NORMA KERLIN *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF GREENWICH ET AL.
(AC 45082)

Alvord, Cradle and Suarez, Js.

Syllabus

The plaintiff filed three separate appeals with the trial court, one from the decision of the defendant planning and zoning board of appeals affirming the decision of the defendant planning and zoning commission approving an application for the subdivision of a property in Greenwich, and two from the decisions of the commission approving two applications by the defendant P Co. for coastal area management site plans. The three applications had been submitted by the defendant P Co. for property located in an area accessible only by a private access drive that was approximately twelve feet wide. In its applications for coastal area management site plans, P Co. dedicated a fifty foot right-of-way through the subject property to comply with the front and side yard depth

requirements found in the building zone regulations of the Greenwich Municipal Code (§§ 6-203 (b) and 6-205 (a)). The right-of-way was comprised of the twelve foot wide private access drive plus land to the east, most of which lay in tidal wetlands. P Co.'s applications did not propose the expansion of the existing twelve foot wide street but added two pull off areas that would not be located within the coastal wetland area. The trial court consolidated the three appeals and rendered judgments dismissing the appeal from the decision of the board affirming the commission's approval of the subdivision application and sustaining the plaintiff's appeals challenging the commission's decision to approve the coastal area management site plan applications. Specifically, the court held that the commission and the board had considered the environmental impact of the activity proposed within the applications. The court also held that § 6-203 (b), establishing minimum front and side yard depths on the basis of streets at least fifty feet wide, was not satisfied by P Co.'s proposed incorporation of the fifty foot right-of-way because that land partially encompassed wetlands and was not intended to be used as an actual roadway. Thereafter, the court granted P Co.'s motion for reargument and reconsideration and altered its judgments to dismiss the plaintiff's appeals in their entirety. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The trial court properly interpreted and applied the building zone regulations of the Greenwich Municipal Code to the facts before it: permitting the use of the entire fifty foot right-of-way, including the wetland portions not intended to be used for travel, as a paper street to measure compliance with § 6-203 (b) of the building zone regulations did not yield an absurd or unworkable result or thwart the purpose of the regulation, namely, to establish a point of measurement to satisfy the required depths of front and side yards; moreover, as the plaintiff did not provide any evidence demonstrating that the commission misapplied the building zone regulations and that its decisions approving the coastal area management site plans were unreasonable, arbitrary or illegal, the trial court's reliance on the right-of-way to satisfy the building space requirements of § 6-203 (b) did not constitute an abuse of its discretion.
2. The plaintiff could not prevail on her claim that the trial court erred in upholding the approvals of the subdivision and coastal area management site plan applications in the absence of evidence that the board or commission considered the impacts of the right-of-way on coastal resources: contrary to the defendants' claim, the plaintiff's appeal from the approval of the subdivision application was not moot, as this court was capable of granting relief to the plaintiff if it were to conclude that the trial court's determination that substantial evidence existed to show that the board had considered coastal impacts in ruling on the subdivision application was improper; moreover, substantial evidence in the record supported the court's conclusion that the commission and the board considered the environmental impact of the activity proposed in

the applications, including the testimony of consultants regarding the impacts of the proposed activity on coastal areas, evidence from the Department of Environmental Energy and Protection regarding the proposed activity's compliance with Connecticut Coastal Management Act policies, and reports from P Co.'s consultant and a memorandum from the Greenwich conservation commission regarding the environmental impact of the proposed activity; furthermore, it was undisputed that P Co.'s proposed activity did not contemplate expanding the private street beyond the addition of two gravel pull offs not located in the wetlands, the impact of which the commission considered, thus, the commission was not required to consider the impact of expanding the private street into the wetlands.

Argued November 9, 2022—officially released October 31, 2023

Procedural History

Appeal from the decision of the defendant board of appeals affirming the decision of the named defendant to approve a subdivision application and appeals from the decisions of the named defendant approving two applications for coastal area management site plans, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the appeals were consolidated and tried to the court, *Genuario*, *J.*; judgments sustaining in part and dismissing in part the plaintiff's appeals; thereafter, the court, *Genuario*, *J.*, granted the motion of the defendant Palmer Island, LLC, to reargue or reconsider and rendered judgments dismissing the plaintiff's appeals, from which the plaintiff appealed to this court. *Affirmed.*

Diana E. Neeves, with whom was *Brian R. Smith*, for the appellant (plaintiff).

Brendon P. Levesque, *with whom* was *John K. Wetmore*, town attorney, for the appellees (named defendant et al.).

Brendon P. Levesque, with whom, on the brief, were *Ryan P. Barry* and *W. I. Haslun II*, for the appellee (defendant Palmer Island, LLC).

Opinion

SUAREZ, J. The plaintiff, Norma Kerlin, appeals from the judgments of the trial court dismissing her appeals from (1) the decision of the defendant Planning and Zoning Board of Appeals of the Town of Greenwich (board), in which the board upheld the decision of the defendant Planning and Zoning Commission of the Town of Greenwich (commission) to approve an application for a subdivision and (2) the decision of the commission to approve two applications for coastal area management (CAM) site plans. The subdivision application and the two CAM applications were submitted to the commission by the defendant Palmer Island, LLC (applicant).[1] The plaintiff, who lives near the subject property, claims that the court erred (1) in upholding the commission's approval of the CAM site plan applications, misinterpreting a regulation and misapplying it to the facts before it, and (2) in upholding the two lot subdivision and the CAM site plan application approvals in the absence of evidence that the board or commission considered the impacts of the right-of-way on coastal resources. We affirm the judgments of the trial court.

The following facts, as were found by the court or were otherwise undisputed, and procedural history are relevant to our resolution of this appeal. The rulings at issue in this appeal were brought before the trial court by way of three appeals, all of which were based on the same record.[2] The court consolidated the appeals

[1] The applicant, the board, and the commission are named as defendants in the underlying actions. In this opinion, we will refer to these entities collectively as the defendants. In this appeal, the board and the commission adopted the applicant's brief pursuant to Practice Book § 67-3.

[2] In *Kerlin* v. *Planning & Zoning Commission*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6047732-S, the plaintiff appealed from the commission's approval of a CAM site plan application for lot 2 in the subdivision. In *Kerlin* v. *Planning & Zoning Commission*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6047735-S, the plaintiff appealed from the commission's approval of a CAM

for trial. The court found that "[t]hese three appeals involve a decision by the [board] approving a subdivision of the subject property into two lots and two appeals from the [commission], each one approving a . . . [CAM] site plan. Each approved site plan proposes a single-family residential development on each of the lots newly created by the [commission's] subdivision approval. The subdivision proposal and the CAM site plan proposals were heard by the [commission] at the same time and the records before the [commission] for all three matters are the same. A somewhat unique provision of the Greenwich Town Charter requires subdivision approval for a division of a lot into two or more lots. Two of the appeals were taken in timely fashion after the [commission] approved the CAM site plans for development of the single-family residential properties. However, under the Greenwich Town Charter, the [board] is authorized to review and uphold or reverse the [commission's] action on a subdivision application. In this case, the entire record before the [commission] was made a part of the record before the [board]. Thus, the appeal of the subdivision approval is taken from the action of the [board], but the appeals from the CAM site plan approvals are taken from the decisions of the [commission].

"The subject property is located in Greenwich's R-12 zone, a residential zone requiring a minimum lot size of 12,000 square feet, as well as a coastal overlay zone. The subject property is located in an area of Greenwich known as Palmer Island. Palmer Island is not currently an island; it is currently accessed by a private access drive that is approximately twelve feet in width. This

site plan application for lot 1 in the subdivision. In *Kerlin* v. *Planning & Zoning Commission*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-20-6047733-S, the plaintiff appealed from the board's decision upholding the commission's approval of a plan to subdivide the subject property into two lots.

private access drive has existed since at least 1926 and probably for many years before that. Prior to the subject subdivision, Palmer Island consisted of six lots, including the subject parcel, each of which supports a single-family residence.

"According to the application of the . . . [applicant], the entire project falls within the coastal hazard area as defined by the Federal Emergency Management Agency (FEMA). Immediately to the west of the property is Long Meadows Creek, a tidal water course. Tidal wetlands are located within the western and eastern boundary lines of the property. In the eastern section of the property most of the wetland is 'high marsh habitat.' In the western section it is mostly 'low marsh habitat.' The three applications taken together will result in the removal of an existing single-family residential structure located on the subject parcel which in many respects is nonconforming with current governmental regulations, including FEMA regulations, and the development of two new single-family residential structures, one on each of the two newly approved lots.

"The subject property is the northernmost parcel on Palmer Island and is the first parcel that one encounters as one drives up to and through Palmer Island to any of the other residential lots. All of the residential lots, including the subject lot on Palmer Island, are accessed not by a public road but by the private access drive, named South End Court. Title to the private access drive, until it reaches the southerly border of the subject property, is owned by [the applicant], but the five other Palmer Island parcels have rights of ingress and egress as well as other rights over and under that access drive. The remainder of the access drive beyond the southerly border of the subject property is owned by the Palmer Island Association, Inc. . . . The access drive is the sole means of ingress and egress from Palmer Island

and at least some, if not all, of the Palmer Island residential lots receive their water supply by virtue of plastic water lines located beneath the access drive.

"The plaintiff, in her capacity as one of the three cotrustees of the Sander-Buchman Marital Trust, is a title holder of one of the single-family residential lots generally identified as 26 South End Court. The private access drive in all of its locations is known generally as South End Court. The subject property is identified as 10 South End Court. There is one lot between the plaintiff's property and the subject property. Accordingly, the plaintiff's property does not abut the [applicant's] property."[3]

On May 2, 2019, the applicant filed the current applications at issue with the commission. Specifically, the applicant sought approval of a subdivision application to subdivide the subject parcel into two lots and the approval of two CAM site plan applications to remove the existing buildings and construct two new single-family homes, one on each of the two newly created lots. To comply with the front yard depth requirement of the Greenwich building zone regulations; see Greenwich Municipal Code, c. 6, art. 1, §§ 6-203 (b) and 6-205 (a) (December, 2017) (building zone regulations);[4] the applicant, in the CAM site plan applications, dedicated a fifty foot wide right-of-way through the subject parcel, which was comprised of the existing twelve foot wide private road and the land to the east of it. Most of the land dedicated to the right-of-way that is located

[3] The court determined that the plaintiff was both classically and statutorily aggrieved, and it determined that the plaintiff had standing pursuant to General Statutes § 22a-19 to bring the appeals to the extent that she raised environmental issues within the purview of that enactment. These aspects of the trial court's decision are not challenged in the present appeal.

[4] All references herein to the building zone regulations are to the version of the regulations updated through December, 2017, unless otherwise indicated.

to the east of the private road lies in tidal wetlands. The applicant did not contemplate expanding the private road into the wetlands. Rather, as reflected in the applications, the only expansions the applicant proposed making to the private road were two pull offs that would be added to the north and west sides of the road; both pull offs were to have gravel surfaces, and neither would be located in a wetland area.

On August 20, 2019, the commission approved the CAM site plan applications after finding that they complied with the applicable regulations. In approving the applications, the commission found that the site plan applications were subject to §§ "6-5, 6-13–6-15, 6-111,[5] 6-139.1, and 6-205" of the building zone regulations. (Footnote added.) The commission also approved the subdivision application. The plaintiff appealed the commission's decision approving the subdivision application to the board, which denied the appeal on November 25, 2019. The board concluded that the application satisfied "all the town of Greenwich building zoning regulations and subdivision regulations . . . ." As stated previously in this opinion, under multiple docket numbers, the plaintiff appealed to the Superior Court from the decision of the board, as well as from the decisions of the commission approving the CAM site plan applications. See footnote 2 of this opinion.

Relevant to the claims raised in this appeal, the plaintiff argued to the court that (1) "[the commission] erred as a matter of law by failing to require compliance with

[5] Chapter 6, art. 1, § 6-111, of the Greenwich Municipal Code provides in relevant part: "(c) (A) Coastal Site Plan review and approval by the Planning and Zoning Commission and, as applicable, by the Planning and Zoning Board of Appeals shall be required for all projects and activities as defined in Section 22a-105 (b) of the Connecticut Coastal Management Act fully or partially within the Coastal Overlay Zone. These activities shall include but not limited to all applications for building permits, subdivisions, rezoning, special permits, special exceptions, variances, and Municipal Improvements. . . ."

§ 6-203 (b) [of the building zone regulations] regarding the access drive" and (2) the commission and the board failed to consider the impact of imposing a right-of-way over coastal wetlands as required under § 6-111 of the building zone regulations and General Statutes §§ 22a-105 and 22a-106. The court, *Genuario*, *J.*, held a hearing on the matter on October 8, 2020. On January 27, 2021,[6] the court issued a memorandum of decision in which it sustained the plaintiff's appeals insofar as they challenged the commission's decision to approve the CAM site plan applications.[7] The court also dismissed the appeal from the board's decision affirming the commission's decision approving the subdivision application.[8] With respect to the latter part of its judgments, the court concluded that the board and the commission had considered the environmental impact of the subdivision of the subject property. With respect to the CAM site plan applications, the court rejected the applicant's argument that § 6-203 (b) of the building zone regulations[9] could be satisfied by relying on the entirety of the fifty foot right-of-way in the site plan because the right-of-way in the site plan partially encompasses wetlands and was not intended to be developed as an actual roadway.

In its memorandum of decision, the court stated: "Both of the proposed lots which were subject to CAM site plan review are located in Greenwich's R-12 zone.

[6] The court's memorandum of decision is dated January 27, *2020*. We interpret this to be a scrivener's error as the trial court record indicates that the court issued its memorandum of decision on January 27, *2021*.

[7] These appeals were brought under Docket Nos. CV-19-6047732-S and CV-19-6047735-S.

[8] This appeal was brought under Docket No. CV-20-6047733-S.

[9] Chapter 6, art. 1, § 6-203, of the Greenwich Municipal Code is titled "Open Spaces, Height and Bulk of Buildings," and provides in relevant part: "(b) The required minimum front yard depths and street side yard widths are based on streets at least fifty (50) feet wide. For every foot less in width of a street the required depths and widths of front yards and street side yards respectively are to be increased six (6) inches."

The primary use contemplated in the R-12 zone is single-family residential dwellings on lots exceeding 12,000 square feet. Both of the proposed lots substantially exceed 12,000 square feet. The R-12 zone requires a thirty-five foot front yard. It also requires a ten foot side yard but an aggregate of the two side yards equal to not less than twenty-five feet. A front yard is defined in the [regulations] as 'an open space across the full width of the lot between the front wall of the principal building and the front lot line . . . .' [Greenwich Municipal Code, c. 6, art. 1, §] 6.5 (54) (December, 2017). The two site plans evidence that the principal buildings comply with this thirty-five foot front yard requirement and the side yard requirement. However, [§] 6-203 (b) [of the building zone regulations] requires an increase in the front and side yards under certain circumstances. [Section] 6-203 (b) provides: 'The required minimum front yard depths and street side yard widths are based on streets at least fifty (50) feet wide. For every foot less in width of a street the required depths and widths of the front yards and street side yards respectively are to be increased six (6) inches.' The Greenwich [building zone] regulations define street as '[s]treet shall mean and include all public and private streets, highways, avenues, boulevards, parkways, roads and other similar ways.' [Greenwich Municipal Code, c. 6, art. 1, §] 6-6 (46) [December, 2017]. . . .

"The subdivision regulations of Greenwich set forth a requirement for minimum street width in § 6-124 [of the building zone regulations]. Section 6-124 reads as follows: 'Minimum Street Width. (a) No plot shall be subdivided into lots and no lot shall be improved with one (1) or more buildings unless all such lots shall front upon a street having a minimum width of fifty (50) feet. (b) This limitation however shall not apply where the maximum width of a street in front of a given plot or lot on February 1, 1926 is less than fifty (50) feet.'

"The parties do not seem to disagree and there is certainly evidence in the record from which the [commission] could have found that South End Court existed before February 1, 1926, and is therefore exempt from the fifty foot requirement in the subdivision regulations. However, no such exemption is applicable to the requirements of § 6-203 (b) [of the building zone regulations], which provides for increasing setbacks in the event a street upon which a house is being built is less than fifty [feet] wide.

"The homes on Palmer Island, including the homes to be built on the new proposed lots, are accessed by South End Court, which is a relatively narrow private right-of-way. The improved right-of-way, allowing for vehicular access, is approximately twelve feet wide. The [applicant's] property lies on both sides of South End Court. The proposed new subject lots lie to the west of South End Court and contain upland area suitable for construction of a single-family home. The area proposed for development, including driveways, are in upland areas. The area to the east of South End Court, directly across from [the] proposed lots is, for the most part, tidal wetlands. The [applicant] is the titleholder, not only of the subject proposed lots, but of the land below South End Court and of much of the tidal wetlands to the east of South End Court. The applications include with them proposals and commitments of the [applicant] to dedicate a right-of-way in the area of the existing South End Court and in the area to the east of the existing South End Court that is fifty feet wide. The vast majority of this newly dedicated right-of-way area to the east of the existing South End Court lies in the tidal wetlands. The [applicant] is also dedicating the balance of the tidal wetlands which it owns to the east of South End Court to open space.

"The [applicant] argues that, because it has dedicated land allowing for a fifty foot right-of-way [§] 6-203 (b)

[of the building zone regulations] does not require increased setbacks. The [commission] in approving the site plans agreed with the [applicant]. The plaintiff argues that to dedicate land in a tidal wetland that cannot realistically be used for street purposes is a 'sham' and cannot result in the exemption of the [applicant] from the provisions of [§] 6-203 (b). If the [applicant] is not exempt from this provision, then the [applicant] must accommodate a larger front yard and side yard and [its] approved CAM site plans do not comply with the Greenwich zoning regulations because their front yards and side yards are not consistent with the more extensive front and side yards required by § 6-203 (b). Put more succinctly, if § 6-203 (b) applies, the [applicant's] site plans do not comply with the required front yard/side yards and the [commission's] decision approving them must be reversed. If § 6-203 (b) does not apply, then the site plans do comply with the Greenwich zoning regulations, and the decision of the [commission] must be affirmed (at least with regard to this issue). In this regard, there is not much dispute as to the facts relating to the proposed right-of-way. The [applicant's] plans evidence that the vast majority of the newly dedicated right-of-way area lies to the east of South End Court in the tidal wetlands. According to the [applicant's] consultant, those tidal wetlands flood several times a month. They are by all accounts a sensitive environmental area and home to various plant and animal species. Moreover, the [applicant's] application demonstrates that most of this area is at an elevation of 5.5 feet above sea level or lower and, therefore, lies within the coastal area jurisdiction of the [Department of Energy and Environmental Protection (department)]. The [applicant's] application defines these tidal wetlands as a 'high marsh habitat.' Neither the [applicant] nor the [commission] suggested that there could actually be road or street improvements built in these tidal

wetlands. As one commissioner put it, 'the roadway, the paved area is not *obviously* going—is not into the tidal wetland area.' . . .

"The [applicant] argued and the [commission] agreed that the [applicant] could avoid the application of § 6-203 (b) [of the building zone regulations], which increases the front and side yard requirements by dedicating this area of tidal wetlands as a fifty foot right-of-way. There is no indication anywhere in the record that the [commission] considered the impact on CAM resources, if there was even a modest infringement into the tidal wetlands for street improvement. Presumably, the [commission's] failure to consider any impact . . . of road widening on coastal resources resulted from its conclusion that such an infringement into the tidal wetlands was not contemplated or even a possibility, now or in the future.

"The [applicant] argues and the [commission] agreed that there are many roadways in Greenwich [that] are within a fifty foot right-of-way but upon which the paved or improved road is considerably narrower. Greenwich, in those situations, apparently does not require the application of § 6-203 (b) [of the building zone regulations]. This court does not need to decide and certainly does not suggest or imply that § 6-203 (b) requires increased front or side yards in the more typical situation posited by the [applicant] and observed by the [commission] in which an upland area is dedicated to a right-of-way. In those situations, the unimproved area is available for road expansion or improvement in the event the town considers such improvement necessary or desirable and chooses to widen a given roadway for public safety or other applicable reasons within their discretion. In the typical situation, the dedicated right-of-way is available for improvements if needed in the future. Indeed, and while beyond the scope of this decision, the court can envision many reasons why the town

or citizens of a neighborhood within the town would prefer not to have a street widened for the entire width of a fifty foot right-of-way.

"The more narrow issue before the court is whether or not the regulations [that] require [an] increased front or side yard when a road is less than fifty [feet] wide is applicable when a right-of-way is granted in an area that is under the jurisdiction of the [department] and in an area where all of the parties seem to agree that there is no intention to invade the tidal wetlands with a street improvement. The application additionally raises the question of whether or not, at a minimum, the [commission] was required to consider the impact of any potential road widening within the right-of-way on coastal area management resources." (Citations omitted; emphasis in orginal.)

The court explained that it had considered this court's analysis in *Field Point Park Assn., Inc.* v. *Planning & Zoning Commission*, 103 Conn. App. 437, 930 A.2d 45 (2007). The court stated that "[t]he lesson of *Field Point Park Assn., Inc.* . . . is that the proper construction of the [building zone] regulations must be read in context of all the regulations, and the evident purpose and policy and recognized principles of zoning in general. . . . In order to avoid the increased front and side yards contemplated by § 6-203 (b) of the [building zone] regulations, the dedication of a right-of-way must, at a minimum, be on property that has a somewhat feasible opportunity to be used for the purposes that streets are to be used for. The [applicant's] dedication of tidal wetlands under the jurisdiction of [the department] cannot meet that purpose."

Finally, the court stated that "[its] conclusion with regard to the application of § 6-203 (b) [of the building zone regulations] impacts only the approval of the coastal area site plans by the [commission]. Because

the Greenwich subdivision regulations expressly allow the subdivision of a lot on a roadway that was built before 1926 and is less than fifty feet wide, this conclusion does not affect the [commission's] or the [board's] approval of the subdivision itself. The subdivision could well be approved based upon a twelve foot street, which the [commission] and the [board] clearly did without any consideration of widening the street into the tidal wetlands. . . . [T]here is ample evidence in the record from which the [commission] and the [board] could have determined that there was not a significant adverse impact on the coastal area resources from the subdivision itself. Accordingly, the court's ruling in this regard requires a reversal of the [commission's] approval of the coastal area site plans but does not require a reversal of the approval of the subdivision."

On February 16, 2021, following the court's decision, the applicant filed a motion to reargue. The applicant acknowledged, as the court found, that "there was no . . . proposal before [the commission] to extend the road further into the tidal wetlands and therefore no environmental impact to consider, other than that occasioned by the actual proposal before it, which the [commission] and [the department] found satisfactory." Although the applicant did not draw the court's attention to any evidence in the record, it stated that the court had improperly speculated that improvements to South End Court cannot be made in the future. The applicant stated that its original application provided for the widening of the road but that it revised its application "when it became apparent that no one . . . *preferred* to have the road widened or felt it necessary or desirable." (Emphasis in original.)

The applicant also argued that the court improperly had assumed that the purpose of § 6-203 (b) of the

building zone regulations was solely related to the construction of developed or improved roads. The applicant argued that §§ 6-203 (b) and 6-124[10] "were intended in pertinent part to require such width to further the separation of structures and to establish the edge of the right-of-way as the proper line from which to measure setbacks, rather than the edge of the paved or improved portion of the road. This is evidenced by the fact that [§] 6-203 (b) requires greater setbacks when a right-of-way is deficient in width, not the dedication of additional property to the right-of-way or the widening of the road." On February 26, 2021, the court granted the motion to reargue over the plaintiff's objection and heard arguments on April 6, 2021.

Upon reconsideration, the court reversed, in part, its prior decision and concluded that, in its original decision, it had improperly "focused on what it perceived to be the primary purpose of § 6-203 (b) [of the building zone regulations], which the court determined was to provide an area for expansion of a roadway should the town determine, sometime in the future, that conditions required expansion of the roadway. . . . The court based its conclusion on its determination that the purpose of § 6-203 (b) was to provide the municipality with an ability to utilize the additional property within the dedicated street lines for future street widening without creating nonconformities. . . . However, upon reconsideration, the court believes it overlooked another important purpose of § 6-203 (b) besides the potential provision for land widening purposes. One of the significant purposes of setback requirements is to

[10] Chapter 6, art. 1, § 6-124, of the Greenwich Municipal Code provides: "(a) No plot shall be subdivided into lots and no lot shall be improved with one (1) or more buildings unless all such lots shall front upon a street having a minimum width of fifty (50) feet.

"(b) This limitation however shall not apply where the maximum width of the street in front of a given plot or lot on February 1, 1926 is less than fifty (50) feet."

require buildings to be built a certain distance from each other. . . . The purpose of § 6-203 (b) is at least in part to ensure that houses continue to be built the same distance from each other as contemplated in the building zone regulations regardless of the width of the actual roadway surface. This explains the reason why [under § 6-203 (b)] the setback is increased on each side of the roadway by [one] half [of one] foot for every foot that the roadway fails to meet the fifty foot requirement. . . .

"The court had overlooked this important purpose of § 6-203 (b) [of the building zone regulations] and particularly the language used within it which provides support for the [commission's] conclusions. Because the purpose of requiring a certain distance between the construction of buildings on opposite sides of the road is served by the dedication of a fifty foot right-of-way, regardless of the likelihood that it will be utilized for actual roadway purposes, [the commission's] determination that § 6-203 (b) does not require an extended setback provides for a reasonable and rational result." (Citations omitted.) Thereafter, the court altered its judgments to dismiss the plaintiff's appeals in their entirety.

The plaintiff then filed a petition for certification to appeal with this court. On October 28, 2021, after this court granted the plaintiff's petition for certification to appeal, she filed her appeal to this court.[11] Additional

[11] General Statutes § 8-9 provides: "Appeals from zoning commissions and planning and zoning commissions may be taken to the Superior Court and, upon certification for review, to the Appellate Court in the manner provided in section 8-8."

General Statutes § 8-8 (o) provides: "There shall be no right to further review except to the Appellate Court by certification for review, on the vote of three judges of the Appellate Court so to certify and under such other rules as the judges of the Appellate Court establish. The procedure on appeal to the Appellate Court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the Superior Court unless modified by rule of the judges of the Appellate Court."

facts and procedural history will be set forth as necessary.

Before addressing the plaintiff's claims, we first set forth the deferential standard of review that applies to the administrative decisions made by zoning entities. "In traditional zoning appeals, the scope of judicial review depends on whether the zoning commission has acted in its legislative or administrative capacity. . . . In considering either an application for a special permit or an application for subdivision approval, a commission acts in an administrative capacity. . . . Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. The [Appellate Court and the] trial court . . . decide whether the board correctly interpreted the section [of the regulations] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the board is endowed with a liberal discretion, and its action is subject to review by the courts only to determine whether it was unreasonable, arbitrary or illegal." (Citations omitted; internal quotation marks omitted.) *Drewnowski* v. *Planning and Zoning Commission*, 220 Conn. App. 430, 447–48, 299 A.3d 259 (2023).

"[U]pon appeal, the trial court reviews the record before the board to determine whether it has acted fairly or with proper motives or upon valid reasons . . . . We, in turn, review the action of the trial court. . . . The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn

"This court's grant of certification in a zoning matter is considered 'extraordinary relief,' granted only in limited circumstances." *Murphy* v. *Zoning Board of Appeals*, 86 Conn. App. 147, 155, 860 A.2d 764 (2004), cert. denied, 273 Conn. 910, 870 A.2d 1080 (2005).

the board's decision . . . ." (Citation omitted; internal quotation marks omitted.) *Raymond* v. *Zoning Board of Appeals*, 76 Conn. App. 222, 229, 820 A.2d 275, cert. denied, 264 Conn. 906, 826 A.2d 177 (2003). "Courts are not to substitute their judgment for that of the board . . . and decisions of local boards will not be disturbed so long as honest judgment has been reasonably and fairly exercised after a full hearing." (Internal quotation marks omitted.) *Horace* v. *Zoning Board of Appeals*, 85 Conn. App. 162, 165, 855 A.2d 1044 (2004).

I

The plaintiff first claims that, in upholding the commission's approval of the CAM site plan applications, the court improperly interpreted the building zone regulations and misapplied the regulations to the facts before it. Specifically, she argues that the court improperly concluded that the area of tidal wetlands dedicated to the right-of-way could be used to constitute a "street" under § 6-203 (b) of the building zone regulations and thereafter relied on the width of that "street" for purposes of calculating the setback requirement of proposed buildings. The plaintiff's claim challenges both the interpretation and application of § 6-203 (b). We will address each of these issues in turn.

We note that, in the site plan applications, one of the new lots has a front yard depth of thirty-five feet, and the other has a front yard depth of forty-one feet. On the basis of their location in the R-12 zone, the building zone regulations require the front yards to be at least thirty-five feet deep if the street that they border is fifty feet wide. Greenwich Municipal Code, c. 6, art. 1, §§ 6-203 (b) and 6-205 (a) (December, 2017).

The plaintiff argues that an interpretation of the building zone regulations permitting the entire width of a right-of-way to be considered as a "street" ignores the commonly understood meaning of the word "street"

and would lead to a bizarre and unreasonable result. As the plaintiff observes, in this case, the dedicated right-of-way at issue is, in part, actually comprised of wetlands that are not planned to be used as a road that is suitable for vehicular travel. In support of her position, the plaintiff argues that the definition of the word "street" under § 6-5 (46) of the building zone regulations,[12] and under this court's decision in *Field Point Park Assn., Inc.* v. *Planning & Zoning Commission*, supra, 103 Conn. App. 444, supports her interpretation.

The plaintiff argues that the court's interpretation of § 6-203 (b) of the building zone regulations in its initial decision must control because it is more plausible than its interpretation of the regulation in the decision that it rendered after granting the applicant's motion for reconsideration. In the plaintiff's view, the court's interpretation in the decision it rendered after granting the motion for reconsideration creates a "bizarre and unreasonable result of designating tidal wetlands as part of a 'street.' " She asserts that this interpretation is inconsistent with a cohesive reading of the building zone regulations.

The plaintiff also states that, contrary to what the applicant argued in its motion to reargue, the commission's approval of the right-of-way as laid out in the applications is not authorized by statute, the town charter, or the subdivision regulations. "It follows [she argues] that the provisions cited in the applicant's motion to reargue cannot be read to broadly authorize the commission to vary the application of . . . [the] minimum street width requirements [of § 6-203 (b) of the building zone regulations] on a case-by-case basis."

The defendants argue that, in *Park Construction Co.* v. *Planning & Zoning Board of Appeals*, 142 Conn. 30,

[12] Chapter 6, art. 1, § 6-5 (46), of the Greenwich Municipal Code defines "street" as "all public and private streets, highways, avenues, boulevards, parkways, roads, and other similar ways."

37, 110 A.2d 614 (1954), our Supreme Court addressed the identical question of law at issue in the present appeal, namely, whether the entirety of a fifty foot right-of-way was properly considered a "street" for purposes of the Greenwich building zone regulations when only a portion of the right-of-way was developed as a road suitable for travel. On the basis of our Supreme Court's prior interpretation of what constitutes a "street" for purposes of the Greenwich building zone regulations, they assert that we should give deference to the commission's construction of the regulation at issue in this appeal. Alternatively, the defendants assert that, if the interpretation of the word "street" under the building zone regulations is a matter of first impression, zoning laws are to be " 'construed against rather than in favor of a restriction,' " and that, when there are two equally plausible interpretations of a regulation, this court may give deference to the construction the agency charged with enforcement of the regulation adopts. Therefore, the defendants contend that a zoning agency is given liberal discretion in the interpretation of its own regulations and applying the law to the facts, and, thus, courts may only review an agency's decision as to whether it was unreasonable, arbitrary or illegal.

The defendants then argue that the plain language of the regulation supports the court's conclusion that the entire width of a dedicated right-of-way may be used to satisfy the building spacing requirements of § 6-203 (b) of the building zone regulations. They further argue that, if the plain meaning of the word "street" is ambiguous, the regulatory purpose of § 6-203 (b) supports a conclusion that the word "street" includes rights-of-way. The regulatory purpose of § 6-203 (b), the defendants argue, is to ensure that buildings are constructed a certain distance apart to limit housing density. In support of this position, they point to how § 6-203 (b)'s requirement that "[f]or every foot less [than fifty feet]

in width of a street the required depths and widths of front yards and street side yards respectively are to be increased [by] six (6) inches," results in a consistent minimum distance between two buildings on opposite sides of a street regardless of whether the street bordering these properties consists of a traveled roadway that is narrower than fifty feet. Therefore, they assert, it is not material, for the purpose of § 6-203 (b), that a portion of the land dedicated to a right-of-way is not accessible for vehicular travel. The defendants contend this reading of the regulation is consistent with the building zone regulations in their entirety.

A

Having discussed the parties' arguments, we now turn to the issue of whether the court properly concluded that the commission interpreted the building zone regulations correctly. We begin by setting forth additional principles governing our review of this issue.

"Because the interpretation of the regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Ordinarily, [appellate courts afford] deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply

governing principles of law." (Internal quotation marks omitted.) *Putnam Park Apartments, Inc.* v. *Planning & Zoning Commission*, 193 Conn. App. 42, 47, 218 A.3d 1127 (2019).

Our Supreme Court has observed that "regulations must be interpreted in accordance with the principle that a reasonable and rational result was intended . . . and the words employed therein are to be given their commonly approved meaning." (Internal quotation marks omitted.) *Rapoport* v. *Zoning Board of Appeals*, 301 Conn. 22, 34, 19 A.3d 622 (2011). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Moon* v. *Zoning Board of Appeals*, 291 Conn. 16, 21, 966 A.2d 722 (2009).

"Regulations must be viewed to form a cohesive body of law, and they must be construed as a whole and in such a way as to reconcile all their provisions as far as possible. . . . This is true because particular words or sections of the regulations, considered separately, may be lacking in precision of meaning to afford a standard sufficient to sustain them. . . . When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre

results. . . . [W]e consider the statute as a whole with a view toward reconciling its parts in order to obtain a sensible and rational overall interpretation." (Citations omitted; internal quotation marks omitted.) *Field Point Park Assn., Inc.* v. *Planning & Zoning Commission*, supra, 103 Conn. App. 440–41. Stated otherwise, whether the board properly interpreted and applied the relevant regulations depends upon whether it read the particular regulations "in the context of all of the regulations, their evident purpose and policy, and recognized principles of zoning in general." Id., 441.

We first address the defendants' assertion that the commission's interpretation of the regulation is entitled to deference because it has already been subject to judicial scrutiny in our Supreme Court's decision in *Park Construction Co.* Although we agree with the defendants that an agency's interpretation of a regulation it is empowered by law to carry out is entitled to deference when the interpretation has been subject to judicial review; see *Putnam Park Apartments, Inc.* v. *Planning & Zoning Commission*, supra, 193 Conn. App. 47; we are not convinced that the commission's interpretation has been subject to such review.

In *Park Construction Co.*, our Supreme Court held that the Greenwich building zone regulations' definition of a "street" included the entire width of a fifty foot wide right-of-way even though only twenty feet of the right-of-way had actually been developed for vehicular traffic.[13] *Park Construction Co.* v. *Planning & Zoning*

[13] In *Park Construction Co.*, our Supreme Court analyzed a previous version of the Greenwich building zone regulations. *Park Construction Co.* v. *Planning & Zoning Board of Appeals*, supra, 142 Conn. 37 n.3. The definition of the term "street" in the prior regulations, however, was materially identical to the definition found in the both the December, 2017 and the current building zone regulations. See Greenwich Municipal Code, c. 6, art. 1, § 6-5 (46) (December, 2017); Greenwich Building Code, c. 6, art. 1, § 6-5 (46) (2023).

Board of Appeals, supra, 142 Conn. 38–40. This determination was necessary to resolve the issue of whether the parcel that the right-of-way benefitted had access to a public road as required by the building zone regulations. Id. Unlike *Park Construction Co.*, the present appeal concerns the issue of whether, for purposes of compliance with § 6-203 (b) of the building zone regulations, the commission may consider the entire width of a fifty foot right-of-way, which includes wetlands that are neither suitable nor intended to be used for vehicular traffic, to be a "street." It is significant that, in *Park Construction Co.*, it was not a point of contention, nor was it a subject of the court's analysis, whether the undeveloped portion of the right-of-way was suitable to be developed and used for roadway purposes. Nor was the issue of what constitutes a "street" relevant to compliance with § 6-203 (b). Given these distinctions between the issues in the present case and *Park Construction Co.*, the commission's interpretation of the regulations at issue cannot be said to have been the subject of judicial scrutiny in *Park Construction Co.*, and, therefore, the commission's interpretation is not entitled to deference.

As previously discussed, pursuant to § 6-203 (b) of the building code regulations, "[t]he required minimum front yard depths and street side yard widths are based on streets at least fifty (50) feet wide. For every foot less in width of a street the required depths and widths of front yards and street side yards respectively are to be increased six (6) inches." A review of the plain language of § 6-203 (b) reflects that the subject of the regulation is not the size, design, or location of streets, but front yard depths and side yard widths. To the extent that the regulation refers to the streets and the width of streets, it does so not to mandate the feasibility, usability, or size of streets, but to establish a point of

measurement so that the front yard depth and side yard width requirements may be satisfied.

We recognize that, in the present case, the commission was presented with a site plan application that reflected an actual street that was twelve feet in width, which street was compliant with applicable zoning regulations. The CAM site plan applications submitted to the commission, and pertaining to the same development scheme, however, reflected a fifty foot right-of-way that encompassed the existing street. Relying on the fifty foot right-of-way, which cannot be said to be arbitrary in light of the fifty foot requirement for streets that are not subject to the grandfathering clause, does not lead to an irrational or bizarre result for, as the court recognized, it serves the spacing requirements of § 6-203 (b) of the building zone regulations.

Thus, we agree with the trial court that, in light of the evident purpose of § 6-203 (b) of the building zone regulations, it is not dispositive whether the "street," by which the required sizes of front yards and side yards are measured, exists as a street that is capable of vehicular travel or whether it exists as a paper street that is designated as a right-of-way on a site plan. "Black's Law Dictionary (8th Ed. 2004) [p. 1462] defines a paper street or road as '[a] thoroughfare that appears on plats, subdivision maps, and other publicly filed documents, but that has not been completed or opened for public use.' But see *Simone* v. *Miller*, 91 Conn. App. 98, 101 n.1, 881 A.2d 397 (2005), citing *Burke* v. *Ruggerio*, 24 Conn. App. 700, 707, 591 A.2d 453 (describing paper street as one never paved, not developed as public road, not used by abutting owners for access, no formal dedication for use as highway and no formal or informal acceptance by town), cert. denied, 220 Conn. 903, 593 A.2d 967 (1991) . . . ." (Citation omitted.) *Kores* v. *Calo*, 126 Conn. App. 609, 616 n.6, 15 A.3d 152 (2011). Land dedicated as a street or road on a site plan, though

unpaved, unimproved, and inaccessible to traffic, "is what is commonly referred to as a 'paper street.' " *Meder* v. *Milford*, 190 Conn. 72, 73, 458 A.2d 1158 (1983); see also *Katz* v. *West Hartford*, 191 Conn. 594, 596, 469 A.2d 410 (1983) (noting that balance of unimproved land that was designated as street on subdivision plan constitutes " 'paper street' ").

The necessity for the use of paper streets on site plans, such as that at issue in the present case, which by definition depict things that do not exist, in an attempt to evaluate whether a proposed development complies with applicable regulations, is readily apparent. It strains logic to suggest that the utilization of and the reliance on a paper street is improper in a situation such as the present one. We are not persuaded that the utilization of a paper street as a tool to obtain compliance with the spacing requirements of § 6-203 (b) of the building zone regulations, as described, undermines the decision of the administrative agency entrusted to interpret the regulation and apply it.

Pursuant to § 6-124 (a) of the building zone regulations, "[n]o plot shall be subdivided into lots and no lot shall be improved with one (1) or more buildings unless all such lots shall front upon a street having a minimum width of fifty (50) feet." Despite the fact that, in the present circumstance, compliance with § 6-124 (a) was not required pursuant to the grandfathering provision in § 6-124 (b),[14] permitting the use of a paper street to measure compliance with § 6-203 (b) of the building zone regulations does not yield an absurd or unworkable result. Nor does it thwart the purpose of the regulation, namely, to mandate the depths of front yards and the widths of side yards and, thus, limit building density to the extent required by the existence of

[14] See footnote 10 of this opinion.

a fifty foot wide street as is mandated under the regulations.

The requirement of § 6-203 (b) of the building zone regulations that a building's setback from the road be an additional six inches for every foot the street is narrower than fifty feet ensures that a minimum distance is maintained between buildings regardless of a street's width. The fact that the regulation does not require the yards that a street borders to be usable for vehicular traffic supports the conclusion that its purpose does not concern whether the land between the buildings is suitable for travel, vehicular or otherwise. We therefore conclude, on the basis of our interpretation of § 6-203 (b), that the entire width of a right-of-way that is comprised, in part, of wetlands that are not intended to be used for travel may properly be considered a street under the building zone regulations.

Furthermore, this interpretation of the building zone regulations favors development and, therefore, comports with the principle of zoning interpretation that, "[w]here more than one interpretation of language is permissible, restrictions upon the use of lands are not to be extended by implication . . . [and] doubtful language will be construed against rather than in favor of a restriction . . . ." (Internal quotation marks omitted.) *Wihbey* v. *Zoning Board of Appeals*, 218 Conn. App. 356, 383, 292 A.3d 21, cert. granted, 346 Conn. 1019, 292 A.3d 1254 (2023). For the foregoing reasons, we conclude that the court correctly interpreted § 6-203 (b) of the building zone regulations.

B

Having concluded that the court did not misinterpret the building zone regulations, we now turn to the portion of the plaintiff's claim in which she asserts that the court misapplied them. In addressing this portion of the claim, we recount that, "[i]n applying the law to

the facts of a particular case, the [court] is endowed with a liberal discretion, and its decision will not be disturbed unless it is found to be unreasonable, arbitrary or illegal." (Internal quotation marks omitted.) *Raymond* v. *Zoning Board of Appeals*, supra, 76 Conn. App. 229. To the extent that the plaintiff claims that the court misapplied the building zone regulations, she provides us with nothing to demonstrate that the commission's decision was unreasonable, arbitrary, or illegal. Without demonstrating that the commission did not reasonably and fairly come to an honest judgment with respect to the matter before it, we have no basis on which to conclude that the court misapplied the building zone regulations when it approved the applications. See *Taylor* v. *Planning & Zoning Commission*, 218 Conn. App. 616, 631, 293 A.3d 357 ("[c]ourts are not to substitute their judgment for that of the board, and . . . the decisions of local boards will not be disturbed as long as honest judgment *has been reasonably and fairly made after a full hearing*" (emphasis in original)), cert. denied, 346 Conn. 1022, 293 A.3d 897 (2023). The plaintiff has not demonstrated that the court's reliance on the right-of-way reflected an abuse of its discretion.

II

Next, the plaintiff claims that the court erred in upholding the subdivision and CAM site plan application approvals in the absence of evidence that the board or commission considered the impacts of the right-of-way on coastal resources.

A

We must first address a mootness argument that was raised by the defendants, namely, that, insofar as the plaintiff appeals from the approval of the subdivision application as opposed to the CAM site plan applications, the appeal is moot, in part, because the plaintiff failed to challenge the application of the grandfathering

clause of § 6-124 (b) of the building zone regulations, which the applicant characterizes as an independent basis that the trial court relied on for upholding the approval of the subdivision.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) *that the determination of the controversy will result in practical relief to the complainant*. . . . [I]t 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. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Peterson* v. *Torrington*, 196 Conn. App. 52, 57–58, 229 A.3d 119, cert. denied, 335 Conn. 921, 232 A.3d 1104 (2020).

As our Supreme Court has observed, "[w]here an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

As a preliminary matter, the plaintiff asserts that, on appeal, she has challenged the subdivision approval because "the grandfathering clause is irrelevant to the issue of whether the trial court properly affirmed the subdivision approval when the zoning authorities had not fully considered the potential impacts of the approved plan on coastal resources." We note that, in its January 27, 2020 decision, the court expressly found that there was substantial evidence that the subdivision and CAM site plan applications "were consistent with coastal area management policies" and that both entities had taken into account both the impact of the proposed development and coastal management concerns. In the present claim, the plaintiff plainly challenges the trial court's finding that such an impact had been considered.

We disagree that the trial court's application of the grandfathering clause to the facts of the present case was an independent basis for its ruling. Here, the plaintiff challenges the sole basis on which the trial court dismissed the appeal from the approval of the subdivision application, namely, its conclusion with respect to whether the board had given due consideration to coastal management area policies and the impact of the proposed subdivision. The record reflects that such approval was governed by a broad regulatory scheme that encompassed coastal area management policies. Thus, we are able to grant relief to the plaintiff if we conclude that the trial court improperly determined that there was substantial evidence to show that the board had considered coastal impacts in ruling on the subdivision application. For the foregoing reasons, we disagree that the appeal from the approval of the subdivision application is moot.

B

Having resolved the jurisdictional issue raised by the defendants, we now turn to the merits of the plaintiff's

claim that the court erred in upholding the subdivision and site plan application approvals in the absence of evidence that the board or commission considered the impacts of the right-of-way on coastal resources. The plaintiff argues that the court could not affirm the decision of the board given that it found that the commission never considered the impact on coastal resources that would result from the expansion of the private road within the right-of-way from the existing twelve feet to the entire fifty feet that the proposed right-of-way encompasses under the applications. We are not persuaded.

The following facts are relevant to the resolution of this issue. As set forth in the applications, the proposed activity before the commission would leave the existing twelve foot wide private road at its current width, with the exception of two pull -off areas that were to be added on the north and west sides of the road, neither of which would be located within a coastal wetland area. The private road would not be expanded into the wetland area encompassed within the right-of-way.

The commission had before it reports assessing the compliance of the proposed activity, the applications outlined with coastal management policies and the impact the proposed activity would have on coastal resources from the applicant's consultant, professional soil and wetland scientist, William Kenney. Kenney stated in his report that the pull off areas that would be added to the private road would not have an adverse environmental impact due to their gravel surfaces, which would allow for the infiltration of stormwater. On the basis of an email from the department, the commission found that the "[department] found the [proposed activity] to be consistent with Connecticut Coastal Management Act policies . . . ." The Greenwich conservation commission stated concerns about the environmental impact of the proposed activity in a

memorandum, which the commission acknowledged in its approval of the applications.

At the commission's public hearings on the applications, the impact of the proposed activity on coastal resources was discussed extensively. Members of the commission voiced concerns about the size of the buildings proposed to be built and heard testimony from the applicant's counsel and Kenney stating that decreasing the size of the buildings would have no environmental benefit. Kenney further discussed that, as part of the site plans, the applicant would add plants to the subject parcel in order to provide a buffer for the coastal wetlands, as the plantings would filter runoff and mitigate erosion. The commission also heard from the plaintiff's expert, Robert Sonnichsen, a professional engineer, regarding concerns that approval of the subdivision plan would have an adverse impact on coastal resources. Sonnichsen also stated that he believed the buffers Kenney had discussed would not be effective in protecting the coastal wetlands.

The plaintiff argues that, on the basis of the court's finding that the commission never considered the impact of widening the existing private road into the portion of the right-of-way containing coastal wetlands, the court erred when it affirmed the approval of the right-of-way in the tidal wetlands. The defendants argue that the commission needed to only consider the "proposed activity" to comply with the statutes and building zone regulations and, therefore, the commission did not need to consider the impact of expanding the existing private road into the wetlands because this was not part of the proposal. The defendants further argue that substantial evidence in the record supports the court's conclusion that the environmental impact of the proposed activity was considered. We agree with the defendants.

Before addressing the plaintiff's claim, we first set forth our standard of review. The parties disagree over which standard of review applies. The plaintiff argues that the proper standard of review for this claim is the "clearly erroneous" standard, while the defendants assert the proper standard of review is the "substantial evidence" standard. Our case law is clear that "[j]udicial review of zoning commission determinations is governed by the substantial evidence standard . . . ." *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, 176 Conn. App. 570, 600, 170 A.3d 73 (2017); see *Sams* v. *Dept. of Environmental Protection*, 308 Conn. 359, 374, 63 A.3d 953 (2013); *Hescock* v. *Zoning Board of Appeals*, 112 Conn. App. 239, 248, 962 A.2d 177 (2009).

Under the substantial evidence standard, "[c]onclusions reached by [the] commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the trial court would have reached the same conclusion . . . but whether the record before the [commission] supports the decision reached. . . . If a trial court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The [commission's] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given. . . .

"The substantial evidence standard is one that is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard

of review. . . . In that vein, our Supreme Court has described the substantial evidence standard as an important limitation on the power of the courts to overturn a decision of an administrative agency . . . and to provide a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous action. . . .

"In an appeal from a decision of a zoning commission, the burden of overthrowing the decision . . . rest[s] squarely upon the appellant." (Citations omitted; internal quotation marks omitted.) *St. Joseph's High School, Inc.* v. *Planning & Zoning Commission*, supra, 176 Conn. App. 600–602.

"[Sections] 22a-105 (e) and 22a-106 (b) direct municipalities, when reviewing a coastal site plan, to determine whether the potential adverse impacts of the proposed activity on coastal resources are acceptable. The term 'coastal resources' is defined, generally, as the coastal waters of the state and their natural resources, and shoreline marine and wildlife habitats. General Statutes § 22a-93 (7)." *Sams* v. *Dept. of Environmental Protection*, supra, 308 Conn. 406. Section 6-111 of the building zone regulations requires the commission to review and approve all coastal site plans and "consider . . . the potential effects . . . of the proposed activity on coastal resources . . . ." Greenwich Municipal Code, c. 6, art. 1, § 6-111 (c) (D) (6) (b) (December, 2017).

The record reflects that, during public hearings on the applications, the commission heard from consultants regarding the impacts of the proposed activity on coastal resources. The consultants spoke both to the reasons that they believed the proposed activity would, and would not, have an adverse impact on the coastal environment. The commission also sought and received approval from the department regarding the proposed

activity's compliance with Connecticut Coastal Management Act policies. Furthermore, the commission had before it a report from the applicant's consultant and a memorandum from the Greenwich conservation commission regarding the environmental impact of the proposed activity. On the basis of the record and transcripts, there is substantial evidence to support the board's conclusion that the commission considered the environmental impact of the proposed activity. See *Hescock* v. *Zoning Board of Appeals*, supra, 112 Conn. App. 245–50 (record showing zoning board reviewed application with attached material demonstrating lack of impact on coastal resources, reviewed letter from environmental analyst, and heard from architect addressing environmental analyst's concerns, contained sufficient evidence for board to consider impact of development on coastal resources).

The plaintiff nonetheless argues that the court's finding that the commission did not consider the impact of widening the existing private road to the full width of the fifty foot right-of-way precluded the court from affirming the decision of the board. The plaintiff is mistaken as to what the statutes and building zone regulations require. Under §§ 22a-105 (e) and 22a-106 (b), and under § 6-111 of the building zone regulations, the commission was required to consider only the potential impact of the *proposed* activity on coastal resources. See *Sams* v. *Department of Environmental Protection*, supra, 308 Conn. 406. Here, it is not in dispute that the applicant's proposed activity did not contemplate expanding the private road beyond the addition of two gravel pull offs, the impact of which the commission considered. Thus, the commission was not required to consider activities beyond those proposed in the applications.

The plaintiff further argues that the approval of the fifty foot wide right-of-way "implies that the [entire]

right-of-way has been approved for use by vehicular and other traffic," and, therefore, the commission was required to consider the impact of widening the road into the coastal wetlands. In support of this, she points to the portion of the *Park Construction Co.* decision, in which our Supreme Court stated that, although expanding a road that passed through a right-of-way to the total width of the right-of-way would violate the zoning regulations, there could be no objection to the use of the private road to access the parcel which it benefitted because "the road exist[ed] as a fait accompli . . . ." *Park Construction Co.* v. *Planning & Zoning Board of Appeals*, supra, 142 Conn. 40.

We do not read *Park Construction Co.* to state that an area necessarily has been approved for vehicular traffic simply by virtue of its having been designated as a right-of-way. In *Park Construction Co.*, our Supreme Court did not state that the road designated for vehicular traffic could be expanded to the full fifty foot width of the right-of-way without approval from the commission. Rather, it stated that, regardless of whether the regulations permitted the expansion of the road to the full fifty foot width of the right-of-way, the development of the twenty foot wide road, as it existed, had been approved and, therefore, the use of the road to access the parcel that the right-of-way benefitted could not be contested. See id., 39–40. Apart from her reliance on *Park Construction Co.*, the plaintiff provides no support to substantiate her concern that if the town approves the right-of-way containing wetlands, then the wetland portion of it can be developed and used for vehicular travel without any prior approval from the relevant agencies. Accordingly, we are not persuaded that the commission's approval of the applicant's expansion of the right-of-way necessarily, as the plaintiff argues, implies that the wetlands within the right-of-way have been approved for traffic use.

The judgments are affirmed.

In this opinion the other judges concurred.

INTERNATIONAL ASSOCIATION OF EMTS AND PARAMEDICS, LOCAL R1-701 *v.* BRISTOL HOSPITAL EMS, LLC (AC 45498)

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

Syllabus

The defendant, an emergency medical service organization providing mobile intensive care, appealed to this court from the judgment of the trial court granting a motion filed by the plaintiff, a union representing certain employees of the defendant, to enforce a prior judgment of the court. The prior judgment confirmed an arbitration award reinstating an employee of the defendant, S, an emergency medical technician (EMT). The plaintiff and the defendant were parties to a collective bargaining agreement that provided for final and binding arbitration of disputes. After a complaint of sexual harassment was made against S, S was suspended pending an investigation. The plaintiff filed two grievances regarding the suspension, and, pursuant to the agreement, an arbitrator conducted a hearing on those grievances, issuing a decision in which she concluded that there was just cause for the defendant to suspend S pending an investigation, but that discharge was too harsh of a penalty for the proven misconduct. The arbitrator ordered S to be returned to his position but denied his request for back pay. The plaintiff filed an application to confirm the arbitration award, in which it did not challenge the arbitrator's decision to decline to award back pay to S, and the defendant filed an application to vacate the award, including with its application a letter from L, a medical doctor and medical director with the defendant, stating that S was not authorized to perform work that would require L's medical oversight, supervision, or direction based on his best medical judgment with regard to the health, safety, and general welfare of the individuals who receive care from the defendant. To work as an EMT, S was required by statute (§ 19a-180) to be appropriately and validly licensed or certified by the Department of Public Health to perform job duties and to secure and maintain medical oversight. Various state regulations (§§ 19a-179-12 and 19a-179-15) set forth L's responsibilities as a mobile intensive care medical director and the authority to withhold medical authorization from an individual such as S. Following

a hearing, the court denied the defendant's application to vacate the arbitration award and granted the plaintiff's application to confirm it. In the plaintiff's subsequent motion to enforce the judgment of the court confirming the arbitration award, it sought a finding that, although S had been reinstated, the defendant was acting in bad faith in refusing to allow S to return to work in light of L's letter withdrawing medical oversight of S. The plaintiff also sought attorney's fees, costs, and other relief. The court granted the plaintiff's motion to enforce the judgment, concluding that the withdrawal of medical supervision was pretextual and done in bad faith, ordering the defendant to immediately return S to work under L's supervision, or, "if not by [L], then by a new medical director." The court also awarded S back pay and awarded reasonable attorney's fees and costs to the plaintiff. On the defendant's appeal, *held*:

1. The trial court lacked subject matter jurisdiction to order the defendant to provide medical authorization and supervision to S through L or another medical director due to the plaintiff's failure to exhaust its administrative remedies: in granting the motion to enforce the judgment, the court concluded that L had acted improperly in withholding his medical authorization from S, an issue that arose only after the arbitration award had been issued, and, as such, that issue was not raised in the grievances filed by the plaintiff, was not part of the arbitration proceeding, and, in the initial trial court decision confirming the arbitration award, the issue of medical oversight was not addressed, thus, the issue of whether S was qualified to provide services as an EMT, which qualification requires that he have medical authorization, was a separate issue from his employment status with the defendant, and the discretion to withhold medical authorization from S was delegated to L as a medical director and subject to review by the department in an administrative hearing, such that the issue was not properly before the trial court; moreover, the futility exception to the exhaustion of administrative remedies doctrine did not apply to the plaintiff's claim for remedies because, in the event that the department were to determine that L acted outside the scope of his discretion, possible remedies provided by statute (§ 19a-11) authorize the department to issue an appropriate order to L to cease withholding medical authorization, which, when coupled with the arbitration award ordering S's reinstatement, could result in S being placed back on active duty, and the back pay and attorney's fees sought by the plaintiff, if available, resulted from issues arising after the issuance of the arbitration award and thus were not properly the subject of the plaintiff's motion to enforce that award, rather, the proper forum to resolve such issues was through the grievance process pursuant to the agreement.
2. The trial court was without authority to award attorney's fees and back pay as those issues were outside the scope of the arbitration award and were not properly before the trial court on a motion to enforce the judgment confirming that award; the arbitrator had expressly declined

to award back pay to S and the plaintiff did not challenge that determination in its application to confirm the award, and the arbitrator also did not address the issue of attorney's fees, as that issue was not raised by any party to the arbitration, and, as such, those issues were not properly before the court when acting on the plaintiff's motion to enforce the judgment confirming the arbitration award.

Argued April 4—officially released October 31, 2023

Procedural History

Application to confirm an arbitration award, brought to the Superior Court in the judicial district of New Britain, where the defendant filed an application to vacate the award; thereafter, the case was tried to the court, *Farley, J.*; judgment granting the plaintiff's application to confirm the arbitration award and denying the defendant's application to vacate; subsequently, the court, *Aurigemma, J.*, granted the plaintiff's motion to enforce the judgment, and the defendant appealed to this court. *Reversed*; *judgment directed.*

James F. Shea, with whom were *Justin E. Theriault*, and, on the brief, *Sara R. Simeonidis*, for the appellant (defendant).

Douglas A. Hall, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Bristol Hospital EMS, LLC, appeals from the judgment of the Superior Court granting the motion of the plaintiff, International Association of EMTs and Paramedics, Local R1-701, to enforce a prior judgment of the court confirming the arbitration award to reinstate an employee of the defendant. The defendant claims the court (1) lacked subject matter jurisdiction to require that medical authorization be given to the employee and (2) improperly awarded back pay and attorney's fees when those issues were not

properly before it.[1] We agree and, accordingly, reverse the judgment of the Superior Court.

The following facts and procedural history are relevant to this appeal. The plaintiff and the defendant were parties to a collective bargaining agreement (agreement) that provided for final and binding arbitration of disputes. The dispute at issue arose from an incident occurring on August 7, 2019, in which a complaint was made by a paramedic trainee assigned to a shift at Bristol Hospital in an ambulance staffed by Ryan Stanford, an emergency medical technician (EMT), and Art Bellemere, a paramedic. Stanford and Bellemere, who were unaware that the trainee could hear them from the backseat of the ambulance, engaged in sexually explicit dialogue throughout the day, which was not directed at the trainee. The defendant, an emergency medical service organization providing mobile intensive care, suspended Stanford on August 9, 2019, pending an investigation into the complaint of sexual harassment.

The plaintiff, a union representing certain employees of the defendant, including Stanford, filed two grievances regarding his suspension. Pursuant to the agreement between the parties, an arbitrator conducted a hearing on the grievances. On February 14, 2020, the arbitrator issued a decision, in which she concluded that there was just cause for the defendant to suspend Stanford pending an investigation, but that discharge was too harsh of a penalty for the proven misconduct. The arbitrator thus ordered that Stanford be returned to his position as an EMT but denied Stanford's request for back pay due to the seriousness of his misconduct.

The plaintiff filed an application to confirm the arbitration award, in which it did not challenge the arbitrator's decision to decline to award back pay to Stanford.

[1] In light of our resolution of these two claims, we need not reach the defendant's additional claim that the decision of the court was preempted by § 301 (a) of the Labor Management Relations Act, 29 U.S.C. § 141 et seq.

The defendant filed an application to vacate the arbitration award on public policy grounds. The defendant included with its application a letter from Andrew Lim, a medical doctor and medical director with the defendant. In that letter, Dr. Lim informed the director of the defendant that Stanford was not authorized as of March 9, 2020, "to perform work in any capacity that would require [Lim's] medical oversight, supervision, or direction . . . based on [Lim's] best medical judgment with regard to the health, safety, and general welfare of the individuals who receive care from [the defendant]."

Following a hearing on both applications, the court, *Farley, J.*, on October 12, 2021, denied the defendant's application to vacate the arbitration award and granted the plaintiff's application to confirm it. On November 24, 2021, the plaintiff filed a motion to enforce the judgment of the court confirming the arbitration award, in which it sought a finding that the defendant refused to comply with the judgment confirming the arbitration award and was acting in bad faith and for an improper purpose. In its prayer for relief, the plaintiff sought attorney's fees and costs, and "other relief as in law or equity may be appropriate." The plaintiff claimed that, although the defendant had advised the plaintiff that Stanford had been reinstated on November 12, 2021, it nevertheless refused to allow him to return to work in light of Dr. Lim's letter "withdrawing medical oversight of Stanford."

On April 26, 2022, the court, *Aurigemma, J.*, issued a memorandum of decision on the motion to enforce, in which it concluded that "the 'withdrawing' of medical supervision by Dr. Lim was wholly pretextual and done in bad faith" and ordered the defendant "to immediately reinstate the employment of . . . Stanford, which should include provision of medical supervision, if not by Dr. Lim, then by a new medical director." The court

also awarded Stanford back pay from February 14, 2020, the date of the arbitration award, and awarded the plaintiff reasonable attorney's fees and costs. This appeal followed.

I

The defendant first claims that the court erred in granting the motion to enforce the judgment to the extent that "the trial court lacked jurisdiction or authority to order a medical director to provide medical oversight to a specific individual under the medical director's supervision. The issue of medical control is properly reserved under Connecticut law to the discretion of Dr. Lim as the [defendant's] medical director, whose oversight is required for EMTs such as Stanford to provide services. Additionally, any challenge to the revocation of Stanford's medical control and direction was required to be redressed through [the Department of Public Health (department)] rather than through the courts. In the absence of Stanford's exhaustion of administrative remedies at [the department], the trial court lacked subject matter jurisdiction or authority to consider the issue of medical oversight or require the reinstatement of same." We agree.

We begin with our standard of review and relevant legal principles. "Because the exhaustion [of administrative remedies] doctrine implicates subject matter jurisdiction, [the court] must decide [it] as a threshold matter . . . . [Additionally] [b]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter. . . . Thus, exhaustion of remedies serves dual functions: it protects the courts

from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities. . . .

"[When] a statute has established a procedure to redress a particular wrong a person must follow the specified remedy and may not institute a proceeding that might have been permissible in the absence of such a statutory procedure. . . . [T]he requirement of exhaustion may arise from explicit statutory language or from an administrative scheme providing for agency relief." (Internal quotation marks omitted.) *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 208, 105 A.3d 210 (2014).

We begin our inquiry by examining the relevant statutes and regulations to determine whether there is an established administrative procedure for addressing an allegation that a medical director has improperly withheld medical authorization from an EMT. To work as an EMT, Stanford was required, among other things, to be appropriately and validly licensed or certified by the department to perform job duties and to "secure and maintain medical oversight, as defined in section 19a-175, by a sponsor hospital, as defined in section 19a-175." General Statutes § 19a-180 (g) (3). Medical oversight is defined as "the active surveillance by physicians of the provision of emergency medical services sufficient for the assessment of overall emergency medical service practice levels, as defined by state-wide protocols"; General Statutes § 19a-175 (25); and a sponsor hospital is defined as "a hospital that has agreed to maintain staff for the provision of medical oversight, supervision and direction to an emergency medical service organization and its personnel and has been approved for such activity by the Department of Public Health . . . ." General Statutes § 19a-175 (27). According to

§ 19a-179-12 (a) (6) (D) of the Regulations of Connecticut State Agencies, a sponsor hospital must, among other things, appoint a mobile intensive care medical director "who shall be responsible for the following . . . (ii) [a]ssurance of medical supervision and training of [mobile intensive care] personnel . . . [and] (iv) [w]ithholding of medical authorization and the recommendation of suspension of [mobile intensive care] personnel from the system when in the interest of patient care, in accordance with Sec. 19a-179-15 (c) of these regulations on licensure and certification." Mobile intensive care personnel, such as Stanford, "shall be under the supervision and direction of a physician at the sponsor hospital from which they are receiving medical direction"; Regs., Conn. State Agencies § 19a-179-12 (a) (4); and mobile intensive care services are under the control of the mobile intensive care director, which in this case was Dr. Lim. See Regs., Conn. State Agencies § 19a-179-12 (a) (5). Pursuant to § 19a-179-15 (b) of the Regulations of Connecticut State Agencies, a medical director "may withhold medical authorization from, and may recommend to [the Office of Emergency Medical Services] and the regional medical director the removal from practice of, any [mobile intensive care] level personnel or service when such personnel or service act in a manner which evidences incompetence, negligence, or otherwise poses a threat to public health or safety or which is contrary to medical direction."

In the present case, Dr. Lim, in the exercise of his medical judgment and sole discretion pursuant to § 19a-179-15 (b) of the regulations, withheld his medical authorization from Stanford on account of "the health, safety, and general welfare of the individuals who receive care from [the defendant]." There is an explicit and established procedure to redress a medical director's alleged improper withholding of medical authorization from an EMT, which involves the filing of a petition with the department. Pursuant to § 19a-9-9 of the

Regulations of Connecticut State Agencies, "[a]ny person may file a petition whenever that person has cause to believe that any health professional or institution licensed by the department, or other entity under the jurisdiction of the department, has been engaged or is engaging in any practice that violates a statute or regulation."

In response, the plaintiff union filed in the Superior Court a motion to enforce the judgment of the court confirming the arbitration award, which ordered that Stanford return to his position as an EMT. In granting the motion to enforce, the court ordered the defendant "to immediately reinstate the employment of . . . Stanford, which should include provision of medical supervision, if not by Dr. Lim, then by a new medical director."[2] In so doing, the court concluded that Dr. Lim had acted improperly in withholding his medical authorization from Stanford following the arbitration award and ordered that the defendant return Stanford to work under Dr. Lim's supervision or that of another medical director. Notably, the issue of whether Dr. Lim properly withheld his medical authorization arose *after* the arbitration award was issued. As such, that issue was not raised in the grievances filed by the plaintiff and was not part of the arbitration proceeding. Moreover, in confirming the arbitration award, Judge Farley did not address the issue of medical oversight. Thus, in acting on the plaintiff's subsequent motion to enforce

[2] The defendant also contends that the court improperly granted the motion to enforce because Stanford already had been reinstated. Both parties agree that the plaintiff was informed by letter that Stanford's employment was reinstated November 12, 2021, but that he was not eligible to perform services of an EMT due to lack of medical authorization by Dr. Lim. In granting the motion to enforce, the court, however, did not merely order Stanford reinstated, but interpreted medical authorization as a necessary component of that reinstatement. Because the court did not separate the issues of reinstatement from the issue of medical authorization, we do not address the issue of reinstatement separately.

that judgment, Judge Aurigemma addressed that issue for the first time.

Our Supreme Court has "recognized on multiple occasions that an aggrieved party must exhaust its administrative remedies *before* it may seek judicial relief. . . . [I]f an adequate administrative remedy exists, it must be exhausted before the Superior Court will obtain jurisdiction to act in the matter . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 810–11, 82 A.3d 602 (2014). Notwithstanding this well established doctrine, the plaintiff contends that, given that Dr. Lim's letter was issued after the arbitration award and proffered to the court as a defense in the defendant's motion to vacate, the record supports the court's determination that Dr. Lim's decision was made, not for medical reasons, but "solely to defy and thwart" the order of reinstatement. The plaintiff argues that, because there was no evidence that a medical decision was the basis for Stanford's termination, the court was not required to defer to an administrative body and, instead, appropriately exercised its authority to enforce a final judgment. We are not persuaded.

The issue of whether Stanford was qualified to provide services as an EMT, which qualification requires that he have medical authorization, is a separate issue from his employment status with the defendant. The discretion to withhold medical authorization from Stanford was delegated to Dr. Lim as medical director and such exercise of his discretion is subject to review by the department. See Regs., Conn. State Agencies §§ 19a-179-12 (a) (6) (D) (iv) and 19a-179-15 (b). The plaintiff's contention that there was no evidence of a medical reason is beside the point; the factors that are encompassed in the department's review of a medical director's determination to grant or withhold medical authorization include whether such determination "evidences

incompetence, negligence, or otherwise poses a threat to public health or safety or which is contrary to medical direction." See Regs., Conn. State Agencies § 19a-179-15 (b). Because it is the prerogative of the department to consider these factors in an administrative hearing, the issue of whether Dr. Lim properly withheld medical authorization from Stanford was not properly before the court.

The plaintiff further contends that exhaustion of administrative remedies would be futile since the remedies they seek—employment, back wages and attorney's fees—are not available in that forum. "Despite the important public policy considerations underlying the exhaustion requirement . . . appellate courts in this state have recognized several exceptions to the requirement, albeit infrequently and only for narrowly defined purposes. . . . One of the limited exceptions to the exhaustion rule arises when recourse to the administrative remedy would be demonstrably futile or inadequate. . . . [A]n administrative remedy is futile or inadequate if the agency is without authority to grant the requested relief. . . . It is futile to seek a remedy [if] such action could not result in a favorable decision and invariably would result in further judicial proceedings." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Godbout* v. *Attanasio*, 199 Conn. App. 88, 98–99, 234 A.3d 1031 (2020). "The plaintiff's preference for a particular remedy does not determine the adequacy of that remedy. [A]n administrative remedy, in order to be adequate, need not comport with the [plaintiff's] opinion of what a perfect remedy would be." (Internal quotation marks omitted.) *BRT General Corp.* v. *Water Pollution Control Authority*, 265 Conn. 114, 123–24, 826 A.2d 1109 (2003).

We are not persuaded that the futility exception to the exhaustion doctrine applies to relieve the plaintiff from the exhaustion requirement. In the event that the

department were to determine that Dr. Lim acted outside the scope of the discretion given to him by § 19a-179-15 (b) of the regulations in withholding his medical authorization from Stanford, possible remedies, according to General Statutes § 19a-11, include that the department "may, in its discretion, issue an appropriate order to any person found to be violating an applicable statute or regulation, providing for the immediate discontinuance of the violation." The remedies provided for in § 19a-11 authorize the department to order Dr. Lim to cease withholding medical authorization, which, when coupled with the arbitration award ordering Stanford's reinstatement, could result in Stanford being placed back on active duty.

As to the back pay and attorney's fees sought by the plaintiff in its motion to enforce, those remedies, if available, resulted from issues arising after the issuance of the arbitration award and thus were not properly the subject of the plaintiff's motion to enforce that award. Rather, the proper forum to resolve such issues is through the grievance process pursuant to the agreement. "It is well settled under both federal and state law that, before resort to the courts is allowed, an employee must at least attempt to exhaust exclusive grievance and arbitration procedures, such as those contained in the collective bargaining agreement between the defendant and the plaintiffs' union. . . . Failure to exhaust the grievance procedures deprives the court of subject matter jurisdiction. . . . The purpose of the exhaustion requirement is to encourage the use of grievance procedures, rather than the courts, for settling disputes. A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. . . . [I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.

If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would inevitably exert a disruptive influence upon both the negotiation and administration of collective [bargaining] agreements." (Citation omitted; internal quotation marks omitted.) *Hunt* v. *Prior*, 236 Conn. 421, 431–32, 673 A.2d 514 (1996).

Accordingly, we conclude that the court lacked subject matter jurisdiction to order the defendant to reinstate Stanford and provide medical authorization and supervision through Dr. Lim or another medical director due to the plaintiff's failure to exhaust its administrative remedies.

II

The defendant next claims that the issues of back pay and attorney's fees were not properly before the court on the motion to enforce. Specifically, the defendant argues that the judgment sought to be enforced encompassed only the terms of the confirmed arbitration award, and that the court was without authority to award back pay and attorney's fees. We agree.

"It is well established that the construction of a judgment presents a question of law over which we exercise plenary review." (Internal quotation marks omitted.) *Almeida* v. *Almeida*, 190 Conn. App. 760, 766, 213 A.3d 28 (2019). "Prior to confirmation, enforcement of an arbitration award relies solely on the parties' voluntary compliance. Confirmation of an arbitration award converts it into an enforceable judgment of the Superior Court." *Aldin Associates Ltd. Partnership* v. *Healey*, 72 Conn. App. 334, 341 n.10, 804 A.2d 1049 (2002). "Although the court may not modify the terms of the arbitration award after the expiration of the thirty day period provided by [General Statutes] § 52-420, once the award is confirmed, the court possesses inherent

authority to enforce the terms of the judgment by appropriate postjudgment orders." Id., 341.

At the same time, "[s]uch judgments are confined by their very nature to the terms of the arbitration award." Id., 339. "General Statutes § 52-417 sets forth the authority of the trial court in ruling on an application to confirm an arbitration award. The statute contains no provision for finding facts or resolving additional issues. The court may only confirm the award, unless the award suffered from any of the defects described in General Statutes §§ 52-418 and 52-419." *Amalgamated Transit Union Local 1588* v. *Laidlaw Transit, Inc.*, 33 Conn. App. 1, 5, 632 A.2d 713 (1993); see also *Middlesex Mutual Assurance Co.* v. *Komondy*, 120 Conn. App. 117, 128, 991 A.2d 587 (2010) ("arbitrators are limited to deciding the issues included in the submission"). Thus, a reviewing court must "hold judgments in confirmation of an arbitration award to the same strict standard of review as that applied to judicial modification of the arbitration award itself. Any other approach would allow the parties to circumvent the established statutory scheme governing the review of arbitration awards by permitting them to modify the terms of the judgment on the award when they could not otherwise alter or modify the terms of the award itself." *Aldin Associates Ltd. Partnership* v. *Healey*, supra, 72 Conn. App. 339.

In the present case, the plaintiff sought to enforce the judgment of the court confirming the arbitration award, which decision involved only the terms of the arbitration award. By its terms, the arbitration award ordered that Stanford be returned to his position as an EMT and denied him back pay, which had been requested from the date of his suspension until the date of the arbitration award. After the court granted the plaintiff's application to confirm the arbitration award, in which the plaintiff did not challenge the arbitrator's failure to award back pay, the plaintiff subsequently filed a motion to enforce that judgment. Because that motion concerned the enforcement of the *judgment*

confirming the arbitration award, the legal principles limiting judgments in effectuation of arbitration awards to the scope of the award apply in the present case.

In granting the motion to enforce, the court addressed the additional issues of attorney's fees and back pay, which were well beyond the scope of the judgment confirming the arbitration award. Significantly, the arbitrator expressly declined to award back pay and the plaintiff did not challenge that determination in its application to confirm the arbitration award. The arbitrator also did not address the issue of attorney's fees, as that issue was not raised by any party to the arbitration. As such, those issues were not properly before the court when acting on the plaintiff's motion to enforce the judgment confirming the arbitration award.[3] Accordingly, we conclude that the award of attorney's fees and back pay was outside the scope of the arbitration award and, thus, was not properly before the court on a motion to enforce the judgment confirming that award.

The judgment is reversed and the case is remanded with direction to render judgment dismissing that part of the motion seeking to have Stanford reinstated and provided with medical supervision and denying that part of the motion seeking back pay and attorney's fees.

In this opinion the other judges concurred.

MARINA P. WALKER *v.* ARTHUR L. WALKER
(AC 45308)

Cradle, Suarez and Flynn, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain financial orders. *Held*:

[3] The fact that the court's award of attorney's fees and back pay is predicated on its determination that Dr. Lim's withholding of medical authorization was "pretextual and done in bad faith," supports our conclusion that the award was improper. After we determined in part I of this opinion that

1. The defendant could not prevail on his claim that the trial court improperly failed to consider each factor set forth in the applicable statute (§ 46b-81 (c)) when distributing the marital property: because the trial court expressly stated that it had considered all of the statutory criteria for marital property distributions in § 46b-81, it is presumed to have performed its duty unless the contrary appears from the record, and, in this case, the court provided a well reasoned analysis for the disparity in awards, which was based on the facts, including the origin of the assets, the parties' respective contributions, and their respective needs; moreover, it is well established that, in a case in which the court has considered all statutory criteria, the court need not make express findings as to each individual statutory criterion.
2. The defendant could not prevail on his claim that the trial court applied an unreasonable amount of weight to his fault in the breakdown of the marriage in fashioning its orders distributing the marital property and awarding alimony: the court stated that it had considered all of the statutory factors for distributing marital property in § 46b-81 and for awarding alimony pursuant to statute (§ 46b-82), and this court determined that the trial court properly considered fault in fashioning its financial orders and, in fact, was required to do so because the cause for the dissolution of the marriage is a statutory factor that the court must consider in distributing marital property and awarding alimony in a contested dissolution proceeding; moreover, contrary to the defendant's claim, a finding by the trial court of irretrievable breakdown, rather than intolerable cruelty, a ground also alleged by the plaintiff, does not preclude it from considering fault in fashioning its financial awards; furthermore, although it was not entirely clear from the memorandum of decision the precise amount of weight the trial court gave to fault, it was not necessary for this court to be able to discern this, as when it is evident from the decision that the trial court considered all of the relevant statutory criteria, the trial court is given broad discretion in determining the weight to be given to each individual factor, no single criterion is preferred over others, and the trial court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case, and the trial court's careful reasoning for its financial orders, which had a reasonable basis in the facts, reflected no abuse of the court's broad discretion in assigning the weight to be given to each statutory factor.

Argued September 20—officially released October 31, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a

the court lacked subject matter jurisdiction to adjudicate that issue, it follows that the award of attorney's fees and back pay is improper for that reason as well.

cross complaint; thereafter, the case was tried to the court, *Moukawsher*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

Kevin F. Collins, for the appellant (defendant).

John H. Harrington, for the appellee (plaintiff).

Opinion

FLYNN, J. The defendant, Arthur L. Walker, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Marina P. Walker, awarding alimony to the plaintiff and dividing the marital property between the parties. On appeal, the defendant claims that the court improperly (1) failed to consider all of the statutory criteria set forth in General Statutes § 46b-81 (c) in its division of the marital property and (2) applied an unreasonable amount of weight to the defendant's fault in the breakdown of the marriage in fashioning its orders distributing the marital property and awarding alimony.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The plaintiff and the defendant married in 1993 and had three children together.[2] The parties resided in a house in Old Greenwich, which the plaintiff's father had purchased for her. The plaintiff owned 74.5 percent of the

[1] In the body of his main appellate brief, the defendant expressly declined to pursue on appeal the following three additional claims, which had been included in his statement of issues: the court erred in providing for an inequitable double-dipping in the plaintiff's favor; the court erred in its weighing of the testimony of a third-party witness in assigning the marital estate; and the court unreasonably limited the amount of time allocated for trial, resulting in the defendant not having an adequate opportunity to present his case. Accordingly, we do not review these expressly abandoned claims. See, e.g., *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 165, 75 A.3d 651 (2013).

[2] It is undisputed that the parties' three children were adults by the time of the dissolution proceedings.

marital home and the defendant owned 25.5 percent. The defendant and his sister inherited a building in Eastchester, New York, that housed the family business, a custom frame shop. The parties remortgaged the marital home and with the proceeds purchased the interest of the defendant's sister in the Eastchester building and the custom frame shop, and thus the defendant became the owner of the custom frame shop. A major cause of the breakdown of the marriage was the defendant's extramarital affairs. The defendant was also repeatedly violent toward the plaintiff. The plaintiff has no job skills outside of her work at the custom frame shop and her limited work in retail. The defendant's annual business income is approximately $100,000.

The court awarded the marital home to the plaintiff, which was worth $800,000 and was burdened with a mortgage of approximately $440,000, and awarded to the defendant the custom frame shop and the Eastchester building, which was worth approximately $600,000, had no mortgage, and had significant rental income with potential for more. The court also ordered that the defendant pay the plaintiff $235,000, which represented the amount for which the parties had mortgaged the marital home to purchase the interest of the defendant's sister in the Eastchester building and the custom frame shop. The court determined that the defendant would receive nothing for his interest in the marital home and the plaintiff would receive nothing for her claim against the custom frame shop, her share of claimed back rent, or any interest on the $235,000 mortgage on the marital home. The court ordered that the defendant pay the plaintiff $1000 per month in modifiable alimony for ten years. This appeal followed. Additional facts will be set forth as necessary.

We begin by noting our general standard of review in family matters. A court must fashion its division of marital property in accordance with the statutory

factors in § 46b-81 (c) and its alimony orders in accordance with the statutory factors in General Statutes § 46b-82 (a). See *Riccio* v. *Riccio*, 183 Conn. App. 823, 826, 194 A.3d 337 (2018). We will not disturb a trial court's financial orders in domestic relations cases unless the court has abused its discretion or could not reasonably conclude as it did based on the facts presented. See *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 366–67, 999 A.2d 721 (2010).

I

The defendant first claims that the court improperly failed to consider each statutory factor set forth in § 46b-81 (c) when distributing the marital property. We disagree.

Section 46b-81 (c) provides that the factors that the court shall consider in assigning property in a dissolution case are "the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

The court expressly stated in its memorandum of decision that it "considered all" of the statutory criteria for marital property distributions in § 46b-81. Because the court stated that it had considered all the relevant statutory factors, it is presumed to have performed its duty unless the contrary appears from the record. See *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 130–31, 300 A.3d 1175 (2023). Nothing contrary to that presumption appears in the record. The court found that the parties were married for twenty-nine years, that the

plaintiff was fifty years of age with limited job skills and that the defendant was ten years older with an approximate annual income of $100,000. The court further found that the plaintiff's father purchased the marital home for her and that the defendant inherited a part of the Eastchester building and custom frame shop. The court detailed the amount of interest each party had in the marital home and the Eastchester building housing the custom frame shop and the value of the respective properties, including any outstanding mortgages, and noted that the parties took out a $235,000 mortgage on the marital home to purchase the interest the defendant's sister had in the Eastchester building and custom frame shop. The court also made findings as to the causes of the breakdown of the marriage. It is well established that in a case in which the court has considered all statutory criteria, the court need not make express findings as to each individual statutory criterion. See, e.g., *Riccio* v. *Riccio*, supra, 183 Conn. App. 826. "It is sufficient that the memorandum of decision at least reflect a proper consideration and weighing of the factors set forth in the statute." (Internal quotation marks omitted.) *Miller* v. *Miller*, 22 Conn. App. 310, 314, 577 A.2d 297 (1990). The court provided a well reasoned analysis for the disparity in awards, which was based on the facts, including the origin of the assets, the parties' respective contributions and their respective needs. We conclude that the memorandum of decision reflects a consideration of the relevant statutory criteria for the distribution of marital property, and, accordingly, the court did not abuse its discretion in that regard.

II

The defendant next claims that the court applied an unreasonable amount of weight to the defendant's fault in the breakdown of the marriage in fashioning its orders distributing the marital property and awarding

alimony. Specifically, the defendant argues that the fact that the court dissolved the marriage on the ground of irretrievable breakdown[3] rather than intolerable cruelty, which ground was also alleged in the amended complaint, "leaves open the question as to whether the proportional 'fault' assignment to the defendant/husband was given unreasonable weight . . . ." He also argues that, because the court did not state that it had considered all of the statutory criteria set forth in § 46b-81 (c) for distributing marital property, it is "impossible to assess whether the court assigned an unreasonable amount of weight to 'fault.' " We disagree.

We begin our analysis by noting that the court did, in fact, state that it had considered all the statutory factors for distributing marital property in § 46b-81 and awarding alimony in § 46b-82.[4] In distributing the marital property, the court reasoned that the plaintiff had a strong claim to the marital home her father purchased for her and the defendant had a strong claim to the building and business his father left him. The court stated that the disparity between the monetary value of the properties distributed reflected: the plaintiff's interest in and contributions to the success of the custom frame shop; the origin of the marital assets; that the defendant was awarded the Eastchester building and custom frame shop with which he can support himself; that the plaintiff has little chance to acquire

[3] See General Statutes § 46b-40.

[4] "The statutory factors for determining alimony in . . . § 46b-82 are almost identical to the factors used to distribute property in . . . § 46b-81(c). . . . They include: the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . ." (Citation omitted; internal quotation marks omitted.) *Dombrowski* v. *Noyes-Dombrowski*, 273 Conn. 127, 137, 869 A.2d 164 (2005). In 2013, the legislature added as additional factors "education" and "earning capacity." See Public Acts 2013, No. 13-213; see also General Statutes § 46b-82 (a).

property in the future and is in need of money on which to live; and the court's findings of fault.

In fashioning the alimony award of $1000 per month from the defendant to the plaintiff for ten years, the court noted that the financial circumstances of the parties were "critical." The court reasoned that, because the defendant received the custom frame shop, the plaintiff "will be left with no skills and no job. She sacrificed them to maintain a home and raise three children during a marriage that lasted nearly thirty years. She will need time to get a decent job and money to survive until she can recover from her economic dependence on family and family enterprise. Given that [the defendant] will likely struggle to keep his business together and find a new home after paying [the plaintiff] the property settlement, [the plaintiff] will have to accept a sum calculated as best [as] the court can to keep both parties' heads above water." The court further stated that, given that the plaintiff reports no current income, the defendant, who received the custom frame shop, would be left with almost all of the parties' joint income. The court additionally reasoned that, although the plaintiff was unfaithful and there was evidence that she was also violent, the defendant "was both repeatedly unfaithful to her and—especially [because] he admits it—violent. The degree to which he was unfaithful and the degree to which he was violent outstrips any claims he makes on these same subjects against [the plaintiff]."[5]

The court properly considered fault in fashioning its financial orders. In fact, it was required to do so because

[5] To the extent that the defendant also contends that it was clearly erroneous for the court to find that the degree to which the defendant was unfaithful and violent outstrips any claims he made on those subjects against the plaintiff, we disagree. The court found that both parties were unfaithful and violent but determined that the defendant had admitted his violence and further concluded that it found the plaintiff to be a more credible witness than the defendant. It was within the province of the court to assess credibility, and we will not disturb such determinations on appeal. See *Zilkha* v. *Zilkha*, 167 Conn. App. 480, 487–88, 144 A.3d 447 (2016).

the causes for the dissolution of the marriage is a statutory factor that the court must consider in distributing marital property and awarding alimony in a contested dissolution proceeding. See *Sweet* v. *Sweet*, 190 Conn. 657, 660, 462 A.2d 1031 (1983); see also General Statutes §§ 46b-81 (c) and 46b-82 (a). Additionally, a finding by the trial court of irretrievable breakdown does not preclude it from considering fault in fashioning its financial awards. *Sweet* v. *Sweet*, supra, 660.

Although it is not entirely clear from the memorandum of decision the precise amount of weight the court gave to fault—other than that fault was one factor among many that it considered in distributing the marital property and that the critical consideration in awarding alimony was the parties' respective financial circumstances—it is not necessary for us to be able to discern this. Because it is evident from the decision that the court considered *all* of the relevant statutory criteria in §§ 46b-81 and 46b-82, it is given broad discretion in determining the weight to be given to each individual factor. See, e.g., *Coleman* v. *Coleman*, 151 Conn. App. 613, 617, 95 A.3d 569 (2014); *McMellon* v. *McMellon*, 116 Conn. App. 393, 395–96, 976 A.2d 1, cert. denied, 293 Conn. 926, 980 A.2d 911 (2009). Although a trial court must consider the statutorily delineated criteria, no single criterion is preferred over others and "the court is accorded wide latitude in varying the weight placed upon each item under the peculiar circumstances of each case." (Internal quotation marks omitted.) *Pencheva-Hasse* v. *Hasse*, supra, 221 Conn. App. 130. The court's careful reasoning for its financial orders, which has a reasonable basis in the facts, reflects no abuse of the court's broad discretion in assigning the weight to be given to each statutory factor.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT v. THOMAS S.*
(AC 45104)

Prescott, Clark and Bear, Js.**

Syllabus

Convicted, after a jury trial, of criminal violation of a protective order and of being a persistent serious felony offender, the defendant appealed to this court. The trial court issued the protective order prohibiting the defendant from contacting P, an individual with whom he had previously been in a relationship, following his arrest on various charges for incidents involving P. The protective order specifically prevented the defendant from contacting P's home or her workplace, which was a liquor store that she owned. The order did, however, permit the defendant to return to P's home one time, with a police escort, to retrieve his belongings. P moved the defendant's belongings to the liquor store and instead attempted to arrange for one of the defendant's family members to pick them up. Thereafter, the defendant contacted the local police department and requested a police escort to accompany him to the liquor store so that he could retrieve his belongings. The defendant arrived at the liquor store prior to the police escort. He entered the store and immediately turned off a security camera. He then took money out of the register, cigarettes from behind the register, and tools from a back room. He also took bottles of alcohol off the shelves and placed them into multiple bins. P was not at the store at this time and the defendant told R, P's employee, not to contact her or to try and stop him from removing the items he had collected. When the police escort arrived, the officer helped the defendant load the items into the vehicle in which the defendant had arrived, unaware that there was a criminal protective order in place. The defendant then left the liquor store. Shortly thereafter, P arrived at the store and was greeted by the police officer, who testified that P appeared to be angry and there was fear in her face and in her voice. P became very upset after entering the store and discovering the items that had been taken. She informed the police officer that everything that the defendant had taken, other than the box of his personal belongings,

* In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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

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

belonged to her. The police officer then called the defendant and instructed him to have a third party return the items to the liquor store. With the exception of one bottle of alcohol and a few packs of cigarettes, the items were returned. *Held* that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant was guilty of violating the protective order: although the effective information charged the defendant with only one count of criminal violation of a protective order and the evidence presented at trial supported multiple, separate incidents of conduct in violation of the protective order, this court was not required to address whether a unanimity issue existed because the defendant did not raise such a claim at trial or in his appellate brief, nor did he ask this court to review the unpreserved claim pursuant to *State* v. *Golding* (213 Conn. 233); moreover, contrary to the defendant's argument that he had complied with the protective order and did not voluntarily go to the liquor store because he necessarily had to go there to retrieve his belongings, there was sufficient evidence from which the jury reasonably could have found that the defendant was guilty of violating the protective order because he deliberately went to P's workplace, as criminal violation of a protective order is a general intent crime, and, accordingly, it was not necessary for the state to prove that the defendant knew that his conduct violated the protective order or to disprove his alleged subjective belief that his conduct did not violate the protective order; furthermore, there was sufficient evidence from which the jury reasonably could have found that the defendant was guilty of violating the protective order because he deliberately had contact with R in a manner likely to cause annoyance or alarm to P, as the jury reasonably could have found that the defendant, while in the presence of R, took items from the liquor store after turning off the store's security camera and, in a confrontational manner, warned R not to call P, contact that could cause P to fear that the defendant would continue to act in an angry and confrontational manner toward her and others associated with her.

Argued September 7—officially released October 31, 2023

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of criminal violation of a protective order and larceny in the sixth degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the first part of the information was tried to the jury before *D'Andrea*, *J.*; verdict of

guilty of criminal violation of a protective order; thereafter, the court, *D'Andrea*, *J.*, declared a mistrial as to the charge of larceny in the sixth degree, and the state entered a nolle prosequi as to that charge; subsequently, the second part of the information was tried to the jury before *D'Andrea*, *J.*; verdict of guilty; thereafter, the court, *D'Andrea*, *J.*, rendered judgment in accordance with the verdicts, from which the defendant appealed to this court. *Affirmed*.

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, and *Kristin Chiriatti*, assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Thomas S., appeals from the judgment of conviction, rendered following a jury trial, of criminal violation of a protective order in violation of General Statutes § 53a-223.[1] On appeal, the defendant claims that the evidence was insufficient to prove beyond a reasonable doubt that he had the requisite intent to violate the protective order. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are pertinent to this appeal. On January 28, 2019, the trial court issued a criminal protective order identifying P, a person formally romantically involved with the defendant, as the protected person and the defendant as the respondent. The protective order instructed the defendant to "not

[1] General Statutes § 53a-223 (a) provides in relevant part: "A person is guilty of criminal violation of a protective order when an order . . . has been issued against such person, and such person violates such order."

assault, threaten, abuse, harass, follow, interfere with, or stalk the protected person"; to "[s]tay away from the home of the protected person and wherever the protected person shall reside"; and to "not contact the protected person in any manner, including by written, electronic or telephone contact, and [to] not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person." Additionally, the order permitted the defendant to "return to [P's] home one time with police to retrieve [his] belongings."

Prior to the issuance of the protective order, the defendant and P lived together in a home owned by P. P worked at a liquor store in Fairfield County (liquor store) that she owned.[2] The relationship between the defendant and P eventually began to deteriorate. The defendant became abusive toward P, including incidents in which he was verbally abusive, intimidated P, and broke P's belongings. As a result of these incidents, P filed an application for an ex parte restraining order against the defendant in family court, which was granted on January 25, 2019.

The defendant subsequently was arrested for threatening in the second degree and criminal violation of a restraining order after threatening to kill P following the issuance of the ex parte restraining order. As a result of this arrest, the court issued the criminal protective order now at issue. As previously discussed, although the protective order ordered the defendant to stay away from P's home, it permitted him to visit her home once with a police escort in order to collect his personal belongings. P instead tried to arrange for the

[2] During their relationship, the defendant convinced P to purchase two liquor stores, including the one in Fairfield County. After purchasing the Fairfield County liquor store, P began working there every day and assumed the daily operations of the business.

defendant's father or sister to pick up the defendant's personal belongings from the liquor store.[3]

On February 5, 2019, at around 4 p.m., the defendant contacted the local police department (department) to arrange for a police escort to accompany him to the liquor store to pick up his personal belongings.[4] Sergeant Chris McManus received the dispatch assigning him to escort the defendant into the liquor store. Pursuant to department protocol, he first conducted a records search to determine whether there were any pertinent protective orders issued against the defendant. Although McManus discovered the ex parte civil restraining order through this search, McManus did not discover the criminal protective order against the defendant.[5]

[3] On appeal, the defendant argues that by moving his belongings from her home to the liquor store, P "modified" the protective order. The defendant's argument amounts to a contention that P consented to him entering her workplace because, by moving his belongings, he was unable to go to P's home to retrieve his belongings with a police escort and instead could retrieve his belongings only by going to P's workplace. We summarily reject this assertion. A criminal protective order is issued by the court following consideration of all of the relevant considerations and does not depend on the consent of the protected person. See, e.g., *State* v. *Riggsbee*, 112 Conn. App. 787, 792 n.2, 963 A.2d 1122 (2009) (noting that criminal protective orders are issued to promote public peace, as well as to protect victim, and that, as such, protective orders are often issued against express wishes of victim). Because it is a court order, the defendant is bound by its terms unless he seeks and obtains relief from it by the court. See *State* v. *Fernando A.*, 294 Conn. 1, 29–31, 981 A.2d 427 (2009) (detailing procedures to challenge necessity for criminal protective order). Thus, a defendant who does not comply with the conditions of a protective order violates the order, even if the violation occurs as a result of the protected person's consent or in accordance with the protected person's wishes. See *State* v. *Winter*, 117 Conn. App. 493, 501, 979 A.2d 608 (2009) ("[a]n order issued by a court of competent jurisdiction must be obeyed by the parties until it is reversed by orderly and proper proceedings" (internal quotation marks omitted)), cert. denied, 295 Conn. 922, 991 A.2d 569 (2010).

[4] The criminal protective order issued on January 28, 2019, was still in effect on this date.

[5] The record does not reflect the reason why the department did not discover the criminal protective order.

The defendant and a friend drove to the liquor store in a pickup truck. On arrival, rather than wait for the police escort to arrive, the defendant entered the business alone. P was not present at the liquor store when the defendant arrived. R, an employee of the liquor store, observed the defendant turn off the inside security camera immediately after the defendant entered the store. The defendant then proceeded to take money from the cash register, while telling R not to call P and not to try to stop him. Additionally, the defendant took several packs of cigarettes from behind the register and tools from the back room of the store. R felt "nervous," "cornered," "scared," and "panick[ed]," and "froze" upon being confronted by the defendant. The defendant then began to fill several empty bins with bottles of alcohol from the liquor store's shelves. The defendant appeared aggressive and angry as he did so. A man who worked next door entered the liquor store, and R signaled for him to call P and inform her about what was happening.

Shortly thereafter, McManus arrived at the liquor store. After McManus entered the liquor store, the defendant began to load his personal belongings, the bins containing the bottles of alcohol,[6] the packs of cigarettes and the tools taken from the back room of the liquor store into the pickup truck. Both R and McManus aided the defendant in loading the truck.[7] R then received a call from P, who told him that she was on her way back to the store. When McManus learned that

[6] The defendant covered the bins with lids when McManus arrived. McManus was not aware that the covered bins contained alcohol until after the defendant had left the liquor store.

[7] R helped the defendant load the items into the truck because he "didn't want to escalate the situation and make it any . . . worse." McManus "had no reason to think that [he] was being deceived, so [he] gave [the defendant] a hand [loading the items into the truck]"; he would not have helped the defendant if he had known that the items taken did not belong to the defendant.

P was on her way back to the liquor store, he instructed the defendant to finish loading the items quickly and leave before P returned.

After the defendant left the liquor store parking lot, P arrived. When McManus greeted P in her car upon her arrival, she appeared very "angry," "upset," "annoyed," and "alarmed," and "there was fear in her face and in her voice." P then entered the store and, after seeing what had been taken, dropped to her knees crying. Because R appeared "shaken" and "traumatized" to P, she sent him home. After assessing the store's inventory and confirming what the defendant had taken, P informed McManus that everything that the defendant had taken, except the box of his personal belongings, belonged to her.

McManus called the defendant to direct him to return the items he had taken. McManus eventually was able to arrange for the return of most of the items taken, except for a partially empty bottle of alcohol and several packs of cigarettes. At McManus' direction, a third party, the driver of the pickup truck, rather than the defendant, returned the remaining items to the liquor store.

The defendant was arrested and charged with larceny in the sixth degree on March 7, 2019. After the defendant's arrest, the state filed several substitute informations adding the additional charges of burglary in the third degree, criminal trespass in the second degree, and criminal violation of a protective order.[8] The trial

[8] The state eventually dropped the burglary and trespass charges. The operative information before the jury was filed on February 28, 2020, and charged the defendant with one count of criminal violation of a protective order in violation of § 53a-223, and one count of larceny in the sixth degree in violation of General Statutes § 53a-125b. Additionally, the state charged the defendant with being a persistent serious felony offender in violation of General Statutes § 53a-40 (c), by way of a part B information dated January 16, 2020.

began on February 11, 2020. At trial, the state argued that the defendant had violated the protective order by deliberately going to P's workplace and by deliberately confronting P's employee in a manner likely to cause annoyance or alarm to P. In response, the defendant, who was self-represented, alleged that he acted with the intent to comply with the protective order. On February 28, 2020, the jury found the defendant guilty of criminal violation of a protective order.[9] On December 3, 2020, the trial court, *D'Andrea*, *J.*, sentenced the defendant to eight years of incarceration, followed by two years of special parole. This appeal followed.

I

The defendant claims on appeal that his conviction of criminal violation of a protective order must be reversed because the state failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant had the necessary intent to violate the protective order. We are not persuaded.

Before we turn to the defendant's claim, we first address a potential issue resulting from the manner in which the state drafted the operative information. The protective order prohibits the defendant from "contact[ing] the protected person's home, workplace *or* others with whom the contact would be likely to cause annoyance or alarm to the protected person." (Emphasis added.) In the long form information, however, the state charged the defendant with violating the protective order "[b]y going to [P's], the protected person's, workplace *and*, thereat, creat[ing] contact likely to cause annoyance and alarm to said protected person, in violation of . . . § 53a-223." (Emphasis added.)

[9] The jury was unable to reach a unanimous verdict on the larceny charge, and, therefore, the trial court, *D'Andrea*, *J.*, declared a mistrial as to that count. Evidence on the part B information was presented to the same jury on March 3, 2020, and the jury found the defendant guilty of being a persistent serious felony offender in violation of General Statutes § 53a-40 (c).

Although the information charges the defendant with only one count of criminal violation of a protective order in violation of § 53a-223, the evidence presented at trial in this case supports multiple, separate incidents of conduct in violation of the protective order. At trial, the state argued to the jury that the defendant had violated the protective order (1) by going to P's workplace and (2) by contacting another person, R, because such contact with him would be likely to cause annoyance or alarm to P. The court gave the jury the following instructions: "The defendant is charged with violating the provision [of the protective order] that states, do not contact the protected person's workplace *or* others with whom the contact would be likely to cause annoyance or alarm to the protected person." (Emphasis added.) No specific unanimity instructions were given to the jury.[10]

Our Supreme Court has held that "a single count of an information that charges a defendant with a single statutory violation is duplicitous when evidence at trial supports multiple, separate incidents of conduct, each of which could independently establish a violation of the charged statute." *State* v. *Joseph V.*, 345 Conn. 516, 521, 285 A.3d 1018 (2022), citing *State* v. *Douglas C.*, 345 Conn. 421, 445–47, 285 A.3d 1067 (2022). "In the absence of a specific unanimity instruction to the jury . . . such a count violates a defendant's constitutional right to jury unanimity and requires the reversal of the judgment of conviction if it creates the risk that the defendant's conviction occurred as the result of different jurors concluding that the defendant committed different criminal acts." *State* v. *Joseph V.*, supra, 521.

[10] When instructing the jury, the trial court included only a general unanimity charge: "If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of criminal violation of a protective order, then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall find the defendant not guilty."

We need not address whether a unanimity issue exists, however, because the defendant did not raise a unanimity claim at trial[11] or in his appellate brief, nor has he asked us to review such an unpreserved 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).[12] We turn now to the defendant's sufficiency of the evidence claim.

II

As previously noted, § 53a-223 (a) provides in relevant part that "[a] person is guilty of criminal violation of a protective order when an order . . . has been issued against such person, and such person violates such order." The defendant does not dispute that a protective order had been issued against him. Rather, the defendant claims that the evidence before the jury was insufficient to prove that he had the requisite intent to violate the protective order. With respect to this claim, the defendant makes two arguments. First, the defendant asserts that the state adduced insufficient evidence that the defendant, by going to the liquor store, intended to engage in conduct that violated the protective order. Second, the defendant argues that the state

[11] We note that the decisions in *State* v. *Joseph V.*, supra, 345 Conn. 516, and its companion case, *State* v. *Douglas C.*, supra, 345 Conn. 421, were released after the underlying trial in the present case.

[12] At oral argument before this court, counsel for the defendant stated that "[he had] not addressed a unanimity issue," that the issue of unanimity was "not something that's before the court," and that the defendant had not objected to the jury instructions given by the trial court.

In *State* v. *Golding*, supra, 213 Conn. 239–40, this court held that "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of 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. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.)

adduced insufficient evidence that the defendant intended to engage in contact likely to cause annoyance or alarm to the protected person. In response, the state argues that there was ample evidence from which the jury reasonably could have found that the defendant was guilty of violating the protective order by (1) deliberately going to P's workplace and (2) deliberately contacting P's employee in a manner likely to cause annoyance or alarm to P. We agree with the state.

We begin our analysis by setting forth the relevant legal principles and standard of review. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We also note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all

possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 186–87, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

"[T]he violation of a protective order statute is not a specific intent crime." (Internal quotation marks omitted.) *State* v. *Cheryl J.*, 203 Conn. App. 742, 748, 249 A.3d 742 (2021). Rather, violation of a protective order is a crime requiring proof of general intent. See id. "General intent is the term used to define the requisite mens rea for a crime that has no stated mens rea; the term refers to whether a defendant intended deliberate, conscious or purposeful action, as opposed to causing a prohibited result through accident, mistake, carelessness, or absent-mindedness. Where a particular crime requires only a showing of general intent, the prosecution need not establish that the accused intended the precise harm or precise result which resulted from his acts." (Internal quotation marks omitted.) *State* v. *Nowacki*, 155 Conn. App. 758, 766, 111 A.3d 911 (2015). "All that is necessary is a general intent that one intend to perform the activities that constitute the violation." (Internal quotation marks omitted.) *State* v. *Cheryl J.*, supra, 748.

A

We first address the defendant's argument that there was insufficient evidence to prove that the defendant

intended to engage in conduct that violated the protective order. The defendant argues that the evidence presented at trial showed that he lacked the requisite intent to contact P's workplace. The defendant argues throughout his principal appellate brief and at oral argument before this court that he intended to comply with the protective order by going to P's workplace and that he did not go to P's workplace voluntarily. He argues that he did not voluntarily go to P's workplace because, after P moved his belongings from her home to the store, he was unable to retrieve his belongings any other way. He concludes that, because the protective order permitted him to enter P's home one time, with a police escort, to retrieve his personal belongings and because he necessarily had to go to the liquor store to retrieve his belongings after they were moved, he complied with the protective order and did not voluntarily go to the liquor store.

In this argument, the defendant conflates voluntariness with necessity. In so arguing, the defendant misconstrues what is required to find a violation of the protective order. Criminal violation of a protective order is a general intent, rather than a specific intent, crime. Id. For a general intent crime, an action is voluntary when the actor deliberately, consciously, or purposefully takes that action, regardless of the actor's subjective intent. See *State* v. *Nowacki*, supra, 155 Conn. App. 766. Therefore, the defendant's subjective intent in going to the liquor store and his perceived necessity of this action does not make his otherwise deliberate, conscious, and purposeful act of going to the liquor store involuntary. Moreover, it was not necessary for the state to prove that the defendant knew that his conduct violated the protective order or to disprove the defendant's alleged subjective belief that his conduct did not violate the protective order. *State* v. *Winter*, 117 Conn. App. 493, 508, 979 A.2d 608 (2009), cert.

denied, 295 Conn. 922, 991 A.2d 569 (2010). On the basis of our review of the record, we conclude that there was sufficient evidence from which the jury reasonably could have found that the defendant intended to engage in conduct prohibited by the protective order.

The protective order instructed the defendant "[to] not contact the protected person's . . . workplace . . . ." The jury was presented with evidence that the liquor store was P's workplace. The jury also was presented with evidence that the defendant had a friend drive him to the liquor store and that he entered the liquor store without waiting for the police escort to arrive. Therefore, a reasonable view of the evidence presented at trial supports the inference that the defendant intentionally contacted P's workplace by entering the liquor store, thereby violating the condition of the protective order ordering the defendant not to contact P's workplace. Moreover, the defendant's counsel conceded during oral argument before this court that the defendant intended to go to the liquor store.

Viewing the record in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant had the intent to enter P's workplace and, therefore, had the requisite general intent to perform an activity in violation of the protective order. The defendant's claim to the contrary fails.

B

We next address the defendant's second sufficiency of the evidence argument, namely, that there was insufficient evidence of his intent to contact others in a manner likely to cause annoyance or alarm to P. He argues that the record reflects that he had the general intent to engage in contact that was either in compliance with the protective order or that was meant to avoid

any potential violations of the protective order.[13] Again, the defendant's argument is unavailing.

The protective order prohibited the defendant from contacting others in a manner likely to cause annoyance or alarm to P. The jury reasonably could have found that the defendant took money, bottles of liquor, cigarettes and tools from the liquor store, in R's presence, after turning off the security camera and that the defendant, in a confrontational manner, warned R not to call P.[14] From this, the jury reasonably could have inferred that the defendant intentionally contacted R.

The jury also reasonably could have found from the evidence admitted at trial that the defendant's contact with R was likely to cause annoyance or alarm to P. Although the defendant argues that the evidence shows that he contacted R in a manner likely to *avoid* annoyance or alarm to P, arguing that he turned off the security camera and directed R not to call P in order not to annoy or alarm her, the jury was not required to accept his version of events or draw the inferences he urges this court to adopt. The jury reasonably could have found from the evidence presented that the defendant contacted P's employee, R, at P's liquor store in a confrontational and angry manner as he took money and inventory from the store. Taken cumulatively, particularly in light of the defendant first turning off the security camera, the jury reasonably could have found that the defendant's confrontational contact with P's

[13] The defendant argues that his conduct in the liquor store, including taking the tools and the bottles of liquor, was influenced by his mistaken or accidental belief that he had an ownership interest in the items. Again, the defendant's subjective belief in his right to engage in this conduct is immaterial to our inquiry. Rather, we ask whether the defendant intentionally, that is, deliberately, consciously, or purposefully, contacted others with whom the contact would be likely to cause annoyance or alarm to P and whether this contact was likely to cause P annoyance or alarm.

[14] R testified that, when he attempted to call P, the defendant told him, "don't you fucking call [P], [R]."

employee could cause P to fear that the defendant would continue to act in an angry and confrontational manner toward her and others associated with her. Therefore, the jury reasonably could have found that such contact would be likely to cause P annoyance or alarm.

Additionally, the record reflects that the defendant's contact with R left R feeling "nervous," "cornered," "scared," and "panick[ed]," and that he "froze" upon being confronted by the defendant. The jury reasonably could have found that finding her employee in such a state was likely to cause P annoyance or alarm.

In summary, we conclude that there was sufficient evidence from which the jury reasonably could have found beyond a reasonable doubt that the defendant had the requisite intent to enter the liquor store, interact with P's employee in a confrontational manner and take items, including bottles of liquor, packs of cigarettes and tools, all of which together constitute contact likely to cause annoyance or alarm to P in violation of the protective order. Accordingly, the defendant's sufficiency of the evidence claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

DEJAN ROBERT COKIC *v.* FIORE POWERSPORTS, LLC, ET AL.
(AC 45740)

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

Syllabus

The plaintiff appealed to this court from the judgment of the trial court awarding attorney's fees to the defendant V Co. in connection with the repair of a jet ski. The plaintiff had brought an action against V Co., alleging, inter alia, claims of conversion, fraud and negligence. During the underlying trial, the plaintiff offered evidence in the form of an email

purportedly from V Co. to a friend of the plaintiff, which contained a copy of an invoice for jet ski repairs, for the purpose of establishing that the plaintiff had a colorable claim against V Co. The trial court rendered judgment for the defendants, concluding that no evidence implicated or tied V Co. to the plaintiff's claims, and, without scheduling a hearing, granted V Co.'s postjudgment motion for attorney's fees. The plaintiff appealed to this court, which reversed the trial court's judgment only as to the award of attorney's fees and remanded the case to that court for a hearing on the issue of attorney's fees. On remand, the trial court conducted a hearing after which it ordered the plaintiff to pay V Co. $2360.89 in attorney's fees. The trial court determined that the plaintiff had failed to articulate the basis of his conversion and negligence claims against V Co. and concluded that the plaintiff's claims were entirely without color and had been brought in bad faith. *Held* that the trial court abused its discretion in granting V Co.'s postjudgment motion for attorney's fees, as the court failed to set forth, with a high degree of specificity, the factual findings necessary to support its determination that the plaintiff's claims were without color and had been brought in bad faith: the court failed to address the plaintiff's assertion that the email purportedly sent by V Co. demonstrated a colorable basis for the plaintiff's belief that V Co. had been involved with the repairs to the jet ski and, thus, might be responsible for the damages that allegedly resulted from those repairs, as V Co.'s reliance on the plaintiff's inability to demonstrate an agency relationship between V Co. and the author of the email or to otherwise prove the plaintiff's claims against V Co. was not sufficient to establish that the plaintiff's claims were entirely without color or that he had acted in bad faith; moreover, despite having the burden to prove that the plaintiff had acted in bad faith, V Co. presented no evidence that the plaintiff knew the email's author was not affiliated with V Co. and, thus, that the plaintiff's claims were therefore baseless; accordingly, because V Co. failed to present any evidence that the plaintiff lacked a colorable claim against it and that his pursuit of those claims was undertaken in bad faith, a new hearing on V Co.'s motion for attorney's fees was unwarranted.

Argued September 11—officially released October 31, 2023

Procedural History

Action to recover damages for, inter alia, the defendants' alleged violation of the Creditors' Collection Practices Act, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment for the defendants; thereafter, the court granted the postjudgment motion for attorney's fees filed by

the defendant Village Marina, LLC, and the plaintiff and Peter A. Lachmann appealed to this court, which dismissed the appeal in part, reversed the judgment in part and remanded the case for further proceedings; subsequently, the court, *Brown*, *J.*, granted the postjudgment motion for attorney's fees filed by the defendant Village Marina, LLC, and the plaintiff appealed to this court. *Reversed*; *judgment directed*.

Peter A. Lachmann, for the appellant (plaintiff).

Opinion

BRIGHT, C. J. The plaintiff, Dejan Robert Cokic, appeals from the judgment of the trial court awarding $2360.89 in attorney's fees to the defendant Village Marina, LLC.[1] On appeal, the plaintiff claims, inter alia, that the court abused its discretion in awarding the defendant attorney's fees on the basis of its conclusion that the plaintiff's claims against the defendant were brought without color and in bad faith. We agree and, therefore, reverse the judgment of the trial court.[2] This

[1] The plaintiff brought the underlying action against Fiore Powersports, LLC, its principal, Christopher G. Fiore, and Village Marina, LLC. None of the defendants is participating in the present appeal, which concerns only the judgment of the court granting the postjudgment motion for attorney's fees that was filed by Village Marina, LLC. Accordingly, all references to "the defendant" in this opinion are to Village Marina, LLC, only.

On February 16, 2023, the defendant filed a notice of intent not to file a brief and requested that this court affirm the judgment of the trial court. Pursuant to Practice Book § 85-1, this court ordered that the appeal will be considered on the basis of the appellant's brief and the record, as defined by Practice Book § 60-4, only. During oral argument before this court, counsel for the plaintiff requested sanctions and an award of attorney's fees pursuant to Practice Book §§ 85-1 and 85-2. We decline to consider counsel's oral request for sanctions. See Practice Book § 85-3 ("Sanctions may be imposed by the court, on its own motion, or on motion by any party to the appeal. A motion for sanctions may be filed at any time, but a request for sanctions may not be included in an opposition to a motion, petition or application. Before the court imposes any sanction on its own motion, it shall provide notice to the parties and an opportunity to respond.").

[2] The plaintiff also claims that the court erred by (1) awarding $2360.89 in attorney's fees in the absence of sufficient evidence to support that award, (2) failing to comply with this court's remand order, (3) placing the burden

court set forth the following facts, as found by the trial court, *Hon. Arthur A. Hiller*, judge trial referee, and procedural history in the plaintiff's prior appeal. See *Cokic* v. *Fiore Powersports, LLC*, 209 Conn. App. 853, 269 A.3d 214 (2022). "A friend of the plaintiff brought a jet ski to Fiore Powersports, LLC (Fiore Powersports), for repair. The form that authorized the repairs listed Pruven Performance, Inc. (Pruven Performance), as the owner of the jet ski and the party responsible for payment. After the repairs were completed, an invoice was provided to Pruven Performance. One night, the jet ski was removed from Fiore Powersports, without payment or permission, and brought to the plaintiff's residence. Fiore Powersports commenced a small claims action against Pruven Performance to recover the cost of the repair work, and, on January 29, 2016, judgment was rendered in favor of Fiore Powersports in the amount of $1908.80.

"In December, 2016, the plaintiff commenced the underlying action in this appeal against Fiore Powersports, its principal, Christopher Fiore, and the defendant. The plaintiff brought several claims against Fiore Powersports, Fiore, and the defendant related to the repair of the jet ski, including claims for conversion, fraud, and negligence, as well as claims under the Creditors' Collection Practices Act, General Statutes § 36a-645 et seq., and the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.[3] On

of proof on the plaintiff as to the defendant's claim of bad faith, (4) granting the defendant's untimely motion for attorney's fees, and (5) failing to allow the plaintiff to fully litigate the motion for attorney's fees. Because we conclude that there was insufficient evidence of bad faith to support the court's award, we do not address those additional claims.

[3] Specifically, the plaintiff alleged that the defendant (1) was "liable for conversion because [it] wrongfully exercised dominion and control over [the] plaintiff's property," (2) violated CUTPA "by committing conversion of the plaintiff's jet ski [and] by engaging in a joint venture, supervising, or consenting to the actions of Fiore," and (3) was negligent in failing to "accurately represent whether . . . [it] would be making repairs to the jet

July 30, 2019, after considering the plaintiff's claims during a bench trial, the court rendered judgment for Fiore Powersports, Fiore, and the defendant. In its memorandum of decision, with respect to the claims against the defendant, the trial court specifically found that '[n]o document, and no credible evidence ties or implicates . . . [the defendant] into or with the claims made by the plaintiff, with any contract or agreement with the plaintiff, with any work on the jet ski, or with any representation, statement or misstatement about the jet ski.'

"On September 3, 2019, the defendant filed a post-judgment motion for attorney's fees. The motion requested that the court 'award attorney's fees against the plaintiff and or the plaintiff's counsel [Peter A. Lachmann] for bringing this action against . . . [the defendant] in bad faith.' The plaintiff objected, arguing, inter alia, that the court did not give the plaintiff an opportunity to be heard on the issue of attorney's fees. On January 13, 2020, the court ordered that the plaintiff's counsel provide, by February 6, 2020, any evidence found in discovery to explain why the plaintiff believed that he would have a colorable claim against the defendant. The plaintiff filed a response to the order.

"On October 14, 2020, without scheduling a hearing, the court granted the motion for attorney's fees and awarded $893.75 to the defendant. The plaintiff then sought clarification of the court's order granting attorney's fees to the defendant. In a memorandum of decision on the motion for clarification, the court stated that, following its order of January 13, 2020, in which it ordered the plaintiff to provide any evidence 'indicating that [the defendant] has responsibility or ownership in this action,' the plaintiff provided no such evidence. The

ski and to seek permission from the plaintiff or [his] representative before transferring the jet ski to Fiore."

court further stated that what the plaintiff did provide to the court in 'claimed compliance [with the order] . . . totally failed.'

"The court also addressed the plaintiff's request to clarify 'whether the order is against [the] plaintiff or [the] plaintiff's counsel.' The court stated that the order was issued 'against both the plaintiff and [the] plaintiff's counsel' because '[n]o facts known to the plaintiff or his counsel . . . would allow a reasonable person or a reasonable attorney to conclude that a colorable claim might be established against the defendant . . . .'

"On November 5, 2020, the plaintiff and Lachmann [appealed] from the decision of the court granting the motion for attorney's fees against both the plaintiff and Lachmann." (Footnote added.) *Cokic* v. *Fiore Powersports, LLC*, supra, 209 Conn. App. 854–57.

This court dismissed Lachmann's appeal because he was not a party to the underlying action, but the court agreed with the plaintiff's claim that the trial court improperly had failed to provide him with a hearing on the defendant's motion for attorney's fees. Id., 859, 861. Accordingly, the court reversed the judgment "only as to the award of attorney's fees against the plaintiff" and remanded the matter "for a hearing on the issue of attorney's fees." Id., 861. On February 1, 2022, the appellate clerk taxed costs in the amount of $489.11 in favor of the plaintiff pursuant to Practice Book § 71-2.[4]

On remand, the court, *Brown, J.*, held a hearing on the defendant's motion for attorney's fees on April 22, 2022. In its memorandum of law in support of that motion, the defendant argued "that there was no colorable claim to be made against it and that both the

[4] Practice Book § 71-2 provides in relevant part: "[I]n all appeals . . . which go to judgment in the Supreme or Appellate Court including an order for a new trial, costs shall be taxed to the prevailing party by the appellate clerk, in the absence of special order to the contrary by the court. . . ."

plaintiff and his attorney were aware of that fact when the suit was brought. The defendant . . . is a legal entity which could only be held liable for the actions of its agents with express or implied authority to act on its behalf. . . . The evidence produced by the plaintiff at trial showed that neither he nor his attorney could identify any agent of [the defendant] who had any contact with the plaintiff or the jet ski in question. The plaintiff also failed to produce any evidence to show that he was damaged by any actions of the defendant . . . .

"The evidence produced at trial by [Fiore Powersports] showed that Pruven Performance (not the plaintiff), was the party to the contract to repair the jet ski. [Fiore Powersports] was never paid by anyone, and there was no evidence linking the actions of any defendant to the condition of the jet ski when it showed up at another repair shop disassembled approximately a year and one half after it was removed from the premises of [Fiore Powersports]." (Citation omitted.)

In his objection to the defendant's motion for attorney's fees, the plaintiff argued that the defendant's "sole reliance on the judgment is irrelevant" to whether the plaintiff's claims against the defendant were colorable and noted that "[t]here [was] no mention of any bad conduct on the part of [the] plaintiff's counsel in the decision, which is the sole claim made by counsel for [the defendant]."

At the hearing, counsel for the defendant stated: "I am not going to offer evidence other than the decision of the trial court, which is already part of the file, and . . . the list of exhibits that [was] before the trial court . . . . And as you can see from the finding of Judge Hiller, there was no evidence linking [the defendant] with the actions—with anything to do with the jet ski in question. I would like the court to just take a quick

look at the findings of fact, which to me are—show a case that was brought without merit and right for these types of sanctions.

"The court has found specifically that someone other than the plaintiff, a Mr. [William] Jackowitz, brought the jet ski to Fiore Powersports and represented to Fiore that it was owned by Pruven, an entity named Pruven. Fiore Powersports was never informed that somehow the named plaintiff in this case was even a part[y] to anything to do with the repairs that Fiore [Powersports] was supposed to make on the jet ski. After there was a dispute between Fiore and the parties, Mr. Jackowitz, and maybe [the plaintiff], the jet ski was removed under the cover of night without permission, and returned to [the plaintiff], with no money being lost by [the plaintiff].

"Further, there is no evidence before this court as to any causation, as to whether or not there [were] any damages caused by whoever had possession. Moreover, there is absolutely no evidence that [the defendant] was involved in this transaction any other way. . . .

"I look at the memorandum I filed . . . and I look at the standard for awarding attorney's fees, which says it means no reasonable person can conclude. There is absolutely no evidence presented. If there is no evidence linking my client to anything to do with the jet ski, no reasonable person can conclude that the case would come out any different and that there would be a finding against my client. And, for those reasons, I would ask that the court award attorney's fees."

Daniel Robert Bagley, the president of the defendant, testified that the defendant had paid its attorney $2850 in connection with the defense of the underlying action, and the plaintiff's counsel declined to question Bagley. Instead, counsel for the plaintiff argued: "[W]e responded to Judge Hiller's request for information of

a [colorable] claim . . . and we provided that information. And it shows, I'll try to find [it], but it shows a document that involved the jet ski. It was sent by Village Marina, according to the document, and it was sent through the friend of the plaintiff. So, it's clear that they were involved. And that's all—it's all a basis of their motion for attorney's fees. And that document, which is the one where the Appellate Court says the plaintiff provided evidence to the court . . . to comply with the order. The court dismissed the evidence as unresponsive to its inquiry. That was evidence that should have been considered, and it shows that there is a colorable claim. Okay, I have a piece of evidence right here. I can direct you to where the evidence is. . . . Okay. The evidence is, I filed a notice of compliance on January 21, 2020, and it is exhibit A. . . . Exhibit A is the document from—the document from Village Marina, which is being forwarded to . . . Jackowitz, who testified at trial. He was a friend of the plaintiff. And it shows the [defendant's] involvement. So, if you have any questions, it shows that they were involved with the jet ski, with the repair of the jet ski . . . ."

Exhibit A is a copy of an email sent from "casey@villagemarinact.com" with the subject, "Jetski Invoice From Fiore's Powersports," and includes a copy of an invoice. The email reads: "If you have any questions send me an email back and I will try to get in touch with Chris. I have no idea what they did to the ski I'm just the messenger. Thanks." The email is signed by "Casey Shackett," and "Village Marina" is written below that name. In his notice of compliance, the plaintiff claimed that exhibit A "relates to the bill that was at issue. It also establishes a prior history of [correspondence] related to the jet ski repair." Exhibit B to the notice of compliance was an email sent by the defendant's counsel to the plaintiff's counsel, stating that "I

have met with my client and even assuming the authenticity of the email that you sent to me, I see no reason to file a supplemental response to your interrogatories. The author of the [e]mail is neither an employee of Village Marina, LLC nor a member of Village Marina, LLC. Further, that is not an email address used or owned by Village Marina, LLC." In his notice of compliance, the plaintiff noted that exhibit B "only states that the sender is currently not an employee or member of [the defendant]. It does not deny that he was an agent or employee at the time the email was sent in June of 2016. It does not deny that the email may have been used by [the] defendant at the time of the incident alleged in the complaint."

In response to that line of argument, the defendant's counsel asserted that exhibit A "was a hearsay document not admitted [into evidence]. The author of the document did not appear on behalf of the plaintiff. And, in fact, the evidence [presented at trial] was [that] the author of this document had never been an employee or an officer of [the defendant].

"What should have been done [is] a proper investigation of the claim; those are the questions that should have been asked before the lawsuit [was filed]. Does Village Marina really mean Village Marina, LLC? Who is this person? Is he an employee? That was not done. It was not done by the plaintiff, and it was not done by counsel. There is a basic difference between an LLC and someone simply using the name. . . .

"What should have been done was the proper investigation once that document was received to see if this person was in any way, shape, or form related to [the defendant]. There has been no evidence that that was done. That evidence was not admitted. And, in fact, the person that authored the document never appeared at trial to testify to any of these facts. So, this is why Judge

Hiller dismissed it out of hand." After the plaintiff's counsel interjected that the email had been admitted into evidence, counsel for the defendant reviewed his file before conceding that the email had been marked as a full exhibit at trial.[5] Counsel for the defendant still maintained that "it proves nothing."

On August 5, 2022, the court issued a memorandum of decision, in which it granted the defendant's motion for attorney's fees in the amount of $2850. In light of the February 1, 2022 taxation of costs in the amount of $489.11 in favor of the plaintiff for his successful appeal from Judge Hiller's decision, the court offset the two awards and ordered the plaintiff to pay the defendant $2360.89 in attorney's fees. This appeal followed.

On appeal, the plaintiff claims that the court abused its discretion in granting the defendant's motion for attorney's fees. He argues that "no evidence, either clear or otherwise, was put forth by either [the] defendant . . . or the court, as to bad faith conduct by the plaintiff." We agree and further conclude that the court failed to find with adequate specificity that the plaintiff's claims were entirely without color and that he acted in bad faith.

We begin our analysis by setting forth the relevant legal principles regarding awards of attorney's fees for litigation misconduct. "An exception to the common-law rule that attorney's fees are not allowed to the successful party in the absence of a contractual or statutory exception is the inherent authority of a trial court to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive

[5] The list of exhibits from the trial court reflects that exhibit 3, identified as "[e]mail from Shackett with invoice," was admitted into evidence as a full exhibit at the underlying trial before Judge Hiller.

reasons. . . . [A] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle. . . . To ensure . . . that fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims, we have declined to uphold awards under the [bad faith] exception absent *both clear evidence* that the challenged actions are entirely without color and [are taken] for reasons of harassment or delay or for other improper purposes . . . *and a high degree of specificity in the factual findings* of [the] lower courts. . . . [Our case law] makes clear that in order to impose sanctions pursuant to its inherent authority, *the trial court must find both that the litigant's claims were entirely without color and that the litigant acted in bad faith.*" (Emphasis in original; internal quotation marks omitted.) *Puff* v. *Puff*, 334 Conn. 341, 371–72, 222 A.3d 493 (2020); see also *Berzins* v. *Berzins*, 306 Conn. 651, 661–63, 51 A.3d 941 (2012); *Maris* v. *McGrath*, 269 Conn. 834, 846–47, 850 A.2d 133 (2004).

"Although this exception . . . is often referred to in shorthand as 'the bad faith exception,' the label is somewhat of a misnomer as it encompasses *both* of the required findings . . . that the litigant's claims were entirely without color and that the litigant acted in bad faith." (Emphasis in original.) *Rinfret* v. *Porter*, 173 Conn. App. 498, 509 n.14, 164 A.3d 812 (2017). "The court must make these findings with a high degree of specificity . . . . When, as in the present case, the actor's bad faith is predicated on the theory that he knowingly brought claims entirely lacking in color, colorability and bad faith are, by necessity, closely linked. . . .

"Colorability is measured by an objective standard, whereas bad faith is measured by a subjective one. . . . Although [our Supreme Court has] stated that the standard for colorability varies depending on whether

the person against whom sanctions are sought is a party or the party's attorney; see *Maris* v. *McGrath*, supra, 269 Conn. 847; [it recently clarified] that the inquiry is the same in either case. . . . [A] claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. . . . Put simply, the colorability inquiry asks whether there is a *reasonable* basis, given the facts, for bringing the claim, regardless of whether it is brought by an attorney or a party.

"A determination of bad faith, by contrast, rather than focusing on the objective, reasonable beliefs of the person against whom sanctions are sought, focuses on subjective intent. . . . [I]n determining whether a party has engaged in bad faith, [t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation. . . . From that conduct, the court may infer the subjective intent of the person against whom sanctions are sought. Some examples of evidence that would support a finding of bad faith include a party's use of oppressive tactics or its wilful violations of court orders . . . or a finding that the challenged actions [are taken] for reasons of harassment or delay or for other improper purposes . . . . When . . . the claim that an individual has brought or maintained an action in bad faith is predicated on the individual's personal knowledge that there is no factual support for the claim or claims at issue, in order to infer that the individual acted in bad faith, the court must make a finding that the individual knew of the absence of that factual basis." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Lederle* v. *Spivey*, 332 Conn. 837, 844–46, 213 A.3d 481 (2019).

On appeal, "we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This

standard applies . . . to the trial court's determination of the factual predicate justifying the award." (Internal quotation marks omitted.) *Berzins* v. *Berzins*, supra, 306 Conn. 661. Therefore, we must "examine the court's findings to determine whether they are sufficiently specific to support the conclusion that the court did not abuse its discretion in arriving at its ultimate findings of bad faith and lack of colorability." *Lederle* v. *Spivey*, supra, 332 Conn. 848 n.8.

In the present case, the court accurately set forth the relevant legal standard, i.e., "[t]he moving party must establish that the challenged conduct was entirely without color and taken for reasons of harassment or delay or for other improper purposes." In concluding that the defendant had satisfied that standard, the court reasoned that "[c]ounsel for the defendant referred to its previously filed postjudgment motion for attorney's fees, wherein it articulated that the plaintiff never produced any document or other credible evidence linking the defendant to the plaintiff's jet ski. . . . [Bagley testified] that the total amount paid to counsel to represent the [defendant] in this matter . . . was $2850. Counsel for the plaintiff chose not to cross-examine . . . Bagley, or to challenge any of the defendant's bad faith assertions. Counsel for the plaintiff, rather [than] putting forth evidence and argument that the claims against the defendant were pursued in good faith, attempted to relitigate [Judge Hiller's] ruling on the merits. Counsel chose not to question . . . Bagley regarding the claimed amount of attorney's fees. Counsel also failed to argue that the claims of conversion or negligence were in fact colorable claims against the defendant. Instead, [the] plaintiff's counsel simply made reference to his filings before the trial court wherein he asserts he provided support for these claims. The Appellate Court already ruled [that] the trial court did not hold a hearing prior to awarding attorney's fees in this case.

The hearing before this court on April 22, 2022, was the plaintiff's opportunity to be heard on the issue of attorney's fees. Nothing in counsel's statements that day leads this court to conclude that the claims of conversion or negligence against the defendant were based upon anything other than bad faith or a desire to delay the proceedings. The court finds the defendant is entitled to attorney's fees in this case on the grounds [that] the plaintiff's claims were entirely without color. Counsel was given an opportunity at the April 22, 2022 hearing to challenge . . . the nature and amount of the claimed attorney's fees, as well as to thoroughly articulate the basis of the conversion and negligence claims and why said claims were not brought in bad faith; he failed to do so."

Although the court summarily concluded that the plaintiff's claims against the defendant "were entirely without color" and were brought in "bad faith or [with] a desire to delay the proceedings," it failed to set forth with a high degree of specificity any factual findings to support the award.[6] Because the court failed to make the necessary findings as to both prongs of the bad faith exception with any specificity, we conclude that the court abused its discretion in granting the defendant's motion for attorney's fees. See, e.g., *Berzins* v. *Berzins*, supra, 306 Conn. 663 (Supreme Court reversed this court's judgment that affirmed the trial court's award of attorney's fees because, "although the court found that the administrator's actions were entirely without color and supported that finding with a high degree of specificity in its factual findings, the court did not make a separate finding that the administrator acted in bad faith"); *Fredo* v. *Fredo*, 185 Conn. App. 252, 270, 196 A.3d 1235 (2018) (vacating trial court's

[6] It is unclear what motive the plaintiff had to delay the proceedings that he had initiated against the defendant.

award of attorney's fees because court's "decision contain[ed] no express findings, made with a high degree of specificity, that the defendant's claims with respect to her motions and the subpoena duces tecum served on the plaintiff were entirely without color and that the defendant had acted in bad faith"); *Sabrina C.* v. *Fortin*, 176 Conn. App. 730, 755, 170 A.3d 100 (2017) ("[a]lthough the court stated that it found the defendant's claims unpersuasive and without merit, the court did not provide, with a high degree of specificity, factual findings to support a determination that those claims were made in bad faith and were entirely without color"); *Rinfret* v. *Porter*, supra, 173 Conn. App. 517–18 ("[b]ecause we conclude that the court has failed to make [its] finding [of lack of colorability] with the specificity required . . . we need not consider whether the court adequately found that the plaintiff also acted in bad faith"); *Kupersmith* v. *Kupersmith*, 146 Conn. App. 79, 99, 78 A.3d 860 (2013) ("[b]ecause the court made no other findings of fact to support its conclusion that the defendant filed his motion in bad faith, we conclude that the court abused its discretion in awarding attorney's fees . . . to the plaintiff").

Our conclusion that the court failed to make the necessary findings to justify its attorney's fees award does not end our inquiry. We must address whether the matter should be remanded for another hearing or with direction that the defendant's motion for attorney's fees be denied. Our resolution of this question turns on whether the defendant, having been given an opportunity to do so, presented sufficient evidence of the plaintiff's lack of a colorable claim and his bad faith to support the required findings. See *Puff* v. *Puff*, supra, 334 Conn. 371 ("[a] litigant seeking an award of attorney's fees for the bad faith conduct of the opposing party faces a high hurdle" (internal quotation marks omitted)). Having reviewed the record, we conclude

that the defendant failed to present any evidence that the plaintiff lacked a colorable claim against it and that his pursuit of his claims was undertaken in bad faith. Therefore, a new hearing on the defendant's motion for attorney's fees is not warranted in the present case.[7]

In support of its motion before Judge Brown, the defendant principally relied on Judge Hiller's finding that "[n]o document, and no credible evidence [links] the defendant . . . [to] the claims made by the plaintiff, with any contract or agreement with the plaintiff, with any work on the jet ski, or with any representation, statement or misstatement about the jet ski." Although the plaintiff's counsel directed Judge Brown's attention to the notice of compliance he had filed in response to Judge Hiller's January 13, 2020 order, the court did not address the import of exhibit A or consider the plaintiff's argument that exhibit A demonstrated that the plaintiff had a reasonable basis to believe that the defendant was involved with the repairs made to the jet ski and, therefore, might be responsible for the damages that allegedly resulted from those repairs.

To be sure, the defendant's counsel disputed the significance of exhibit A for several reasons, including that "[t]here is a basic difference between an LLC and someone simply using the name," and that there was no evidence that the plaintiff investigated whether the author of the email "was in any way, shape, or form related to [the defendant]." The defendant's counsel also argued that "the person that authored the document never appeared at trial to testify to any of these facts. So, this is why Judge Hiller dismissed it out of hand." Nevertheless, the defendant failed to identify any evidence either that there was some other entity,

[7] As previously noted in this opinion, the defendant declined to file a brief in the present appeal. Thus, although it requested that this court affirm the judgment of the trial court, the defendant has failed to offer any support for our doing so.

"Village Marina," which was separate and distinct from Village Marina, LLC, or that the plaintiff knew that the author of the email in exhibit A was not affiliated with the defendant. Simply relying on the fact that the plaintiff ultimately was unable to demonstrate an agency relationship or otherwise prove his claims against the defendant is not sufficient to establish that the plaintiff's claims were entirely without color and that the plaintiff acted in bad faith. See, e.g., *Kupersmith* v. *Kupersmith*, supra, 146 Conn. App. 97 ("[w]hether a claim is colorable, for purposes of the bad-faith exception, is a matter of whether a reasonable [person] could have concluded that facts supporting the claim might be established, *not whether such facts had been established*" (emphasis added; internal quotation marks omitted)). In other words, although Judge Hiller found that the email signed with the defendant's name was insufficient to prove that the author of the email was affiliated with or acted on behalf of the defendant, that email provided a colorable basis for the plaintiff to believe that the defendant was involved in the transaction that gave rise to his claimed damages. Thus, there appears to be *some* factual basis for the plaintiff's claims against the defendant, as someone using the defendant's name emailed a copy of an invoice for the repairs made to the jet ski to a friend of the plaintiff. Similarly, the defendant, despite having the burden to prove the plaintiff's bad faith, presented no evidence to the court that the plaintiff knew that the author of the email was not affiliated with the defendant and that his claims against the defendant were, therefore, baseless. See *Lederle* v. *Spivey*, supra, 332 Conn. 846 ("[w]hen . . . the claim that an individual has brought or maintained an action in bad faith is predicated on the individual's personal knowledge that there is no factual support for the claim or claims at issue, in order to infer that the individual acted in bad faith, the court must make a finding that the individual knew of the absence of that factual basis").

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for attorney's fees, to reinstate the February 1, 2022 taxation of costs in favor of the plaintiff and to render judgment thereon.

In this opinion the other judges concurred.

KENNYNICK, LLC, ET AL. *v.* STANDARD PETROLEUM COMPANY
(AC 45118)

Alvord, Elgo and Seeley, Js.

Syllabus

The plaintiff retail gasoline dealer sought to recover damages from the defendant, a wholesale gasoline distributor, in connection with the defendant's breach of a dealer supply agreement between the parties regarding the sale of gasoline. The plaintiff claimed that it was overcharged when the defendant failed to apply a federal tax credit to the federal gasoline tax charged to the plaintiff and improperly charged the plaintiff for the Connecticut gross receipts tax on the defendant's profit and delivery costs. After a trial, the court found, inter alia, that the defendant breached the parties' contract by failing to properly apply the federal tax credit and the state gross receipts tax. On the plaintiff's appeal and the defendant's cross appeal to this court, *held* that the judgment of the trial court was affirmed; because the trial court properly resolved the issues in its thorough and well reasoned memorandum of decision, this court adopted that decision as a proper statement of the relevant facts, issues and applicable law.

Argued September 12—officially released October 31, 2023

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of Hartford, Complex Litigation Docket, where the plaintiff Faugno Acquisition, LLC, withdrew from the action; thereafter, the case was tried to the court, *Schuman*, *J.*; judgment in part for the named plaintiff, from which the named plaintiff appealed and the defendant cross appealed to this court; subsequently, the court, *Schuman*, *J.*, issued an articulation of its decision. *Affirmed.*

John J. Morgan, for the appellant-cross appellee (named plaintiff).

Nicholas P. Vegliante, with whom was *Joseph J. Arcata III*, for the appellee-cross appellant (defendant).

Opinion

PER CURIAM. The plaintiff Kennynick, LLC, appeals, and the defendant, Standard Petroleum Company, cross appeals, from the judgment of the trial court in this dispute between a wholesale gasoline distributor and a retail gasoline dealer.[1] The plaintiff claims that the court improperly (1) calculated the applicable time period for which it awarded prejudgment interest, (2) concluded that the plaintiff had not established violations of either the Connecticut Petroleum Franchise Act (CPFA), General Statutes § 42-133j et seq., or the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (3) permitted the defendant to offer evidence to support unpleaded special defenses of offset or recoupment. In its cross appeal, the defendant claims that the court improperly (1) construed the contract between the parties to require it to pass along a federal tax credit to the plaintiff and (2) denied its special defenses of waiver and voluntary payment.[2] We affirm the judgment of the trial court.

This action concerns a dealer supply agreement between the parties regarding the sale of gasoline. In

[1] The present case is part of a class action against the defendant for failing to pass on a federal tax credit to retail gasoline dealers and for overcharging them on the state gross receipts tax. Although Faugno Acquisition, LLC, also was named as a plaintiff, it withdrew from this action in December, 2019. As the court emphasized in its memorandum of decision, the present case concerns only the claims of Kennynick, LLC, and does not involve any class issues. We therefore refer to Kennynick, LLC, as the plaintiff in this opinion.

[2] The defendant also contends that the court improperly awarded compound prejudgment interest to the plaintiff, arguing that such an award is not permitted under General Statutes § 37-3a. At oral argument before this court, the defendant's counsel conceded that the defendant did not raise that claim with the trial court at any time, despite the fact that the plaintiff

its operative complaint, the plaintiff alleged that the defendant had overcharged it by (1) failing to apply the federal "volumetric ethanol excise tax credit"; see *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 44 n.5, 191 A.3d 147 (2018); to the federal gasoline tax that it charged the plaintiff and (2) improperly charging the plaintiff for the Connecticut gross receipts tax; see General Statutes § 12-587 (b) (1); on the defendant's profit and delivery costs. The plaintiff's complaint contained six counts alleging breach of contract, unjust enrichment, misrepresentation, and violations of CPFA, CUTPA, and the Uniform Commercial Code. In response, the defendant filed an answer and special defenses, in which it alleged, inter alia, waiver and voluntary payment on the part of the plaintiff.

Following a six day trial, the court found the defendant liable for breach of contract due to its failure to properly apply the federal tax credit and the Connecticut gross receipts tax, which resulted in an overcharge of $37,637.72 to the plaintiff. The court ruled in favor of the defendant on the misrepresentation, CPFA violation, and CUTPA violation counts and rejected its special defenses.[3] The court further concluded that the

expressly requested an award of "5 percent annual compound interest" in its posttrial brief. Accordingly, we decline to consider that unpreserved claim. See Practice Book §§ 5-2 and 60-5; *Chief Disciplinary Counsel* v. *Rozbicki*, 326 Conn. 686, 695, 167 A.3d 351 (2017) ("[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.)), cert. denied, U.S. , 138 S. Ct. 2583, 201 L. Ed. 2d 295 (2018); *State* v. *Favoccia*, 119 Conn. App. 1, 14, 986 A.2d 1081 (2010) ("[i]t is axiomatic that issues not properly raised before the trial court ordinarily will not be considered on appeal"), aff'd, 306 Conn. 770, 51 A.3d 1002 (2012).

[3] The court declined to rule on the unjust enrichment count, as it related only to the class action component of the case, as well as the plaintiff's claims under the Uniform Commercial Code, which the court concluded

plaintiff was entitled to prejudgment interest and reimbursement from the defendant for its attorney's fees, and rendered judgment accordingly. From that judgment, the plaintiff now appeals and the defendant cross appeals.

Our plenary review of the record, briefs, and arguments of the parties persuades us that the judgment should be affirmed. The issues properly were resolved in the court's thorough and well reasoned memorandum of decision. See *Kennynick, LLC* v. *Standard Petroleum Co.*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-CV-09-5042760-S (October 22, 2021) (reprinted at 222 Conn. App. 237, A.3d). We therefore adopt that memorandum of decision as a proper statement of the relevant facts, issues, and applicable law, as it would serve no useful purpose for us to repeat the discussion contained therein. See *Citizens Against Overhead Power Line Construction* v. *Connecticut Siting Council*, 311 Conn. 259, 262, 86 A.3d 463 (2014); *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 81, 153 A.3d 687 (2017).

The judgment is affirmed.

APPENDIX

KENNYNICK, LLC, ET AL. *v.* STANDARD PETROLEUM COMPANY*

Superior Court, Judicial District of Hartford,
Complex Litigation Docket

Docket No. X03-CV-09-5042760-S

Memorandum filed October 22, 2021

"does not apply to the contract between the parties." On appeal, neither party challenges the propriety of that determination.

* Affirmed. *Kennynick, LLC* v. *Standard Petroleum Co.*, 222 Conn. App. 234, A.3d (2023).

Proceedings

Memorandum of decision in named plaintiff's action for breach of contract. *Judgment in part for named plaintiff.*

John J. Morgan, for the named plaintiff.

Nicholas P. Vegliante and *Joseph J. Arcata III*, for the defendant.

Opinion

SCHUMAN, J. The named plaintiff, Kennynick, LLC (Kennynick, or the plaintiff), a retail gasoline dealer, has filed this class action against the defendant, Standard Petroleum Company (Standard, or the defendant), alleging that Standard, a wholesale distributor, overcharged the plaintiff for gasoline. A bench trial of the named plaintiff's claims took place over six days between July 29 and August 5, 2021. The parties completed filing briefs on August 30, 2021.

This opinion constitutes the memorandum of decision only in the named plaintiff's case. The court does not discuss any class issues. It will be up to the parties to decide in the first instance, based on this decision, whether and to what extent to pursue further class action proceedings.

BACKGROUND

The plaintiff filed this suit in the Stamford-Norwalk Judicial District in 2009. The court, *Heller*, *J.*, granted class action status on July 1, 2016. (Docket Entry #163.01, #186.00.) There is no obvious explanation for the delay between the filing of the case and the litigation of the class action motion. As noted later in this opinion, there is no indication of any activity in this case for roughly the five years between June, 2009, and June, 2014.

In 2018, the Supreme Court affirmed the class certification in a companion case that has now been withdrawn. *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 191 A.3d 147 (2018). During the appeal, the case was transferred to the Complex Litigation Docket in Hartford. The court originally set trial for December, 2019, but then had to continue the trial several times due at least partly to the COVID-19 pandemic.

The operative, third amended complaint (complaint [Docket Entry #227.00]) is in six counts: breach of contract, unjust enrichment, violations of the Connecticut Petroleum Franchise Act (CPFA), violations of the Connecticut Unfair Trade Practices Act (CUTPA), violations of the Uniform Commercial Code (UCC), and misrepresentation. The gravamen of the action is that Standard failed to pass on to Kennynick certain federal tax credits and overcharged Kennynick for the state gross receipt tax. The court does not discuss count two, alleging unjust enrichment, because that count relates only to the class action component of the case, and count four, alleging UCC violations, because that count does not apply to the contract between the parties.

I

THE CONTRACT

Many of the basic facts are undisputed. On January 28, 1999, Standard, acting through George McCloskey, its principal officer, entered into a thirty-eight paragraph "Dealer Supply Contract" with Kennynick, acting through its manager, Monty Blakeman, for the sale and purchase of gasoline. (Plaintiff's Exhibit (Pl. Ex.) 3.) Paragraph three of the contract governed pricing. It provided essentially for a "rack cost plus" structure. Specifically, Kennynick would pay Standard's "Texaco Cost"—i.e., Standard's wholesale price before taxes, or what is known as the "rack price"—plus (1) overhead

or a profit margin and (2) taxes.[1] The original contract contained a formula for determining the overhead or profit margin based on the number of gallons sold per month. Paragraph three then contained the phrase "+ ALL APPLICABLE TAXES." The parties crossed this phrase out and initialed it. (Pl. Ex. 3, p. 2.) The undisputed testimony was that McCloskey crossed this phrase out at Blakeman's request based on Blakeman's concern that, because paragraph four also provided for Standard to charge for taxes, there was a risk of double taxation. Paragraph four stated: "Unless otherwise specified, prices include taxes, duties, fees or other charges which [Standard] may be required to collect or pay pursuant to any present or future laws, orders and regulations of any governmental authority." (Pl. Ex. 3, p. 2.)[2]

On October 30, 2003, the parties amended the contract, effective November 1, 2003. Instead of adding a cost for overhead that varied based on the number of gallons sold per month, the parties agreed to amend paragraph three so that it would use a uniform figure

[1] Although there was some debate on the meaning of "Texaco Cost," even the plaintiff's expert stated in his report that, "[a]s used in the Supply Contract, 'Texaco Cost' is the same as the Rack or Terminal price." (Pl. Ex. 10, p. 3.) The court adopts this position.

[2] Standard was not required to "collect" taxes from Kennynick, but it was contractually required to "pay" taxes to Motiva, its principal supplier for this contract. (See, e.g., Pl. Ex. 25, p. 3500; Pl. Proposed Findings [Docket Entry #274.00], para. 65.)

The contract actually set up a more complicated and somewhat confusing pricing structure. It provided or assumed that Standard would charge Kennynick a much higher "posted price" (also known as an invoice, listed, or DTW price) and then give Kennynick a "rebate based on the difference between the Standard Petroleum posted price and its Texaco Cost as follows . . . ." (Pl. Ex. 3, p. 1.) Immediately after this phrase, the contract set out the formula for determining overhead followed by the crossed-out phrase "+ ALL APPLICABLE TAXES." (Pl. Ex. 3, p. 2.)

In retrospect, the use of the phrase "Texaco Cost as follows" was confusing and ill-advised. The contract would have been much clearer had the parties used a phrase such as "Texaco Cost plus" and then listed the additional items.

of 3.5 cents per gallon as the overhead and profit. (Pl. Ex. 4.)[3] The amendment provided that "[a]ll terms and conditions of the present 'Dealer Contract' to remain in full force and effect as if restated herein," except for this revision to the pricing structure in paragraph three. (Pl. Ex. 4.) In addition, the amendment extended the term of the original contract by three years from February 1, 2005, to February 1, 2008. (Pl. Ex. 4.) Because this case concerns sales made from January 1, 2005, to slightly after February 1, 2008, the new terms in the amended contract, rather than the superseded terms in the original contract, govern the issues.[4]

II

THE STATUTORY BACKGROUND

A

The Federal Fuel Tax and Ethanol Credit (VEETC)

Section 4081 of the Internal Revenue Code, codified at 26 U.S.C. § 4081, imposes a federal fuel tax of 18.3 cents per gallon on the "removal of taxable fuel from any refinery" or "any terminal."[5] The statute adds a tax of 0.1 cent per gallon for the Leaking Underground Storage Tank Trust Fund, so that the total tax is 18.4 cents per gallon. 26 U.S.C. § 4081 (a) (1), (a) (2) (A) (i) and (a) (2) (B). In 2004, Congress enacted § 6426 of the Internal Revenue Code, which is codified at 26 U.S.C. § 6426 and allows a "credit . . . against the tax imposed by section 4081" of 5.1 cents per gallon for

[3] Once again, the parties used the confusing phrase "Texaco/Shell cost as follows . . ." followed by a line showing a markup of 3.5 cents per gallon for all types of gasoline purchased. But the contract then misplaced the decimal point and stated the markup as ".0035 Cents." (Pl. Ex. 4.) There was no dispute that the parties intended the contract to read "3.5 Cents."

[4] The evidence reveals that sales took place through March 5, 2008. (Def. Ex. 424, p. 27.)

[5] All United States Code and Connecticut General Statutes citations are to the statutes applicable during the contract period.

sales of an "alcohol fuel mixture" before January 1, 2009. 26 U.S.C. § 6426 (a) (1), (b) (1) and (b) (2) (A) (i). (Pl. Exs. 34, 37.) This credit is known as the "volumetric ethanol excise tax credit," or the "VEETC." *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 44 n.5. There is no dispute that the companies from which Standard purchased gasoline, such as Motiva, Texaco, or Shell, not only had the initial responsibility to remit the federal fuel tax to the federal government and could also take the VEETC when applicable, but also that they passed on both the tax and the credit to wholesalers such as Standard. (Pl. Ex. 25, p. 3500.)

B

The State Gross Receipts Tax (GRT)

Pursuant to General Statutes § 12-587 (b) (1), the state of Connecticut has imposed a gross receipts tax on "any company which is engaged in the refining or distribution, or both, of petroleum products and which distributes such products in this state . . . ." The tax is on the company's "gross earnings derived from the first sale of petroleum products within this state." The tax rate varied during the relevant time period from 5.8 percent to 7 percent. General Statutes § 12-587 (b) (1) (Pl. Ex. 31.) Under state regulations, " 'Gross earnings' mean and include gross receipts from the initial sale of petroleum products, but do not include the amount of state or federal excise taxes on gasoline or special fuel." Regs., Conn. State Agencies § 12-602-1a (Pl. Ex. 32.)

III

COUNT ONE: BREACH OF CONTRACT

A

The VEETC

Count one alleges breach of contract. The critical paragraph of count one concerning the VEETC alleges

the following: "By charging the class members with written contracts 18.4 cents for motor fuels which included 10% alcohol during the time periods set forth in paragraphs 4 and 5 above, the defendant overcharged the plaintiff and class members 5.1 cents or 4.3 cents per gallon and misrepresented the amount of federal tax it was required to collect or pay." (Complaint, count one, para. 35.)[6] The plaintiff argues that the contract called for Standard to pass through to Kennynick not only the federal fuel tax, but also the VEETC, and that Standard did not do the latter.[7]

Standard does not dispute that it did not consistently pass through the VEETC until July 15, 2007, when it changed its practice with Kennynick to ensure a VEETC pass-through of five cents per gallon. Even then, Standard did not pass through the full VEETC credit of 5.1 cents per gallon. In any case, Standard has two principal arguments why it had no obligation to pass through the VEETC at all. First, Standard asserts that, in 1999, when the parties first negotiated their contract, the VEETC did not exist and thus the parties could not have contemplated passing it through. The court rejects this argument. The contract called for Standard to assess "taxes, duties, fees or other charges which [Standard] may be required to collect or pay pursuant to any present or *future* laws, orders and regulations of any governmental authority." (Emphasis added.) (Pl. Ex. 3, p. 2.) Thus, the contract envisioned future changes in the law concerning taxes such as the 2004 enactment of the VEETC.

[6] The VEETC credit went down to 4.5 cents per gallon (although not 4.3 cents as alleged) effective January 1, 2009, which is after the relevant time period for this trial. See 26 U.S.C. § 6426 (b) (2) (A) (ii). Thus, only the 5.1 cent credit is relevant for present purposes.

[7] Kennynick's brief adds a statutory claim based on General Statutes § 12-458 (a) (4) that it did not allege in the complaint. (Pl. Proposed Findings [Docket Entry #274.00], para. 79C.) Because the plaintiff failed to comply with the rule requiring it to allege statutory claims in the complaint, the court does not consider this claim. See Practice Book § 10-3 (a).

Standard's better argument is that the VEETC is a credit, not a tax, and thus the contract, which does not expressly mention credits, did not require Standard to pass it through. There are several responses. First, there is good authority that a tax credit is part of the concept of a "tax" and in effect reduces the tax rate. In the class action appeal, our Supreme Court described the effect of the VEETC as follows: "The federal tax credit *reduced the federal tax* on gasoline that includes ten percent alcohol, which is the gasoline/alcohol mixture used in Connecticut. The federal tax credit *reduced the tax rate* from 18.4 cents per gallon to 13.3 cents per gallon from January 1, 2005 through December 31, 2008, and to 13.9 cents per gallon from January 1, 2009 through December 31, 2011, when the federal tax credit expired." (Emphasis added.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 45 n.5. Similarly, a Special Notice from the state Department of Revenue Services entitled "Effect for Petroleum Products Gross Earnings Tax Purposes of Federal Excise Tax Rate Change on 10% Gasohol" described the VEETC as "reducing the federal excise tax rate." It added: "While the federal excise tax rate on 10% gasohol is 18.4 [cents] per gallon (under Section 4081 (a) (2) (A) and (B)), an alcohol fuel mixture credit is allowed against the tax imposed under Section 4801 equal to 5.1 [cents] per gallon (under Section 6426 (b) (1) and (2) (A)), so that the *net federal excise tax rate* on 10% gasohol is 13.3 [cents] per gallon." (Emphasis added.) (Pl. Ex. 28a, p. 1.) While these state actors perhaps are not the final authority on the definition of a federal tax credit, they do present persuasive commentary on the meaning of "tax" in the contract at issue.[8]

[8] Standard relies on *Sunoco, Inc.* v. *United States*, 908 F.3d 710 (Fed. Cir. 2018), cert. denied, U.S. , 140 S. Ct. 46, 205 L. Ed. 2d 35 (2019), which purportedly distinguished between the "alcohol fuel mixture credit"—the VEETC—and a "reduced excise-tax rate for alcohol fuel mixtures" that Congress repealed in the same act that enacted the credit. Id., 712–13. Standard relies on the following statement from the Congressional commit-

Second, Standard, as stated, explicitly passed through a five cent VEETC beginning July 15, 2007, and now strenuously argues that various credits it gave Kennynick before that date of one to five cents in effect represented at least a partial pass-through of the VEETC. It is true that McCloskey testified that Standard was not obligated to pass on the VEETC, and, in fact, Standard did not always do so prior to July, 2007. Nonetheless, Standard's conduct in generally, if not invariably, passing or attempting to pass through the VEETC reveals its belief that the contract required it to do so because "[t]he meaning of the terms of a contract can also be shown by the conduct of the parties to the contract." *Ruscito* v. *F-Dyne Electronics Co.*, 177 Conn. 149, 170, 411 A.2d 1371 (1979); see also *Old Colony Trust Co.* v. *Omaha*, 230 U.S. 100, 118, 33 S. Ct. 967, 57 L. Ed. 1410 (1913) ("[g]enerally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence"); *In re Chateaugay Corp.*, 139 B.R. 598, 611 (Bankr. S.D.N.Y. 1992) ("[w]here there is doubt as to the meaning of a contract, the court should consider the interpretation placed upon it by the parties, as evidenced by their course of performance").[9]

Thus, the court construes the contract to require Standard to pass through the VEETC. Standard admits

tee report: the "Mixture Credit 'provide[s] a benefit equivalent to the reduced tax rates, which are being repealed under the provision.' " Id., 713. This statement, however, literally suggests more of an equivalency between a tax and a credit than a clear difference.

[9] To the extent that the Dealer Supply Contract was one for the sale of goods within the scope of article 2 of the UCC, the same rule applies. See General Statutes § 42a-2-202 ("[t]erms . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms . . . may be explained or supplemented (a) by course of performance . . ."; see also General Statutes § 42a-1-303 (a) (defining "course of performance"); General Statutes § 42a-2-106 (1) (defining "contract for sale").

that it did not pass through the full 5.1 cent credit during the relevant time period. Therefore, Standard is liable for breach of contract and the court must discuss damages.

B

Damages on the VEETC Claim

It is the plaintiff's burden to prove damages. See *Expressway Associates II* v. *Friendly Ice Cream Corp. of Connecticut*, 218 Conn. 474, 476, 590 A.2d 431 (1991). As part of that burden, the plaintiff must prove that it did not receive the VEETC for part or all of the contract period. Kennynick presented an analysis in which its witness, Michael J. Fox, concluded that "the Ethanol Tax Credit was not applied to Kennynick until at least July 15, 2007," and that therefore Standard is liable for 5.1 cents on every gallon of gasoline it sold Kennynick up until that date. (Pl. Ex. 10, pp. 3-5.)

The court finds that the plaintiff did not prove this proposition. The court instead credits the testimony of Standard's officer, McCloskey, on cross-examination that, during the period before July 15, 2007, he passed through to Kennynick "the credit 50 to 60 percent of the time." McCloskey noted that these amounts ranged from one cent to five cents. (8/2/21 a.m. Transcript [Tr.], pp. 31–32.) Although McCloskey felt that he was not obligated to pass the VEETC through, these actions were not just "voluntary discounts" or "voluntary price reductions" as argued by the plaintiff. (Pl. Mem. in Opp. to Def. Posttrial Brief [Docket Entry #276.00], p. 6; Pl. Mem. in Opp. to Motion to Strike [Docket Entry #277.00], p. 2.) Rather, these credits came in response to the VEETC that Standard received from its suppliers and, at least sometime prior to July, 2007, responded to a specific request of Kennynick for the VEETC. (8/2/21 a.m. Tr., pp. 85–86.) Thus, it is fair to conclude that, to the extent Kennynick received credits of one

to five cents from Standard before July 15, 2007, Kennynick did not prove damages from the loss of the VEETC.[10]

Based on this discussion, the court accepts the alternative VEETC damages analysis of Standard's accountant, Ramy Peress. Peress initially assumed that Standard should have passed along a full 5.1 cent per gallon tax credit on every delivery to Kennynick during this time period. (Def. Exs. 412, 424.) Peress then properly deducted the actual amount—ranging from zero to five cents per gallon—that Standard did pass through. The difference represented Kennynick's VEETC damages. Because Peress factored this difference between the actual credit that Kennynick received and the full credit that it should have received into his cumulative analysis of all damages that Kennynick incurred, the court will defer recognition of the precise amount of damages until the court discusses damages for the GRT errors.

C

GRT Liability and Damages

Paragraph 36 of the complaint's first count alleges that Standard "overcharged . . . for GRT." (Complaint, count one, para. 36.) Standard admits that it erroneously calculated the state GRT, but it contends that there was no net damage to Kennynick.

As stated, the GRT should be calculated based on the "first sale of petroleum products within this state."

[10] The court therefore rejects the plaintiff's suggestion that the reduction in damages arising from Standard's passing through the VEETC represented an "unpleaded special defense" of offset or recoupment. (Pl. Mem. in Opp. to Motion to Strike, p. 2.) This case is not one in which Standard is seeking to offset Kennynick's damages because of some other "equitable reason" arising out of the same transaction. See *Loricco* v. *Pantani*, 67 Conn. App. 681, 686, 789 A.2d 514 (2002). Rather, the case involves the straightforward concept that, to the extent Standard passed through the VEETC, Kennynick did not prove damages from not receiving it.

General Statutes § 12-587 (b) (1). Thus, the proper method of determining the tax is to multiply the GRT tax rate times the rack price, which represents the price at the first sale.

Standard admits erroneously calculating the GRT by adding its overhead or profit of 3.5 cents per gallon to the rack price before multiplying by the GRT tax rate. Fox's report claimed that this process result represented a "GRT overcharge on the profit markup" for the entire contract period. (Pl. Ex. 10, p. 5.) Standard's rebate sheets reveal, however, that, at least after July 15, 2007, Standard both deducted five cents for the VEETC and then added its overhead or profit of 3.5 cents, all before calculating the GRT tax. Standard then added the federal excise tax of 18.4 cents, as well as other state taxes, to this sum. (Pl. Ex. 16-2, p. 8; Def. Ex. 425, p. 5.) The reality was that, in many cases, there was an undercharge for the GRT. Specifically, an undercharge occurred because, when Standard deducted 5 cents for the VEETC and then added 3.5 cents for overhead, it reduced by 1.5 cents the base price by which it calculated the GRT. Standard thereby assessed the GRT against a lower base figure than it should have done. In fact, not only was there no GRT overcharge to Kennynick on any delivery after July 15, 2007, but there was also no overcharge on any delivery before that date when Standard included a five or four cent per gallon reduction—both of which exceeded the 3.5 cents overhead charge—in the rack price.

Fox ultimately admitted these facts. (8/23/21 p.m. Tr., pp. 53, 58.) Because Peress based his damages analysis on these principles, the court accepts his damages analysis on the GRT claim.

D

Fox's Posttrial Affidavit and Standard's Motion to Strike

With the court's permission, the plaintiff submitted a posttrial affidavit and supplemental chart of Fox

responding to Peress' damages analysis, which Standard had disclosed only shortly before trial. (Entry # 274.00.) Fox explained in his affidavit that he multiplied the rack price for all sales of gasoline times 1 percent (or 0.01) in order to represent the discount that Standard routinely received from Motiva for making timely payments. Because Standard did not pass this 1 percent discount on to Kennynick, Fox added the result of this computation to the damages that Kennynick should receive, even under Peress' analysis. This additional amount of $77,350.81, when added to Peress' figure of $37,637.72 for the total VEETC and GRT damages, yields a revised damages total of $114,988.53.

Standard moves to strike the affidavit because it "attempts to assert and quantify a completely new and unpled claim for damages based on a completely new and previously undisclosed theory of liability." (Def. Objection and Motion to Strike Fox Affidavit [Docket Entry #273.00], p. 1.) Standard argues that the complaint alleges only tax overcharges and that the plaintiff specifically disclaimed any other basis for damages.

The court agrees with this argument. The somewhat undeveloped theory of the plaintiff based on this new evidence is that Standard breached its contract by failing to charge Kennynick the true Texaco or rack price for the gasoline. This theory is not dependent on Peress' analysis but, rather, is based on facts that the plaintiff knew or should have known from the outset of the lawsuit in 2009. (See, e.g., Pl. Ex. 25 [March 12, 2005 invoice from Motiva showing 1 percent discount], p. 3501.) The complaint, however, did not allege a breach of contract or any other violations stemming from the failure to charge the correct rack price. Rather, as quoted in part previously, the substantive allegations of the complaint allege discrepancies only in the treatment of the VEETC and the GRT. (Complaint, count one, paras. 35, 36; count three, paras. 40, 41; count six,

paras. 39, 41.) Thus, with respect to the plaintiff's new theory, the plaintiff did not give the defendant the fair notice in the complaint to which the defendant is entitled. See *Moore* v. *Sergi*, 38 Conn. App. 829, 841, 664 A.2d 795 (1995) ("[i]t is fundamental in our law that the right of a plaintiff to recover is limited to the allegations in his complaint"). Indeed, as the defendant points out, the plaintiff's counsel during Fox's 2021 deposition stated that the issue of "rebates below the rack" is "beyond the scope of this lawsuit," and that "rack be considered to be Standard's cost and the equivalent of the first sale in the state of Connecticut for purposes of calculating gross receipts."[11] For these reasons, the court, while denying Standard's motion to strike Fox's affidavit, considers the substance of the affidavit immaterial to this case.

E

Breach of Contract Damages: Conclusion

The court finds that Peress correctly calculated the damages by taking into account all of the factors discussed above. The court accepts his conclusion that, between January 1, 2005, and March 5, 2008, Standard overcharged Kennynick $37,637.72 as a result of the incorrect application of the VEETC and the GRT. (Def.

[11] The full statement of the plaintiff's counsel during Fox's deposition on January 27, 2021, was as follows: "Just to help move this along . . . I have asked Mr. Fox to assume that, for purposes of calculating damages, that Standard's cost was, in fact, rack. We all know that Standard likely received rebates below the rack.

"Whether or not they should be calculated for purposes—I don't want to argue about it in this lawsuit. It's beyond the scope of this lawsuit. So, for purposes of Mr. Fox's calculations and for all purposes, I have asked that rack be considered to be Standard's cost and the equivalent of the first sale in the state of Connecticut for purposes of calculating gross receipts.

"With that—I've asked him to do that. Certainly, Standard probably had a lower price, but it's impossible to calculate that." (Dep. of Michael Fox, January 27, 2021 [attached as Ex. B to Def. Obj. to and Motion to Strike Fox Affidavit], p. 402.)

Ex. 424, p. 27.) Accordingly, the court assesses damages on the breach of contract count of $37,637.72.

IV

COUNT THREE: CONNECTICUT PETROLEUM FRANCHISE ACT (CPFA)

The CPFA, codified at General Statutes §§ 42-133j to 42-133n, creates legislative "standards . . . governing the relationship between suppliers and distributors of gasoline and petroleum products and the dealers within the state who sell those products to the public." General Statutes § 42-133j (a). The purpose of the act is "to promote the public interest and public welfare, to avoid undue control of the dealer by suppliers, to foster and keep alive vigorous and healthy competition for the benefit of the public by prohibiting practices through which fair and honest competition is destroyed or prevented, to promote the public safety, to prevent deterioration of facilities for servicing motor vehicles on the highways of the state, to prevent dealers from unnecessarily going out of business thereby resulting in unemployment with loss of tax revenue to the state and its resultant undesirable consequences, and to offset evident abuses within the petroleum industry as a result of inequitable economic power . . . ." General Statutes § 42-133j (a);[12] see also *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, Docket No. CV-10-6016873-S,

[12] General Statutes § 42-133j (a) provides in full: "The legislature of the state of Connecticut finds and declares that the distribution and sales of gasoline and petroleum products through franchises within the state of Connecticut, including the rights and obligations of suppliers and dealers, vitally affects its general economy. In order to promote the public interest and public welfare, to avoid undue control of the dealer by suppliers, to foster and keep alive vigorous and healthy competition for the benefit of the public by prohibiting practices through which fair and honest competition is destroyed or prevented, to promote the public safety, to prevent deterioration of facilities for servicing motor vehicles on the highways of the state, to prevent dealers from unnecessarily going out of business thereby resulting in unemployment with loss of tax revenue to the state and its resultant undesirable consequences, and to offset evident abuses within the petroleum industry as a result of inequitable economic power, it is necessary to legislate

2019 WL 413581, *9 (Conn. Super. January 7, 2019) ("there is no indication in the legislative history of the CPFA that the legislature intended to turn every contract dispute between a gas franchisee and gas franchisor into a claim under the CPFA").

Count three of the complaint alleges that Standard violated the CFPA in three ways: it "failed to deal in good faith with the class members" in violation of § 42-133*l* (f) (6); it "sold gasoline to the class members for more than a fair and reasonable price" in violation of § 42-133*l* (f) (7); and it "treated certain class members differently from others" in violation of § 42-133*l* (f) (9).[13] In its briefs, the plaintiff merely mentions the claim that Standard sold gasoline for "more than a fair and reasonable price" but does not analyze or otherwise brief it. Accordingly, the court considers that claim abandoned. See *Merchant* v. *State Ethics Commission*, 53 Conn. App. 808, 818, 733 A.2d 287 (1999). The court considers the remaining claims insofar as they might affect the plaintiff individually, and not with respect to any class allegations.

standards pursuant to the exercise of the police power of this state governing the relationship between suppliers and distributors of gasoline and petroleum products and the dealers within the state who sell those products to the public."

[13] These three subdivisions provide as follows: "(f) No franchisor, directly or indirectly, through any officer, agent or employee, shall do any of the following . . . (6) fail to deal in good faith with a franchisee; (7) sell, rent or offer to sell to a franchisee any product or service for more than a fair and reasonable price . . . (9) discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless (A) any such type of discrimination between franchisees would be necessary to allow a particular franchisee to fairly meet competition in the open market, or (B) to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of sections 42-133j to 42-133n, inclusive, and is not arbitrary . . . ." General Statutes § 42-133*l*.

On the lack of good faith claim, the court credits the testimony of Standard accountant Peress on direct examination and principal officer McCloskey on cross-examination that Standard did not intend to harm Kennynick by not passing the VEETC through at the outset or by making errors in the calculation of the GRT. Further, the court finds that the errors in this case occurred as a result of (1) a contract that was poorly written in general, (2) the omission in the contract of any express mention of tax credits, and (3) the fact that the law concerning the VEETC changed in the middle of the contract term. With regard to the GRT, to the extent that the errors in calculation benefited Kennynick, they show good faith rather than bad faith. In sum, there was a breach of contract by Standard but no evidence of the sort of predatory conduct contemplated by the CPFA. The court concludes that the plaintiff did not prove bad faith by Standard.

There was also no discrimination under the CPFA. The only specific example that the plaintiff cited at trial involved three customers—E.L.L.S., LLC, Naples One, LLC, and Sole, LLC (referred to as the "Lenny/Sohail dealers" at trial). (Pl. Ex. 21; Def. Exs. 440, 442.) Although the tax clauses in the contracts with these customers read similarly to the tax clause in the Kennynick contract, the key difference was that McCloskey verbally but specifically agreed during contract negotiations to give the Lenny/Sohail dealers the VEETC discount, whereas McCloskey did not make and, in 2003 before the enactment of the VEETC, could not have made that promise to Kennynick. (8/2/21 a.m. Tr., pp. 84–85.)[14] This type of distinction means that Kennynick and the Lenny/Sohail dealers entered into contracts with Standard at "materially different times," which

[14] Standard should have written its oral agreement with the Lenny/Sohail dealers into their contracts in order to achieve more clarity and to comply with the contracts' integration clause. (Pl. Exs. 21, 440, 442, sec. 28.)

satisfies an express exception to the discrimination prohibition under the CPFA. See General Statutes § 42-133*l* (f) (9) (B); see footnote 13 of this opinion.[15]

Further, the E.L.L.S., LLC, and Sole, LLC contracts with Standard took effect in April, 2008, after the contract terminated with Kennynick in March, 2008. (Pl. Ex. 21, sec. 2; Def. Ex. 442, sec. 2.) Only the contract with Naples One, LLC, which took effect on March 15, 2007, ran at the same time as Kennynick's contract. (Def. Ex. 440, sec. 2.) During this time period, Standard almost always gave Kennynick a VEETC of five cents per gallon. (Def. Ex. 412.)[16] The plaintiff does not point to any evidence showing that Naples One, LLC, received a better credit during this time period. Thus, the plaintiff failed to prove any discrimination that violated the CPFA.[17]

[15] As quoted in footnote 13 of this opinion, General Statutes § 42-133*l* (f) provides in relevant part: "No franchisor, directly, or indirectly, through any officer, agent or employee, shall do any of the following . . . (9) discriminate between franchisees in the charges offered or made for royalties, goods, services, equipment, rentals, advertising services, or in any other business dealing, unless . . . (B) to the extent that the franchisor satisfies the burden of proving that any classification of or discrimination between franchisees is reasonable, is based on franchises granted at materially different times and such discrimination is reasonably related to such difference in time or on other proper and justifiable distinctions considering the purposes of sections 42-133j to 42-133n, inclusive, and is not arbitrary . . . ."

Under the CPFA, "[f]ranchise" includes various types of contracts between a distributor and a retailer. General Statutes § 42-133k (1) and (2).

[16] McCloskey's cross-examination established that, with reference to the "KennyNick Ethanol Tax Credit Analysis" contained in exhibit 412, the handwritten numbers written into the column to the right of "Gals Del" represented the VEETC in cents that Standard gave Kennynick. From March 2 to December 30, 2007, every entry showed a five cent credit except for three that showed a four cent credit.

[17] Standard also observes that, because the CPFA does not have any statute of limitations, the three year tort statute would apply. See General Statutes § 52-577. The plaintiff commenced this case by making service on January 14, 2009, thus presumably barring any claim of discrimination for deliveries of gasoline before January 14, 2006. (Return of Service [Docket Entry #3].) Kennynick's brief does not dispute this point.

V

COUNT FOUR: CUTPA

The court finds no CUTPA liability for essentially the same reasons that it finds no liability under the CPFA. CUTPA does not apply to a breach of contract case unless there are aggravating circumstances. See *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 248, 919 A.2d 421 (2007). "There must be some nexus with a public interest, some violation of a concept of what is fair, some immoral, unethical, oppressive or unscrupulous business practice or some practice that offends public policy." (Internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 276, 89 A.3d 373 (2014). Here, as shown, Standard did not violate the CPFA. Further, there is no federal or state statute or regulation that required Standard to pass through the VEETC or to collect the GRT from Kennynick. Standard's decisions on these matters were solely a matter of interpreting a contract. Further, as discussed, the contract was unclear and thus was subject to various interpretations. Standard's miscalculation of the GRT was an honest mistake that it now admits fully and that it has shown routinely benefited Kennynick after July 15, 2007. At no time did Standard exhibit any offensive, dishonest, or unscrupulous behavior that would justify CUTPA liability.[18]

VI

COUNT SIX: MISREPRESENTATION

The plaintiff bases its misrepresentation count on the claim that Standard's "invoices" were incorrect with regard to the federal tax and GRT that Standard was required to collect or pay. (Complaint, count 6, paras.

[18] In addition, the three year CUTPA statute of limitations would bar any claim for a delivery before January 14, 2006. See General Statutes § 42-110g (f).

39, 41.) In the absence of allegations of fraud, the court assumes that the plaintiff alleges negligent misrepresentation. An action for negligent misrepresentation requires the plaintiff to prove that "[the defendant] made a misrepresentation of fact, that [the defendant] knew or should have known that it was false, that the plaintiff reasonably relied upon the misrepresentation, and that the [plaintiff] suffered pecuniary harm as a result thereof." *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 73, 873 A.2d 929 (2005).

Initially, the testimony established that Kennynick never paid the amounts billed on the actual invoices. Rather, Standard created the invoices only to have a "paper trail" upon delivery of the gasoline. Kennynick instead paid bills based on the rebate worksheets and the credit that resulted in subtracting the rebate worksheet price from the invoice price. (7/30/21 p.m. Tr., pp. 132, 134, 140–46.) Thus, there was no real reliance by Kennynick on the invoices.

If the court interprets the complaint liberally, it could construe the allegation of "invoices" to refer to the rebate worksheets. But the tax charges on the rebate worksheet do not neatly fall into the category of a "misrepresentation of fact . . . ." *Glazer* v. *Dress Barn, Inc.*, supra, 274 Conn. 73. Rather, Standard's statement that Kennynick owed certain amounts for the federal tax and for the GRT in reality represented Standard's opinion about what the contract, which was vague and confusing, allowed or required it to pass through. Such an opinion cannot normally form the basis of an action for misrepresentation of fact. See *Yurevich* v. *Sikorsky Aircraft Division, United Technologies Corp.*, 51 F. Supp. 2d 144, 152 (D. Conn. 1999) ("The misrepresentation must consist of a statement of a material past or present fact. . . . Statements of opinion . . . are not actionable." (Internal quotation marks omitted.)); *Benedict* v. *Dickens' Heirs*, 119 Conn.

541, 547, 177 A. 715 (1935) ("[r]epresentations as to value are ordinarily matters of opinion and not actionable"). Therefore, the court finds for Standard on the misrepresentation count.[19]

VII

STANDARD'S SPECIAL DEFENSES OF WAIVER, VOLUNTARY PAYMENT AND EQUITABLE ESTOPPEL

The defendant alleges in its special defenses that, "[d]espite having full knowledge of the tax charges included in the invoices submitted to it by the defendant, and despite its belief that the invoices submitted to it by the defendant were incorrect, the plaintiff nevertheless voluntarily paid the defendant's said invoices." (Defendant's Amended Answer and Special Defenses [Docket Entry #231.00], First Special Defense, para. 4.) Based on this allegation and others, the defendant raises the defenses of waiver, voluntary payment, and equitable estoppel.

Waiver involves the "intentional relinquishment of a known right." (Internal quotation marks omitted.) *Sablosky* v. *Sablosky*, 72 Conn. App. 408, 414, 805 A.2d 745 (2002). The voluntary payment doctrine, which the court previously recognized as a valid defense in Connecticut (Order re Motion to Strike [Docket Entry #242.86]), provides that "[a] party cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to make such payment existed." *Morris* v. *New Haven*, 78 Conn. 673, 675, 63

[19] The three year statute of limitations and repose for negligence claims would also bar any claim for a delivery before January 14, 2006. General Statutes § 52-584. The court does not reach the defendant's argument that the economic loss doctrine bars recovery in tort for strictly commercial losses. The court adds that any damages under the misrepresentation count would merely duplicate the damages awarded on the breach of contract count.

A. 123 (1906). These defenses, as alleged and defined, require proof of intentional acts based on full knowledge of the tax charges included in Standard's invoices. Standard did not supply this proof. The only evidence comes from Christine Beard, who took over the business in 2007 when her father, Blakeman, became ill. Beard testified credibly that she never understood Standard's invoicing and that the "math never came out." Beard paid the invoices despite not fully understanding them. (8/3/21 a.m. Tr., pp. 14, 17–18.) The court finds that Beard was not a sophisticated businessperson who could make a fully informed decision to pay invoices that she knew with certainty were wrong. Further, there is no testimony as to business practices in 2006, prior to Beard's involvement, when the invoices did not disclose the VEETC at all. Thus, Standard has not met its burden to prove that Kennynick intentionally waived its claims or that it had full knowledge of all of the facts before making its payments.

The defendant bases its equitable estoppel defense on the same facts. (Defendant's Amended Answer and Special Defenses, Seventh Special Defense.) The defendant's reliance on this defense is misplaced. Although there are several distinct elements to the defense, ultimately equitable estoppel rests on the "misleading conduct of one party to the prejudice of the other . . . [and] conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert . . . ." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 338, 71 A.3d 541 (2013).[20]

[20] In full, the elements are: "(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or

The court finds nothing misleading or false about Kennynick's payment of its bills. Both parties here acted in good faith in the face of a confusing contract and equally confusing invoices. The court denies the defendant's special defenses.

VIII

PREJUDGMENT INTEREST

The plaintiff seeks an award of prejudgment interest. General Statutes § 37-3a permits the court to award prejudgment interest for the "detention of . . . money [that is] . . . wrongful." *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 255, 720 A.2d 879 (1998).[21] However, the plaintiff need not prove wrongfulness "above and beyond proof of the underlying legal claim. . . . In other words, the wrongful detention standard of § 37-3a is satisfied by proof of the underlying legal claim, a requirement that is met once the plaintiff obtains a judgment in his favor on that claim." (Citation omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 52, 74 A.3d 1212 (2013). The primary purpose of § 37-3a "is not to punish persons who have detained money owed to others in bad faith but, rather, to compensate parties that have been deprived of the use of their money." *Sosin* v. *Sosin*, 300 Conn. 205, 230, 14 A.3d 307 (2011). Under these standards, the plaintiff is entitled to prejudgment interest for the wrongful detention of the $37,637.72 that the court has determined the defendant owed the plaintiff under their contract.

constructive, of the real facts." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *M.J. Holdings, LLC*, supra, 143 Conn. App. 338.

[21] General Statutes § 37-3a provides in relevant part: "(a) Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recover money loaned at a greater rate, as damages for the detention of money after it becomes payable. . . ."

The remaining issues are the interest rate and the date from which the interest should run. The court agrees with the plaintiff that "a fair, just and reasonable interest rate is 5 percent annual compound interest." (Pl. Proposed Findings of Fact, para. 139.) In this case, the damages accrued on a delivery-by-delivery basis over the contract period, which ended on March 5, 2008. The defendant adds, however, that the plaintiff should not recover for the almost five year period between June 1, 2009, and May 27, 2014, when the docket sheet reflects no activity in the case. The court has no explanation for this period of dormancy, which took place well before the undersigned's tenure in the case. The court will assume, perhaps favorably to the plaintiff, that the plaintiff is only 50 percent responsible for the delay. The court accordingly will add two and one-half years to the date from which interest should run. Thus, prejudgment interest should run from September 5, 2010.

IX

ATTORNEY'S FEES

Paragraph 27 of the contract provides that "[p]arties shall pay and reimburse the other for all legal fees and expenses from enforcing any of the provisions of this contract." (Pl. Ex. 3, para. 27.) The court finds that the plaintiff has partially prevailed on the primary claim in the complaint and, therefore, to that extent, has a right to reimbursement from the defendant of the plaintiff's attorney's fees. The court requests that, based on this finding, the parties attempt to resolve the amount of the attorney's fees obligation on their own. If the parties cannot do so, they should agree on a timetable and a procedure for submitting the matter to the court for resolution.

X

CONCLUSION

Judgment shall enter for the plaintiff on count one in the amount of $37,637.72 plus prejudgment interest and attorney's fees as discussed in this memorandum of decision. Judgment shall enter for the defendant on counts three, five, and six.

It is so ordered.