smith's 1976 letter, Smith also told Reilly that, after learning in 1972 of the potential serious health hazards posed by asbestos exposure, Rogers instituted several safety protocols in its facilities. In this letter, Smith detailed several of those measures, and attached a summary of "[t]he results of the most recent one and two hour air samplings at each of the operations at the Manchester plant and at the Rogers plant . . . ." Rather than attaching the actual reports of those tests, Smith summarized the air sampling results, omitting several readings that exceeded the OSHA limit at that time of 2 f/cc. For example, Smith's summary omitted a reading taken on November 6, 1975, that reflected an exposure level of 24.53 f/cc, significantly in excess of the OSHA limit. Smith also omitted three readings taken on November 11, 1975—10.02, 2.47 and 5.92 f/cc—that exceeded the OSHA limit.

The plaintiff claimed in opposition to Rogers' motion for summary judgment that, in addition to deceiving the union and Rogers' employees, Rogers intentionally misled its customers and the public as to the safety of its facilities and its compliance with OSHA standards. In opposition to Rogers' motion for summary judgment, the plaintiff submitted a letter, dated June 7, 1976, from Norman L. Greenman, the president of Rogers, which was addressed to "all our customers and friends," wherein he expressed Rogers' belief that materials containing asbestos "can be used safely when applicable governmental regulations relating to asbestos fibers are met." He stated, inter alia: "In our own plants, Rogers

has taken the steps necessary to comply with the requirements of OSHA regulations concerning the use and processing of asbestos fibers, which become effective July 1, 1976. All the equipment necessary to meet those requirements is presently in place." He urged the recipients of the letter to take measures to comply with OSHA requirements and advised that, "unless you, too, are prepared to take the steps necessary to meet OSHA requirements relating to the safe use of and exposure to asbestos fibers and materials, and products containing asbestos fibers, then you should discontinue using products and materials containing asbestos fibers." In writing this letter, the plaintiff alleged, Rogers led its recipients to believe that it was meeting OSHA standards. The plaintiff, however, submitted various air sampling surveys of Rogers' facilities, conducted around that time, that reflected readings in excess of OSHA standards. For instance, two of several air samplings taken on August 17, 1976, reflected levels of 22 and 14 f/cc. Samplings taken between March 15 and 16, 1977, revealed five more readings above the OSHA limit. Samplings taken on April 19 and 20, 1977, revealed another three readings over the OSHA limit. Samplings taken on June 28 and 29, 1977, revealed seven readings over the OSHA limit. Samplings taken on August 19, 1977, revealed another three readings over the OSHA limit. Samplings taken on October 20 and 21, 1977, revealed another five readings over the OSHA limit. The plaintiff also submitted, in opposition to Rogers' motion for summary judgment, a letter, dated September 24, 1976, to W. W. Hayes, the division manager of Rogers, from two members of the loss prevention department of Liberty Mutual Insurance Company. The letter indicated that various air samples were collected on August 17, 1976, "in the breathing zones of several workers in order to determine the concentration of air-borne asbestos dust, and, in turn, to appraise the health hazard to these employees."

According to the letter, "[t]he results of this sampling indicate that the concentration of asbestos fibers in the breathing zones of the kneader operators is above the limit of 2 [f/cc] permitted for an eight-hour daily exposure. The concentration in these two samples is also well above the 'ceiling' value of 10 [f/cc], which should never be exceeded." The letter identified various additional infirmities with the various measures and protocols Rogers had in place purportedly to meet OSHA standards and specifically referenced procedures employed by workers that created visible dust and caused particles to become airborne.

Despite all of these documented failures to adhere to OSHA requirements, which continued in the years to come,[11] Rogers again represented in an article titled "The Asbestos Controversy Continues," published in the November/December 1978 edition of Plastics Design Forum, that it had "taken all of the steps necessary to meet the existing OSHA standard of 2 [f/cc] in all of its manufacturing operations in which asbestos fibers are compounded with phenolic resins."

In addressing the question of whether there was deliberate deceit on the part of Rogers with respect to the existence of the dangerous condition at issue, the plaintiff argues that the trial court impermissibly weighed the evidence presented on summary judgment. In support of this argument, the plaintiff focuses on the trial court's statement that, "[a]lthough there is some evidence in the record indicating that Rogers may not have been entirely forthcoming with respect to the potential dangers of asbestos, there is also other evidence demonstrating that it began to implement safety measures in the 1970s." (Internal quotation marks omitted.) We

[11] For example, air samplings taken on April 7, 1978, revealed two readings over the OSHA limit. Air samplings taken from May 31 to June 4, 1979, revealed one reading over the OSHA limit. Samplings taken in March, 1980, produced eight readings over the OSHA limit.

agree with the plaintiff that this conclusion demonstrates that the court did not view the evidence presented in the light most favorable to the plaintiff, as required on summary judgment but, instead, improperly weighed that evidence. Despite Rogers' repeated representations that it was complying with OSHA's requirements, the summary judgment record reveals that Rogers, at various times, was not adhering to OSHA requirements.

This brings us to the third *Lucenti* factor, intentional and persistent violations of safety regulations over a lengthy period of time. *Lucenti* v. *Laviero*, supra, 327 Conn. 782. As previously noted in this opinion, the plaintiff presented in support of her opposition to Rogers' motion for summary judgment voluminous evidence of Rogers' repeated failures to meet OSHA standards pertaining to asbestos exposure levels for several years.[12] In addition to the many air sampling readings that were higher than OSHA standards, the plaintiff presented documentation revealing that Rogers was formally cited by OSHA four times for various asbestos related violations. In its brief to this court, Rogers states: "The vast majority of the air sampling results obtained at the Manchester plant between 1972 and 1990 were within the contemporaneous OSHA limits. In fact, between 1972 and 1975, only 12.8 percent of the 234 samples exceeded the OSHA eight hour limit while only 3.8 percent exceeded the ceiling limit; between 1976 and 1985, only 13 percent of the 296 samples exceeded the reduced OSHA eight hour limit while only 1 percent exceeded the ceiling limit; and, between 1986 and 1990,

[12] An internal memo, dated April 20, 1972, circulated to several individuals within Rogers, acknowledged that "most of our areas are presently over standard . . . ."

On March 22, 1987, another memo was circulated within Rogers, noting, inter alia, that OSHA had revised its regulations for asbestos exposure on June 20, 1986, but that, as of the date of the memo, Rogers was "not in compliance with any section of these regulations."

only 7.2 percent of the 54 samples exceeded the further reduced OSHA eight hour limit while none exceeded the ceiling limit." In considering this evidence in the light most favorable to the plaintiff, a fact finder reasonably could have found that, although those statistics demonstrate a gradual improvement by Rogers in adhering to OSHA standards, they also demonstrate repeated violations of those standards. In other words, even if Rogers met OSHA standards the "vast majority" of the time, there were, undisputedly, times when it did not.

Additionally, the plaintiff argued that Rogers violated OSHA regulations that required employers to notify employees, in writing, about exposure to excessive asbestos levels and corrective action taken in response to those readings.[13] Dusto testified at his deposition that he was never notified, in writing or otherwise, of high levels of asbestos or of any corrective action taken in response to those readings. David Sherman, Rogers' designated corporate representative in this case, testified at his deposition that he did not have any documentation to show that any employees were ever notified of high levels of exposure or corrective action taken.

The plaintiff also argued that Rogers violated the OSHA requirement that employers establish a respirator program in accordance with the requirements of American Standard Practice for Respiratory Protection, which initially was mandated in 1971.[14] The plaintiff submitted several documents containing references to the need to implement a respirator program and the fact that Rogers had not yet done so, dating from 1972 until approximately 1990. Frank Morse, Dusto's coworker and foreman, testified at his deposition that he did not recall any respirator training being performed at the

[13] See 29 C.F.R. § 1910.93a (i) (3) (1972).

[14] See 29 C.F.R. § 1910.93a (c) (5) (1971); 29 C.F.R. § 1910.93a (d) (2) (iv) (1972).

Manchester facility prior to 1987. In a Corporate Environmental Engineering Report dated August 30, 1988, it was noted: "It is apparent that respirator training and fit testing has not begun" at Rogers' Manchester facility. Another report was issued on September 27, 1990, which was prepared "[i]n response to the recent letter from the Department of Labor (OSHA) office regarding asbestos health hazards at the [Manchester] work site . . . ." In the report, it was noted, inter alia: "There continues to be confusion as to the proper use and care of respirators at the [Manchester] plant. As I understand it, training has been conducted in compliance with OSHA [29 C.F.R. §] 1910.134 (respirator protection) for some employees. However, during our last industrial hygiene survey, as well as previous visits to the plant, employees have offered comments to us that training was absent or they were not sure if they had been trained or not." A confidential environmental engineering report dated August 20, 1981, which documented the results of a study conducted to determine worker exposure to air contaminants during a blender clean out operation, revealed: "Dust exposure during the clean out process is well in excess of the current OSHA PEL. Currently used respirator protection is not considered adequate for the measured dust levels."

Additionally, the plaintiff claimed, in opposing Rogers' motion for summary judgment, that Rogers violated OSHA standards by providing the incorrect respiratory protection for its employees. The OSHA standards mandated the use of specific types of respirators dependent upon the asbestos exposure levels.[15] Despite OSHA's requirements as to which type of respirator should be used at certain levels of asbestos exposure, Rogers supplied its employees with only reusable filter type respirators that were prescribed for atmospheres in the lowest levels of exposure. Rogers exceeded those levels of exposure repeatedly throughout the 1970s and 1980s.

[15] See 29 C.F.R. § 1910.93a (d) (2) (i) through (iii) (1972).

The plaintiff also claimed that Rogers violated OSHA regulations against dry sweeping asbestos dust.[16] According to various reports submitted by the plaintiff in opposition to Rogers' motion for summary judgment, Rogers employees continued to dry sweep asbestos dust well after the 1972 promulgation of the ban against doing so, as recently as 1983. Further, the plaintiff alleged that Rogers violated OSHA standards pertaining to the disposal of asbestos bags.[17] Rather than properly disposing of asbestos bags in sealed impermeable containers to prevent airborne asbestos dust, the plaintiff submitted reports of " 'empty' bags [being] carried across the floor and shoved into a waste drum, creating visible dust," in addition to numerous reports of accumulated dust on various surfaces throughout the facility.[18]

On the basis of the foregoing, our review of the evidence submitted to the trial court in support of and in opposition to Rogers' motion for summary judgment, taken in the light most favorable to the plaintiff, demonstrates that Rogers was aware of the risks associated with asbestos exposure before Dusto commenced his employment with Rogers; approximately ten Rogers employees had filed asbestos related claims by the early 1980s, and several had developed respiratory issues, as documented by Rogers' physicians, during that time; Rogers failed to comply with OSHA standards regarding asbestos exposure levels into the late 1980s; Rogers did not inform its employees of the risks associated with

[16] See 29 C.F.R. § 1910.93a (g) (1972).

[17] See 29 C.F.R. § 1910.93a (h) (1972).

[18] The plaintiff argues, as she did in opposing Rogers' motion for summary judgment, that, although this case did not involve the "disabling of safety devices" per se, which is the fourth *Lucenti* factor, Rogers' persistent violation of federal safety regulations had the practical effect of "disabling" those regulations. (Internal quotation marks omitted.) Because we previously discussed Rogers' failure to comply with those safety regulations in considering the third *Lucenti* factor, we do not reiterate that discussion.

exposure to high levels of asbestos, or that those levels were frequently revealed by testing at Rogers facilities; Rogers misled the union and its customers as to its compliance with OSHA standards pertaining to asbestos exposure levels; Rogers violated several federal safety regulations pertaining to working with asbestos, perhaps most notably, its failure to implement a respiratory program and provide its employees with proper respiratory protection. While all of this was happening at Rogers' own facilities, it was admonishing others in the industry that, if they were not able to comply with OSHA's requirements, they should not engage in the handling or production of asbestos related materials due to the risks that asbestos exposure posed to their employees. This stands in stark contrast to *Lucenti*, wherein our Supreme Court concluded that there was no evidence presented of prior accidents, an extensive or protracted history of workplace safety violations, or deception on the part of the defendant with respect to the danger presented. *Lucenti* v. *Laviero*, supra, 327 Conn. 791.

The trial court's conclusions that there were "some" instances in which the asbestos levels were above OSHA limits; that Rogers "may have downplayed" the significance of potential health consequences of asbestos; and that Rogers "may not have completely complied" with federal safety standards do not reflect an examination of the evidence in the light most favorable to the plaintiff, as required on summary judgment. We recognize that a fact finder could review the evidence presented and come to the same conclusions, but those conclusions are not so clear that Rogers was entitled to judgment as a matter of law. In other words, in light of the totality of the evidence presented by the plaintiff in this case, those conclusions are by no means compelled. Our review of the summary judgment record,

as discussed herein, demonstrates that there is an evidentiary factual predicate for reasonable inferences to the contrary. Choosing which of these competing inferences to draw is the province of the jury. See, e.g., *Suarez* [v. *Dickmont Plastics Corp.*], supra, 229 Conn. 111 ("[i]t is for the finder of fact, not the court on summary judgment, to determine what inferences to draw" (internal quotation marks omitted)).

As stated herein, "satisfaction of the substantial certainty exception requires a showing of the employer's subjective intent to engage in activity that it knows bears a substantial certainty of injury to its employees"; *Lucenti* v. *Laviero*, supra, 327 Conn. 779; and "[i]ntent is clearly a question of fact that is ordinarily inferred from one's conduct or acts under the circumstances of the particular case." (Internal quotation marks omitted.) Id., 780. "Substantial certainty exists when the employer cannot be believed if it denies that it knew the consequences were certain to follow." (Internal quotation marks omitted.) *Hassiem* v. *O & G Industries, Inc.*, supra, 197 Conn. App. 650. A plaintiff need not prove substantial certainty at the summary judgment stage but must demonstrate, taking the evidence in the light most favorable to the plaintiff, that there is at least a genuine issue of material fact as to whether, in light of the totality of the evidence presented, a jury could reasonably infer that the employer subjectively believed that its conduct was substantially certain to result in injury to its employees. On the basis of the foregoing, we conclude that the plaintiff has satisfied this burden and, therefore, that the trial court erred in rendering summary judgment in favor of Rogers.

II

The plaintiff also challenges the dismissal of her claims against Special Electric. The plaintiff claims that the trial court improperly concluded that it did not have

subject matter jurisdiction over the plaintiff's claims against Special Electric on the ground that the plaintiff did not file those claims within two years of the date of the publication of the notice of Special Electric's dissolution. Specifically, the plaintiff argues that the notice of dissolution was ineffective because it was published by Special Electric's insurers, who did not have authority to do so. We disagree.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this claim. Special Electric was incorporated in Wisconsin in 1957. It brokered the sale of, and distributed, asbestos to manufacturers of products containing asbestos in several states, including Connecticut, where Rogers was located. In 2004, Special Electric petitioned for relief under chapter 11 of the United States Bankruptcy Code. In August, 2006, Special Electric filed its Second Amended Plan of Reorganization of Special Electric (plan), which was confirmed by the United States Bankruptcy Court for the Eastern District of Wisconsin on December 21, 2006. When the plan was confirmed, and its only remaining officer was John Erato, who served as its director and president after the bankruptcy proceedings commenced, Special Electric had no operations, its corporate assets had been sold, and the only remaining assets of Special Electric from which claims against it might be paid were its liability insurance policies.

The plan provides, inter alia: "The holders of all Claims against or Interests in the Debtor, of whatever nature . . . shall be bound by the provisions of the Plan . . . ." Under the plan, asbestos claims that were not yet settled at the time the plan was filed are included in the definition of "Unliquidated Personal Injury Claims," and asbestos claimants are required to serve their complaints on a designated registered agent,

which tenders the claims directly to the insurance companies.[19] Section 8.1 (c) (1) of the plan further provides in relevant part: "Each Insurance Company shall defend and/or settle Unliquidated Personal Injury Claims . . . in accordance with and in a manner consistent with the language of the applicable Insurance Policies and applicable state law." Section 8.1 (c) (iii) of the plan also provides that "[t]he obligations, if any, of the Insurance Companies to pay holders of Unliquidated Personal Injury Claims shall be determined solely pursuant to the terms of the Insurance Policies and applicable law." Finally, § 8.1 (c) (iv) of the plan contains a reservation of rights and defenses, which provides, inter alia, that nothing in the plan "shall impair, alter, restrict, modify, or limit the right of . . . any Insurance Company to . . . assert any rights, claims, counterclaims, and/or defenses under the Insurance Policies and applicable law . . . ."[20]

[19] The plan requires claims to be submitted to:

"Special Electric Company, Inc.

"c/o CT Corporation System, Registered Agent

"8025 Excelsior Drive, Suite 200

"Madison, WI 53717."

[20] Specifically, § 8.1 (c) (iv) of the plan provides in relevant part: "Reservation of Rights and Defenses. Nothing in the Case, the Plan, the Plan Documents, the Confirmation Order . . . or any finding of fact and/or conclusion of law with respect to confirmation of the Plan . . . shall impair, alter, restrict, modify, or limit the right of: [1] any Insurance Company to [a] assert any rights, claims, counterclaims, and/or defenses under the Insurance Policies and applicable law as they may have against any Entity . . . asserting liability or coverage under any Insurance Policy; or [b] analyze, respond to, litigate, or settle any Unliquidated Personal Injury Claim tendered to such Insurance Company or under or on account of such Insurance Policy; or [2] except as provided in Sections 5.2, 8.1 (a) and 8.1 (b) of the Plan, any Unliquidated Personal Injury Claimant to assert any rights, claims, counterclaims, and/or defenses under the Insurance Policies and applicable law as they may have against any Entity . . . including any Insurance Company. Confirmation of the Plan, the Plan Documents, and the entry of the Confirmation Order . . . or any finding of fact and/or conclusion of law with respect to confirmation of the Plan . . . shall not be deemed to be or have the effect of a waiver of any right, claim, defense, or argument each Insurance Company and Unliquidated Personal Injury Claimant may have

After Erato resigned in 2009, no successor officer or director was appointed and Special Electric failed to submit annual reports or fees to the Wisconsin Department of Financial Institutions (WDFI), which were required to maintain Special Electric's corporate existence. Consequently, on September 11, 2012, the WDFI administratively dissolved Special Electric pursuant to §§ 180.1421 (2) (b), 181.1421 (4) (b) and 183.09025 (2) (c) of the Wisconsin Business Corporation Law (WBCL). See Wis. Stat. §§ 180.1421 (2) (b), 181.1421 (4) (b) and 183.09025 (2) (c) (2021-2022).

On May 8, 2014, the attorneys representing Special Electric's insurers[21] published a Notice of Dissolution of Special Electric Company, Inc. (notice), pursuant to § 180.1407 (1) of the 2013-2014 WBCL, which provides, inter alia, that "[a] dissolved corporation" may publish notice of its dissolution requesting that claimants present their claims in accordance with the notice.[22] Section 180.1407 (2) provides in relevant part that "if the

or would be entitled to assert as against each other in any future judicial or quasi-judicial proceeding. All arguments of Unliquidated Personal Injury Claimants, the Insurance Companies, and the Debtor as of the Petition Date with respect to the Unliquidated Personal Injury Claims and the Insurance Policies are preserved."

[21] The plaintiff does not argue that the attorneys representing the insurers did not have the authority to act on behalf of the insurers.

[22] Wisconsin Statutes (Rev. to 2013-2014) § 180.1407 (1) provides: "A dissolved corporation may publish notice of its dissolution and request that persons with claims, whether known or unknown, against the corporation or its directors, officers or shareholders, in their capacities as such, present them in accordance with the notice. The notice shall be published as a class 1 notice, under ch. 985, in a newspaper of general circulation in the county where the dissolved corporation's principal office or, if none in this state, its registered office is or was last located. The notice shall include all of the following: (a) A description of the information that must be included in a claim, (b) A mailing address where the claim may be sent, (c) A statement that a claim against the dissolved corporation or its directors, officers or shareholders is barred unless a proceeding to enforce the claim is brought within 2 years after the publication date of the notice."

Hereinafter, unless otherwise indicated, all references to § 180.1407 in this opinion are to the 2013-2014 revision of the statute.

dissolved corporation publishes a newspaper notice . . . a claim against the dissolved corporation . . . is barred unless the claimant brings a proceeding to enforce the claim within 2 years after the publication date of the newspaper notice . . . .'' Thus, pursuant to Wisconsin law, if the notice published in 2014 was proper, the period within which claims could be filed against Special Electric expired in May, 2016.

This action was filed in 2019, three years beyond the 2016 deadline that Special Electric asserts was effectuated by the 2014 publication of its notice of dissolution. On that basis, Special Electric moved to dismiss the plaintiff's claims against it on the ground that they were time barred and, therefore, that the court lacked subject matter jurisdiction over them. The plaintiff objected to the motion to dismiss, arguing that the notice of dissolution was inadequate because, inter alia,[23] it was published by Special Electric's insurers who, she alleged, lacked the authority to issue the notice. The plaintiff further argued that, even if Special Electric's insurers had authority to issue the notice of dissolution, they were precluded from doing so by Special Electric's bankruptcy plan, which, she alleged, was intended to allow for claims to be filed in perpetuity.

On February 18, 2022, the court issued a memorandum of decision granting Special Electric's motion to dismiss. In rejecting the plaintiff's argument that the notice of dissolution was ineffective because it was not issued by a corporate officer of Special Electric, the court explained that, after Erato resigned in 2009 and Special Electric was administratively dissolved in 2012, there were no remaining corporate officers to govern Special Electric, and the only remaining parties who

[23] In opposition to Special Electric's motion to dismiss, the plaintiff also argued that the notice was insufficient in that it failed to include certain information required under Wisconsin law. The trial court rejected that argument, and the plaintiff has not challenged that holding on appeal.

were authorized to act on Special Electric's behalf were its insurers. The court reasoned that, although § 180.1407 (1) of the WBCL "provides detailed requirements concerning where the notice shall be published and what it shall contain, the statute provides no further guidance concerning whether the corporation itself must cause the publication of the notice or whether its attorneys or other agents may do so. In the absence of any binding authority requiring a member of the board of directors to personally cause the notice to be published, the court will not infer that such a requirement exists." (Internal quotation marks omitted.) The court further held that Special Electric's insurers were authorized to issue the notice pursuant to Special Electric's bankruptcy plan, which not only contemplates the application of the WBCL to the processing of claims filed against Special Electric but also requires the insurers to defend or settle claims brought against Special Electric. On those bases, the court concluded that the notice published in Wisconsin of Special Electric's dissolution was statutorily sufficient, that the plaintiff failed to file her claims against Special Electric within the two year period triggered by the publication of that notice, and, consequently, that the court lacked subject matter jurisdiction over the plaintiff's claims.[24] This appeal followed.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of

[24] Although a statute of limitations defense typically does not implicate a court's subject matter jurisdiction, the trial court concluded that, because Special Electric was a dissolved corporation that no longer had the capacity to be sued, the plaintiff's claims against it were not justiciable. See, e.g., *Janulawicz* v. *Commissioner of Correction*, 310 Conn. 265, 270, 77 A.3d 113 (2013); *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 444, 54 A.3d 1005 (2012). The parties do not contest the trial court's determination that the plaintiff's failure to timely file her claims against Special Electric implicated the court's subject matter jurisdiction.

action that should be heard by the court. . . . A trial court's determination of its subject matter jurisdiction is a question of law that we review de novo." (Citation omitted; internal quotation marks omitted.) *Dobie* v. *New Haven*, 346 Conn. 487, 495–96, 291 A.3d 1014 (2023).

It is well settled that a business entity is a creature of state law. Consequently, the state under whose law the entity was created is the state that determines whether and how its existence is terminated. See Fed. R. Civ. P. 17 (b) ("[c]apacity to sue or be sued is determined as follows . . . (2) for a corporation, by the law under which it was organized"); *Gross* v. *Hougland*, 712 F.2d 1034, 1040 (6th Cir. 1983) ("the question whether an action has abated because of the dissolution of a corporation is controlled by the law of the state of incorporation"), cert. denied, 465 U.S. 1025, 104 S. Ct. 1281, 79 L. Ed. 2d 684 (1984); *G. M. Standifer Construction Corp.* v. *Commissioner of Internal Revenue*, 78 F.2d 285, 286 (9th Cir. 1935) ("[t]he general effect of the dissolution of a corporation is to put an end to its corporate existence for all purposes whatsoever and to extinguish its power to sue or be sued, but, if the law of the state of incorporation so provides, its existence may continue for a specified period after dissolution for the purpose of winding up its affairs, and during that extended period of corporate life it may sue or be sued"); *Bazan* v. *Kux Machine Co.*, 52 Wis. 2d 325, 333, 190 N.W.2d 521 (1971) ("[i]t is the rule that when a corporation becomes defunct by dissolution in the state of its creation, it is defunct in every other state unless such other state has also granted it a charter"); Restatement (Second), Conflict of Laws § 299, p. 295 (1971) ("[w]hether the existence of a corporation has been terminated or suspended is determined by the local law of the state of incorporation"); 17A Fletcher Cyclopedia of the Law of Corporations (2023) § 8579

("the state or country that grants the corporation its franchise has exclusive and supreme power to withdraw it and to forfeit the corporate charter or dissolve the corporation"); 19 Am. Jur. 2d 463, Corporations § 2335 (2015) ("[t]he existence of a corporation cannot be terminated except by some act of the sovereign power by which it was created").

Here, Special Electric was created in Wisconsin and was administratively dissolved by the state of Wisconsin. Accordingly, we look to Wisconsin law to ascertain the effect of Special Electric's dissolution, particularly on its capacity to be sued. See, e.g., *Bazan* v. *Kux Machine Co.*, supra, 52 Wis. 2d 337 (construing predecessor to § 180.1407 of WBCL as limitation on actions against dissolved corporations "in terms of the capacity to sue or be sued, rather than in terms of a statute of limitation"); *Branch of Citibank, N.A.* v. *De Nevares*, 74 F.4th 8, 15 (2d Cir. 2023) ("[w]hether a party enjoys separate legal existence may be a decisive issue as to whether federal courts have subject matter jurisdiction over disputes involving that party, but legal existence itself turns on an examination of the law of the party's place of incorporation or formation" (internal quotation marks omitted)). In doing so, we are mindful of the following guidance of the Wisconsin Supreme Court, which has explained: "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect. . . . We assume that the legislature's intent is expressed in the statutory language." (Citation omitted; internal quotation marks omitted.) *Banuelos* v. *University of Wisconsin Hospitals & Clinics Authority*, 406 Wis. 2d 439, 449, 988 N.W.2d 627 (2023). Courts are not permitted to read words into the statute that the legislature did not insert. See, e.g., *Dawson* v. *Jackson*, 336 Wis. 2d 318, 335, 801 N.W.2d 316 (2011).

Section 180.1421 (3) of the WBCL provides that § 180.1405 (1) and (2) and §§ 180.1406 through 180.1408 pertain to corporations that have been administratively dissolved.[25] Section 180.1405 is titled "Effect of dissolution" and subsection (1) provides in relevant part: "A dissolved corporation continues its corporate existence but may not carry on any business except that which is appropriate to wind up and liquidate its business affairs including the following . . . (c) [d]ischarging or making provision for discharging its liabilities . . . [and] (e) [d]oing every other act necessary to wind up and liquidate its business and affairs." Section 180.1407 (1) provides in relevant part that "[*a*] *dissolved corporation* may publish notice of its dissolution and request that persons with claims . . . against [it] . . . present them in accordance with the notice. . . ." (Emphasis added.) Pursuant to § 180.1407 (2), such claims against

[25] Section 180.1407 of the WBCL is modeled on § 14.07 of the American Bar Association's Model Business Corporation Act (MBCA), which is substantially identical to § 180.1407 except that it provides for a three year claims period, rather than a two year claims period. The official comment to MBCA § 14.07 indicates that the purpose of the provision is to provide a reasonable time to file a claim against a corporation after its dissolution. The comment states in relevant part: "Section 14.07 addresses the problems created by possible claims that might arise long after the dissolution process is completed and the corporate assets distributed to shareholders . . . . On one hand, the application of a mechanical limitation period to a claim for injury that occurs after the period has expired may involve injustice to the plaintiff. On the other hand, to permit these suits generally makes it impossible ever to complete the winding up of the corporation, make suitable provision for creditors, and distribute the balance of the corporate assets to the shareholders. . . .

"[The three year cutoff] provides a reasonable compromise between the competing interests of potential injured plaintiffs, the ability of dissolved corporations to distribute remaining assets free of all claims, and the interests of shareholders in receiving those assets secure in the knowledge that they may not be reclaimed." Model Business Corporation Act (A.B.A. 2016) § 14.07, comment, p. 338. Many states have adopted statutes that are based on versions of MBCA § 14.07 and are similar to § 180.1407. See 16A Fletcher Cyclopedia of the Law of Corporations (2023) § 8144.10; see also 4 J. Cox & T. Hazen, Treatise on the Law of Corporations (3d Ed. 2022) § 26:10. Several courts have described these corporate survival statutes as allowing a limited period for claimants to sue a dissolved corporation.

the dissolved corporation must be brought within two years of the date of the publication of the notice.

The plaintiff challenges the trial court's dismissal of her claims against Special Electric and its rejection of her argument that the publication of the notice of dissolution that triggered the two year time frame within which claims were to be filed against Special Electric was deficient because it was issued by Special Electric's insurers, rather than a corporate officer of Special Electric. She contends that the authority to publish that notice is limited by § 180.1407 of the WBCL to a corporate officer of Special Electric, in that it provides that "[a] dissolved corporation" may publish notice of its dissolution. Although the statute refers to publication by the corporation, it does not expressly state that a corporate officer or director must publish the notice of dissolution. In the absence of such an explicit requirement, we, like the trial court, decline to read such a requirement into that statute.

Moreover, because § 180.1407 of the WBCL applies only to dissolved corporations, which, like Special Electric, are not likely to have corporate officers to act on their behalf following dissolution, the question of who does have authority to publish the notice of dissolution must be resolved. In the absence of an explicit requirement that a corporate officer must publish the notice of dissolution, it is reasonable to infer that another party who is authorized by the dissolved corporation may do so. "Generally speaking . . . an agency [to act on behalf of an insured] may be created by the active consent of the principal and agent or by an express contract, operation of law, implication, estoppel, or custom or usage." 43 Am. Jur. 2d 161, Insurance § 120 (2013); see also 3 G. Couch, Insurance (3d Ed. 2011) §§ 44:1 through 44:35 and 44:38 through 44:57; 3 Am. Jur. 2d 458–65, Agency §§ 14–19 (2013). The question of "[w]hether an agency has been created is a question

of fact to be determined by the relations of the parties as they exist under their agreements or acts." (Footnote omitted.) 43 Am. Jur. 2d, supra, § 120, p. 161. Here, it is clear, based on Special Electric's bankruptcy plan and the reliance by Special Electric on its insurers since it was administratively dissolved, that the insurers were acting as agents of Special Electric.

As noted herein, pursuant to Special Electric's bankruptcy plan, Special Electric remained only a shell through which claims against it passed to its insurers. As part of the pass-through procedure established by the plan, Special Electric's insurers are authorized and obligated to defend or settle claims filed against Special Electric on its behalf. The only limitation the plan imposes upon the insurers in their authority and obligation to defend claims filed against Special Electric is that they do so consistently with the insurance policies at issue and the applicable state law. There is nothing in the plan that precluded the insurers from publishing the notice of dissolution as a way of exercising the broad authority, afforded by the plan, to defend claims brought against Special Electric by establishing a time limitation for the filing of those claims. Moreover, not only are the insurers afforded broad authority to act in defense of claims brought against Special Electric, but, as agents of Special Electric, they are permitted to take actions in furtherance of winding up the affairs of Special Electric.

In *Morehouse* v. *Special Electric Co.*, Wisconsin Circuit Court, Dane County, Case No. 14CV1154 (April 14, 2016), the Dane County Circuit Court of Wisconsin rejected the argument that Special Electric's insurers did not have authority to publish the same notice of dissolution that is at issue in the present case.[26] That

[26] Indeed, Special Electric's brief to this court cites several cases from courts throughout the country that have rejected this very argument as to the notice of dissolution published by Special Electric's insurers. See, e.g., *Hart* v. *Special Electric Co.*, Docket No. A151293, 2018 WL 6168098, *4–5

court explained: "[T]he [WBCL] appears to provide these rights and appears to have occupied the field. [The legislature] took into account [the] corporations that acted affirmatively to dissolve themselves and corporations that failed to continue to operate. And, so, by eliminating them through the failure to pay, they administratively would dissolve them. . . . [The legislature] did anticipate the situation where corporations had effectively dissolved, everybody walked away, everybody died, and what was the state supposed to do. Because people would logically consider them to still be in existence and, thus, be misled. And, so, they created this scheme or structure, it seems to me, in which . . . the corporation would be dissolved administratively, and also a structure that was to protect creditors, not to hurt creditors, by requiring a publication or having a publication in order to limit the time period. Those seem to me to be actually laudable goals on behalf of potential creditors or claimants . . . that the purpose was to make sure that everyone knew what was going on, that it was happening in an orderly way, that a time period was created in which people could make certain claims, and that at the end of that time period, it would expire." The court reasoned: "[T]he duty of the insurers in this instance is to defend the

(Cal. App. November 26, 2018); *Deister* v. *Asbestos Corp., Ltd.*, California Superior Court, Santa Clara County, Docket No. 2018-1-CV-327331 (January 18, 2019); *Hart* v. *Certainteed Corp.*, California Superior Court, Alameda County, Docket No. RG16833060 (February 10, 2017); *In re Asbestos Litigation*, Delaware Superior Court, Docket Nos. N17C-02-136, N17C-08-0228 (ASB), (December 7, 2017); *Desalvo* v. *Advance Auto Parts, Inc.*, Illinois Circuit Court, Madison County, Docket No. 15 L 803 (July 14, 2017); *Brenon* v. *Asbestos Corp., Ltd.*, 188 App. Div. 3d 1610, 136 N.Y.S.3d 592 (2020), appeal denied, 191 App. Div. 3d 1404, 137 N.Y.S.3d 810 (2021); *In re Eighth Judicial District Asbestos Litigation*, New York Supreme Court, Erie County, Docket Nos. 810168/2017, 805211/2017, 806760/2017, E 162678/2017 (March 14, 2019); *In re New York City Asbestos Litigation*, New York Supreme Court, New York County, Docket No. 190219/2016 (March 16, 2017); *McCoy* v. *Special Electric Co.*, Pennsylvania Court of Common Pleas, Philadelphia County, Docket No. 2830 (August 4, 2016).

insured, it's not to pay the plaintiffs. I mean, it's not to pay claimants, it's to defend the insured. That's their legal, potentially fiduciary obligation to Special Electric."

The court reiterated: "[I]n the end, the statute occupies the field. The legislature made that decision, to make policy choices about whether or not a corporation could be dissolved and the sequence in which it would be dissolved. . . . [T]he legislature considered every aspect of dissolution as far as I can tell. They considered the situation where it's voluntary and they want to do it. They considered where it's involuntary. They considered it where there could be creditors who would come into the corporation and dissolve it or maintain it. . . . We even have a process by which, once dissolved, it still doesn't disappear. There's still preservation of certain rights to those who have given notice or otherwise acted for those assets that the corporation still has. . . . I'm unable to find really any gap in that process. It is true that some people will be aggrieved by the decisions made by the legislature, but simply being an aggrieved party doesn't mean that one would undo this very elaborate and important structure of the [WBCL]. And, so, Special Electric had a right to dissolve. It had a right to be dissolved if it just didn't do anything. And once its officers and directors were gone, it was dissolved, and another state agency has made that decision . . . .

"[O]ne thing I'm sure of is that [the] duties [of the insurers] are to their insured. And, so, it is not bothersome to me . . . in fact, it would be bothersome to me if it was [the] opposite. It's not bothersome to me that they have taken certain steps to perfect the dissolution. To me, that was their obligation. They're not doing it to put the plaintiffs or any other future claimants at risk. That is not the reason they did it. To the extent they are the ones who forced the publication, they did

it because of their fiduciary . . . potentially fiduciary obligation, certainly contractual obligation, to Special Electric to perfect affirmative [defenses]. . . . [T]here are many different kinds of affirmative defenses that insurance companies regularly work to perfect. . . . They may well develop a case of . . . an affirmative case of a statute of limitations against the plaintiff. The insured doesn't care. But the insurance company does, and they have to perfect it by way of going out and taking certain affirmative steps including filing of briefs and doing the like. The very essence of a duty to defend is to take those kinds of steps of behalf of the insured. . . . [And] . . . simply the dissolution doesn't end the obligations of the duty to defend. There may be affirmative defenses and the like."

The court concluded: "The business corporation law, as I said previously, completely occupies the field. There's an unrestricted right to dissolve. If you dissolve in certain circumstances, creditors are dealt with in different ways. The creditors are dealt with in a situation like this, very thoroughly, make your claim, you're there, you will not have a problem under Wisconsin law. There is nothing more for me to do."

The plaintiff argues that, because Special Electric has no remaining corporate officers, no one had the authority to publish the notice of dissolution, which is consistent with the intent of the bankruptcy plan, namely, that Special Electric exist in perpetuity for the purpose of resolving claims brought against it. The bankruptcy plan, however, does not contemplate Special Electric's infinite existence. Indeed, this argument was rejected by the United States Bankruptcy Court for the Eastern District of Wisconsin in *In re Special Electric Co.*, United States Bankruptcy Court, Eastern District of Wisconsin, Docket No. 04-25471-11 (October 7, 2016), in which the court held that the plan "contained

no requirement for Special Electric to remain a corporation in good standing for any particular length of time . . . .'' The court noted that the bankruptcy court had rendered its final decree in Special Electric's bankruptcy case in March, 2010, bankruptcy counsel for Special Electric was permitted to withdraw at that time, and the court ordered the case closed. Id. The court explained: ''Contributing to the anticipation of the eventual dissolution of Special Electric was the fact that the parties to the bankruptcy case had to negotiate the two stay put bonus arrangements for the sole remaining officer [and] director of Special Electric in order to have him available to bring the plan to confirmation.''[27] Id. The court held: ''Nothing in the plan requires Special Electric to remain incorporated into 2016. The only requirements concerning Special Electric's incorporation are found in § 8.12, which required the debtor to file an amended certificate of incorporation with the WDFI and designate a registered agent before the effective date of the plan.'' Id. The court further explained that the plan ''does not require Special Electric to continue to exist for a particular length of time, not even to the point where any available insurance coverage is exhausted.'' Id. The court further held: ''For the same reason, allowing the administrative dissolution to continue to final dissolution is not a violation of § 8.5 of the plan.[28] Not only does the plan fail to mandate Special

[27] In making this statement, the court referred to the record of Special Electric's bankruptcy case. Although that record is not before us for review, the court's statement is not contested by the parties.

[28] Section 8.5 of the plan provides: ''Debtor Injunction. As of the Effective Date, except as otherwise expressly set forth in the Plan, all entities shall be enjoined from (i) prosecuting any Claim, demand, debt, right, cause of action, liability, or interest against or with respect to the Debtor; (ii) enforcing, attaching, collecting, or recovering in any manner, any judgment, award, decree, or order against the Debtor, or its property; (iii) creating, perfecting or enforcing any Lien or encumbrance against the Debtor, or its property; (iv) asserting a right of setoff, right of subrogation, or right of recoupment of any kind against any debt, liability, or obligation due to the Debtor, or its property; (v) commencing or continuing any action, in any manner or in any place, that does not comply with, or is inconsistent with, the provisions

Electric's continued incorporation, but this court must defer to [the state court's] interpretation of the [WBCL] . . . ." Id. (Footnote added.) Like the Bankruptcy Court, we conclude that the plaintiff's argument that the plan contemplated that Special Electric would continue to exist in perpetuity is unavailing.[29]

On the basis of the foregoing, we conclude that Special Electric's insurers had the authority to issue the notice of dissolution. Because the publication of that notice triggered a two year period within which claimants were required to bring any claims, and the plaintiff in this case did not file this action within that two year period, the court properly dismissed her claims against Special Electric.

The judgment with respect to Rogers Corporation is reversed and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion MOLL, J., concurred.

PRESCOTT, J., concurring in part and dissenting in part. I concur with part II of the majority's opinion

of the Plan; and (vi) commencing or continuing, in any manner, any action or other proceeding against the Debtor, or its property. To the extent the foregoing is in conflict with section 1141 of the Code, section 1141 of the Code shall control. Notwithstanding the foregoing, nothing herein shall prevent Claimants from asserting Unliquidated Personal Injury Claims in accordance with section 8.1 of the Plan."

[29] To the extent that the plaintiff argues that the bankruptcy plan preempts the application of Wisconsin law, we disagree. Section 11.11 of the plan, titled "Governing Law," provides: "Unless a rule of law or procedure is supplied by Federal Law (including the Code and the Rules), the laws of the State of Wisconsin, without giving effect to any conflicts of laws principles thereof that would result in the application of the laws of any other jurisdiction, shall govern the construction of the Plan and any agreements, documents, and instruments executed in connection with the Plan." Moreover, as stated herein, because the plan simply does not contemplate the infinite existence of Special Electric, any argument regarding the choice of federal law versus Wisconsin law is unavailing.

affirming the judgment of dismissal rendered in favor of the defendant Special Electric Company, Inc. I do not, however, agree with the majority's conclusion in part I of the opinion. Specifically, I disagree that the substitute plaintiff, Lana Kelly, submitted evidence in opposition to summary judgment that demonstrates the existence of a genuine issue of material fact as to whether those counts of the complaint brought against the defendant employer, Rogers Corporation (Rogers), fall within the "substantial certainty" prong of the intentional tort exception to the exclusivity provision of our Workers' Compensation Act (act). See General Statutes § 31-284 (a). Because I would affirm the judgment of the trial court granting summary judgment, I respectfully dissent with respect to part I of the majority opinion.

The majority opinion accurately sets forth the underlying procedural history as well as our standard of review, and, thus, I do not restate them here. Rather, I turn directly to a discussion of why I depart from the majority opinion's analysis regarding whether summary judgment is warranted in the present case. I begin with a brief explication of the legislative purpose and policy considerations underpinning our workers' compensation statutes, an understanding of which is necessary in considering the proper scope and application of a judicially created exception to the exclusivity provision.

"Connecticut first adopted a statutory scheme of workers' compensation in 1913. The purpose of the [act] . . . is to provide compensation for injuries arising out of and in the course of employment, regardless of fault." (Citation omitted; internal quotation marks omitted.) *Doe* v. *Yale University*, 252 Conn. 641, 672, 748 A.2d 834 (2000). The act "indisputably is a remedial statute that should be construed generously to accomplish its purpose." *Driscoll* v. *General Nutrition Corp.*, 252 Conn. 215, 220, 752 A.2d 1069 (2000). "In appeals arising

under workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act." (Internal quotation marks omitted.) Id., 221. The act contains an express provision that provides in relevant part that "[a]ll rights and claims between an employer who complies with the [act] and employees . . . arising out of personal injury or death sustained in the course of employment are abolished . . . ." General Statutes § 31-284 (a). This so-called exclusivity provision "manifests a legislative policy decision that a limitation on remedies under tort law is an appropriate trade-off for the benefits provided by workers' compensation." *Driscoll* v. *General Nutrition Corp.*, supra, 220–21. "Under the [act], both the employer and the employee have relinquished certain rights to obtain other advantages. The employee no longer has to prove negligence on the part of the employer, but, in return, he has to accept a limited, although certain, recovery. . . . The employer, in turn, guarantees compensation to an injured employee in return for the exclusivity of the workers' compensation liability to its employees." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 451, 820 A.2d 258 (2003). In other words, "it is an essential part of the workers' compensation bargain that an employee, even one who has suffered . . . an offensive injury, relinquishes his or her potentially large common-law tort damages in exchange for relatively quick and certain compensation." *Driscoll* v. *General Nutrition Corp.*, supra, 227.

Our Supreme Court has recognized a very limited exception to the exclusivity provision of the act for intentional torts committed by an employer against an employee and has clarified that "[t]o bypass the exclusivity of the act, the intentional or deliberate act or conduct alleged must have been *designed to cause the injury that resulted*." (Emphasis added.) *Mingachos* v.

CBS, *Inc.*, 196 Conn. 91, 102, 491 A.2d 368 (1985). The Supreme Court has further refined the contours of the intentional tort exception, stating that "a plaintiff employee could establish an intentional tort claim and overcome the exclusivity bar of the [act] . . . by proving either that the employer actually intended to injure the plaintiff (actual intent standard) or that the employer intentionally created a dangerous condition that made the plaintiff's injuries substantially certain to occur (substantial certainty standard)." (Citation omitted; footnote omitted.) *Suarez* v. *Dickmont Plastics Corp.*, 242 Conn. 255, 257–58, 698 A.2d 838 (1997). "Under the [actual intent standard], the actor must have intended both the act itself and the injurious consequences of the act. Under the [substantial certainty standard], the actor must have intended the act and have known that the injury was substantially certain to occur from the act." Id., 280. "Although it is less demanding than the actual intent standard, the substantial certainty standard is, nonetheless, an intentional tort claim requiring *an appropriate showing of intent to injure* on the part of the defendant." (Emphasis added.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 118, 889 A.2d 810 (2006). In short, if an employer knows that injury is substantially certain to occur as a result of its actions, the law will treat this as constructive intent to injure.

This framework is consistent with the Restatement's view of intentional torts, which provides in relevant part: "Intent is not . . . limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." 1 Restatement (Second), Torts § 8A, comment (b), p. 15 (1965); see also 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 1, p. 3 (2010) ("[a] person acts

with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result"). With respect to the substantial certainty prong of the intentional tort exception, it is the employer's knowledge that its actions are so highly likely to lead to the employee's injuries that makes the employer's actions legally equivalent to an act taken with a direct intent to harm and, thus, logically to fall within the exception. See W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 8, p. 36 ("[T]he mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." (Footnote omitted.)).

As our Supreme Court explained in *Lucenti* v. *Laviero*, 327 Conn. 764, 176 A.3d 1 (2018), "satisfaction of the substantial certainty exception requires a showing of the employer's *subjective* intent to engage in activity that it *knows* bears a substantial certainty of injury to its employees." (Emphasis added.) Id., 779.[1] As so defined, the exception is an exceedingly narrow one, and our Supreme Court has cautioned that because the legal justification for the exception "is the nonaccidental character of the injury from the . . . employer's standpoint, the common-law liability of the employer cannot . . . be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence,

[1] "Consistent with the focus . . . on employer knowledge and intent, it is now well established under Connecticut law that proof of the employer's intent with respect to the substantial certainty exception demands a purely subjective inquiry." *Lucenti* v. *Laviero*, supra, 327 Conn. 779.

breach of statute, or other misconduct of the employer *short of a conscious and deliberate intent directed to the purpose of inflicting an injury.* . . . What is being tested is not the degree of gravity of the employer's conduct, but, rather, the narrow issue of intentional versus accidental conduct." (Emphasis altered; internal quotation marks omitted.) Id., 778–79.[2]

Accordingly, to fall within the narrow exception and avoid summary judgment, an employee bringing a tort action against an employer for work-related injuries must produce some evidence from which a jury reasonably could conclude that the employer knew with such a high degree of certainty that the employee would be hurt as a result of some intentional act of the employer that the law will treat the employer as if it actually intended the harm. See *Morocco* v. *Rex Lumber Co.*, 72 Conn. App. 516, 528, 805 A.2d 168 (2002) (affirming granting of summary judgment because plaintiff "failed to establish the factual predicate that the defendant or any alter ego of it knew with substantial certainty that the plaintiff would be hurt or that there was an affirmative intent to create a situation to harm the plaintiff"). Substantial certainty of injury does not, under Connecticut law, mean that an injury must be virtually inevitable to occur, but it also requires more than a mere statistical probability of injury. As this court stated in *Morocco*, "[a]n employers' intentional, wilful or reckless violation of safety standards established pursuant to federal and state laws . . . is not enough to extend the intentional tort exception for the exclusivity of the act. . . . The employer must believe the injury was substantially certain to occur." (Citations omitted; internal quotation marks omitted.) Id., 527–28; see also *Melanson* v. *West*

[2] Our Supreme Court suggested in *Lucenti* that, as a matter of public policy, "only the most egregious cases of intentional misconduct on the part of employers will avoid the bar of workers' compensation exclusivity." *Lucenti* v. *Laviero*, supra, 327 Conn. 782 n.7.

Hartford, 61 Conn. App. 683, 689 n.6, 767 A.2d 764 ("[a] wrongful failure to act to prevent injury is not the equivalent of an intention to cause injury"), cert. denied, 256 Conn. 904, 772 A.2d 595 (2001).

Commentary to § 1 of the Restatement (Third) of Torts acknowledges the difficulties presented by the substantial certainty test, particularly in its application with respect to occupational injuries or diseases like the one suffered by the named plaintiff, Harold Dusto, an employee of Rogers:[3] "The substantial-certainty definition of intent requires an appreciation of its limits. In those occupational-injury cases in which courts have applied the substantial-certainty test, there generally is a localized job-site hazard, which threatens harm to a small number of identifiable employees during a relatively limited period of time. . . . The applications of the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area. *The test loses its persuasiveness when the identity of potential victims becomes vaguer and when, in a related way, the time frame involving the actor's conduct expands and the causal sequence connecting conduct and harm becomes more complex.*" (Emphasis added.) 1 Restatement (Third), supra, § 1, comment (e), pp. 8–9.

[3] The act covers both accidental injuries and occupational diseases that arise out of and in the course of employment. General Statutes § 31-275 (1) and (16) (A). "Occupational disease" is defined in the act as "any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such . . . ." General Statutes § 31-275 (15); see also 82 Am. Jur. 2d 328–29, Workers' Compensation § 291 (2013) ("[a]n occupational or industrial disease is a disease or infirmity that develops gradually and imperceptibly as a result of engaging in a particular employment and that is generally known and understood to be a usual incident or hazard of that employment").

To summarize, employees seeking to recover tort damages from employers for harm suffered in the workplace must overcome an extremely high burden of establishing that the exclusivity provision does not limit their remedies to those provided by our workers' compensation system. Indeed, a review of our appellate cases demonstrates that plaintiffs are rarely successful in their attempts to overcome the exclusivity bar, with most claims failing to survive beyond the summary judgment stage. See, e.g., *Lucenti* v. *Laviero*, supra, 327 Conn. 766–67; *Mingachos* v. *CBS*, *Inc.*, supra, 196 Conn. 95–96; *Hassiem* v. *O & G Industries*, *Inc.*, 197 Conn. App. 631, 633, 232 A.3d 1139, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020); *DaGraca* v. *Kowalsky Bros.*, *Inc.*, 100 Conn. App. 781, 783–84, 919 A.2d 525, cert. denied, 283 Conn. 904, 927 A.2d 917 (2007); *Morocco* v. *Rex Lumber Co.*, supra, 72 Conn. App. 517; but see *Suarez* v. *Dickmont Plastics Corp.*, 229 Conn. 99, 100–101, 639 A.2d 507 (1994). Additionally, with respect to occupational diseases caused by long-term exposure to dangerous substances in the workplace, the difficulties of meeting the substantial certainty test might be even greater in light of the fact that many employees who are exposed to such substances, even for long periods, do not become seriously ill. See, e.g., *Pittsburgh Corning Corp.* v. *Travelers Indemnity Co.*, Docket No. 84-3985, 1988 WL 5302, *2 (E.D. Pa. January 21, 1988) ("[n]ot everyone exposed to asbestos is affected"); *Abadie* v. *Metropolitan Life Ins. Co.*, 784 So. 2d 46, 96–97 (La. App.) (parties' experts gave consistent testimony that not everyone exposed to asbestos will get asbestos related disease due to dose response relationship as well as individual sensitivity or individual responsiveness to exposure), writ denied, 804 So. 2d 642 (La. 2001), and writ denied, 804 So. 2d 642 (La. 2001), and writ denied, 804 So. 2d 643 (La. 2001), and writ denied, 804 So. 2d 643 (La. 2001), and writ denied,

804 So. 2d 643 (La. 2001), and writ denied, 804 So. 2d 644 (La. 2001), and writ denied, 804 So. 2d 644 (La. 2001), cert. denied sub nom. *Territo* v. *Adams*, 535 U.S. 1107, 122 S. Ct. 2318, 152 L. Ed. 2d 1071 (2002); *Shellenbarger* v. *Longview Fibre Co.*, 125 Wn. App. 41, 49, 103 P.3d 807 (2004) ("[w]e know now that asbestos exposure does not result in injury to every person, and the evidence does not suggest [employer] believed otherwise [thirty] years ago"), review denied, 154 Wn. 2d 1021, 120 P.3d 73 (2005).

Neither this court nor our Supreme Court has yet applied the substantial certainty test to a case seeking recovery in tort for harm suffered by long-term exposure to asbestos or similar toxic substances in the workplace.[4] I turn then to New Jersey, a state whose law Connecticut favorably has cited in developing our own substantial certainty jurisprudence. See *Lucenti* v. *Laviero*, supra, 327 Conn. 780. The New Jersey Supreme Court, which has adopted a similar substantial certainty test, has addressed the applicability of that exception in a case involving an employee's asbestos exposure in the workplace attributed to the alleged wrongdoings of the employer. See *Millison* v. *E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 176–79, 501 A.2d 505 (1985).[5] The

[4] But see *Stebbins* v. *Doncasters, Inc.*, 47 Conn. Supp. 638, 820 A.2d 1137 (2002), aff'd, 263 Conn. 231, 819 A.2d 287 (2003). Our Supreme Court adopted the Superior Court's decision in *Stebbins* granting summary judgment for an employer in an action brought by employees alleging that they developed a form of hypersensitivity pneumonitis as a result of inhaling airborne droplets of petroleum based metal working fluids used in their employment that were contaminated by microorganisms. *Stebbins* v. *Doncasters, Inc.*, 263 Conn. 231, 234–35, 819 A.2d 287 (2003); see also *Stebbins* v. *Doncasters, Inc.*, supra, 47 Conn. Supp. 640. The Superior Court concluded that "[t]he plaintiffs' [summary judgment] submissions may show that the defendant exhibited a lackadaisical or even cavalier attitude toward worker safety, but are bereft of evidence from which one might reasonably and logically infer that the defendant believed its conduct was substantially certain to cause [the plaintiffs' injuries]." *Stebbins* v. *Doncasters, Inc.*, supra, 47 Conn. Supp. 644.

[5] In *Millison*, the plaintiff employees alleged not only that their employer had knowingly exposed them to asbestos and deliberately concealed the

court in *Millison* stated in relevant part: "Although we are certain that the legislature could not have intended that the system of workers' compensation would insulate actors from liability outside the boundaries of the [Compensation] Act for all willful and flagrant misconduct short of deliberate assault and battery, we are equally sure that the statutory scheme contemplates that as many work-related disability claims as possible be processed exclusively within the [Compensation] Act. Moreover, if 'intentional wrong' is interpreted too broadly, this single exception would swallow up the entire 'exclusivity' provision of the [Compensation] Act, since virtually all employee accidents, injuries, and sicknesses are a result of the employer or a co-employee intentionally acting to do whatever it is that may or may not lead to eventual injury or disease. Thus, in setting an appropriate standard by which to measure an 'intentional wrong,' we are careful to keep an eye fixed on the obvious: the system of workers' compensation confronts head-on the unpleasant, even harsh, reality—but a reality nevertheless—that industry knowingly exposes workers to the risks of injury and disease.

"The essential question therefore becomes what level of risk-exposure is so egregious as to constitute an 'intentional wrong.'

* * *

"In adopting a 'substantial certainty' standard, we acknowledge that every undertaking, particularly certain business judgments, involve some risk, but that

risks but that company doctors had fraudulently concealed specific medical information obtained during employee physicals that showed employees already had contracted asbestos related diseases. *Millison* v. *E.I. du Pont de Nemours & Co.*, supra, 101 N.J. 182. The New Jersey Supreme Court held that, "although the employees are limited to workers' compensation benefits for any initial occupational-disease disabilities related to the hazards of their employment experience, the Compensation Act does not bar plaintiffs' cause of action for aggravation of those illnesses resulting from defendants' fraudulent concealment of already-discovered disabilities." Id., 166.

willful employer misconduct was not meant to go undeterred. The distinctions between negligence, recklessness, and intent are obviously matters of degree, albeit subtle ones . . . . In light of the legislative inclusion of occupational diseases within the coverage of the Compensation Act, however, the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework of the [Compensation] Act is not circumvented simply because a known risk later blossoms into reality. . . .

"Courts must examine not only the conduct of the employer, but also the context in which that conduct takes place: may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act? . . .

"Although [the] defendants' conduct in knowingly exposing plaintiffs to asbestos clearly amounts to deliberately taking risks with employees' health, as we have observed heretofore the mere knowledge and appreciation of a risk [of occupational disease]—even the strong probability of a risk—will come up short of the 'substantial certainty' needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the compensation statute." (Citations omitted; emphasis omitted.) Id., 177–79.

Appellate courts in other jurisdictions that utilize a "substantial certainty" analysis in evaluating whether tort claims are barred by workers' compensation exclusivity have affirmed the granting of summary judgment or dismissed for failure to state a claim actions brought

There are no equivalent fraudulent concealment claims raised in the present case.

by employees alleging that an employer's wrongful actions resulted in injuries caused by asbestos exposure. See, e.g., *Vidrine* v. *Constructors, Inc.*, 953 So. 2d 193, 197, 199 (La. App.) (affirming summary judgment on asbestos exposure claim despite evidence that employer was aware employees exposed to asbestos during renovation job but never provided access to safety gear or safety equipment and had sought abatement of asbestos prior to renovation from which knowledge of danger could be inferred), writ denied, 958 So. 2d 1189 (La. 2007), and writ denied, 958 So. 2d 1196 (La. 2007); *Landry* v. *Uniroyal Chemical Co.*, 653 So. 2d 1199, 1204 (La. App.) ("record shows no genuine issue of material fact which could possibly lead to the conclusion that defendants acted in a manner so certain to cause injury that intent to cause injury must be imputed"), writ denied, 660 So. 2d 461 (La. 1995); *Speck* v. *Union Electric Co.*, 741 S.W. 2d 280, 283 (Mo. App. 1987) (affirming dismissal as to portion of wrongful death action that claimed employee's initial illness was due to exposure from asbestos, holding that it was barred by workers' compensation statute). Furthermore, in the jurisdictions that employ a "substantial certainty" analysis,[6] courts generally require "a standard of proof that falls only slightly short of that

[6] Fourteen states (Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Kentucky, Massachusetts, Nebraska, Pennsylvania, Rhode Island, Virginia, Wisconsin, Wyoming) either recognize no employer intentional tort exception to workers' compensation exclusivity or strictly limit application of the exception to cases of direct physical assault by an employer. See J. Lockhart, "Cause of Action Against Employer for Intentional Exposure of Employee to Hazardous Condition in Workplace," 7 Causes of Action 2d 197, § 17 (2023) (collecting cases).

Only twelve other states besides Connecticut (Alabama, Florida, Indiana, Louisiana, Missouri, New Jersey, New York, North Carolina, Ohio, South Dakota, Texas, West Virginia) hold that the intentional tort exception applies both in cases in which the employer actually intended to injure an employee and those in which the employer knew that an injury was substantially certain to occur as a result of the employer's actions. Id., § 7.

In the remaining majority of states that do recognize an intentional tort exception (Alaska, Arizona, Illinois, Maryland, Michigan, Minnesota, Missis-

required to show actual intent"; R. Wald, "Workers' Compensation—Employer's Intentional Misconduct," 48 Am. Jur. 1, Proof of Facts 2d § 2 (2023); and I am aware of none that have extended the exception to cover a case involving an occupational disease resulting from exposure to asbestos or a similarly toxic substance. See, e.g., *Namislo* v. *Akzo Chemical Co.*, 671 So. 2d 1380, 1382 (Ala. 1995) (affirming granting of summary judgment in action alleging, inter alia, that employer knew employee was exposed to harmful amounts of mercury and committed intentional fraud by causing her to believe no risk existed).

Turning to the present case, in the plaintiff's opposition to summary judgment, she argues that "[a]ny reasonable observer would have seen that asbestos was consistently killing some predictable percentage of workers exposed to the deadly material, even when exposures were 'slight.' Put another way, it was a 'substantial certainty' that a predictable percentage of exposed workers would die. Rogers was literally handed the necessary information and resources to understand all of this." In making this argument, the plaintiff relies on a letter, submitted as exhibit 11 to her opposition to summary judgment, that was written to Rogers in 1968, two years before Dusto was employed by Rogers, by one of its asbestos fiber suppliers, Johns-Manville, that included significant information regarding the very real dangers of asbestos, including a copy of an article in The New Yorker by a leading expert, Paul Brodeur, titled "The Magic Mineral." P. Brodeur, "The Magic Mineral," New Yorker, October 12, 1968, p. 117. Brodeur's article also clarified the dangers of asbestos exposure, providing statistical data regarding

sippi, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Utah, Vermont, Washington), they apply the exception only if an employer knowingly and deliberately injures an employee. Id., § 6.

resulting occupational diseases, including mesothelioma.

The premise of the plaintiff's summary judgment argument and her argument on appeal, however, is flawed because the substantial certainty test does not look to what a "reasonable observer" would know, but to the subjective belief of the defendant. *Lucenti* v. *Laviero*, supra, 327 Conn. 779. More fundamentally, evidence that a "predictable percentage of exposed workers" would, over some undefined period of time, develop some asbestos related occupational disease does not raise a genuine issue of material fact that the defendant engaged in the particular acts or omissions alleged by the plaintiff with the direct intent to injure or the knowledge or belief that Dusto was *substantially certain* to fall victim to those statistics.

Although I agree that the plaintiff has presented evidence from which a reasonable jury or fact finder could infer that the defendant acted intentionally when it suppressed information regarding the dangers of asbestos, ignored clear warnings to the contrary, and tolerated poor air quality standards in its facilities, my review of the record shows no evidence, even viewed in the light most favorable to the plaintiff, that reasonably could be viewed to demonstrate that Rogers acted knowingly with anywhere close to substantial certainty that Dusto, many years later, would contract mesothelioma or another asbestos related occupational injury. To satisfy the substantial certainty standard, an employer must both have "intended the act and have known that the injury was substantially certain to occur from the act." *Suarez* v. *Dickmont Plastics Corp.*, supra, 242 Conn. 280.

The majority opinion understandably relies upon our Supreme Court's discussion in *Lucenti*, in which our Supreme Court attempted to provide some guidance

regarding "the kind of evidence that would allow for an inference that an employer subjectively believed that [an] employee injury was substantially certain to follow its actions." *Lucenti* v. *Laviero*, supra, 327 Conn. 780. Our Supreme Court, which found a series of decisions from New Jersey instructive, endorsed four nonexclusive factors for consideration by courts evaluating "whether [an] employer knew of a substantial certainty of employee harm . . . ."[7] (Footnote omitted; internal quotation marks omitted.) Id., 781. These "*Lucenti* factors" were not set forth as a legal test but only as an analytical tool, and their relative applicability necessarily will vary depending upon the particular circumstances of each case. For example, as the majority acknowledges, the fourth factor—whether there was any affirmative disabling of safety devices—has no applicability under the facts of this case. Because *Lucenti* was not an asbestos exposure case and did not involve an occupational injury, the usefulness of the *Lucenti* factors in resolving the present appeal is, in my view, greatly diminished.

I am acutely aware of the considerable harm suffered by Dusto and his family as a result of his mesothelioma diagnosis, from which he eventually succumbed, and the real limitations—imposed by the legislature—that workers' compensation exclusivity places on legal compensation for such harm. As the New Jersey Supreme Court acknowledged in *Millison*, there is "a certain anomaly in the notion that employees who are severely ill as a result of their exposure to asbestos in their place

[7] Specifically, our Supreme Court noted with favor that "New Jersey courts consider factors such as: (1) prior similar accidents related to the conduct at issue that have resulted in employee injury, death, or a near-miss, (2) 'deliberate deceit' on the part of the employer with respect to the existence of the dangerous condition, (3) 'intentional and persistent' violations of safety regulations over a lengthy period of time, and (4) affirmative disabling of safety devices." (Footnote omitted.) *Lucenti* v. *Laviero*, supra, 327 Conn. 782.

of employment are forced to accept the limited benefits available to them through the Compensation Act. Despite the fact that the current system sometimes provides what seems to be, and at times doubtless is, a less-than-adequate remedy to those who have been disabled on the job, all policy arguments regarding any ineffectiveness in the current compensation system as a way to address the problems of industrial diseases and accidents are within the exclusive province of the legislature." *Millison* v. *E.I. du Pont de Nemours & Co.*, supra, 101 N.J. 179–80.

In Connecticut, the legislature enacted workers' compensation legislation that included a broad exclusivity provision with no express exceptions for intentional torts of the employer. See General Statutes § 31-284 (a). The legislature also elected to include occupational illnesses within the types of injuries that are compensable under the act and thus intended to be subject to the exclusivity provision. I am mindful that courts, in recognizing and applying common-law exceptions to legislation, must do so with great caution, and any such exception should be construed as narrowly as possible so as not to frustrate the intent of the legislature.

I conclude on the basis of my review of the summary judgment record and consideration of the facts and circumstances, both undisputed and reasonably inferred, that the plaintiff has failed to raise a genuine issue of material fact that Rogers knew Dusto's illness was a substantially certain result of its actions. Accordingly, I would affirm the trial court's decision to grant summary judgment on the ground that the plaintiff's suit against Rogers is barred by the exclusivity provision of the act. I therefore cannot join the majority with respect to part I of the opinion.

I respectfully dissent as to part I of the majority opinion and concur as to part II.

PETER REK ET AL. *v.* KIRK PETTIT ET AL.
(AC 45210)

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

Syllabus

The plaintiffs, the legal guardians of C, a minor child, appealed to this court from the December, 2021 judgment of the trial court issuing certain orders regarding visitation between the defendant maternal grandparents and C. The plaintiffs subsequently amended their appeal to include a challenge to the trial court's denial of their motion for a mistrial and their motion to open and vacate the judgment. While this appeal was pending, the trial court granted the plaintiffs' motion to terminate visitation between the defendants and C, and no appeal was taken from that judgment. *Held* that, because the plaintiff's appeal was moot, this court lacked subject matter jurisdiction and, accordingly, the appeal was dismissed: because the trial court rendered judgment terminating visitation between the defendants and C while this appeal was pending, there no longer was any practical relief that this court could grant by addressing the merits of the plaintiffs' appeal, and, even if this court were to conclude that the trial court improperly entered the visitation related orders in question or that it failed to render judgment in accordance with statute (§ 51-183b), a remand to the trial court for further proceedings would be futile, as no actual controversy remained regarding visitation between the defendants and C; moreover, contrary to the plaintiffs' claim that it was unclear whether a portion of the trial court's December, 2021 order regarding therapy for C remained in effect after visitation was terminated, it was apparent that, when read in the context of the evidentiary hearing, that portion of the order was plainly intertwined with the visitation issues before the trial court and was, therefore, mooted when the court terminated visitation; furthermore, the collateral consequences exception to the mootness doctrine did not apply, as the plaintiffs failed to show that there was a reasonable possibility, rather than mere conjecture, that the issue of the defendants' standing to seek visitation would arise in the future, as the defendants did not avail themselves of their right to appellate review or reconsideration by the trial court regarding the judgment terminating visitation, and the plaintiffs also failed to show that there was a reasonable possibility that they would suffer reputational harm as a result of certain statements by the trial judge in a ruling made in connection with the December, 2021 visitation orders, as the trial judge's statements of which the plaintiffs complained were more expressions of frustration with the plaintiffs than factual findings of malfeasance on their part and any collateral consequences stemming from those isolated statements were speculative at best, particularly when considered in light of the undisputed fact

that the plaintiffs ultimately were found in contempt due to their failure to comply with the trial judge's visitation orders.

Argued May 11—officially released October 24, 2023

Procedural History

Action seeking to modify the terms of a visitation agreement, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the court, *Coleman*, *J.*, rendered judgment granting the plaintiffs' motion to modify visitation and issued certain orders; thereafter, following an evidentiary hearing, the court, *Hon. Eric D. Coleman*, judge trial referee, reversed its previous orders and issued new orders, from which the plaintiffs appealed to this court; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion for a mistrial, and the plaintiffs filed an amended appeal; thereafter, the court, *Hon. Eric D. Coleman*, judge trial referee, denied the plaintiffs' motion to open and vacate, and the plaintiffs filed a second amended appeal; subsequently, the court, *Rapillo*, *J.*, granted the plaintiffs' motion to terminate visitation between the defendants and the minor child. *Appeal dismissed.*

Megan L. Wade, with whom was *James P. Sexton*, for the appellants (plaintiffs).

Opinion

ELGO, J. This appeal concerns the propriety of the December 15, 2021 judgment of the trial court issuing certain orders regarding visitation between the defendants, Kirk Pettit and Charlotte Pettit, and Caleb, a minor child.[1] On appeal, the plaintiffs, Peter Rek and Carisa Rek, the legal guardians of Caleb, claim that the court (1) lacked subject matter jurisdiction to issue those orders, (2) improperly denied their motion to open and vacate the December 15, 2021 judgment, and (3) improperly

[1] The defendants are Caleb's maternal grandparents.

denied their motion for a mistrial due to the court's failure to render judgment in accordance with General Statutes § 51-183b.

While this appeal was pending, the trial court granted the plaintiffs' motion to terminate visitation between the defendants and Caleb. When no appeal was taken from that judgment, this court invited the parties to file supplemental briefs on the issue of whether the present appeal is moot. Having considered that issue of subject matter jurisdiction in light of the foregoing, we conclude that the plaintiffs' appeal is moot and dismiss the appeal.

The relevant facts are not in dispute. On August 8, 2016, the Superior Court for Juvenile Matters, *Dooley, J.*, appointed the plaintiffs as legal guardians of Caleb and approved a visitation agreement between the plaintiffs and the defendants. That agreement, which was entered as an order of the court, specifically provided that enforcement or modification thereof would be in family court. On November 29, 2016, the plaintiffs filed the underlying action seeking to modify the terms of the visitation agreement. The defendants, in turn, filed an objection and a motion for contempt. As this court noted in *Rek* v. *Pettit*, 214 Conn. App. 854, 280 A.3d 1260, cert. dismissed, 345 Conn. 969, 285 A.3d 1126 (2022), protracted litigation between the parties followed. Id., 857.

Relevant to this appeal is the judgment rendered by the court, *Hon. Eric D. Coleman*, judge trial referee, on December 15, 2021, following a three day evidentiary hearing on the issue of the parties' compliance with existing visitation orders. The court at that time issued various orders regarding visitation between the defendants and Caleb and the appointment of a therapist to facilitate such visitation. The court also suspended Caleb's treatment with his personal therapist, Patricia Levesque.

On December 28, 2021, the plaintiffs filed a motion for a mistrial with the trial court predicated on the court's

failure to render a timely decision pursuant to § 51-183b.[2] The plaintiffs commenced the present appeal on January 3, 2022. Approximately three weeks later, the court denied the plaintiffs' motion for a mistrial and the plaintiffs thereafter filed an amended appeal with this court to include a challenge to that determination.

On November 14, 2022, the plaintiffs filed a motion to open and vacate the December 15, 2021 judgment and related orders on the ground that the court lacked subject matter jurisdiction to issue them pursuant to *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002), and General Statutes § 46b-59. After hearing argument from the parties, the court orally denied that motion on December 8, 2022. The plaintiffs then filed a second amended appeal to challenge the court's denial of their motion to open and vacate.

The plaintiffs filed their appellate brief with this court on January 30, 2023. On March 7, 2023, the defendants filed a notice of their intent not to file an appellate brief in this appeal. This court thereafter heard oral argument from the plaintiffs' counsel on May 11, 2023.

While this appeal was pending, the plaintiffs filed a motion with the trial court to terminate visitation between the defendants and Caleb. The court, *Rapillo*, *J.*, held a two day hearing in March, 2023, and issued a memorandum of decision on July 11, 2023, in which it concluded that, "based on the testimony of the guardian ad litem, the therapists and [Caleb] himself, the court cannot conclude that mandating visitation [with the defendants] is in the

[2] General Statutes § 51-183b provides: "Any judge of the Superior Court and any judge trial referee who has the power to render judgment, who has commenced the trial of any civil cause, shall have power to continue such trial and shall render judgment not later than one hundred and twenty days from the completion date of the trial of such civil cause. The parties may waive the provisions of this section." See also *Waterman* v. *United Caribbean, Inc.*, 215 Conn. 688, 693, 577 A.2d 1047 (1990) ("a late judgment is merely voidable, and not void" under § 51-183b).

best interest of this young man. . . . [It] is in [Caleb's] . . . best interest and the evidence is sufficient to show that he would suffer psychological harm by being forced to engage in further efforts at reunification with the [defendants]." The court thus granted the plaintiffs' motion and ordered that "[v]isitation with the defendant[s] . . . is terminated immediately."

When the appeal period passed without the filing of an appeal by any party to challenge the propriety of that judgment, this court invited the parties to file supplemental briefs on the issue of mootness. See *Chief of Police* v. *Freedom of Information Commission*, 68 Conn. App. 488, 491 n.4, 792 A.2d 141 (2002) ("in matters involving subject matter jurisdiction, we have exercised our discretion in determining whether to order parties to brief the issue or to decide the issue in lieu of such an order"). We now conclude that the present appeal is moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . In other words, where the question presented is purely academic, we must refuse to entertain the appeal." (Citation omitted; internal quotation marks omitted.) *Harris* v. *Harris*, 291 Conn. 350, 354–55, 968 A.2d 413 (2009).

The present appeal concerns the propriety of the orders issued by the court on December 15, 2021, regarding

visitation between the defendants and Caleb and the appointment of a therapist to facilitate such visitation. Because the trial court rendered judgment terminating visitation between the defendants and Caleb while this appeal was pending, there no longer is any practical relief that this court can grant by addressing the merits of the plaintiffs' appeal. Even if we were to conclude that the trial court improperly entered the visitation related orders in question or that the court failed to comply with the 120 day rule of § 51-183b, a remand to the trial court for further proceedings would be futile, as no actual controversy remains regarding visitation between the defendants and Caleb.

In their supplemental brief, the plaintiffs submit that the present appeal is not moot for two reasons. They first contend that, because the court's July 11, 2023 judgment "*only* concerns termination of visitation, the December 15, 2021 order terminating the therapeutic relationship between Caleb and Levesque appears to remain in effect."[3] (Emphasis in original.) They argue that "[i]t is not clear that the July 11, 2023 order terminating visitation explicitly voids Judge Coleman's order regarding Levesque, because that order was not directly related to the visitation orders." The record before us belies that claim. At the hearing held on August 16, 2021, Levesque offered her professional opinion that forcing Caleb to participate in therapy with the defendants would "further traumatize him"[4] and that it was not advisable to engage another

[3] To be clear, the court did not *terminate* Caleb's relationship with Levesque. Rather, it ordered that "[t]he psychotherapy sessions and any other contacts between [Caleb and Levesque] shall be suspended until further order of the court."

[4] As Levesque explained, Caleb "has consistently expressed that he does not want to have a relationship with [the defendants]. He's afraid of them and what they could possibly do. So, for the people that he trusts, whether it's the [plaintiffs], myself or whomever, to put him in that position would not only traumatize him . . . but it could compromise his trust with the adults who care for him."

therapist for purposes of facilitating visitation with the defendants. After counsel for the parties concluded their respective examinations, the court proceeded to question Levesque extensively with respect to how her work with Caleb affected the court's visitation orders.[5] The court also asked Levesque if her purpose at any time was "to facilitate the visitation between Caleb and [the defendants] that was a part of the stipulated agreement reached in Juvenile Court," to which Levesque replied that she was not "involved" with the defendants but rather was providing therapeutic treatment to Caleb.

In light of that questioning, during closing argument counsel for the defendants sought to modify the defendants' proposed orders to seek removal of Levesque "from this boy's life."[6] At the conclusion of the hearing, the court noted its concern that "the professionals that are involved" were not "getting the job done" and then ordered, in its subsequent memorandum of decision, that "[t]he psychotherapy sessions and any other contacts between [Caleb and Levesque] shall be suspended until further order of the court." When read in the context of the evidentiary hearing held on June 1 and 28, and August 16, 2021, that order plainly was intertwined with the visitation issues before the court, as this court has held.[7]

[5] Among the questions Judge Coleman posed to Levesque were the following: (1) "So it was you that decided that the [defendants] should not exchange any writings with Caleb?" (2) "Was it you that decided that telephone contact between the [defendants] and Caleb [was] not appropriate?" (3) "And was it you that decided that the . . . fun time meetings were [no] longer appropriate?" And (4) "[a]nd was it you that provided that the provision for visits between the [defendants] and Caleb one time per week was not appropriate?"

[6] Both the plaintiffs' counsel and the guardian ad litem for Caleb opposed that request.

[7] In its March 8, 2022 order on the defendants' postjudgment motion for a protective order, the trial court specifically found that its December 15, 2021 decision constituted a "visitation order" and, thus, was not subject to an automatic appellate stay. The plaintiffs subsequently challenged the propriety of that determination in a motion for review filed with this court. In our published decision on that motion, this court agreed with the trial court's conclusion that its December 15, 2021 orders "are visitation orders that are

Accordingly, when the court terminated visitation between the defendants and Caleb on July 11, 2023, it effectively mooted the December 15, 2021 order suspending therapy sessions with Levesque.

The plaintiffs also claim that the "collateral consequences" exception to the mootness doctrine applies. "[T]o invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not." (Internal quotation marks omitted.) *Putman* v. *Kennedy*, 279 Conn. 162, 169, 900 A.2d 1256 (2006).

In this regard, the plaintiffs allege that, "[g]iven the lengthy litigation in this case," there is a reasonable possibility that the issue of the defendants' standing to seek visitation will arise again in the future. We do not agree. The record indicates, and no one doubts, that the defendants love their grandson, who was six years old when this litigation commenced.[8] He is now thirteen and repeatedly has indicated, in written statements admitted into evidence as exhibits and testimony before the trial court earlier this year, that he does not wish to have contact with the defendants. When the trial court terminated visitation between the defendants and Caleb, it specifically found that Caleb "would suffer psychological harm by being forced to engage in further efforts at reunification with the [defendants]." The defendants thereafter did not avail themselves of their right to appellate review of that determination, nor did they seek reconsideration by the trial

not automatically stayed pursuant to Practice Book § 61-11 (c)." *Rek* v. *Pettit*, supra, 214 Conn. App. 856.

[8] At the June 28, 2021 hearing, the guardian ad litem testified that, whenever she spoke with Caleb, she explained that the reason for this litigation "is that the [defendants] love him and want to have a relationship with him." She further testified that, in her conversations with the defendants, they emphasized that "they don't want to force anything on [Caleb]."

court.[9] Indeed, there has been no further activity in this case since Judge Rapillo ordered that visitation be terminated immediately. For that reason, we believe the prospect of further litigation between the parties regarding the defendants' visitation with Caleb is mere conjecture at this time.

The plaintiffs also allege that they will suffer the collateral consequence of reputational harm; see *Williams* v. *Ragaglia*, 261 Conn. 219, 233, 802 A.2d 778 (2002); due to certain statements made by Judge Coleman in his March 8, 2022 ruling on the defendants' motion for a protective order, which also appear in his December 7, 2022 articulation of that ruling.[10] In our view, the comments of which the plaintiffs complain were more expressions of frustration with the plaintiffs than factual findings of malfeasance on their part.[11] We conclude that any collateral

[9] The defendants also did not file an appellate brief or a supplemental brief in this appeal.

[10] The plaintiffs also take issue with certain factual findings allegedly made by Judge Rapillo in her July 11, 2023 judgment. The propriety of those findings is not properly before us, as the plaintiffs have not amended their appeal to challenge that July 11, 2023 judgment. See Practice Book § 61-9 ("[s]hould the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision"); *Brown* v. *Brown*, 190 Conn. 345, 350–51, 460 A.2d 1287 (1983) (refusing to consider appellant's challenge to court ruling rendered subsequent to filing of appeal because appellant did not amend appeal to include that claim); *Carlson* v. *Carlson*, 210 Conn. App. 501, 511, 270 A.3d 181 (2022) (same). In this regard, we note that, in addition to granting the plaintiffs' motion to terminate visitation in her July 11, 2023 decision, Judge Rapillo also found the plaintiffs in contempt "in that they wilfully and intentionally violated a valid [and] unambiguous court order" and ordered them to pay the defendants $2500 in attorney's fees. Although the plaintiffs twice have amended the present appeal with this court, they have not done so to challenge any aspect of the July 11, 2023 judgment.

[11] In its March 8, 2022 memorandum of decision on the defendants' motion for a protective order to ensure compliance with the court's December 15, 2021 orders, the court stated that the plaintiffs had "inexplicably engaged the services" of Levesque and that they had "not done all that they could have done" to ease Caleb's anxiety to facilitate visitation with the defendants. The court further noted that "[t]he plaintiffs' good faith in this [visitation] matter" had been called into question due to a variety of factors, including "their

consequences stemming from those isolated statements are speculative at best, particularly when considered in light of the undisputed fact that the plaintiffs ultimately were found in contempt due to their failure to comply with Judge Coleman's visitation orders. See id., 227 (collateral consequences standard requires showing of "more than an abstract, purely speculative injury"). Because the plaintiffs have not met their burden of demonstrating "that there is a reasonable possibility that prejudicial collateral consequences will occur"; *State* v. *McElveen*, 261 Conn. 198, 208, 802 A.2d 74 (2002); we conclude that the plaintiffs' appeal is moot.

The appeal is dismissed.

In this opinion the other judges concurred.

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resistance" to the visitation orders imposed by the court on December 15, 2021. In addition, the court found that "[n]either . . . Levesque nor [licensed clinical social worker] Kristan McLean nor [the guardian ad litem] testified that they personally observed [Caleb] exhibit the so-called severe symptoms of anxiety . . . ."