JOSEPH M. BOOTH *v.* PARK TERRACE II MUTUAL HOUSING LIMITED PARTNERSHIP ET AL.
(AC 45094)

Alvord, Prescott and Moll, Js.

Syllabus

The plaintiff sought to recover damages for injuries he sustained when he allegedly tripped and fell on a concrete walkway separating the lawns of two buildings on a property owned by the defendants P Co. and M Co. The defendants C Co. and T Co. were hired to work on a rehabilitation project on the property. The plaintiff alleged that he tripped on the raised edge of the walkway, which was perpendicular to and abutted the front sidewalk between the two buildings. He claimed that the raised edge created a hazardous condition. During the pretrial proceedings, P Co. and M Co. served the plaintiff with a request for admission pursuant to the applicable rule of practice (§ 13-22). The request stated that an attached photograph fairly and accurately depicted the location of the plaintiff's fall, and that the alleged proximately causative defect of the claimed fall as asserted in the complaint was encircled in red on the photograph. The plaintiff did not answer or object to the request for admission, and the request for admission was deemed admitted. Thereafter, P Co. and M Co. filed an expert witness disclosure, which represented that the expected testimony of their expert, C, was that the plaintiff's fall did not occur on their property but on land owned by the city of Hartford. Subsequently, the defendants filed motions for summary judgment, claiming, inter alia, that the plaintiff's fall occurred on a public sidewalk owned and maintained by the city of Hartford and that they had no legal duty to maintain or repair the sidewalk. In support thereof, they attached an affidavit of C, who averred that he had performed a comprehensive land survey of the property and that the area circled on the photograph attached to the request for admission was not private property of the abutting owner but was a public sidewalk owned and maintained by the city of Hartford. The defendants further argued that the exceptions to the general rule absolving property owners of liability for defective public sidewalks were not applicable, as there was no ordinance shifting responsibility to the abutting landowner and the plaintiff's complaint had not alleged any "positive act" on behalf of the defendants that created a defect. The plaintiff filed objections to the motions for summary judgment, claiming that genuine issues of material fact existed as to whether he fell on property owned by P Co. and M Co. and whether C Co. and T Co. were contracted to repair and renovate the walkway at issue and the abutting sidewalk, thus engaging in a positive act. Thereafter, the plaintiff filed a request to amend the revised complaint, in which he sought to include additional allegations as to

the construction, maintenance, and renovations by the defendants. The trial court denied the plaintiff's request to revise and granted the defendants' motions for summary judgment. On the plaintiff's appeal to this court, *held*:

1. The trial court properly granted the defendants' motions for summary judgment, that court having properly determined that there were no genuine issues of material fact:

a. The trial court properly concluded that there were no genuine issues of material fact with respect to the extent and location of the defective condition that caused the plaintiff's alleged fall: the location of the plaintiff's fall was conclusively established by the request for admission; moreover, the plaintiff's claim that the admission established, at most, the location of the fall, and not the defective condition that caused the fall, was unavailing, as the court properly relied on the admission as conclusively establishing that the alleged defect was contained with the red circled area of the photograph.

b. The trial court properly concluded that the plaintiff, as the opposing party, failed to present evidence demonstrating the existence of some disputed factual issue as to the ownership or maintenance of the area in which he allegedly fell: the plaintiff's submissions of sidewalk citation and correction records, a demolition plan, and a renovation and repair plan, did not create a genuine issue of material fact as to whether the defendants were responsible for keeping the abutting sidewalk in a safe condition, as the citation and correction records related to other properties and not to the property at issue, the demolition plan contained print so small and blurry as to be practically unreadable and, although the text of that plan failed to explicate the technical design plans, the plaintiff failed to support his opposition with affidavits or deposition testimony of fact witnesses with personal knowledge of the plans or the property, and the renovation and repair plan documents were dated after the date of the plaintiff's fall and none of the extensive textual notes or legends on the plan documents were legible; moreover, representations by the plaintiff's counsel as to what was depicted in and the significance of the text in the demolition plan was not evidence.

c. Contrary to the plaintiff's contention, the operative complaint did not allege any positive acts by the defendants involving the area where the plaintiff fell to bring his claims within the positive act exception to the common-law rule that an abutting landowner is under no duty to keep the public sidewalk in front of its property safe: the plaintiff did not allege that the defendants constructed the walkway or abutting sidewalk nor did he allege that they undertook any positive act with respect to the walkway or abutting sidewalk, rather, the plaintiff alleged that the defendants failed to take affirmative steps to remediate the defective condition; moreover, the allegation that there existed a walkway that was raised higher than the abutting sidewalk could not be construed as

alleging that the defendants, through a positive act, caused the defect in the sidewalk.

2. The trial court did not abuse its discretion in denying the plaintiff's request to amend his revised complaint: that court properly found that permitting the amendments would prejudice the defendants in that it would alter the substance of the plaintiff's claim while the motions for summary judgment were pending, the motions having already been fully briefed by all parties, and oral argument on those motions having already been scheduled; moreover, the plaintiff's claims that he did not assert new counts of liability and that his delay in obtaining documents from the city of Hartford was not unreasonable due to limited access to the city hall during the pandemic were unavailing, as the trial court properly determined that permitting the amendments would prejudice the defendants by requiring additional discovery and occasion further delay.

3. This court declined to review the plaintiff's claim that the trial court abused its discretion in denying his motion to preclude the expert witness affidavit offered by P Co. and M Co. in support of their motion for summary judgment: the plaintiff's claim was inadequately briefed, as he devoted only one paragraph of his brief to this claim, and he provided no analysis in support of his argument.

Argued November 8, 2022—officially released January 31, 2023

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the defendants filed motions for summary judgment; thereafter, the court, *Parkinson*, *J.*, denied the plaintiff's request to amend the complaint and his motion to preclude the expert witness affidavit of the named defendant et al.; subsequently, the court, *Parkinson*, *J.*, granted the defendants' motions for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

David S. Seidman, for the appellant (plaintiff).

Lawrence L. Connelli, for the appellees (named defendant et al.).

Jeffrey D. Bausch, with whom, on the brief, was *Donald W. Doeg*, for the appellees (defendant Crosskey Architects, LLC, et al.).

Opinion

ALVORD, J. The plaintiff, Joseph M. Booth, appeals from the judgment of the trial court granting motions for summary judgment filed by the defendants, Park Terrace II Mutual Housing Limited Partnership and Mutual Housing Association of Greater Hartford, Inc. (collectively, owner defendants), and Crosskey Architects, LLC, and TO Design, LLC (collectively, design defendants), and denying the plaintiff's request to amend his complaint and his motion to preclude expert testimony. On appeal, the plaintiff claims that the court (1) improperly rendered summary judgment because genuine issues of material fact exist, (2) abused its discretion in denying his request to amend his complaint, and (3) abused its discretion in denying his motion to preclude the expert affidavit offered in support of the owner defendants' motion for summary judgment. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to our analysis of the plaintiff's claims. On or about April 24, 2018, the plaintiff allegedly tripped and fell on a walkway separating the lawns of 286 and 290 Park Terrace in Hartford. In April, 2020, the plaintiff commenced this action against the owner defendants, owners of property located at 286 and 290 Park Terrace, and the design defendants, who were retained to work on a rehabilitation project at 286 and 290 Park Terrace. The operative complaint, which is the revised complaint filed on October 22, 2020,[1] contains six counts sounding in negligence and premises liability.

[1] On July 9, 2020, the design defendants filed requests to revise the plaintiff's original complaint. On November 1, 2020, the design defendants moved for entry of nonsuit against the plaintiff for failure to file a responsive

In counts one and two, the plaintiff alleged that the owner defendants "owned or were in control of and/or had a duty to maintain the walkway and surrounding areas where the plaintiff fell." The plaintiff alleged that he tripped and fell on the walkway separating the lawns of 286 and 290 Park Terrace. Specifically, he alleged that his "left foot caught the raised edge of the concrete walkway that leads to the rear parking lot. That walkway is perpendicular to and abuts the front sidewalk between 286 and 290 Park Terrace . . . . The concrete walkway is raised higher than the abutting sidewalks creating a hazardous condition which led to [the plaintiff's] fall." The plaintiff set forth nine allegations of negligence that he contended caused his injuries: the owner defendants "failed to lower the walkway so that it was level with the abutting sidewalks . . . failed to position the slab of the walkway so that it was level with the abutting sidewalks . . . failed to shave down the slab of the walkway so it was not higher than the abutting sidewalks . . . failed to maintain the property in a reasonably safe condition . . . failed to warn the plaintiff of the dangerous condition . . . breached [their] duty to inspect [their] property from time to time to make sure that no hazards or defects existed or if a dangerous condition existed . . . failed to inspect [their] property . . . the conditions had existed for an unreasonable period of time, yet the defendant[s] had taken no measure to remedy or correct them; and . . . [they] knew or in the exercise of reasonable care and inspection should have known of these conditions and should have taken measures to remedy and correct them, but the defendant[s] carelessly and negligently failed to do." The plaintiff alleged, inter alia, that he sustained physical injuries, he has undergone serious medical treatment, his ability to enjoy and participate

pleading to their requests to revise, which motion for nonsuit was denied by the court after the plaintiff had filed the revised complaint.

in life's activities has been severely diminished, and he has lost wages.

In counts three and four, the plaintiff alleged that "[a]t all times hereto" the design defendants were hired to rehabilitate certain properties on Park Terrace, including property located at 286 and 290 Park Terrace. He alleged that the design defendants were "responsible for the construction means, methods, techniques, sequences and/or procedures of the rehabilitation." He alleged that the design defendants "owned, possessed, controlled or had an interest in and/or [were] responsible for the maintenance and/or rehabilitation of the properties located at 286 . . . and 290 Park Terrace." He alleged that the design defendants were responsible for maintaining the walkway and surrounding areas where the plaintiff fell. He further alleged that the design defendants "reviewed and surveyed the property," but failed to or "did not recommend that the raised edge of the slab where the plaintiff tripped be repaired and/or modified." In addition to the nine allegations of negligence set forth against the owner defendants, the plaintiff alleged that the design defendants "did not place markers or flags to warn the plaintiff of [the] defective condition."

In counts five and six, the plaintiff alleged that "[o]n or about April 24, 2018, and at some time prior thereto," the design defendants were "hired to design and/or work a rehabilitation plan so that invitees would be able to safely walk on the walkway and surrounding areas at the property." He alleged that the design defendants were negligent in that "[they] failed to design the rehabilitation plan so that the walkway was level with the abutting sidewalks . . . failed to design the rehabilitation plan so that [the] position of the slab of the walkway was level with the abutting sidewalks . . . failed to design the rehabilitation plan so that the slab

of the walkway was not higher than the abutting sidewalk . . . failed to design the rehabilitation plan so that the property was in a reasonably safe condition . . . failed to design the rehabilitation plan so that [the] plaintiff was warned of the dangerous condition . . . breached [their] duty to inspect the property from time to time to make sure that no hazards or defects existed or if a dangerous condition existed . . . failed to inspect the property . . . the conditions had existed for an unreasonable period of time, yet [they] had taken no measure to remedy or correct them . . . knew or in the exercise of reasonable care and inspection should have known of these conditions and should have taken measures to remedy and correct them, but [they] carelessly and negligently failed to do . . . failed to observe or inspect work in place."[2]

In November, 2020, the owner defendants served the plaintiff with a request for admission pursuant to Practice Book § 13-22. The request stated: "At the time and place referenced in [the] plaintiff's complaint, the photograph attached to Request for Admission #1 of October 20, 2020 (#109), which is marked as 'Exhibit A' and dated May 24, 2018, fairly and accurately depicts the location of the plaintiff's claimed fall, and the alleged proximately causative defect of the claimed fall as asserted in the complaint, is encircled in red in that Exhibit A"[3] (request for admission). The plaintiff did not answer or object to the request for admission. As

[2] The defendants filed answers including special defenses. The plaintiff filed a certificate of closed pleadings on February 22, 2021. Three days later, on February 25, 2021, the plaintiff, despite having filed a certificate of closed pleadings, filed replies to the defendants' special defenses.

[3] On October 20, 2020, the owner defendants served the plaintiff with a first request for admission, in which they incorrectly represented that the photograph marked as exhibit A was dated June 24, 2018. On November 17, 2020, the plaintiff objected to the first request for admission on the basis that "the dates are different." Thereafter, the owner defendants served the relevant request for admission.

a result of the plaintiff's failure to respond, the request for admission was deemed admitted. See Practice Book § 13-23 (a).[4]

On April 26, 2021, the owner defendants filed an expert witness disclosure, in which they disclosed Kenneth R. Cyr, a professional land surveyor and principal of Flynn & Cyr Land Surveying, LLC, a company which had performed a survey of the property (Cyr survey map). The disclosure stated that Cyr's expected testimony was "based on his education, training and experience, based on his personal familiarity with the property at issue in this case and its boundaries, based upon the [Cyr survey map], and based upon the Survey Map and Zoom-in Survey Map of the subject property, provided to all counsel of record at the time of this disclosure of expert." The disclosure represented that "[i]t is the opinion of Mr. Cyr that the alleged fall in this case did not occur on the property of these defendants, but on city of Hartford owned land."

In April, 2021, the owner defendants also filed a joint motion for summary judgment and memorandum of law in support of that motion. Therein, they argued that the plaintiff's alleged fall occurred on a public sidewalk owned and maintained by the city of Hartford. In support of that contention, the owner defendants attached an affidavit of Cyr, who averred that he and his firm had performed a comprehensive land survey of the property. Cyr averred that he carefully had reviewed the survey map and the photograph that was attached to the request for admission. Cyr averred that the "area

[4] Practice Book § 13-23 provides in relevant part: "(a) Each matter of which an admission is requested is admitted unless, within thirty days after the filing of the notice required by Section 13-22 (b), or within such shorter or longer time as the judicial authority may allow, the party to whom the request is directed files and serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . ."

within the red circle on that photograph, Exhibit A, is not private property of the abutting owner; rather, it is very clearly public sidewalk based on the Survey Map. The area encircled in red on Exhibit A is within the public right-of-way. . . . That area within the red circle on the photograph, is owned and maintained by the [c]ity of Hartford, and not by the abutting landowner." (Emphasis omitted.)

On the basis of the foregoing evidence, the owner defendants argued that the alleged fall occurred within the public right-of-way, not on private property, and that, therefore, they had no legal duty to maintain or repair the sidewalk. They further argued that the exceptions to the general rule absolving property owners of liability for defective public sidewalks were not applicable, as there was no ordinance shifting responsibility to the abutting landowner and the plaintiff's complaint had not alleged any "positive act" on behalf of the defendants that created a defect.

The design defendants also filed a joint motion for summary judgment and memorandum of law in support of their motion, in which they represented that they joined fully in the motion for summary judgment, memorandum of law, and supporting exhibits filed by the owner defendants. The design defendants reiterated the owner defendants' arguments, arguing that they had no duty to maintain property owned by the city of Hartford and that the plaintiff had alleged no positive act by them.

On July 2, 2021,[5] the plaintiff filed objections to the defendants' motions for summary judgment. The plaintiff asserted that the owner defendants "constructed

[5] On May 21, 2021, the deadline contained in the scheduling order for filing his response to the motions for summary judgment, the plaintiff filed a motion for extension of time. Over the defendants' objections, the court granted the plaintiff an extension until July 2, 2021. Oral argument on the motions originally was scheduled for June 29, 2021, but was continued, to allow time for the objections, until July 7, 2021, leaving the defendants one business day to file their reply briefs.

the abutting sidewalk, repaired it, maintained it, and have corrected various sidewalk citations relating to the abutting sidewalk." The plaintiff argued that genuine issues of material fact existed with respect to whether the plaintiff fell on the owner defendants' property or on an abutting sidewalk; whether the hazardous condition consisted of the entire walkway, which he contended was steeply sloped, or only the raised lip at the end of the walkway; whether the owner defendants, in constructing both the walkway and the abutting sidewalk and correcting various sidewalk citations issued by the city, had engaged in positive acts that imposed a duty on the owner defendants; and whether the owner defendants, in constructing the walkway and the abutting sidewalk and correcting the sidewalk citations, had possession and control over the area in which the plaintiff fell.

The plaintiff further argued that the following documents demonstrated genuine issues of material fact: a Survey and Demolition Plan dated May 8, 2001 (2001 demolition plan) purportedly showing that the owner defendants undertook substantial renovation and rehabilitation work on the property, which the plaintiff contended included constructing the subject walkway and the entire abutting sidewalk; sidewalk citation and correction records; and a layout and demolition plan dated April 25, 2018 (2018 renovation and repair plan), which the plaintiff contended included repairing walkways and the abutting sidewalk. In support of his objection to the owner defendants' motion for summary judgment, the plaintiff filed his own affidavit, in which he averred that he had obtained the 2001 demolition plan, the 2018 renovation and repair plan, and the sidewalk citation and correction records from the city or its website and part of the 2018 renovation and repair plan from his employer during the course of his employment.[6] The

[6] The plaintiff averred: "When I tripped and fell, I was an invitee for testing and data collection purposes for my employer Home Energy Technologies

plaintiff's affidavit also stated: "I believe that based on the evidence submitted, my fall occurred on the [w]alkway maintained and controlled by [the] defendants and/or their agents, and that their negligence caused the hazardous condition that resulted in my substantial injuries." He also submitted other documents as exhibits in support of his objection to the owner defendants' motion for summary judgment.

In his objection to the design defendants' motion for summary judgment, which was not accompanied by any affidavits or exhibits, the plaintiff asserted that genuine issues of material fact included: whether the design defendants, having been contracted to repair and renovate the walkway and abutting sidewalk, engaged in a positive act over the abutting sidewalk; whether the design defendants had possession and control over the walkway and/or abutting sidewalk; whether the design defendants, through their repair and renovation work on the walkway and abutting sidewalk, created the hazardous condition that caused the plaintiff's trip and fall; whether the design defendants failed to warn the plaintiff of the hazardous condition that they knew or should have known about; and the extent and scope of the hazardous condition, whether it was the entire walkway and its steep slope, or limited to the end slab of the walkway with its raised lip. The plaintiff also asserted that the design defendants failed to warn him of the hazardous condition and argued that the design defendants had failed to respond to this allegation of negligence.

(HERS Rating firm), which was contracted by the [d]efendants (Crosskey and Mutual Housing Association of Greater Hartford) for rating and certification services of the [fourteen] buildings that are known as the Park Terrace II development . . . . I relied on building plans drafted by [the] defendant Crosskey . . . and site surveys drafted by [the] defendant TO Design to verify, test and inspect various stages of the renovation and repair process of the [fourteen] properties. I was not warned by the [d]efendants of the hazardous condition on the walkway."

On July 7, 2021, the defendants filed replies to the plaintiff's objections. The owner defendants argued that the plaintiff's affidavit was insufficient to authenticate the documents that he filed as exhibits, which contained hearsay, and that the affidavit was inadmissible to the extent that the plaintiff asserted, without personal knowledge, that he "believe[d]" that he fell on property "maintained or controlled by the defendants." The owner defendants further argued that the plaintiff had failed to plead any alleged defect in the slope of the walkway or any positive acts of the defendants. The design defendants reiterated these arguments and additionally argued that, even if the court determined that the exhibits filed in support of the plaintiff's objection and affidavit were admissible, the exhibits failed to demonstrate a genuine issue of material fact.

Oral argument on the motions for summary judgment was scheduled for July 7, 2021. On that date, the parties appeared before the court and the plaintiff's counsel orally requested an additional two week continuance of oral argument and to file a surreply brief.[7] The court granted the plaintiff's requests and the defendants' ensuing request to file an additional surreply following the plaintiff's surreply. The court rescheduled oral argument for August 12, 2021.

[7] In support of his request for a continuance, the plaintiff's counsel represented that the defendants' reply briefs had been filed on the morning of the hearing and he would like the opportunity to file a surreply; he did not have the opportunity to review what the defendants had filed because he attended a funeral for a family member of a paralegal from his office and also experienced a death in his own family; and that his understanding was that the scheduled proceeding was for a status conference, not oral argument on the motions for summary judgment. Counsel for the owner defendants objected to the requested continuance, noting that he was prepared to argue the motion despite having been afforded only one business day to file his reply brief; see footnote 5 of this opinion; and that the plaintiff's counsel had not contacted him about the continuance request. The court granted the requested continuance on the basis of the deaths experienced by the plaintiff's counsel and granted his request for time to file a surreply.

In his surreply, the plaintiff not only argued that his original submissions were sufficient to demonstrate a genuine issue of material fact, but he also submitted his amended affidavit together with copies, certified by city officials, of the 2001 demolition plan, the 2018 renovation and repair plan, and the sidewalk citation and correction records. With respect to his complaint, he argued in his surreply that the operative complaint alleged that the entire walkway constituted the hazardous condition and that the defendants had engaged in positive acts, but he also filed a request to amend his complaint to "conform such allegations to the evidence recently discovered . . . that the defendants did in fact construct the abutting sidewalk, walkway, and maintain them."[8] Last, he noted in his surreply that he had sought to depose the owner defendants' expert, but that the owner defendants had filed a motion for protective order. In his surreply directed to the design defendants, the plaintiff additionally argued that these defendants knew of the hazardous condition as evidenced by their plans including a correction to the slope of the abutting sidewalk and walkway. The plaintiff argued that the design defendants failed to adequately identify and warn the plaintiff of the hazard.

The defendants filed surreplies to the plaintiff's surreply. The owner defendants reiterated that there was no genuine issue of material fact that the plaintiff's claimed fall occurred on a city sidewalk. The design defendants argued, inter alia, that they did not "have a duty of care to identify hazardous conditions outside the property boundaries," i.e., on the public sidewalk. They further argued that the 2018 renovation and repair plan is dated

[8] All defendants objected to the request for leave to amend the complaint, the plaintiff filed a reply, and the court denied the request to amend. See part II of this opinion. On August 11, 2021, the plaintiff also filed a motion to preclude Cyr's expert witness affidavit and memorandum of law in support thereof, which motion the court denied. See part III of this opinion.

after the date of the plaintiff's alleged fall and, therefore, it could not form the basis of any positive act on behalf of the design defendants. Oral argument was held on August 12, 2021.

On October 14, 2021, the court granted the defendants' motions for summary judgment, rendering summary judgment in favor of the defendants on all counts. In its memorandum of decision, the court first determined that the defendants had satisfied their initial burden as movants for summary judgment. The court discussed the owner defendants' request for admission and the plaintiff's failure to respond thereto. The court determined that "it has been conclusively established that the photo[graph] marked in exhibit A of the request for admission fairly and accurately depicts the location of the plaintiff's fall and the alleged defect is contained within the red encircled area of the photograph." The court also summarized Cyr's affidavit, in which Cyr averred that the "area within the red circle in [e]xhibit A of the defendant's request for admission is not private property of the abutting landowner, but rather is a public sidewalk." The court additionally noted Cyr's determination that the "area within the red circle on the photograph is owned and maintained by the city of Hartford, not the abutting landowner." On the basis of the request for admission and Cyr's affidavit, the court determined that the defendants had sustained their burden of demonstrating that "there is no genuine issue of material fact that the plaintiff's alleged fall occurred in the red-circled area of the request for admission, and that area is not owned and maintained by the defendants."

Having concluded that the defendants met their initial burden, the court turned to whether the plaintiff had presented evidence establishing the existence of a disputed factual issue. The court first considered the plaintiff's affidavit, which it found flawed in two ways. First,

the court found that "the plaintiff's affidavit is self-serving as it is made by a party to the action" and, therefore, was insufficient to create a genuine issue of material fact. Second, the court stated that the plaintiff's averment that his fall "occurred on the walkway maintained and controlled by [the] defendants and/or their agents, and that their negligence caused the hazardous condition," amounted to a conclusory statement that lacked evidentiary support.

Next, the court turned to the exhibits submitted by the plaintiff. Specifically, the court considered the 2001 demolition plan, the 2018 renovation and repair plan, and the sidewalk citation and correction records.[9] The court assumed, without deciding, that the exhibits submitted together with the plaintiff's surreply were "sufficient to consider in support of the plaintiff's objection," but found that such evidence failed to "establish a genuine issue of material fact regarding the location of the plaintiff's fall, and who owns or controls the area where the plaintiff fell." The court viewed the exhibits in light of the plaintiff's arguments that the 2001 demolition plan showed that the defendants constructed the walkway and abutting sidewalk and that the 2018 renovation and repair plan showed plans to correct the slope of the walkway meeting the abutting sidewalk. The court found that the plaintiff's arguments were flawed "because these defects, modifications, and/or corrections are not apparently clear from the face of the plans, and there is no affidavit from an individual with personal knowledge of the area that can attest to what the plaintiff argues is contained with the plans. Without more, these are merely the plaintiff's own interpretations and assertions of the 2001 and 2018 plans and

[9] The court also considered the unofficial property record cards for 286-288 Park Terrace and 290 Park Terrace, which the plaintiff submitted as exhibit D to his affidavit. The court noted that "[t]he plaintiff makes no arguments in any of his filings regarding how these property cards create a genuine issue of material fact."

cannot create any genuine issue of material fact regarding the plaintiff's fall."

With respect to the sidewalk citation and correction records, the court stated that the records showed that the owner defendants were issued citations related to other addresses along Park Terrace, but that the record provided by the plaintiff lacked any reference to the property at issue, 286 and 290 Park Terrace. Thus, the court determined that such evidence "[did] not create a genuine issue of fact as to whether there was a defect, or whether the defendants were responsible for keeping the abutting sidewalk at 286 and 290 Park Terrace in a safe condition." Having reviewed the evidence submitted by the plaintiff, the court determined that there was no genuine issue of material fact.

The court next set forth the general rule that abutting landowners generally are not liable for injuries sustained on a defective public sidewalk. The court then addressed the plaintiff's argument that the exception to the general rule, in situations in which the defect in the sidewalk was caused by an affirmative or positive act of the landowner, applied.[10] Specifically, the plaintiff had argued "that the defendants constructed both the walkway and abutting sidewalk in 2001 and that the defendant ha[d] maintained, repaired, and renovated both the walkway and the abutting sidewalk." The court rejected this argument on the basis that the plaintiff failed to allege in his complaint that the defendants constructed the walkway or abutting sidewalk.

Accordingly, the court rendered judgment in favor of the defendants. This appeal followed. Additional facts and procedural history will be provided as necessary.

[10] The court noted that the plaintiff did not claim that the other exception to the general rule, where a statute or ordinance shifts liability to the landowner, was applicable.

I

With respect to the trial court's decision granting the defendant's motion for summary judgment, the plaintiff claims that the court improperly determined that no genuine issues of material fact existed. Specifically, the plaintiff contends that there are genuine issues of material fact with respect to the scope and extent of the physical characteristics and location of the hazardous condition; whether the abutting sidewalk was a municipal sidewalk, whose obligation it was to maintain the sidewalk, and who was in possession and control over the location of the plaintiff's fall;[11] and whether the defendants engaged in positive acts. We disagree with the plaintiff.

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

[11] Although the plaintiff briefs possession and control separately, we discuss the purported issues surrounding ownership, maintenance, and possession and control together. See part I B of this opinion.

make a difference in the result of the case. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Robinson* v. *Cianfarani*, 314 Conn. 521, 524–25, 107 A.3d 375 (2014).

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . Because the court's determination of whether the defendant owed a duty of care to the plaintiff is a question of law, our standard of review is plenary." (Citation omitted; internal quotation marks omitted.) *McFarline* v. *Mickens*, 177 Conn. App. 83, 92, 173 A.3d 417 (2017), cert. denied, 327 Conn. 997, 176 A.3d 557 (2018).

"As a general rule, Connecticut law holds that an abutting landowner is not liable for injuries sustained by a traveler on the highway that were caused by the defective condition of a public sidewalk. . . . There are two exceptions to the general rule: (1) where a statute or ordinance shifts liability to the landowner to keep the sidewalk in a safe condition . . . and (2) where the affirmative or positive act of the landowner causes the defect in the sidewalk." (Citations omitted.) *Pollard* v. *Bridgeport*, 204 Conn. App. 187, 198, 252 A.3d 869, cert. denied, 336 Conn. 953, 251 A.3d 992 (2021); see also *Wilson* v. *New Haven*, 213 Conn. 277, 280, 567 A.2d 829 (1989).

A

The plaintiff first contends that there existed genuine issues of material fact as to the extent and location of

the defective condition causing his alleged fall. Specifically, he argues that "the hazardous condition was not just the lip causing the fall, but the steep slope of the entire walkway that contributed to the defective raised lip on the slab." The plaintiff points to the allegations of his complaint that his injuries were caused by the defendants' failure "to lower the walkway so that it was level with the abutting sidewalks." The plaintiff contends that the court ignored his allegations and supporting evidence, including photographs that depicted the steep slope and documentary evidence suggesting that the defendants constructed the walkway. The plaintiff argues in the alternative that, even if the entire walkway does not constitute the hazardous condition, the "concrete slab with the raised lip . . . is the hazardous condition." The plaintiff contends that he submitted evidence that the slab extends onto the owner defendants' property and, thus, there exist genuine issues of material fact as to whether the slab is the hazardous condition, the length of the slab, and whether it extends onto the owner defendants' property. The design defendants maintain that the location of the plaintiff's claimed fall was conclusively established by the request for admission and the owner defendants further respond that the plaintiff's arguments as to the slab and entire walkway are therefore irrelevant. We agree with the defendants.

As noted previously, the owner defendants served the plaintiff with a request for admission that included an attached photograph and requested that the plaintiff admit, inter alia, that the area encircled in red in that photograph "fairly and accurately depicts . . . the alleged proximately causative defect of the claimed fall as asserted in the complaint . . . ." The plaintiff did not respond to the request. Pursuant to Practice Book § 13-23 (a), the plaintiff's failure to respond to the request for admission resulted in his admission of the

matter contained therein. See *Bank of America, N.A.* v. *Kydes*, 183 Conn. App. 479, 488, 193 A.3d 110 ("[t]he defendant's failure to timely answer or object to the requests for admission pursuant to § 13-23 (a), and his subsequent failure to ask the court for permission to withdraw or amend those admissions pursuant to [Practice Book] § 13-24 (a), resulted in his admission of all the matters as to which admissions were requested"), cert. denied, 330 Conn. 925, 194 A.3d 291 (2018). Specifically, it was admitted that the area encircled in red in the photograph attached to the request for admission depicted the alleged defect that proximately caused the plaintiff's claimed fall. At no time did the plaintiff seek permission to withdraw or amend the admission, and the trial court appropriately recognized in its memorandum of decision that "it has been conclusively established that the photo[graph] . . . fairly and accurately depicts the location of the plaintiff's fall and the alleged defect is contained with the red encircled area of the photograph."

The plaintiff contends in his reply brief that the defective condition was not established by the request for admission. He maintains that the admission established, at most, the location of the fall, not the defective condition that caused the fall. We reject the plaintiff's attempt to minimize the effect of his admission and conclude that the court properly relied on the admission as conclusively establishing that the alleged defect is contained within the red encircled area of the photograph, which does not encompass the whole slab or the entire walkway.[12] Accordingly, the court properly concluded

[12] Last, we note that the plaintiff's contention that it was the entire walkway, or, in the alternative, the entire slab, that constituted the defect is unavailing for additional reasons, discussed further in part I B and C of this opinion. First, the plaintiff did not plead any allegations regarding a claimed "steep slope" of the walkway. Second, the plaintiff's arguments relative to the slab are premised entirely on the documents submitted in support of his surreply to the defendant's motion for summary judgment, which we determine are insufficient to demonstrate genuine issues of material fact.

that there were no genuine issues of material fact with respect to the extent and location of the defective condition causing the plaintiff's alleged fall.

B

The plaintiff next contends that the evidence that he submitted "unequivocally created an issue of material fact as to whether the abutting sidewalk was a municipal sidewalk or was owned by the abutting owners . . . . Moreover, the evidence similarly created an issue regarding whose responsibility it was to maintain the abutting sidewalk." In support of this argument, the plaintiff relies on various sidewalk citations, which he contends "shows that both the city, along with [the owner defendants], determined that the legal obligation to maintain the abutting sidewalk belonged to [the owner defendants]." He also points to the 2001 demolition plan as showing that the owner defendants "constructed the abutting sidewalk," and the 2018 renovation and repair plan as showing that the design defendants negligently designed the walkway. The owner defendants respond that, because the sidewalk citations do not relate to the property at issue, the citations are irrelevant and do not create a genuine issue of material fact. They further respond that the 2001 demolition plan and 2018 renovation and repair plan are "unclear" and "not self-evident" and the trial court properly determined that these documents did not create a genuine issue of material fact.[13] We agree with the owner defendants.

[13] The design defendants argue, inter alia, that neither the 2001 demolition plan nor the sidewalk citation and correction records create a genuine issue of material fact as to the design defendants. Specifically, they contend that the 2001 demolition plan was not prepared by the design defendants and note that the plaintiff does not allege that they were involved in or prepared the 2001 demolition plan. Similarly, with respect to the sidewalk citation and correction records, the design defendants argue that they do not create a genuine issue of material fact because the plaintiff has not alleged that they had any involvement with the property in the 1990s.

The owner defendants submitted with their motion for summary judgment Cyr's affidavit, in which he averred that the "area within the red circle on that photograph, Exhibit A, is not private property of the abutting owner; rather, it is very clearly public sidewalk based on the Survey Map. The area encircled in red on Exhibit A is within the public right-of-way. . . . That area within the red circle on the photograph, is owned and maintained by the [c]ity of Hartford, and not by the abutting landowner." (Emphasis omitted.) The trial court determined, and we agree, that this evidence, together with the plaintiff's admission as to the location and proximate cause of his claimed fall, submitted by the owner defendants satisfied their initial burden, as the movants for summary judgment, to establish the nonexistence of a genuine issue of material fact as to ownership and maintenance of the sidewalk.

The burden then shifted to the plaintiff, as the nonmoving party, to demonstrate the existence of some disputed factual issue. *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019) ("[o]nce the moving party has met its burden . . . the opposing party must present evidence that demonstrates the existence of some disputed factual issue"). The plaintiff attempted to satisfy his burden by submitting the sidewalk citation and correction records, the 2001 demolition plan, and the 2018 renovation and repair plan. As the trial court recognized, the sidewalk citation and correction records relate to other properties on Park Terrace, but do not involve the property at issue. We agree with the trial court that "[w]hether the defendants were issued citations for other properties along Park Terrace does not create a genuine issue of fact as to whether . . . the defendants were responsible for keeping the abutting sidewalk at 286 and 290 Park Terrace in a safe condition."[14]

[14] The plaintiff argues that "other courts have held that similar sidewalk citations, in itself, create an issue of material fact as to ownership and

With respect to the 2001 demolition plan, the plaintiff argues that "[o]nly a cursory review without any technical expertise reveals [that] the walkway and abutting sidewalk were constructed by [the owner defendants]." He represents that on page one of the 2001 demolition plan, the walkway is not present, but that on page C-1 of the demolition plan, the walkway area "shows dots" and there are also "dotted areas" "denoting demolished or removed." He represents that page two of the 2001 demolition plan shows that the walkway was installed after the demolition. He concludes: "[A] cross-reference on page one (demolition and removal work) and page two (new work) shows [that the owner defendants] demolished the previous driveway areas and installed the walkways between each building."

Additionally, the plaintiff argues that the 2001 demolition plan shows that the owner defendants also constructed the abutting sidewalk. He argues: "The 2001 demolition plan also shows [that the owner defendants] constructed the abutting sidewalk. A review of page one of the 2001 demolition plan clearly shows the dots across the abutting sidewalk which denotes demolished and removed, as with the walkways. . . . This is highlighted. . . . Moreover, the abutting sidewalk is

maintenance responsibilities." The plaintiff cites only one unpublished case issued by the Appellate Division of the Superior Court of New Jersey, which involved the question of "whether a condominium association is obligated to indemnify a first-floor commercial unit owner in the building for sums that the commercial entity paid to settle claims brought by a pedestrian who tripped on an uneven portion of the adjacent public sidewalk." *Na* v. *369 First Street Condominium Assn.*, Superior Court of New Jersey, Appellate Division, Docket No. A-2971-14T3 (May 5, 2016). Although the court referenced a citation, issued following the pedestrian's accident, to correct the sidewalk's condition, the record also included evidence that the condominium association, which was made up of the four units in a single building, had repaired the sidewalk and proportionately charged each of the unit owners for the costs. Id. We conclude that this factually and procedurally distinguishable case is not in any way persuasive of the plaintiff's contention that the sidewalk citations in the current case demonstrate a genuine issue of material fact.

denoted 'All Conc. Walks and Aprons to be Demolished and Removed (As Shown, Typical).' . . . This is also highlighted. . . . This shows the abutting sidewalk, including aprons, were removed. . . .

"Page two of the demolition plan also clearly shows that a new abutting sidewalk with aprons was constructed as part of the new work. Indeed, the plans denote '4" conc. Walk', the plans for the thickness of the concrete of the abutting sidewalk. . . . This also is highlighted. . . . Page two of the 2001 demolition plans also denoted new curbing on the abutting sidewalk and new aprons, also highlighted. . . . On page two, the New Child Safe Surfacing is also denoted on the abutting sidewalk. . . . [The owner defendants] therefore also constructed the entire abutting sidewalk." (Citations omitted; emphasis omitted.)

We first note that the plaintiff's argument in his appellate brief cites and refers to uncertified reproductions of portions of the 2001 demolition plan contained in the appendix to his appellate brief. Further, these uncertified reproductions contain highlighting and handwritten notations.[15] In its memorandum of decision, the trial court stated that all of its references were to the exhibits contained in docket entry number 150.00. None of those exhibits contain highlighting or handwritten notations. Like the trial court, we consider the exhibits contained

[15] At oral argument before the trial court on the motions for summary judgment, the plaintiff's counsel referred to certain of the highlighted documents, which he previously had submitted in connection with his objections to the motions for summary judgment. When questioned by the court, the plaintiff's counsel responded that "[m]y office" had highlighted the document.

As noted previously, although the plaintiff argued, in his surreply, that his original submissions were sufficient to demonstrate a genuine issue of material fact, he also refiled, at docket entry number 150.00, certified documents. On appeal, he does not claim that the court erred in confining its consideration to the documents filed at docket entry number 150.00.

in docket entry number 150.00 for purposes of determining whether the plaintiff satisfied his burden of demonstrating a genuine issue of material fact and we do not consider the highlighted documents or the plaintiff's arguments premised thereon.

Having thoroughly examined the 2001 demolition plan, we agree with the trial court that it does not demonstrate a genuine issue of material fact. First, much of the document contains print so small and blurry as to be practically unreadable. Aside from the readability failure, the greater concern is what can be demonstrated by the document alone. First, the text, some of which is merely abbreviations, fails to explicate these technical design plans. The plaintiff's counsel points to dotted areas supposedly depicting demolition and other text on the plan purportedly indicating construction. However, the representations of the plaintiff's counsel as to what is depicted in and the significance of the text on the 2001 demolition plan are not evidence. See *Hudson City Savings Bank* v. *Hellman*, 196 Conn. App. 836, 863, 231 A.3d 182 (2020) (representations of counsel that barcode and numbers on envelope constituted evidence that envelope was sent by regular mail were not evidence); see also *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 652 n.12, 127 A.3d 257 (2015) ("[t]his court, as well as our Supreme Court, repeatedly has stated that representations of counsel are not evidence" (internal quotation marks omitted)).

The owner defendants'[16] motion for summary judgment was supported by an expert affidavit, but the plaintiff did not provide any expert opinion in response to the averments of the owner defendants' expert to establish any genuine issue of material fact. See *Koutsoukos* v. *Toyota Motor Sales, U.S.A., Inc.*, 137 Conn.

[16] The plaintiff does not argue that the design defendants prepared the 2001 demolition plan or had any involvement whatsoever in that plan. Thus, we analyze the 2001 demolition plan in relation to the owner defendants only.

App. 655, 662–64, 49 A.3d 302 (where defendants' expert averred that airbag responded properly to accident, summary judgment was appropriate because plaintiff failed to offer expert opinion demonstrating airbag was defective), cert. denied, 307 Conn. 933, 56 A.3d 714 (2012). Nor did the plaintiff support his opposition to summary judgment with affidavits[17] or deposition testimony of fact witnesses with personal knowledge of the plans or the property. See *Salamone* v. *Wesleyan University*, 210 Conn. App. 435, 443, 270 A.3d 172 (2022) ("It is not enough . . . for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court. . . . [T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred." (Internal quotation marks omitted.)). The trial court determined, and we agree, that the "defects, modifications, and/or corrections" as argued by the plaintiff, are "not apparently clear from the face of the plans." Without some aid, either in the form of expert opinion or a witness with personal knowledge, to explain the 2001 demolition plan, it is insufficient to demonstrate a genuine issue of material fact.

The 2018 renovation and repair plan, which is contained in docket entry number 150.00 as exhibits B and E, likewise does not create a genuine issue of material

[17] Practice Book § 17-46 "sets forth three requirements necessary to permit the consideration of material contained in affidavits submitted in a summary judgment proceeding. The material must: (1) be based on personal knowledge; (2) constitute facts that would be admissible at trial; and (3) affirmatively show that the affiant is competent to testify to the matters stated in the affidavit." (Internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 550, 285 A.3d 1128 (2022).

fact. First, the portion of the plan labeled "Exhibit B" is dated April 25, 2018, and the portion of the plan labeled "Exhibit E" is dated June 20, 2018—both dates are subsequent to the date of the plaintiff's alleged fall. Second, the 2018 renovation and repair plan suffers from the same defects as the 2001 demolition plan. Although the document titles are legible, none of the extensive textual notes or legends on the documents are legible. Like the 2001 demolition plan, the 2018 renovation and repair plan is unaccompanied by any affidavit to aid in its utility or interpretation.

The plaintiff contends that "our courts have held that maps and surveys alone are sufficient to create an issue of material fact without any affidavit of a surveyor or an individual with personal knowledge of such surveys."[18] The Superior Court decisions cited by the plaintiff, which are not binding precedent on this court, are also factually distinguishable. In *Marone* v. *Coric*, Superior Court, judicial district of New London, Docket No. CV-08-5007739 (February 18, 2011), the court recognized,

[18] The plaintiff raises three additional arguments in support of his contention that the exhibits he filed did not require accompanying affidavits. First, he argues that "allegations of a positive act that are not negated, as in *Cyr* [v. *VKB*, *LLC*, 194 Conn. App. 871, 880, 222 A.3d 965 (2019)], are sufficient in itself to create an issue of material fact." We address the premise of this contention in part I C of this opinion, wherein we conclude that the plaintiff failed to allege positive acts. Second, he argues that the exhibits he filed are "certified public documents, which are self-authenticated and exempt from the rules of hearsay." The trial court, however, did not determine that the documents were inadmissible on the basis that they had not been authenticated or contained hearsay. Rather, it assumed without deciding that the documents were admissible and afforded them consideration. Third, he argues that, even if an affidavit was required, his own affidavit satisfies the requirement, in that he attested to "where he obtained the plans and that he fell on the walkway owned and maintained by [the defendants]." With respect to his averment regarding ownership and maintenance of the walkway, the trial court determined, and we agree, that it constitutes a conclusory statement insufficient to demonstrate a genuine issue of material fact. "[A] nonmoving party's conclusory affidavits alone are insufficient grounds to deny a motion for summary judgment." *Walker* v. *Housing Authority*, 148 Conn. App. 591, 597, 85 A.3d 1230 (2014).

without the submission of an affidavit, that a survey of a piece of property showed that the property contained 17.65 acres rather than 21 acres. See also *Dufford* v. *Jones-Richards, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-06-6000045 (January 8, 2009) (survey showed acreage of property was 6.4 acres more or less); *Danbury* v. *Novella*, Superior Court, judicial district of Danbury, Docket No. 318827 (April 17, 1996) (noting that land was designated as open space on tax maps). The information needed to be gleaned from the documents in the Superior Court decisions cited by the plaintiff is significantly less complex than the information the plaintiff seeks the court to extract and utilize from the exhibits he has filed. Moreover, there is no indication in those cases that there were any readability concerns with the documents.

Accordingly, we agree with the trial court that the plaintiff failed to present evidence demonstrating a genuine issue of material fact as to the ownership or maintenance of the area in which he allegedly fell.

C

The plaintiff's next contention is that there exists a genuine issue of material fact as to whether the owner defendants and the design defendants engaged in positive acts involving the area in which the plaintiff fell. Specifically, relying on the 2001 demolition plan, the plaintiff contends that the owner defendants constructed the walkway and abutting sidewalk and, relying on the 2018 renovation and repair plan, argues that the owner defendants contracted with the design defendants to design substantial repairs and renovations to the property, including the walkway and abutting sidewalk. The defendants respond that the operative complaint does not allege any positive acts. We agree with the defendants.

As noted previously, the general rule is that "an abutting landowner is not liable for injuries sustained by a traveler on the highway that were caused by the defective condition of a public sidewalk. . . . There are two exceptions to the general rule: (1) where a statute or ordinance shifts liability to the landowner to keep the sidewalk in a safe condition . . . and (2) where the affirmative or positive act of the landowner causes the defect in the sidewalk." (Citations omitted.) *Pollard* v. *Bridgeport*, supra, 204 Conn. App. 198. In order to fall within the second exception, the plaintiff was required to assert allegations that the defendants caused the defect by performing a positive act. See *Cyr* v. *VKB, LLC*, 194 Conn. App. 871, 880, 222 A.3d 965 (2019); see also *McFarline* v. *Mickens*, supra, 177 Conn. App. 86–88 (where plaintiff alleged that she tripped and fell because of defect consisting of "a broken and cracked concrete sidewalk and adjacent curb with grass growing wildly through the crack and broken sections," court properly rendered summary judgment in absence of any allegations in complaint that defendant created wildly growing grass through positive act (internal quotation marks omitted)).

This court's decision in *Cyr* v. *VKB, LLC*, supra, 194 Conn. App. 871, guides our analysis. In that case, the plaintiff had alleged that while walking on a public sidewalk, she tripped on "an approximately one and one-half inch lip between two sidewalk segments" and fell, sustaining injuries. Id., 874. The plaintiff commenced an action against five defendants, including the owners of the property abutting the sidewalk, alleging negligence, among other causes of action. Id., 874–75. The plaintiff asserted alternative theories as to the creation of the alleged defect. Id. In counts four and five of her complaint, the plaintiff alleged that the claimed defect "developed as a result of the settling of one adjacent segment." (Internal quotation marks omitted.)

Id. In counts three, six, and seven of her complaint, the plaintiff alleged that certain defendants had "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property." (Internal quotation marks omitted.) Id., 881. The defendants filed a motion for summary judgment in which they argued that there was no evidence "that the defendants created the alleged defect so as to fall within an exception to the general rule that liability remains with the municipality in cases involving public sidewalk defects." Id., 875–76. The court granted the motion for summary judgment. Id., 876.

On appeal, this court first considered the counts in which the plaintiff had alleged settling of the sidewalk and determined that those counts lacked any allegation that a "positive act on the part of the defendants caused the settling of the sidewalk segment." Id., 882. This court explained that "the allegation that the defect in the sidewalk 'developed as a result of the settling of one adjacent segment' suggests only that the alleged settling resulted from nature and the passage of time, which is insufficient as a matter of law to impose a duty on an abutting landowner." Id. Thus, this court concluded that those counts were legally insufficient and the trial court properly had rendered summary judgment thereon. Id.

This court next examined the counts in which the plaintiff had alleged that the defendants "constructed a sidewalk on the property with a resulting approximately 1 1/2" lip between the sidewalk segments it installed and the sidewalk on the adjoining property." (Internal quotation marks omitted.) Id., 883. This court determined that this allegation "may be reasonably viewed as alleging that [the defendants] constructed the sidewalk with the alleged defect (i.e., that the alleged defect resulted from the construction of the

sidewalk)." Id., 884. Because the plaintiff had alleged that the defendants constructed the sidewalk, the defendants, in order to prevail on their motion for summary judgment, were required "to proffer evidence that either they did not construct the sidewalk or that they constructed the sidewalk without the alleged defect." Id., 885. The defendants submitted evidentiary materials with their reply brief, and the plaintiff did not object to the court's consideration of those materials. Id., 886 n.5. This court concluded that the materials submitted by the defendants did not establish the nonexistence of a genuine issue of material fact, because such materials lacked "any affidavits or other supporting documents that demonstrate that the defendants either did not construct the sidewalk or constructed the sidewalk without the alleged defect."[19] Id., 885–86.

In the present case, the plaintiff did not allege in his operative complaint that the owner defendants or the design defendants constructed the walkway or abutting sidewalk nor did he allege that they undertook any other positive act with respect to the walkway or abutting sidewalk. Instead, he alleged that the defendants failed to take affirmative steps to remediate the defective condition. For example, the plaintiff alleged that the defendants "failed to lower the walkway" and "failed to shave down the slab of the walkway so it was not higher than the abutting sidewalks." The only allegation approaching a positive act is his allegation that the defendants "failed to position the slab of the walkway so that it was level with the abutting sidewalks."[20] The

[19] The reply materials included "certificates of use and occupancy, two photographs of the sidewalk, excerpts from the plaintiff's deposition transcript, and the affidavit of Ronald J. Houde, Jr., Esq., attesting that the submitted documents are true and accurate copies." *Cyr* v. *VKB, LLC*, supra, 194 Conn. App. 886 n.5.

[20] The plaintiff cites *Noel* v. *Beck*, Superior Court, judicial district of Middlesex, Docket No. CV-13-6009396-S (August 16, 2013), in support of his contention that the allegation regarding a failure to position the slab level is sufficient to allege a positive act. In that case, the court denied the defendants' motion to strike on the basis that the plaintiff sufficiently had alleged

allegation that there exists a walkway that is raised higher than the abutting sidewalk cannot be construed as alleging that the defendants, through a positive act, caused the defect in the sidewalk.[21] With respect to the design defendants, the plaintiff also alleged only the failure to take affirmative steps with respect to the design, inspection, and remedy of the alleged defect. Like his claims against the owner defendants, the plaintiff's claims against the design defendants fail to allege positive acts.[22] Therefore, the plaintiff's claims do not

a positive act, where the plaintiff had defined "the alleged 'positive act' as the creating of 'an abrupt change in the elevation from the sidewalk to the driveway resulting in a raised section of paving with an untreated vertical displacements,' " which act occurred while paving the driveway. Id. In the present case, the plaintiff alleged a failure to lower the walkway, failure to shave down the slab, and failure to position the slab level, none of which rises to the level of the express allegations of paving the driveway and *creating* the raised section of paving.

[21] Throughout his principal appellate brief, the plaintiff emphasizes the allegation contained in his complaint that the defendants "were in control of" the walkway. He contends that "allegations of possession and control are sufficient allegations of a positive action." The decisions of the Superior Court cited by the plaintiff in support of this contention are distinguishable. In *Schumacher* v. *Morey*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-98064798 (August 10, 2001), the court denied a motion to strike where the plaintiff had alleged possession and control of a metal pipe that protruded from the sidewalk, not possession and control of the sidewalk generally. In *Stahl* v. *Hadelman*, Superior Court, judicial district of New Haven, Docket No. 411954 (May 17, 1999), the court denied the defendants' motion for summary judgment on the basis that the defendants had not rebutted the allegation, made in the complaint, that the defendants owned the sidewalk, that is, that the sidewalk was within the owner's property line. Thus, contrary to the representation in the plaintiff's appellate brief, the court in *Stahl* did not deny the motion for summary judgment on the basis that the allegations and evidence "[were] sufficient to establish positive acts . . . ."

[22] The plaintiff also contends that summary judgment should have been denied on the basis that he had alleged the defendants' failure to warn him of the hazardous condition. In support of this argument, he contends that "our courts have held that a duty to warn exists to business invitees for hazards on an abutting sidewalk in the immediate vicinity of the property." The Superior Court decisions on which the plaintiff relies do not support his argument and are factually distinguishable. See *Eaves* v. *Ebonas, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-19-6113052-S

fall within the positive act exception to the common-law rule that an abutting landowner is under no duty to keep the public sidewalk in front of its property safe.[23]

II

The plaintiff's second claim on appeal is that the court improperly denied his request to amend his revised complaint. We disagree.

The following additional procedural history is relevant to this claim. As noted previously, on July 7, 2021, the parties appeared before the court for oral argument on the defendants' motions for summary judgment, which had been briefed fully by all parties. The plaintiff's counsel, at the commencement of the scheduled argument, orally requested a two week continuance of the oral argument and also requested permission to file a surreply, which requests the court granted. The plaintiff's counsel did not alert the court at that time that he intended to file a request to amend his complaint.

(August 5, 2021) (denying motion for summary judgment where evidence demonstrated "competing inferences of material fact" including ownership of sidewalk); *Swain* v. *Leninski*, 47 Conn. Supp. 660, 665–66, 823 A.2d 462 (2003) (granting defendant's motion for summary judgment after concluding that defendant had no duty under *Wilson* v. *New Haven*, supra, 213 Conn. 277, to warn user of public sidewalk of defect, declining to address whether there exists exception to *Wilson* rule in cases where "dangerous defect exists *immediately outside an exit*" (emphasis added)).

[23] Finally, the plaintiff argues that "the trial court failed to address [the plaintiff's] argument that there is also an issue of material fact whether [the defendants] were in possession and control over the area where [the plaintiff] fell, which is an element of all premises liability actions. This is a separate and distinct analysis from the positive action doctrine, independently requiring denial of [the defendants' motions for summary judgment]." We disagree that the trial court failed to address this contention. The trial court determined that the defendants satisfied their burden of demonstrating that there was no genuine issue of material fact that the plaintiff's alleged fall occurred on land owned and maintained by the city of Hartford and that the plaintiff failed to submit evidence to demonstrate a genuine issue of material fact as to whether the area in which his claimed fall occurred was owned or maintained by the defendants.

Two weeks later, on July 21, 2021, the plaintiff filed his surreply briefs and also filed a request to amend his complaint and memorandum in support of that request. In his request, he represented that he sought to include allegations that the owner defendants constructed the walkway and abutting sidewalk, that the owner defendants repaired and maintained the walkway and abutting sidewalk, that the design defendants "designed, oversaw and participated in a substantial renovation of the property [in] 2018 which included the walkway and abutting sidewalk," and that the design defendants "provided the plaintiff certain surveys while the plaintiff was employed by a subcontractor of the defendants, which the plaintiff relied on during the scope of his employment, and such surveys failed to adequately warn him of the hazardous condition on the property which caused his injuries." The defendants objected to the request to amend the complaint, and the plaintiff filed a reply. The owner defendants subsequently filed a surreply.

On October 13, 2021, the court denied the plaintiff's request to amend his complaint. In its order, the court found that "there would clearly be great prejudice to the defendants if the plaintiff was permitted to amend the complaint to allege new theories of liability against the defendants following both the filing and oral argument of the pending motions for summary judgment. The undue delay is obvious since even a cursory review of the requested revisions shows new theories of liability alleged against the defendants. Such new theories would necessitate discovery and resultant delay in concluding this matter either by summary judgment or ultimately at trial." The court concluded, given the history of the case, that it would be unjust to permit the plaintiff to further delay the matter. Accordingly, it denied the request to amend.

On appeal, the plaintiff argues that the court abused its discretion in denying his request to amend because he "did not assert new counts of liability, only allegations that conform to the original allegations of possession and control over the area where [he] fell." He contends that the delay was not unreasonable, in that he was unable to obtain the documents from the city "due to the limited access to town hall in 2020 during [the] pandemic."

We first set forth our standard of review. "Our standard of review of the [plaintiff's] claim is well defined. A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion. . . .

"A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Wahba* v. *JPMorgan Chase Bank, N.A.*, 200 Conn. App. 852, 241 A.3d 706 (2020), cert. denied, 336 Conn. 909, 244 A.3d 562 (2021). "The trial court is in the best position to assess the burden which an amendment would impose on the opposing party in light of the facts of the particular case." (Internal quotation marks

omitted.) *Mastrolillo* v. *Danbury*, 61 Conn. App. 693, 696, 767 A.2d 1232 (2001).

The plaintiff has failed to demonstrate that the court abused its discretion in disallowing the amendment.[24] When the plaintiff filed his request to amend after the scheduled date of oral argument, the defendants' motions for summary judgment had been briefed. The trial court found that permitting the amendment would prejudice the defendants in that it would alter the substance of the plaintiff's claim while the motions for summary judgment were pending. The court determined that the new theories of liability would require additional discovery and occasion further delay. In light of the delay and likelihood that the amendment would prejudice the defendants, we conclude that the court's ruling did not reflect an abuse of its discretion.

III

In one paragraph of his principal appellate brief, the plaintiff claims that the court abused its discretion in denying his motion to preclude the expert witness affidavit offered by the owner defendants in support of their motion for summary judgment. We conclude that the plaintiff's claim is inadequately briefed.

[24] The plaintiff argues that our appellate courts "have unambiguously held that it is an abuse of discretion for a trial court to deny a motion to amend a complaint to conform to facts revealed during discovery that, if denied, would moot the moving party's motion for summary judgment." Contrary to the blanket rule suggested by the plaintiff, both cases on which he relies are fact specific and do not compel the conclusion that the court improperly denied the request to amend in the present case. See *Falby* v. *Zarembski*, 221 Conn. 14, 25, 602 A.2d 1 (1992) (court abused its discretion in denying plaintiffs' motion to amend complaint where amendment sought to separate theories of liability that improperly had been pleaded in same count); *Miller* v. *Fishman*, 102 Conn. App. 286, 295, 925 A.2d 441 (2007) (court abused its discretion in denying motion to amend where proposed amendment did not set forth new theories of liability and preparation of defense would not have required significant additional time and resources), cert. denied, 285 Conn. 905, 942 A.2d 414 (2008).

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Citation omitted; internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803, 256 A.3d 655 (2021).

The plaintiff devotes only one paragraph of his principal brief to this claim. "Although the number of pages devoted to an argument in a brief is not necessarily determinative, relative sparsity weighs in favor of concluding that the argument has been inadequately briefed." (Internal quotation marks omitted.) Id., 805. The plaintiff states that "[t]he trial court erroneously denied [the plaintiff's] motion to preclude because [the Cyr survey] contained numerous errors raising serious issues of credibility. . . . The discrepancies are discussed in detail in [the plaintiff's] motion to preclude." The plaintiff has provided no analysis in support of this argument. To the extent that the plaintiff seeks to incorporate by reference any arguments raised in his motion to preclude, these arguments are inadequately briefed.[25] See *Cambridge Mutual Fire Ins. Co.* v. *Sakon*,

[25] The plaintiff also alludes vaguely to purported issues of credibility and errors in the Cyr survey in arguing that the court erroneously relied on Cyr's affidavit in rendering summary judgment. For the same reasons previously set forth, we conclude that this argument is inadequately briefed.

132 Conn. App. 370, 383 n.6, 31 A.3d 849 (2011) (arguments from opposition to motion for summary judgment incorporated by reference into appellate brief are deemed inadequately briefed), cert. denied, 304 Conn. 904, 38 A.3d 1202 (2012). Accordingly, we decline to review the plaintiff's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

DOMINIQUE AVILES ET AL. *v.* REGINA BARNHILL ET AL.
(AC 44587)

Prescott, Seeley and Sheldon, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant landlord, H Co., for injuries they sustained as a result of H Co.'s alleged negligence with respect to an off premises attack by a dog. H Co. owned a multifamily home, which it leased to the defendant B. The defendants M, G, and B were the owners and/or keepers of the dog, which lived with B. The dog ran from H Co.'s premises to the plaintiffs' premises and attacked the plaintiffs, severely injuring them. The trial court granted H Co.'s motion for summary judgment, reasoning that, because it was undisputed that the incident occurred off H Co.'s premises and because Connecticut's common law provides that a lessor owes no duty of care beyond its premises, H Co. owed no duty to the plaintiffs. On the plaintiffs' appeal to this court, *held*:

1. The trial court correctly concluded that H Co. did not owe the plaintiffs a duty of care under a theory of premises liability because the dog attack did not occur on property that it controlled; moreover, the plaintiffs' argument that our Supreme Court's decision in *Giacalone* v. *Housing Authority* (306 Conn. 399) broadened the scope of a landlord's duty under a theory of premises liability was unavailing because their argument was based on a misreading of the record in that case and because the court in *Giacalone* did not expand a property owner's duty beyond the property's boundary line.
2. This court rejected the plaintiffs' request that this court adopt a provision (§ 379A) of the Restatement (Second) of Torts, which, if its elements were met, would extend liability to H Co. regardless of where the dog attack took place: our appellate precedent makes clear that a landlord does not owe a duty of care to someone who sustains injuries from a

dog if the attack occurs beyond the landlord's property line in an area over which the landlord has no control; moreover, although neither our Supreme Court nor this court has expressly declined to adopt § 379A, both courts have adhered in dog bite cases to traditional principles of premises liability, which run counter to § 379A, and, thus, adopting § 379A would require this court to depart from appellate precedent, which it was not free to do.

Argued September 19, 2022—officially released January 31, 2023

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New London, where the named defendant et al. were defaulted for failure to appear; thereafter, the court, *Calmar*, *J.*, granted the motion of the defendant H-Squared Construction, LLC, for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

James M. Harrington, for the appellants (plaintiffs).

Joseph M. Busher, *Jr.*, for the appellee (defendant H-Squared Construction, LLC).

Opinion

SEELEY, J. The plaintiffs, Dominique Aviles, individually and on behalf of her minor child, Xavier Bauza,[1] appeal from the summary judgment rendered by the trial court in favor of the defendant landlord, H-Squared Construction, LLC, on two counts of the plaintiffs' complaint asserting negligence against the defendant arising from an off premises attack by a dog owned by one of

[1] "It is well established that a child may bring a civil action only by a guardian or next friend, whose responsibility it is to ensure that the interests of the ward are well represented." (Internal quotation marks omitted.) *Harris* v. *Neale*, 197 Conn. App. 147, 149 n.1, 231 A.3d 357 (2020).

its tenants.[2] On appeal,[3] the plaintiffs argue that the court incorrectly determined that the defendant could not be held liable as a matter of law because, contrary to the court's conclusion, Connecticut case law provides that a landlord has a duty of care under a premises liability theory to use reasonable care to prevent injuries to third parties from known vicious dogs housed on the property by a tenant, including, in certain circumstances, from a dog attack occurring off of the landlord's property. The plaintiffs also argue that this court should adopt § 379A of the Restatement (Second) of Torts (§ 379A),[4] which, if its elements are met, would

[2] Because H-Squared Construction, LLC, is the sole defendant participating in the present appeal, we refer to it throughout this opinion as the defendant and to the other parties by name. The plaintiffs' complaint also included claims against three additional defendants, Regina Barnhill, Keith A. McGraw, and Michael J. Gomez. The remaining twelve counts of the plaintiffs' fourteen count complaint allege that Barnhill, McGraw, and Gomez are the owners and/or keepers of the dog and that they violated General Statutes § 22-357, which is commonly known as the dog bite statute. This statute "imposes strict liability on the 'owner or keeper' of a dog for harm caused by the dog, with limited exceptions." *Giacalone* v. *Housing Authority*, 306 Conn. 399, 405, 51 A.3d 352 (2012). For a plaintiff to assert a claim pursuant to § 22-357 successfully against a defendant, the plaintiff must prove that the defendant is the "owner or keeper" of the dog. *Auster* v. *Norwalk United Methodist Church*, 286 Conn. 152, 153–54, 943 A.2d 391 (2008). Ownership of the premises where a dog lives "unaccompanied by any evidence of caretaking of the dog or actual control over its actions" is insufficient to hold a property owner or landlord liable under this statute. (Internal quotation marks omitted.) Id., 163.

[3] Counts thirteen and fourteen were the only counts of the complaint brought against the defendant and, thus, the summary judgment rendered on those counts is immediately appealable. See Practice Book § 61-3 ("[a] judgment disposing of only a part of a complaint . . . is a final judgment if that judgment disposes of all causes of action in that complaint . . . brought by a particular party or parties").

[4] Section 379A of the Restatement (Second) of Torts provides: "A lessor of land is subject to liability for physical harm to persons outside of the land caused by the activities of the lessee or others on the land after the lessor transfers possession if, but only if,

"(a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and

"(b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary

extend liability to the defendant regardless of where the attack took place. We disagree with the plaintiffs' first claim and conclude that, within the specific context of off premises dog attacks, landlords do not owe a duty of care to injured third parties under a theory of premises liability. We also decline to adopt § 379A for this particular context because we determine that doing so would be contrary to our appellate precedent. Accordingly, we affirm the judgment of the trial court.

The record before the court, which we view in the light most favorable to the plaintiffs as the nonmoving parties, reveals the following facts and procedural history. The defendant is the owner and landlord of 151-153 Golden Street, a multifamily home in Norwich. Regina Barnhill leased 151-153 Golden Street from the defendant at all relevant times. Barnhill, along with Keith A. McGraw and Michael J. Gomez, were the owners and/or keepers of a dog named " 'Yank' " that lived with Barnhill at 151-153 Golden Street. On June 16, 2016, Yank ran unleashed from 151-153 Golden Street to 22 Page Street, the plaintiffs' residence, and attacked and severely injured the plaintiffs.[5] The two residences,151-153 Golden Street, where the dog was housed, and 22 Page Street, where the plaintiffs were injured, have adjoining backyards.

The plaintiffs commenced this action on April 30, 2018. The complaint, dated April 19, 2018, contained

to safety would not be taken." 2 Restatement (Second), Torts § 379A, p. 283 (1965).

[5] As alleged in the complaint, Aviles, who was in her third trimester of pregnancy at the time of the incident, sustained extensive injuries, including eighteen punctures /lacerations to her stomach, complete severance of her left ear that was unable to be reattached, and numerous punctures/lacerations to her arm, fingers, breast, back, head, chin, and jaw. Bauza suffered physical injuries to the back of his neck, scalp, and arms, as well as mental health issues after the injury, including adjustment disorder with anxiety, attention deficit hyperactivity disorder, and language disorder involving understanding and expression of language.

fourteen counts. Counts thirteen and fourteen were brought against the defendant and sounded in negligence. The complaint alleges that the plaintiffs' injuries were the result of the negligence and carelessness of the defendant because it knew or should have known of the existence of the dangerous condition posed by Yank and failed to secure the property and prevent Yank's escape, advise Yank's alleged owners and/or keepers to remove Yank from the premises, inspect the premises periodically to ensure it was safe and posed no danger to the public, take adequate measures to remedy and/or eliminate the dangerous condition posed by Yank, and/or warn the plaintiffs of the dangerous condition.

On June 28, 2018, the defendant filed a motion for summary judgment as to the thirteenth and fourteenth counts of the plaintiff's complaint. The defendant argued that it was entitled to summary judgment as a matter of law because, consistent with appellate precedent, it owed no duty to the plaintiffs under a premises liability theory because the attack did not take place on the defendant's premises. The defendant also argued that it was entitled to summary judgment because the defendant was not aware that Yank lived on the premises, and it had no knowledge that Yank was dangerous.

The plaintiffs filed a memorandum of law in opposition to the motion for summary judgment in which they conceded that the incident did not occur on the defendant's premises, 151-153 Golden Street. The plaintiffs argued, nonetheless, that summary judgment was improper because § 379A was a "notable exception" to premises liability law and a genuine issue of material fact existed as to whether its prongs were met. Specifically, the plaintiffs maintained that a genuine issue of fact existed as to whether the defendant knew that Yank resided at the property. Although two members of the defendant, John Hardy and Derek Hatch, asserted

in their affidavits submitted in support of the defendant's motion for summary judgment that they were not aware of Yank's presence, the plaintiffs argued that there was obvious evidence demonstrating that Yank lived there, and that, pursuant to comment (b) to § 379A, "knowledge may be . . . found by implication from all of the circumstances existing at the time of the lease." 2 Restatement (Second), Torts § 379A, comment (b), pp. 283–84 (1965). Further, the plaintiffs argued that, even if the defendant was not initially aware of Yank's existence, it certainly was by the time of the successive lease renewals between the parties, and, because comment (g) to § 837 of the Restatement (Second) of Torts[6] provides in relevant part that, "[i]f at the time that the lessor renews the lease [it] knows that activities are being carried on . . . [it] is liable for the continuance of the interference after the renewal," the first prong of § 379A was thereby satisfied. 4 Restatement (Second), Torts § 837, comment (g), pp. 153–54 (1979). Thus, the plaintiffs argued before the trial court that, because this genuine issue of material fact existed, summary judgment should be denied.

The court, *Calmar*, *J.*, initially denied the defendant's motion. The court reasoned that, although generally a landlord's duty applies only to areas of the premises over which the landlord retains control, § 379A is "an exception to the general rule . . . ." Because § 379A requires that the landlord consent to the dog's activity on the premises or know of the dog's vicious propensities, both of which were disputed in this case, the court determined that a genuine issue of material fact existed and, therefore, denied the defendant's motion.

[6] Comment (a) to § 379A provides that it should be read together with § 837 of the Restatement (Second) of Torts, which concerns lessor liability for nuisances on the land, and that the comments to § 837 "are applicable so far as they are pertinent." 2 Restatement (Second), supra, § 379A, comment (a), p. 283.

Thereafter, the defendant filed a motion for reconsideration in which it argued that the court's reliance on § 379A was misplaced because our appellate courts had not adopted it and, moreover, § 379A is inconsistent with Connecticut's common law. Following a hearing on the motion, the court vacated its initial order and granted the defendant's motion for summary judgment. In its memorandum of decision, the court explained in relevant part: "Although [the] court was initially persuaded by the belief that appellate courts previously had applied § 379A and/or would apply § 379A given the right factual scenario and if proper evidence was presented, it is clear upon closer examination and review that the appellate courts have not yet adopted [§ 379A] and Connecticut's common-law precedent does not support this exception." The court further reasoned that, because Connecticut's common law unequivocally provides that a lessor owes no duty of care beyond its premises, and because it is undisputed that the incident in this case occurred off the defendant's premises, the defendant owed no duty to the plaintiffs. Accordingly, the court determined that the defendant met its burden of demonstrating that there was no genuine issue of material fact, and granted the motion for summary judgment in favor of the defendant on counts thirteen and fourteen of the plaintiff's complaint. This appeal followed.

The plaintiffs claim on appeal that the court incorrectly concluded, as a matter of law, that the defendant did not have a duty to prevent its tenant's dog from harming a nontenant beyond the boundaries of its property, an area over which the defendant did not exercise control. The plaintiffs specifically argue that in *Giacalone* v. *Housing Authority*, 306 Conn. 399, 51 A.3d 352 (2012), our Supreme Court "broadened the scope of a landlord's duty under a premises theory of liability" by recognizing landlord liability for a tenant's dog attack

even when the attack did not occur within the boundaries of the property on which the dog lived and over which the landlord exercised control. Additionally, although conceding that § 379A has not been explicitly adopted by Connecticut courts, the plaintiffs argue that this court should adopt § 379A because it "strikes a reasonable balance between concerns over the expansion of landlord liability and the need to hold accountable those landlords who have knowledge of dangerous conditions on their property and who fail to act."

The defendant argues that the court properly rendered summary judgment in its favor because it is undisputed that the underlying incident took place off the defendant's property and our case law repeatedly has held that a lessor's duty does not extend to land outside of its control. The defendant further argues that § 379A is inconsistent with our case law and, therefore, we should decline to adopt it.[7] We agree with the defendant.

Before turning to our analysis, we must first set forth the standard of review that governs this appeal. "Our standard of review with respect to a court's ruling on a motion for summary judgment is well settled. Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary

[7] On appeal, the defendant also argues that if, assuming arguendo, we were to adopt § 379A, we should nonetheless affirm the granting of its motion for summary judgment because the plaintiffs did not plead sufficient facts in their operative complaint to establish liability under § 379A, and, additionally, the plaintiffs failed to establish a genuine issue of material fact as to the elements of § 379A. Because we decline to adopt § 379A, we need not address these arguments.

judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . .

"[I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Adams* v. *Aircraft Spruce & Specialty Co.*, 215 Conn. App. 428, 440–41, 283 A.3d 42, cert. denied, 345 Conn. 970, A.3d (2022). Furthermore, although "[i]ssues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner . . . [t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Goody* v. *Bedard*, 200 Conn. App. 621, 631, 241 A.3d 163 (2020); see also *Gonzalez* v. *O & G Industries, Inc.*, 341 Conn. 644, 680, 267 A.3d 766 (2021) ("[t]he existence of a legal duty is a question of law over which we exercise plenary review" (internal quotation marks omitted)).

I

The plaintiffs first claim that the court incorrectly concluded, as a matter of law, that the defendant did

not owe them a duty of care because the dog attack did not occur on property controlled by the defendant. Specifically, they argue that the scope of landlord premises liability was expanded by our Supreme Court in *Giacalone* v. *Housing Authority*, supra, 306 Conn. 399. Conversely, the defendant argues that the court correctly determined that it owed no duty of care to the plaintiffs because appellate case law repeatedly has held that a landlord's duty does not extend to uncontrolled land beyond the landlord's premises. According to the defendant, our Supreme Court did not expand that principle in *Giacalone*, rather, the court merely reaffirmed it. We agree with the defendant.

We begin our analysis with a discussion of the relevant principles of negligence and premises liability. "In a negligence action, the plaintiff must meet all of the essential elements of the tort in order to prevail. These elements are: duty; breach of that duty; causation; and actual injury. . . . [T]he existence of a duty of care is a prerequisite to a finding of negligence . . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . .

"The general rule is that a landlord has a duty reasonably to maintain property over which he exercises control. . . . That duty serves to protect entrants (invitees, licensees, trespassers) and tenants. . . . The duty does not, however, extend to uncontrolled land such as neighboring property or public lands." (Citations omitted; internal quotation marks omitted.) *Charles* v. *Mitchell*, 158 Conn. App. 98, 108–109, 118 A.3d 149 (2015); see also *Stokes* v. *Lyddy*, 75 Conn. App. 252, 260, 815 A.2d 263 (2003).

In *Stokes*, this court, as a matter of first impression, held that a landlord does not owe a common-law duty to nontenants who, while outside the boundaries of the premises, are bitten by a tenant's dog. *Stokes* v. *Lyddy*, supra, 75 Conn. App. 253–54. In that case, a dog owned by the landlord's tenant escaped the premises and attacked the plaintiff as she walked along a nearby public sidewalk. Id., 254. The attack did not occur on any portion or common area of the landlord's property. Id. On appeal, the plaintiff argued, inter alia, that the landlord should be held liable because the landlord had a duty under general principles of premises liability to maintain the nearby public property in a reasonably safe manner. Id., 259–60. This court disagreed and determined that, pursuant to traditional principles of premises liability, a landlord's duty does not extend to uncontrolled land such as a public sidewalk and, therefore, the landlord could not be held liable under a theory of premises liability. Id., 260–62.

This court addressed the issue again in *Charles* v. *Mitchell*, supra, 158 Conn. App. 98. In *Charles*, as in *Stokes*, the tenant's dog escaped the premises and attacked the plaintiff while she was on a public street. Id., 101. On appeal, the plaintiff argued that a landlord should be held liable for an off premises dog attack "so long as the resulting harm was reasonably foreseeable." Id., 110. This court disagreed, and, citing to *Stokes*, reaffirmed the traditional principle that a landlord's duty does not extend to uncontrolled land and, therefore, a landlord cannot be held liable for injuries sustained from an off premises dog attack. Id., 109–10.

In *Giacalone*, our Supreme Court was asked to resolve the sole issue of whether a landlord may be held liable under the general theory of premises liability for a dog bite injury, or whether the landlord must have direct care of, or control over, the dog and, therefore, fall within the purview of the dog bite statute to be

liable. *Giacalone* v. *Housing Authority*, supra, 306 Conn. 401. The court determined that a claim brought pursuant to the dog bite statute, General Statutes § 22-357, and a claim brought under a premises liability theory are two independent and separate causes of action, and a landlord can be held liable under the "ordinary—indeed, hoary—principles of common-law liability . . . ." Id., 407. The court reasoned that it is a matter of well settled common law that a landlord owes a duty to alleviate dangerous conditions in areas of the premises over which it retains control, and that "a vicious dog may qualify as a dangerous condition under the traditional, common use of this term because this court has long recognized that a landlord's common-law obligation to alleviate known dangers exists independent of the specific source of that danger." Id., 408. Thus, the court concluded that a landlord "must take reasonable steps to alleviate the dangerous condition created by the presence of a dog with known vicious tendencies in the common area of the property" over which the landlord retains control, and that "[w]hat defines the landlord's duty is the obligation to take reasonable measures to ensure that the *space* over which it exercises dominion is safe from dangers, and a landlord may incur liability by failing to do so." (Emphasis in original.) Id.

Despite the holdings in *Stokes* and *Charles*, and of the undisputed fact that, in the present case, the incident took place off the premises, the plaintiffs claim that the defendant can be held liable under a theory of premises liability because of our Supreme Court's decision in *Giacalone*. They argue, on the basis of their reading of *Giacalone*, that our Supreme Court broadened the scope of premises liability in that case by determining that the landlord was liable even though the dog attack occurred outside of the premises on which the dog was housed. The plaintiffs contend that

Giacalone stands for the proposition that "a property owner's duty under premises liability . . . does not evaporate if that harm crosses the property's boundary line." The plaintiffs additionally argue that the court's failure to discuss in detail the location of the dog attack further supports their contention that the location of the harm is not dispositive in determining whether a landlord owes a duty under a theory of premises liability.

The plaintiffs' argument fails for two reasons. First, it rests on a misunderstanding of the facts of *Giacalone*. In their appellate brief, the plaintiffs represented that, in *Giacalone*, "the plaintiff was injured at her residence when she was attacked by her neighbor's dog who had escaped from the home the dog resided in," and that the dog had "travelled around 528 feet down the block and across an intersection to reach the plaintiff's residence where he attacked her in her yard." However, contrary to the plaintiffs' assertion, the dog attack in *Giacalone* did not occur at the plaintiff's residence; rather, it occurred "at or near" the dog owner's residence. *Giacalone* v. *Housing Authority*, supra, 306 Conn. 402. The plaintiffs cite to our Supreme Court's decision in *Giacalone* as support for their assertion regarding the location of the attack; the specific page of the *Giacalone* decision cited by the plaintiffs in their appellate brief, however, states: "The complaint alleges that *the plaintiff*, a tenant of the defendant's *residing at 44 Louis Circle* in Wallingford, sustained injuries and other harm after being bitten by a dog *at or near 14 Tremper Drive* in Wallingford, a nearby property of which the defendant is also the landlord." (Emphasis added.) Id. Thus, it is clear that the plaintiff in *Giacalone* was not bitten at her residence but, rather, "at or near 14 Tremper Drive . . . ." Id. Although it is not explicitly evident from our Supreme Court's decision who resided at 14 Tremper Drive, this court's decision, the trial

court's decision on the defendant's motion to strike, and the original complaint in *Giacalone* established that the dog owner resided there. *Giacalone* v. *Housing Authority*, 122 Conn. App. 120, 121–22, 998 A.2d 222 (2010), aff'd, 306 Conn. 399, 51 A.3 352 (2012); *Giacalone* v. *Housing Authority*, Superior Court, judicial district of New Haven, Docket No. CV-08-6002041-S (December 19, 2008) (46 Conn. L. Rptr. 829, 829), rev'd, 122 Conn. App. 120, 998 A.2d 222 (2010). The plaintiffs in the present case may have mistakenly believed that 14 Tremper Drive was the plaintiff's residence in *Giacalone* and, as a result, determined the distance between the properties to reach their conclusion that the dog in that case travelled "528 feet" to the plaintiff's residence and attacked her in her yard. This interpretation of the facts in *Giacalone*, however, is incorrect. The plaintiff in *Giacalone* was, in fact, bitten "at or near" the dog owner's residence, that is, property owned and controlled by the landlord. *Giacalone* v. *Housing Authority*, supra, 306 Conn. 402. Therefore, the plaintiffs' argument that *Giacalone* broadened the scope of premises liability is based on a misreading of the record in that case.

Second, the plaintiffs' argument that *Giacalone* supports the notion that "a property owner's duty under premises liability . . . does not evaporate if that harm crosses the property's boundary line," is contrary to our Supreme Court's analysis. As previously discussed in this opinion, in *Giacalone*, our Supreme Court held that "a landlord, in exercising the closely analogous duty to alleviate dangerous conditions *in areas of a premises over which it retains control*, must take reasonable steps to alleviate the dangerous condition created by the presence of a dog with known vicious tendencies *in the common areas of the property*." (Emphasis added.) *Giacalone* v. *Housing Authority*, supra, 306 Conn. 408. The court further emphasized

that "[w]hat defines the landlord's duty is the obligation to take reasonable measures to ensure that the *space* over which it exercises dominion is safe from dangers, and a landlord may incur liability by failing to do so." (Emphasis in original.) Id. The court made clear that it is the property lines, and the potential harms within them, that define a landlord's duty. Thus, contrary to the plaintiffs' first claim, *Giacalone* did not expand a property owner's duty beyond the property's boundary line.

For these reasons, we conclude that, within the limited context of an off premises dog attack, a landlord does not owe a duty of care to injured third parties under a theory of premises liability and, therefore, we reject the plaintiffs' first claim on appeal.

II

The plaintiffs next claim that this court should adopt § 379A and, consequently, hold that a genuine issue of material fact exists as to whether its prongs are met. As previously noted in this opinion, § 379A provides: "A lessor of land is subject to liability for physical harm to persons outside of the land caused by activities of the lessee or others on the land after the lessor transfers possession if, but only if, (a) the lessor at the time of the lease consented to such activity or knew that it would be carried on, and (b) the lessor knew or had reason to know that it would unavoidably involve such an unreasonable risk, or that special precautions necessary to safety would not be taken." 2 Restatement (Second), supra, § 379A, p. 283. The plaintiffs argue that we should adopt § 379A because it "strikes a reasonable balance between concerns over the expansion of landlord liability and the need to hold [landlords] accountable . . . ." The defendant counters that this court should not adopt § 379A because it is inconsistent with

precedent from both our Supreme Court and this court. We agree with the defendant.

"It is axiomatic that, as an intermediate appellate tribunal, this court is not free to depart from or modify the precedent of our Supreme Court." *Davis* v. *Davis-Henriques*, 163 Conn. App. 301, 312, 135 A.3d 1247 (2016); see also *State* v. *Gonzalez*, 214 Conn. App. 511, 522–23 n.10, 281 A.3d 501 ("[W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). Furthermore, it is well established that "one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we have often stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. [That] may be accomplished only if the appeal is heard en banc. . . . Prudence, then dictates that this panel decline to revisit such requests." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 524. Our appellate precedent makes clear that a landlord does not owe a duty of care to someone who sustains injuries from a dog if the attack occurs in an area over which the landlord has no control. Although neither our Supreme Court nor this court expressly has declined to adopt § 379A, as discussed in part I of this opinion, both courts have adhered to traditional principles of premises liability, and those principles run counter to § 379A.

In *Giacalone*, our Supreme Court affirmed that a landlord's common-law duty under a theory of premises liability is applicable to "the dangerous condition created by the presence of a dog with known vicious tendencies," and that the duty is defined by the *space* over which the landlord exercises control. *Giacalone* v. *Housing Authority*, supra, 306 Conn. 408. This court

also has abided by these traditional principles of premises liability for dog bite cases in *Stokes*, *Charles*, and, most recently, in *Raczkowski* v. *McFarlane*, 195 Conn. App. 402, 225 A.3d 305 (2020). In *Raczkowski*, the plaintiff was walking in front of a residence when a dog ran out and bit her. Id., 405. Even though the incident took place partly on the defendant landlord's property, this court nonetheless concluded that the landlord did not owe a duty to the plaintiff under a theory of premises liability because the tenant, the dog owner, had exclusive possession of the property under the unique circumstances of that case. Id., 415. Therefore, we concluded that the landlord did not have possession or control of the property. Id. Thus, *Raczkowski* demonstrates this court's continued pattern of strict compliance with traditional principles of premises liability. These principles are inconsistent with the scope of liability that § 379A imposes on a landlord and, thus, adopting it would require us to depart from our appellate precedent, which we are not free to do.[8]

At oral argument before this court, the plaintiffs' counsel claimed that we can adopt § 379A despite this precedent, but we are not persuaded. The plaintiffs' counsel specifically reasoned that we are not prevented from adopting § 379A by *Stokes* because, in that case, we analyzed § 379A in "quite exhaustive detail." The plaintiffs further argue in their appellate brief that, in

[8] This court previously declined to adopt a Restatement provision that conflicted with existing case law. In *Davis* v. *Davis-Henriques*, supra, 163 Conn. App. 301, the plaintiff requested that this court adopt a provision from the Restatement (Third) of Property, Wills and other Donative Transfers, that was contrary to our Supreme Court's pattern of reliance on Connecticut's wills act, General Statutes § 45a-251 et seq. Id., 311–12. We concluded that, because this court "is not free to depart from or modify the precedent of our Supreme Court," and "[b]ecause our Supreme Court has articulated a 'rule of strict compliance with the wills act,' " we could not depart from that rule and adopt the Restatement provision. Id., 312–13. We reach the same conclusion in the present case.

Stokes, we only "stopped short" of adopting § 379A. The plaintiffs are correct that this court discussed § 379A in *Stokes*. *Stokes* v. *Lyddy*, supra, 75 Conn. App. 263. Contrary to the plaintiffs' characterization, however, we did not merely stop short of adopting § 379A in *Stokes*. Rather, without determining whether § 379A should be adopted, we rejected the plaintiff's argument in *Stokes* because the plaintiff in that case had failed to provide any evidence to support the first prong of § 379A, that is, that the lessor at the inception of the lease consented to the dog's presence. Id., 264–65. In fact, the *Stokes* decision contained the following language that suggests that this court would have declined to adopt § 379A even if the plaintiff had provided evidence to support both prongs: "Another public policy concern that influences our decision is our desire to prevent the possible flood of litigation that might result from adopting the rule proposed by the plaintiff. If landlords were held liable for off premises injuries caused by their tenants' dogs, landlords would become the insurers of the general public without end. That should not be encouraged."[9] Id., 272.

The plaintiffs' counsel also maintained at oral argument before this court that this court is not prevented from adopting § 379A by *Giacalone* because it is factually distinguishable, or by *Charles* because, in that case, although the plaintiff asserted a claim under § 379A, the claim was deemed abandoned. These observations, although accurate, do not provide support for the plaintiffs' argument that this court should adopt § 379A. The

[9] This court made that statement in response to the plaintiff's argument that the dog bite statute should be extended to landlords. See *Stokes* v. *Lyddy*, supra, 75 Conn. App. 265–66. If the trial court in the present case had been asked expressly to adopt § 379A, it would have encountered the same concern as the court in *Stokes* because adopting § 379A, like expanding the dog bite statute, would have made landlords liable for off premises injuries and, consequently, required them to become the insurers of the public without end.

plaintiffs ignore that, in both cases, our appellate courts adhered to traditional premises liability law with respect to a landlord's liability for dog attacks, and that this court has continued to do so. It is this pattern of strict adherence that requires this court to reject the plaintiffs' invitation to adopt § 379A.

In sum, our appellate precedent continuously has maintained that premises liability does not extend beyond the property line within the specific context of off premises dog attacks. We conclude that we cannot depart from that precedent and, therefore, we reject the plaintiffs' request to adopt § 379A of the Restatement (Second) of Torts.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MARCUS HURDLE (AC 44701)

Alvord, Prescott and Moll, Js.

Syllabus

Convicted, on pleas of guilty, of the crimes of robbery in the first degree and conspiracy to commit robbery in the first degree, the defendant appealed to this court from the judgment of the trial court, claiming, inter alia, that the trial court improperly concluded that it lacked the authority to award him presentence confinement credit pursuant to statute (§ 18-98d). The defendant had been incarcerated on other convictions when he entered into an agreement with the state under which he would plead guilty to charges of robbery in the first degree and conspiracy to commit robbery in the first degree in exchange for the entry of a nolle prosequi as to all other charges he was facing. The trial court accepted the pleas after canvassing the defendant, who indicated that he understood the terms of the agreed upon sentence. At sentencing, the defendant, for the first time, claimed that he was entitled to certain presentence confinement credit. The court declined to award presentence confinement credit and imposed the agreed upon sentence. *Held*:

1. The defendant could not prevail on his claim that the trial court, in structuring his sentence, had the authority and discretion to account for presentence confinement credit that the court determined to be

appropriate: under § 18-98d (c), the Commissioner of Correction has the sole responsibility and authority to calculate and apply presentence confinement credit toward the sentence that actually was imposed by the court, as presentence confinement credit is not a part of a sentence but a calculation of the amount of credited time a defendant already has served toward completing that sentence, and, although § 18-98d contains no language that explicitly bars a sentencing court from awarding presentence confinement credit, our courts have clearly established that presentence confinement credit is a creature of statute; moreover, the defendant presented no appellate authority in support of his assertion that, because the trial court has broad authority to craft and impose sentences, it also has the inherent authority to award presentence confinement credit, the legislature having expressly placed the authority to apply presentence confinement credit in the hands of the Commissioner of Correction; furthermore, although sentencing courts differ in their views about how to address issues concerning presentence confinement credit, including, as did one of the courts that imposed a prior sentence against the defendant, by placing an order on the judgment mittimus that the defendant was to be given presentence confinement credit, that notation was not binding on the Commissioner of Correction, who has, in the first instance, the authority to calculate and apply presentence confinement credit.

2. The defendant failed to present any evidence to support his claim that the trial court improperly accepted his guilty pleas and thereafter denied his motion to withdraw them because there was no meeting of the minds regarding the terms of the pleas: the plea agreement between the defendant and the state did not include any offer or acknowledgment by the state regarding presentence confinement credit, which defense counsel acknowledged on the record, the prosecutor indicated that presentence confinement credit was never part of the plea bargaining discussions, and the defendant acknowledged more than once during the court's initial plea canvass that he understood the terms of the agreed upon sentence.

3. The defendant could not prevail on his unpreserved claim that the trial court's plea canvass was constitutionally invalid because he was not advised that his guilty pleas would operate as a waiver of his right to a jury trial; although the court did not indicate that the waiver included the right to a jury trial, the defendant acknowledged during the canvass that he was waiving his right to a trial by pleading guilty, and, because he was represented by counsel and had elected a jury trial as part of his initial plea of not guilty, the record was sufficient to infer that he understood that his waiver of a right to a trial meant the right to a jury trial.

Argued November 8, 2022—officially released January 31, 2023

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of home invasion,

robbery in the first degree, conspiracy to commit robbery in the first degree and criminal possession of a firearm, and, in the second part, with being a persistent dangerous felony offender, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendant was presented to the court, *Brown*, *J.*, on pleas of guilty to robbery in the first degree and conspiracy to commit robbery in the first degree; thereafter, the court denied the defendant's motion for certain presentence confinement credit; subsequently, the court, *Brown*, *J.*, denied the defendant's motion for reconsideration or to withdraw the pleas and rendered judgment in accordance with the pleas; thereafter, the state entered a nolle prosequi as to the charges of home invasion, criminal possession of a firearm and being a persistent dangerous felony offender, and the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Howard S. Stein*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Marcus Hurdle, appeals from the judgment of conviction, rendered following his entry of guilty pleas pursuant to the *Alford* doctrine,[1] of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4) and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a). The defendant claims that the trial court improperly (1) determined that it

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

lacked the authority, in accordance with General Statutes § 18-98d, to award him presentence confinement credit, (2) accepted his guilty pleas and denied his subsequent motion for jail credit or to withdraw his pleas, despite his contention that there was never a "meeting of the minds" regarding the terms of his plea agreement with the state, and (3) violated his constitutional rights by failing to advise him during his plea canvass that his guilty pleas would operate as a waiver of his right to a trial by jury. We affirm the judgment of conviction.

The following undisputed facts and procedural history are relevant to our consideration of the defendant's claims. On January 11, 2016, the defendant was sentenced in two criminal files factually unrelated to the present matter.[2] He received concurrent sentences of five years of incarceration, execution suspended after nine months, followed by three years of probation. On July 20, 2018, the defendant admitted to violating the terms of his probation and was released pending sentencing on a *Garvin* plea agreement (probation files).[3]

Less than one month later, on August 16, 2018, the defendant participated in a robbery in West Haven that led to the conviction now under review. Although the defendant and his coconspirators initially evaded the

[2] The defendant was convicted in the judicial district of Ansonia-Milford in Docket No. CR-14-0086982 of assault in the third degree in violation of General Statutes § 53a-61 and criminal violation of a protective order in violation of General Statutes § 53a-223, and in Docket No. CR-15-0158739 of criminal violation of a protective order in violation of § 53a-223. It is axiomatic that we may take judicial notice of the defendant's various prior criminal files to the extent that doing so aids our consideration of the claims raised on appeal. See *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 3 n.1, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019).

[3] See *State* v. *Garvin*, 242 Conn. 296, 699 A.2d 921 (1997). "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 7, 895 A.2d 771 (2006).

police following the robbery, the defendant was apprehended later that day by the New Haven police.[4] Because of his actions during the arrest in New Haven, the defendant was charged in the judicial district of New Haven in Docket No. CR-18-0186768 with interfering with a police officer and with criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (pistol possession file). He was detained on bond on those charges.

Subsequently, on October 24, 2018, while still detained on bond in the pistol possession file, the defendant was arrested by warrant in connection with the West Haven robbery. He was charged in the judicial

[4] The prosecutor provided the court with the following factual basis for the defendant's pleas related to the robbery. On August 16, 2018, at approximately 5:18 a.m., the West Haven police were called to the Econo Lodge motel on Highland Street in West Haven. At that time, they came into contact with the victim, a New York resident who was visiting a local acquaintance, Jennifer Torres. Torres came to the victim's motel room with another woman. Shortly after arriving, Torres excused herself from the room, following which two men, one of whom was the defendant, came in. One of the men was armed with a handgun and proceeded to pistol-whip the victim. Both men ransacked the room, stealing, among other things, a watch and some money. After the four individuals left, the victim contacted the police. The police, who were familiar with Torres, began an investigation pursuant to which they learned the identity of her companions. The police then went to a location that those individuals were known to frequent and were waiting outside when a car pulled up. Several of the individuals suspected to be involved in the robbery were in the car, which was being operated by the defendant. When the police attempted to stop the car, a pursuit ensued, which the police terminated at some point due to public safety concerns. The car later was located in New Haven. The New Haven police then came into contact with the defendant, who was, by then, known to be a suspect in the West Haven robbery. The defendant threw down a firearm that he was carrying, dropping it in a yard. The firearm was recovered and met the description of the gun with which the robbery victim claimed he was struck. On the basis of statements given by several individuals, including some of the defendant's coconspirators, which were corroborated by surveillance video from the motel, the police learned that the coconspirators had hatched a plan to rob the victim by having the women gain entry to the motel room and having the men wait outside and, at the appropriate time, enter the motel room and rob the victim.

district of Ansonia-Milford in Docket No. CR-18-0097217 with home invasion in violation of General Statutes § 53a-100aa (a) (1), robbery in the first degree in violation of § 53a-134 (a) (4), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 and 53a-134 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1) (robbery file). The state also filed a substitute part B information charging the defendant as a persistent dangerous felony offender under General Statutes § 53a-40 (a) (1). At his arraignment on the charges in the robbery file, the court set a $300,000 bond and also raised the defendant's bonds in his other files.

On October 26, 2018, the court appointed an attorney for the defendant and confirmed that bond had been set in the robbery and probation files. The defendant subsequently entered not guilty pleas in the robbery file and elected a jury trial. On December 19, 2018, the defendant posted bond and was released.

Sentencing with respect to the probation files initially was scheduled for February 20, 2019. The defendant, however, arrived late and was intoxicated. Accordingly, the court raised the defendant's bond and continued the matter. On February 26, 2019, the court terminated the defendant's probation and sentenced him in the probation files to concurrent terms of three and one-half years of incarceration. He began to serve those sentences while awaiting resolution of the charges in the robbery and pistol possession files.

On May 15, 2019, in the pistol possession file, the defendant pleaded guilty under the *Alford* doctrine to criminal possession of a pistol or revolver. Following a plea canvass, the court, *Cradle, J.*, sentenced the defendant to ten years of incarceration, two years of which were mandatory, execution suspended after three and one-half years, followed by three years of

conditional discharge. The court, in response to a question by the defendant about jail credit, stated that the defendant could "get [his] jail credit for the time that [he had] been confined on bond on this matter." The order for jail credit was reflected on the mittimus.[5]

On October 29, 2020, as part of a plea agreement with the state and in order to resolve his remaining criminal charges on the robbery file, the defendant pleaded guilty under the *Alford* doctrine to robbery in the first degree and conspiracy to commit robbery in the first degree. As part of the plea agreement, the state agreed to enter a nolle prosequi on all remaining charges, including the charge of being a persistent dangerous felony offender. The court, *Brown*, *J.*, accepted the pleas following a thorough canvass during which the defendant repeatedly was advised of the terms of the agreed upon sentence, which was twelve years of incarceration, execution suspended after seven and one-half years, followed by five years of probation, which would run concurrently with all of the sentences he already was serving. On two separate occasions, following the court's recitation of the agreed upon sentence, the defendant verbally indicated that he understood the terms. During this proceeding, neither the defendant nor his counsel suggested that the plea agreement included a provision regarding jail credit. The matter was continued to January 28, 2021, for sentencing.

On that date, the defendant raised to the court, for the first time, his belief that he was entitled to certain presentence confinement credit in the present case. Specifically, after the court had given the defendant an opportunity to address the court, defense counsel indicated that he had a "few more comments." Counsel

[5] "[A] judgment mittimus is . . . a clerical document by virtue of which a person is transported to and rightly held in prison." (Internal quotation marks omitted.) *State* v. *Montanez*, 149 Conn. App. 32, 34 n.1, 88 A.3d 575, cert. denied, 311 Conn. 955, 97 A.3d 985 (2014).

concluded those comments with the following: "The final thing that I would say is that there was discussion of making the sentence run with the other sentences. And I contacted records at [the Department of Correction (department)], and they instructed me that you can order a jail credit going back to those dates. And I have those dates for the court, if so inclined. The arrest date of August 17, 2018, through December 19, 2018, at which time [the defendant] bonded out. And then he was readmitted on February 20, 2019, and the jail credit can be ordered from then to [the present]." The prosecutor indicated in his response that presentence confinement credit "was not bargained for," meaning that the issue was not part of the plea agreement between the defendant and the state, and that the court's practice in the past had always been to "[defer] to the [department] with regard to the calculation of jail credit." The prosecutor also took the position that the defendant already had received "every single credit from . . . every judge who has sentenced him with regard to his violations of probation [and] the gun charges he picked up . . . ."

The court indicated its intent to impose a sentence at that time, stating: "So, there is an agreed upon sentence. I am going to impose that agreed upon sentence. I am also going to allow the department to impose whatever presentence credit the department feels is appropriate. You're obviously entitled to presentence credit. I'm going to let them make that determination. . . . I'm not going to do that on the record." At that time, the defendant interrupted and complained that he had been told that he would "receive all jail credit if [he] agree[d] to the [plea] deal." The prosecutor reiterated that the state had never made any representations regarding presentence confinement credit as part of the plea negotiations. At the request of defense counsel, the court continued the matter without imposing sentence to afford counsel additional time to consult with the defendant and to review his file.

The defendant subsequently filed a motion asking the court to order that presentence confinement credit be applied to the sentence imposed or, alternatively, to allow him to withdraw his pleas. On February 18, 2021, the court conducted a hearing on the defendant's motion. During that hearing, defense counsel made clear that, although he had indicated to the defendant that he would pursue any available presentence confinement credit, "I did not tell him there was an agreement for jail credit. There was not, and I can't represent that there was." The court denied the defendant's motion regarding presentence confinement credit, denied the defendant's request to withdraw his pleas, and sentenced the defendant, in accordance with the plea agreement, to a total effective term of twelve years of imprisonment, suspended after seven years and one-half years, and five years of probation to run concurrently with all other sentences the defendant was then serving. The defendant subsequently filed the present appeal.

I

The defendant first claims that the court improperly determined that it lacked the authority to award him presentence confinement credit at sentencing pursuant to § 18-98d. The defendant argues that a sentencing court has both the inherent authority and broad discretion to structure its sentences within statutory limits, and that this authority necessarily must include the discretion to account for presentence confinement credit that the court determines to be appropriate. The state responds that the court's conclusion that it lacked authority to calculate and order presentence confinement credit at the time of sentencing comports with statutory law.[6] We agree with the state.

[6] The state also argues that the defendant cannot prevail on this claim because he was not legally entitled to the credit that he claims the court failed to award and because the plea agreement never contemplated deducting presentence confinement credit from the agreed upon sentence. Although

No appellate court has answered unequivocally whether, in crafting an appropriate and legal sentence, a sentencing court has the authority to order presentence confinement credit to which a defendant claims he is entitled. See *Gooden* v. *Commissioner of Correction*, 169 Conn. App. 333, 339–40 n.3, 150 A.3d 738 (2016) (whether sentencing authority includes ability to award jail credit at time of sentencing is open issue). In answering that question, we do not start with an entirely blank canvas. Rather, we are guided by the relevant statute as well as our prior decisional law.[7]

A defendant's entitlement to, and the application of, presentence confinement credit is governed by § 18-98d. Because the periods of confinement at issue in the

we will briefly discuss the latter of these arguments in part II of this opinion, we need not address the former argument. Our conclusion that a sentencing court lacks the authority to order presentence confinement credit at sentencing renders it unnecessary to resolve the state's argument that the defendant was not entitled to any such credit in the first instance. As set forth in this opinion, whether the defendant is entitled to presentence confinement credit must be determined, not at sentencing, but by the Commissioner of Correction (commissioner) upon review of all relevant records and in accordance with the application of the pertinent statutes and the policies and procedures of the department. Only after such a determination is made will the issue be ripe for judicial review by way of a petition for a writ of habeas corpus. See *State* v. *Riddick*, 194 Conn. App. 243, 244–45, 220 A.3d 908 (2019) ("petition for a writ of habeas corpus, rather than a motion directed at the sentencing court, is the proper method to challenge the [commissioner's] application of presentence confinement credit"); *State* v. *Carmona*, 104 Conn. App. 828, 833, 936 A.2d 243 (2007) (habeas proceeding, not motion to correct illegal sentence, is proper method to raise claim concerning presentence confinement credit), cert. denied, 286 Conn. 919, 946 A.2d 1249 (2008).

[7] Generally, "[w]e defer to the broad authority that legislatures possess in determining the types and limits of punishment for crimes." *State* v. *Heinemann*, 282 Conn. 281, 311, 920 A.2d 278 (2007). To the extent that the defendant suggests in his argument on appeal that the legislature's decision to place the authority to calculate and apply presentence confinement credit exclusively within the hands of the department rather than sentencing courts somehow implicates the doctrine of separation of powers, this notion has been rejected by our Supreme Court. See *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 826–29, 950 A.2d 1220 (2008).

present case occurred after July 1, 1981, but prior to October 1, 2021, the applicable portion of § 18-98d is subparagraph (a) (1) (A), which provides in relevant part: "Any person who is confined to a community correctional center or a correctional institution for an offense committed on or after July 1, 1981, and prior to October 1, 2021, under a mittimus or because such person is unable to obtain bail or is denied bail shall, if subsequently imprisoned, earn a reduction of such person's sentence equal to the number of days which such person spent in such facility from the time such person was placed in presentence confinement to the time such person began serving the term of imprisonment imposed; provided (i) each day of presentence confinement shall be counted only once for the purpose of reducing all sentences imposed after such presentence confinement; and (ii) the provisions of this section shall only apply to a person for whom the existence of a mittimus, an inability to obtain bail or the denial of bail is the sole reason for such person's presentence confinement, except that if a person is serving a term of imprisonment at the same time such person is in presentence confinement on another charge and the conviction for such imprisonment is reversed on appeal, such person shall be entitled, in any sentence subsequently imposed, to a reduction based on such presentence confinement in accordance with the provisions of this section. . . ."

Of particular relevance to the issue now before us is subsection (c) of § 18-98d, which provides: "The Commissioner of Correction shall be responsible for ensuring that each person to whom the provisions of this section apply receives the correct reduction in such person's sentence; provided in no event shall credit be allowed under subsection (a) of this section in excess of the sentence actually imposed." Thus, subsection (c) expressly and unequivocally mandates that it is the

Commissioner of Correction (commissioner) who is responsible for ensuring that a defendant receives all presentence confinement credit due under the statute and, importantly, that any such credit be applied as a "reduction in such person's sentence." We construe this language to mean that any applicable credit is to be calculated and later applied toward whatever sentence actually was imposed by the court and not by reducing the sentence prior to its imposition. This construction is consistent with our Supreme Court's statement in *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 950 A.2d 1220 (2008), that the petitioner in that case had made an "erroneous assumption that, pursuant to § 18-98d, the petitioner [was] entitled to have . . . presentence confinement credit applied to his sentences in such a manner as to actually advance his release date from prison. . . . [Section] 18-98d does not entitle the petitioner to that treatment but merely confers on him a right to have any days spent in presentence confinement applied once, upon imposition, to reduce the sentences imposed." (Emphasis omitted.) Id., 830. In other words, presentence confinement credit is not a part of a sentence; it is a calculation of the amount of credited time a defendant already has served toward completing that sentence.

Although it is true that § 18-98d contains no language that explicitly bars a sentencing court from awarding presentence confinement credit, we previously have stated that "[o]ur courts have clearly established that presentence [confinement] credit is a creature of statute . . . ." (Internal quotation marks omitted.) *State* v. *Deshawn D.*, 136 Conn. App. 373, 380, 44 A.3d 907 (2012). If the legislature had wanted to authorize sentencing courts to calculate and apply presentence confinement credit as part of their sentencing function, it presumably could have included express language granting such authority and/or responsibility. Furthermore, we agree

with the state that "[i]t would defy reason and logic to allow trial courts unfettered discretion to order presentence confinement credit, yet regulate the department . . . in carrying out the administrative function of calculating and applying such credit."

Our construction of § 18-98d as granting the sole responsibility and authority to the commissioner to calculate and apply presentence confinement credit is further buttressed by a number of practical considerations. First, as the present case demonstrates, it often will be difficult for a court to determine whether and to what extent a defendant may be statutorily entitled to jail credit. The record before a sentencing court may not reflect to what extent a defendant with multiple criminal files has already received jail credit in another file. The sentencing court, without conducting an investigation, has no way of verifying the precise dates that a defendant entered a given facility or when he may have been released on bond. The necessary records to make such determinations generally are not readily available to a court at the time of sentencing. Moreover, the court reasonably should not rely on factual representations made by counsel, who themselves may not have accurate or complete information necessary to calculate a defendant's entitlement to jail credit. The information necessary to make an accurate calculation regarding presentence confinement credit is in the hands of the department, and, thus, as recognized by the legislature in enacting § 18-98d, the commissioner is the proper party to "ensur[e] that each person to whom the provisions of [§ 18-98d] apply receives the correct reduction in such person's sentence . . . ." General Statutes § 18-98d (c).

Although the defendant acknowledges subsection (c) of § 18-98d and its clear designation of the commissioner as the authority charged with applying presentence confinement credit, he nonetheless urges us to

hold that the sentencing court, which has broad discretion to craft and impose sentences, also can directly account for presentence confinement credit as a part of the sentencing process and that the court's refusal to do so in the present case was an abuse of discretion. We do not find any of the defendant's arguments in support of this proposition persuasive.

First, the defendant argues that, just as a sentencing court typically has the discretion and authority to determine whether sentences will run concurrently or consecutively, it has the inherent authority to award presentence credit as it sees fit. We do not consider this an apt analogy. "Determining whether two sentences will be concurrent or consecutive is part of the judicial function of imposing sentences upon a convict and is a matter for the determination of the court." (Internal quotation marks omitted.) *State* v. *Banks*, 59 Conn. App. 145, 150, 763 A.2d 1046 (2000). Further, this authority has long been recognized at common law and is expressly authorized by statute. See General Statutes § 53a-37. By contrast, presentence confinement credit is strictly a creature of statute, and any right to such credit is a "matter of legislative grace . . . ." *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 833, 860 A.2d 715 (2004). As such, "the manner in which [presentence confinement credits] are applied [toward] a sentence and the proscription against double counting are properly determined by the legislature." Id. As we have already indicated, the legislature has expressly placed the authority to apply presentence confinement credit in the hands of the commissioner.

Second, the appellate cases relied on by the defendant to argue that a sentencing court has the authority and/or discretion to award presentence confinement credit are not direct criminal appeals like the present case but appeals from decisions on petitions for writs of habeas corpus that address various claims that the

commissioner—not a sentencing court—either has miscalculated or misapplied presentence confinement credit. Such decisions clearly are inapposite to the issue before us. For example, the defendant states that *James* v. *Commissioner of Correction*, 327 Conn. 24, 29, 170 A.3d 662 (2017), "is a quintessential example of the appropriate exercise of a *trial court's discretion*." (Emphasis added.) But *James* contains no relevant discussion pertaining to whether a sentencing court has the authority to calculate and award presentence confinement credit. The sole issue in *James* was whether the *commissioner* properly calculated and applied such credit. The defendant cites no appellate authority holding that a sentencing court has the discretion to calculate and apply presentence confinement credit at sentencing.

Finally, we are aware that trial courts in this state have differing views about how to address issues concerning presentence confinement credit raised at sentencing. Some trial courts, consistent with the position that we have taken, regularly refuse to address jail credit as part of sentencing because they conclude that it is not "within the power of a Superior Court judge to do so." *Gooden* v. *Commissioner of Correction*, supra, 169 Conn. App. 339 n.3.[8]

Other sentencing courts have taken the view that they have authority to order that a defendant be given jail credit by placing an order to that effect on the

[8] In *Gooden*, the petitioner had been sentenced in accordance with a plea agreement that included an agreed upon sentence of ten years of incarceration followed by five years of special parole. In the subsequent habeas action, he claimed that his counsel was ineffective because, inter alia, he failed to ask the sentencing court to account for 286 days of jail credit by reducing his time to serve to nine years and seventy-nine days. The habeas court rejected the claim, indicating that the sentencing judge would not have awarded jail credit even if counsel had asked. See *Gooden* v. *Commissioner of Correction*, supra, 169 Conn. App. 342–43.

judgment mittimus. The court that sentenced the present defendant in the pistol possession file seemingly took this approach. In light of our conclusion that the authority to calculate and apply presentence confinement credit lies, at least in the first instance,[9] with the commissioner, any such notation would not be binding on the commissioner.

Still other courts have endeavored to avoid the issue of authority to order presentence confinement credit by adjusting the actual sentence that it imposes, thereby reducing the sentence in an amount roughly equal to the presentence confinement credit sought. By way of example, a court that is considering the acceptance of a plea agreement entered into between the state and a defendant may choose to resolve the defendant's request for an order for presentence confinement credit by way of a different sentencing structure that reduces the previously agreed upon sentence offered by the state by some additional amount to assuage the defendant without overstepping the court's authority regarding such credit. Whether this approach is a viable option, however, will depend on the particulars of the plea agreement with the state and the charges pending against the defendant.[10]

[9] To be clear, we hold only that a sentencing court lacks authority to calculate and award presentence confinement credit. This should not be misunderstood as suggesting that a habeas court, when adjudicating a petition for a writ of habeas corpus in which it is claimed that the commissioner acted improperly with respect to presentence confinement credit, lacks authority to craft an appropriate remedy.

[10] This is because the state may have agreed to nolle charges in reaching the agreed upon sentence. Although a sentencing court has the authority to structure a sentence differently than that agreed to in a plea deal between the defendant and the state, unless the state agrees otherwise, the court may do so only if the defendant is prepared to enter a plea to all charges in the information, including any that the state had agreed to nolle as part of its own plea agreement with the defendant. If the nolled charges carry a statutory minimum sentence in excess of the previously agreed upon time to serve, any additional reduction in the agreed upon sentence by the sentencing court, acting alone, would not be legally possible. For example, in the present case, one of the charges that the state had agreed to nolle

In sum, the commissioner, rather than the sentencing court, is the proper authority to determine a defendant's eligibility for presentence confinement credit and to apply such credit against a defendant's sentence after the sentence is imposed. The defendant in the present case cannot demonstrate that the sentencing court improperly concluded that it lacked the authority to account for his claim to presentence confinement credit when imposing sentence or that it abused any discretion it had by refusing to note on the mittimus that the commissioner should award the defendant any such credit, which the commissioner already had a statutory obligation to do under § 18-98d. If the defendant believes that the commissioner has not properly applied all presentence confinement credit to which he is statutorily entitled toward the completion of his sentence, the defendant can raise this issue in an appropriate habeas action.

II

The defendant next claims that the court improperly accepted his guilty pleas, and later denied his motion to withdraw his pleas, because there never was a "meeting of the minds" regarding the terms of the pleas. The state responds, inter alia, that the terms of the plea agreement, as reflected in the record, were understood by all parties and did not include presentence confinement credit.[11] We agree with the state and, accordingly, reject the defendant's claim.

was the home invasion charge, which carries a mandatory minimum sentence of ten years to serve. See General Statutes § 53a-100aa (c). The court could not unilaterally have structured a sentence that was less than the seven and one-half years to serve that the state previously had agreed to unless the state also agreed to nolle the home invasion charge.

[11] The state also argues that the credit to which the defendant claimed he was entitled had been applied against the sentence he received for the New Haven file. We need not address this assertion because we agree that the plea deal at issue did not include an accounting for any presentence confinement credit.

In *Santobello* v. *New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court stated that "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Moreover, "[t]he validity of plea bargains depends on contract principles. . . . Thus, [p]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements." (Citation omitted; internal quotation marks omitted.) *State* v. *Stevens*, 278 Conn. 1, 7–8, 895 A.2d 771 (2006). It is axiomatic that, to form a binding and enforceable contract, there must be a mutual assent, or a " 'meeting of the minds' " between the contracting parties. *Computer Reporting Service, LLC* v. *Lovejoy & Associates, LLC*, 167 Conn. App. 36, 44, 145 A.3d 266 (2016). Because the existence of a contract is a factual determination made by the court, our review is limited to whether the court's decision was clearly erroneous in light of the existing evidence. See, e.g., *Senco, Inc.* v. *Fox-Rich Textiles, Inc.*, 75 Conn. App. 442, 445, 816 A.2d 654, cert. denied, 263 Conn. 916, 821 A.2d 770 (2003).

The defendant's claim falters on the fact that the defendant has failed to direct us to any evidence that tends to support his claim. To the contrary, the record before us reflects that the plea agreement negotiated between the state and the defendant, in fact, did not include any offer or acknowledgment by the state regarding presentence confinement credit.[12] Defense

[12] Given our current holding that the authority to calculate and apply presentence confinement credit lies exclusively with the commissioner, it is unlikely that the state has any authority to directly negotiate a plea bargain that addresses presentence confinement credit.

counsel acknowledged on the record that the plea agreement between the state and the defendant did not include any agreement between the parties regarding presentence confinement credit. The prosecutor concurred, indicating to the sentencing court that the presentence confinement credit requested by the defendant had never been part of the plea bargaining discussions and that the defendant had been warned of the likelihood of his serving "dead time"[13] between sentencing in the other files and his sentencing in the present case. Moreover, defense counsel unequivocally indicated to the court that he had never explicitly told the defendant that the state's offer would be reduced at sentencing by jail credit but only that he would make an effort to have the court order presentence confinement credit at the time of sentencing. Finally, and most significantly, during his initial plea canvass, the defendant acknowledged more than once that he understood that the agreed upon sentence was for a term of incarceration of twelve years of imprisonment, suspended after seven and one-half years, with five years of probation. That is the sentence that was bargained for, and that is the sentence that the defendant in fact received. In short, there is simply nothing in the record before the sentencing court or this court to support the defendant's assertion that there was no meeting of the minds with respect to the terms of the plea agreement such that the court should have found the plea agreement unenforceable. Accordingly, the defendant's claim fails.

III

Finally, the defendant claims that the court improperly violated his constitutional rights by failing to advise

[13] "[D]ead time is prison parlance for presentence confinement time that cannot be credited because the inmate is a sentenced prisoner serving time on another sentence." (Internal quotation marks omitted.) *Bagalloo* v. *Commissioner of Correction*, 195 Conn. App. 528, 531 n.2, 225 A.3d 1226, cert. denied, 335 Conn. 905, 226 A.3d 707 (2020).

him during the plea canvass that his guilty pleas would operate as a waiver of his constitutional right to a jury trial. Although the defendant acknowledges that the court asked him as part of the canvass whether he understood that, by pleading guilty, he was waiving his right to *a trial*, the defendant argues that the court never clearly indicated that this waiver included giving up his right to a *jury trial*, thus rendering the plea canvass constitutionally invalid. We disagree.

As a preliminary matter, the defendant concedes that this claim was not properly preserved because he never raised it as an issue in his motion to withdraw his pleas. He nevertheless requests review pursuant to *Golding*[14] or the plain error doctrine. See Practice Book § 60-5.[15] We conclude that, although the defendant's claim satisfies the first and second prongs of *Golding* because the record is adequate for review and the claim is of constitutional magnitude, the defendant is not entitled to reversal of the judgment under the third prong of *Golding* or the plain error doctrine because he cannot

[14] *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), provides 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 omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40.

[15] Practice Book § 60-5 provides in relevant part: "The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." It is axiomatic, however, that "[t]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so [patent and readily discernible from the record] that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

establish that the court's canvass was improper, let alone constitutionally insufficient.

"Several federal constitutional rights [as enunciated in *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)] are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination . . . [s]econd, is the right to trial by jury . . . [t]hird, is the right to confront one's accusers. . . .[16] Further, under the Connecticut rules of practice, a trial judge must not accept a plea of [guilty or] nolo contendere without first addressing the defendant personally and determining that the plea is voluntarily made under Practice Book § [39-20] and that the defendant fully understands the items enumerated in Practice Book § [39-19]." (Citation omitted; footnote added; internal quotation marks omitted.) *State* v. *Badgett*, 200 Conn. 412, 417, 512 A.2d 160, cert. denied, 479 U.S. 940, 107 S. Ct. 423, 93 L. Ed. 2d 373 (1986).

In *State* v. *Badgett*, supra, 200 Conn. 419–20, our Supreme Court rejected a claim that was nearly identical to the one now raised by the defendant. Specifically, the defendant in *Badgett*, who had entered conditional pleas of nolo contendere, raised as his "principal constitutional claim" on appeal that the court had not properly informed him that his plea operated as a waiver of his right to a trial by jury because, during his plea canvass, the court asked him only if he understood that he was "giving up [his] right to trial at this present time" without making any specific reference to a right to a "jury trial." (Internal quotation marks omitted.) Id., 418–19. That omission, the defendant argued, "prevented him from making a knowing waiver of the right and, therefore,

[16] The same rights are guaranteed under our state constitution in article first, § 8, as amended by article seventeen of the amendments. See *State* v. *Suggs*, 194 Conn. 223, 227 n.3, 478 A.2d 1008 (1984).

rendered his plea constitutionally defective." Id., 419. Our Supreme Court stated that, although it did "not condone the court's failure expressly to reference the right to a 'jury' trial, we conclude that the inquiry was constitutionally sufficient under the circumstances of th[e] case." Id. In reaching that conclusion, our Supreme Court reasoned "that the trial court's express mention of waiver of the right to *trial*, combined with the defendant's prior election for a jury trial, his experience with criminal proceedings and apparently adequate representation by counsel" rendered the canvass constitutionally sufficient. (Emphasis in original.) Id., 420.

Following *Badgett*, this court similarly has rejected claims like the one advanced by the defendant in the present case, provided that the record contained similar indicia from which to infer that the defendant understood that his waiver of his right to a trial meant the right to a *jury* trial. See *State* v. *Lage*, 141 Conn. App. 510, 525, 61 A.3d 581 (2013) (court's canvass was constitutionally sufficient despite court's failure to use modifier "jury" in informing defendant that guilty plea would waive his right to trial); *State* v. *McElyea*, 40 Conn. App. 60, 63, 668 A.2d 742 (same), cert. denied, 236 Conn. 920, 674 A.2d 1327 (1996). But see *State* v. *Smith*, 83 Conn. App. 411, 416–17, 849 A.2d 918 (acknowledging that, "[a]s a general matter . . . the court's failure to use the term jury trial does not in and of itself render a plea involuntary" but declining to follow *Badgett* because defendant "was arraigned, entered a plea and was sentenced on the same day . . . was not represented by counsel, and at no point in the proceeding did he elect a jury trial or show any understanding that he had a right to one" (citations omitted; internal quotation marks omitted)), cert. denied, 271 Conn. 940, 861 A.2d 516 (2004).

Under the facts of the present case, in which the defendant was represented by counsel and had elected

a jury trial as part of his initial plea of not guilty, *Badgett* and its progeny are applicable and binding on this court. The defendant duly recognizes this, articulating the following in his brief: "The defendant acknowledges a line of case law from [the Appellate Court] and the Supreme Court in which representation by counsel has been held adequate to make up for a defective plea canvass. This line of case law is at variance with federal case law interpreting this federal constitutional right *but is controlling*. This issue is raised for the sake of future review." (Emphasis added.)

"[I]t is axiomatic that this court, as an intermediate body, is bound by Supreme Court precedent and [is] unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 148 Conn. App. 641, 645, 85 A.3d 1240, cert. denied, 311 Conn. 945, 90 A.3d 976, cert. denied sub nom. *Anderson* v. *Dzurenda*, 574 U.S. 883, 135 S. Ct. 201, 190 L. Ed. 2d 155 (2014). Similarly, it is the policy of this court that one panel of this court cannot overrule or decline to follow a prior panel's holding. See, e.g., *State* v. *White*, 215 Conn. App. 273, 304–305, 283 A.3d 542 (2022). We are unpersuaded by the defendant's attempts to distinguish the present case from *Badgett* and its progeny and, thus, must leave for our Supreme Court the defendant's question of whether courts in this state should implement a new and more rigorous standard for evaluating the sufficiency of a plea canvass.[17] Because the defendant's claim fails as

[17] We note that our Supreme Court previously has declined an invitation to do so. See *Ghant* v. *Commissioner of Correction*, 255 Conn. 1, 13, 761 A.2d 740 (2000) ("The petitioner urges this court to adopt a more stringent requirement for jury trial waivers based upon cases from jurisdictions other than Connecticut. We decline, however, to mandate more stringent requirements for jury trial waivers in plea canvasses.").

a matter of settled law, he cannot satisfy the third prong of *Golding* or the more stringent standard for relief pursuant to the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.