KENECHUKWU ONYILOGWU *v.* CATHERINE I. ONYILOGWU
(AC 44942)

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

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dissolving his marriage to the defendant and making certain financial orders. Following a trial, the court ordered the plaintiff to pay the defendant a certain amount per month in alimony for ten years. In a subsequent articulation, the court clarified that, in determining the amount and sources of the plaintiff's income, it took into account funds received by the plaintiff as temporary unemployment assistance due to the COVID-19 pandemic. *Held* that the trial court abused its discretion in making an excessive award of alimony and the case was remanded for a new trial on all financial orders: the trial court improperly included the plaintiff's temporary pandemic unemployment assistance benefits in its calculation of his income because those benefits did not occur with enough regularity due to their temporary nature and, thus, could not form the basis for determining the amount of income available for support purposes for the court's ten year alimony award; moreover,

when this court subtracted the plaintiff's temporary pandemic unemployment assistance benefits from the court's calculation of the plaintiff's income, the alimony order would have consumed most of the plaintiff's income, which was contrary to the long settled principle that the plaintiff's ability to pay is a material consideration in formulating financial awards, and both common knowledge at the time of the court's 2021 decision, as well as common sense, indicated that the plaintiff would stop receiving temporary pandemic unemployment assistance benefits soon after the court's order of a ten year alimony award.

Argued October 17, 2022—officially released February 21, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the case was tried to the court, *Rodriguez*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed to this court. *Reversed in part*; *further proceedings*.

David V. DeRosa, for the appellant (plaintiff).

James H. Lee, with whom, on the brief, was *Charleen Merced Agosto*, for the appellee (defendant).

Opinion

NORCOTT, J. The plaintiff, Kenechukwu Onyilogwu, appeals from the trial court's judgment dissolving his marriage to the defendant, Catherine I. Onyilogwu. On appeal, the plaintiff challenges the court's financial orders and claims that the court abused its discretion in making an excessive award of alimony. We agree and, accordingly, reverse the judgment as to the financial orders.[1]

The following facts, as found by the trial court, and procedural history are relevant. The parties were married in Nigeria on October 4, 2010, and no children were

[1] Because we agree with the plaintiff's first claim regarding the alimony award and reverse in part the judgment and remand the case for reconsideration of all the financial orders, we need not reach his additional claims challenging the court's financial orders.

born of the marriage. Both parties moved to the United States and were symbolically married in a religious ceremony in November, 2013. The plaintiff filed an action for dissolution of marriage in 2019. Following a trial on August 10, 2021, which was held remotely due to the COVID-19 pandemic, the court issued a memorandum of decision on August 27, 2021, in which it found that the marriage had broken down irretrievably without the possibility of reconciliation due to the plaintiff's adulterous behavior and mismanagement of household expenses. The court found that the defendant has a bachelor's degree in chemistry and a master's degree in business administration and has worked as a substitute teacher and as a caregiver companion. The court further found that the plaintiff is a banker and financial adviser who is self-employed and that, although he earned a negative net income between 2016 and 2018, his "finances have improved and . . . he is able to support himself and support the defendant . . . while she attends an institution of higher education." The court found, on the basis of defendant's exhibit I, which contains records of deposits and withdrawals from the plaintiff's savings and checking accounts, that the plaintiff "has been earning income ranging from $3000–$7000" per month. The court ordered that the plaintiff pay the defendant $1500 per month in alimony for ten years, commencing on September 20, 2021, or, alternatively, to make a lump sum payment to the defendant of $120,000 on or before November 26, 2021. This appeal followed.[2]

[2] On September 15, 2021, the plaintiff filed in the trial court an amended motion to stay alimony payments and attorney's fees pending the outcome of this appeal. The court denied the motion on November 2, 2022. On November 16, 2022, the plaintiff filed with this court a motion for review of the trial court's decision denying his motion for a stay. On that same day, the plaintiff also filed with this court an emergency motion for a stay of his periodic alimony obligation until the resolution of his motion for review of the trial court's November 2, 2022 order denying his motion for a discretionary stay. On November 17, 2022, this court granted the plaintiff's motion for a stay pending our resolution of the plaintiff's motion for review

On September 15, 2021, during the pendency of the present appeal, the plaintiff filed a motion to reargue/reconsider in the trial court in which he requested that the court grant reconsideration due to, among other things, the temporary nature of the pandemic unemployment assistance he had been receiving and the fact that he stopped receiving benefits in early September, 2021. The court has not ruled on that motion.[3]

Following oral argument before this court, we ordered the trial court "to articulate its August 27, 2021 memorandum of decision concerning the 'amount and sources of income'; General Statutes § 46b-82; that it used to calculate the plaintiff's income for the purposes of its alimony award, specifically addressing whether the plaintiff received temporary unemployment pandemic assistance and, if so, whether that assistance was included as a source of income in the court's calculations and in what amount." On December 19, 2022, the court clarified in its articulation that, "[i]n determining the amount and sources of income used to calculate

of the trial court's order denying his motion for a discretionary stay. On January 12, 2023, we granted the plaintiff's motion for review and granted relief, ordering that the plaintiff's periodic alimony obligation shall be stayed pending the final resolution of this appeal.

[3] We note that, despite the pending nature of the motion to reargue/reconsider, which was filed after the timely filing of the present appeal, a final judgment exists for purposes of this appeal. "[W]hen a timely appeal has been filed before a motion to open has been filed . . . there is an effective, final judgment at the time of the appeal, and thus [an appellate] court has jurisdiction to consider the appeal. . . . [B]ecause we may suspend the exercise of our jurisdiction while a trial court resolves a matter necessary to the proper resolution of the appeal, the granting of a motion to open while the appeal is pending does not divest us of jurisdiction to consider the appeal upon the resolution of that motion. . . . [T]he same principles apply to a motion to reargue. In fact, these principles arguably apply with even greater force to a motion to reargue because, unlike the granting of a motion to open, the granting of a motion to reargue a judgment does not alter the judgment." (Citations omitted; internal quotation marks omitted.) *Paniccia* v. *Success Village Apartments, Inc.*, 215 Conn. App. 705, 716 n.11, 284 A.3d 341 (2022).

the plaintiff's income for the purpose of the alimony award, the court took into account funds received by the plaintiff as temporary pandemic unemployment assistance in the total amount of approximately $16,085. This is assistance which was included as a source of income in awarding alimony to the defendant. (Defendant's Exhibit I)." On December 21, 2022, we permitted the parties to file supplemental memoranda in response to the court's articulation. Both parties submitted memoranda.

On appeal, the plaintiff argues that the court abused its discretion in ordering him to pay $1500 per month in alimony for ten years when that award "was so excessive it would leave the plaintiff destitute." He contends that the court improperly included his temporary pandemic unemployment assistance benefits in its calculation of his income. Highlighting exhibit I, on which the court relied in fashioning the alimony award, the plaintiff contends that, according to that exhibit, he "only made between $1500 to $3000 per month from his own efforts in his business," and that this amount was "artificially inflated" when he began receiving "temporary pandemic related unemployment payments of about $1400 a month . . . ." In his supplemental memorandum, the plaintiff contends that "[t]he articulation by the Superior Court removes any doubt that in establishing a [ten] year alimony order at $1500 a month, the Superior Court considered the pandemic unemployment assistance in determining the plaintiff's earning capacity. . . . Given that it was foreseeable at trial that the plaintiff would no longer have access to the temporary pandemic unemployment assistance, it was an error for the court . . . to rely on those funds in establishing a periodic alimony order of that magnitude or for a term that long as a regular periodic alimony order." (Citation omitted.)

The defendant counters in her supplemental memorandum that, "[a]t the time the trial court made its decision, the unemployment compensation the plaintiff received as temporary pandemic relief was before the court, but the fact that it was about to end does not appear to have been. . . . While it is true that these benefits are temporary, in a larger sense all income is temporary. Even salaried employment can end abruptly and unexpectedly. While it does not appear of record that the trial court knew at the time of its decision that these benefits were temporary and about to end, what matters is that the plaintiff did receive them and they were income." The defendant further contends that, because of the way unemployment benefits are calculated, "they are an appropriate stand-in for the employment income he had earned before he became unemployed, and might expect to earn again when he is no longer unemployed."

We begin with the standard of review and relevant legal principles. "[Section] 46b-82 governs awards of alimony. That section requires the trial court to consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties . . . . In awarding alimony, [t]he court must consider all of these criteria." (Internal quotation marks omitted.) *Kovalsick* v. *Kovalsick*, 125 Conn. App. 265, 271, 7 A.3d 924 (2010).

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation

marks omitted.) *Steller* v. *Steller*, 181 Conn. App. 581, 587–88, 187 A.3d 1184 (2018). "[I]t is generally uncommon for a reviewing court to determine that the trial court has abused its broad discretion in deciding whether to award alimony and otherwise craft financial orders in a dissolution decree. Reluctance to reverse the trial court's exercise of discretion, however, should not mean that the door is entirely closed to successful appeals in dissolution cases. . . . Our appellate courts have reversed excessive or inequitable financial orders. See *Greco* v. *Greco*, 275 Conn. 348, 356–60, 880 A.2d 872 (2005) (reversing financial orders when 98.5 percent of marital property and substantial alimony awarded to one spouse); *Pellow* v. *Pellow*, 113 Conn. App. 122, 129, 964 A.2d 1252 (2009) (reversing financial orders when orders consumed 90 percent of paying spouse's income)." (Citation omitted; internal quotation marks omitted.) *Wiegand* v. *Wiegand*, 129 Conn. App. 526, 536–37, 21 A.3d 489 (2011).

In its decision, the court found that the plaintiff had been earning income ranging from $3000 to $7000 per month.[4] The court clarified in its December 19, 2022 articulation that, in calculating the plaintiff's alimony obligation, it had considered the funds that the plaintiff had received as temporary pandemic unemployment assistance, totaling approximately $16,085. Exhibit I, on which the court relied to determine the amount of the plaintiff's income and the award of alimony, makes clear the excessive nature of the alimony award. Exhibit I shows that the deposits and additions into the plaintiff's checking account varied from approximately $1500 to $3000 per month from mid-December, 2019, until mid-June, 2020. Beginning in mid-June, 2020, the plaintiff's checking account began showing an increase in total deposits due to the receipt of unemployment

[4] We note that the plaintiff does not claim that the court improperly relied on his gross rather than net income.

compensation benefits. The plaintiff testified that he had received pandemic assistance, which he deposited into his checking account. The plaintiff's checking account shows deposits for unemployment compensation in almost every month from mid-June, 2020, through mid-July, 2021, which was the final checking account statement included in exhibit I before trial was held in August, 2021.

One of the factors in § 46b-82 that a court is required to consider when fashioning alimony orders is the "amount and sources of income . . . ." In dissolution of marriage proceedings, the concept of income is defined "broadly so as to include in income items that increase the amount of resources available for support purposes." *Unkelbach* v. *McNary*, 244 Conn. 350, 360, 710 A.2d 717 (1998). Defining income broadly in dissolution of marriage proceedings "is consistent with our approach of includ[ing] in income items that increase the amount of resources available for support purposes. . . . Indeed, [our Supreme Court has] held that, even gifts, *if received regularly and consistently*, whether in the form of contributions to expenses or otherwise, are properly considered in determining alimony awards to the extent that they increase the amount of income available for support purposes. . . . For example, Black's Law Dictionary defines income as [t]he money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like. Black's Law Dictionary (11th Ed. 2019) p. 912. Another dictionary defines income as something that comes in as an increment or addition usu[ally] by chance . . . a gain or recurrent benefit that is usu[ally] measured in money and for a given period of time . . . . Webster's Third New International Dictionary (2002) p. 1143 . . . .

"Despite the generally expansive meaning of the term, not every receipt of funds will be considered

income." (Citations omitted; emphasis added; internal quotation marks omitted.) *Birkhold* v. *Birkhold*, 343 Conn. 786, 796–97, 276 A.3d 414 (2022). "The particular items to be included in income are likely to vary from case to case. For the most part there are no broad rulings or generalizations as to whether particular items will or will not be included in income, leaving the trial courts with wide discretion to evaluate the individual circumstances in each case." (Internal quotation marks omitted.) A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 33:11, p. 54.

The broad, yet not limitless, definition of income does not include the temporary pandemic unemployment assistance benefits received by the plaintiff. Those benefits do not occur with enough regularity due to their temporary nature and cannot form the basis for determining the amount of income available for support purposes for the ten year alimony award. See *Unkelbach* v. *McNary*, supra, 244 Conn. 362 (regular contributions increase amount of income available for support purposes). When we subtract the plaintiff's temporary pandemic unemployment assistance benefits from the calculation, the court's order requiring the plaintiff to pay $1500 per month in alimony would consume most of the plaintiff's income. This is contrary to "the long settled principle that the [plaintiff's] ability to pay is a material consideration in formulating financial awards." (Internal quotation marks omitted.) *Pellow* v. *Pellow*, supra, 113 Conn. App. 129. The order is "irreconcilable with the principle that alimony is not designed to punish, but to ensure that the former spouse receives adequate support. . . . [I]t is hornbook law that what a spouse can afford to pay for support and alimony is a material consideration in the court's determination as to what is a proper order . . . ." (Citations omitted; internal

quotation marks omitted.) *Greco* v. *Greco*, supra, 275 Conn. 361–62.

The defendant contends that the plaintiff's temporary pandemic unemployment assistance benefits properly were included as income because there was no indication that the trial court was aware at the time of its decision that those benefits were temporary. We are unpersuaded. Although the last statement of the status of the plaintiff's checking account in exhibit I included within it a deposit for temporary pandemic unemployment assistance benefits, nothing in the court's decision or articulation indicates that it assumed that the plaintiff would continue to receive temporary pandemic unemployment assistance benefits for the ten year duration of the alimony award. Both common knowledge at the time of the court's August, 2021 decision[5] as well as

[5] A news release posted on the website of the United States Department of Labor on April 5, 2020, titled U.S. DEPARTMENT OF LABOR PUBLISHES GUIDANCE ON PANDEMIC UNEMPLOYMENT ASSISTANCE, available at https://www.dol.gov/newsroom/releases/eta/eta20200405 (last visited February 14, 2023), provides that "[t]he U.S. Department of Labor today announced the publication of Unemployment Insurance Program Letter (UIPL) 16-20 providing guidance to states for implementation of the Pandemic Unemployment Assistance (PUA) program. Under PUA, individuals who do not qualify for regular unemployment compensation and are unable to continue working as a result of COVID-19, such as self-employed workers, independent contractors, and gig workers, are eligible for PUA benefits. This provision is contained in Section 2102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act enacted on March 27, 2020.

"PUA provides up to 39 weeks of benefits to qualifying individuals who are otherwise able to work and available for work within the meaning of applicable state law, except that they are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19 related reasons, as defined in the CARES Act."

A subsequent news release by the United States Department of Labor, titled U.S. DEPARTMENT OF LABOR ISSUES NEW GUIDANCE TO STATES ON IMPLEMENTING AMERICAN RESCUE PLAN ACT UNEMPLOYMENT INSURANCE PROVISIONS, available at https://www.dol.gov/newsroom/releases/eta/eta20210316 (last visited February 14, 2023), and dated March 16, 2021, which date was prior to the court's August, 2021 decision, stated that pandemic unemployment assistance and pandemic emergency unemployment compensation were extended through September 6, 2021. A court

common sense indicate that the plaintiff would stop receiving temporary pandemic unemployment assistance benefits soon after the court's August 27, 2021 order of a ten year alimony award. "[Triers of fact] are not required to leave common sense at the courtroom door . . . nor are they expected to lay aside matters of common knowledge or their own observations and experience of the affairs of life, but, on the contrary, to apply them to the facts in hand . . . ." (Internal quotation marks omitted.) *In re Kristy A.*, 83 Conn. App. 298, 316, 848 A.2d 1276, cert. denied, 271 Conn. 921, 859 A.2d 579 (2004). Additionally, the defendant's argument that the plaintiff's temporary pandemic unemployment assistance benefits are an "appropriate stand-in" for the income earned by the plaintiff when employed ignores the court's finding that the monies received by the plaintiff as temporary pandemic unemployment assistance constituted income to the plaintiff; it did not find that the temporary pandemic unemployment assistance benefits received by the plaintiff represented his earning capacity. See, e.g., *Milazzo-Panico* v. *Panico*, 103 Conn. App. 464, 468, 929 A.2d 351 (2007) (under certain circumstances, earning capacity may constitute basis for financial orders).

In light of our conclusion that the court abused its discretion in fashioning the alimony award, we remand the case for a new trial on all financial orders. "Financial orders in dissolution proceedings often have been described as a mosaic, in which all of the various financial components are carefully interwoven with one another. . . . Because the court's support orders, particularly its spousal support or alimony order, are informed by and reflective of the parties' incomes and assets, as affected by the court's other financial orders,

may take judicial notice without the request of a party and without notice to the parties for matters of established fact, the accuracy of which cannot be questioned. *W. K.* v. *M. S.*, 212 Conn. App. 532, 539–40, 275 A.3d 232 (2022).

the entirety of the mosaic must be refashioned whenever there is error in the entering of any such interdependent order." (Citation omitted.) *O'Brien* v. *O'Brien*, 138 Conn. App. 544, 555, 53 A.3d 1039 (2012), cert. denied, 308 Conn. 937, 66 A.3d 500 (2013). "[O]ur courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards." (Internal quotation marks omitted.) *Keusch* v. *Keusch*, 184 Conn. App. 822, 825–26, 195 A.3d 1136 (2018). "[W]hen an appellate court reverses a trial court judgment based on an improper alimony, property distribution, or child support award, the appellate court's remand typically authorizes the trial court to reconsider all of the financial orders." (Internal quotation marks omitted.) *Morris* v. *Morris*, 262 Conn. 299, 307, 811 A.2d 1283 (2003).

The judgment is reversed only as to the financial orders, and the case is remanded for a new trial on all financial issues; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MICHAEL R. FOSTER *v.* COMMISSIONER OF CORRECTION
(AC 45132)

Cradle, Suarez and Clark, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crime of murder, sought a writ of habeas corpus, alleging ineffective assistance of his trial counsel. As a result of a head injury the petitioner sustained during the commission of the underlying offense, as well as his claims of amnesia both before and after the incident, the petitioner's trial counsel requested that he be evaluated for competency to stand trial. Following a competency evaluation and hearing, the trial court found

the petitioner competent to stand trial. Subsequently, the petitioner pleaded guilty pursuant to *Alford* v. *North Carolina* (400 U.S. 25), and was sentenced in accordance with the plea agreement. In his habeas action, the petitioner alleged that his trial counsel's representation of him was constitutionally deficient in that counsel failed to advise him not to plead guilty and that his guilty plea was not made voluntarily. The habeas court denied the petition, and, on the granting of certification to appeal, the petitioner appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, the petitioner having failed to demonstrate that, but for his trial counsel's conduct, he would not have pleaded guilty, thereby failing to prove that he suffered prejudice under *Strickland* v. *Washington* (466 U.S. 668): the habeas court's findings were supported by the evidence in the record, and this court was not left with the definite and firm conviction that a mistake had been committed, as, at the habeas trial, the petitioner testified that he did not want to put his wife and children through a trial because he believed his wife would have had to testify about weapons and illegal drugs in their home, his wife would go to jail as a result, and that his children would end up in the foster care system; moreover, the habeas court found that no credible evidence supported the petitioner's bare assertion at the habeas trial that, had he been properly advised, he would have insisted on entering a conditional plea of nolo contendere in order to preserve an appeal of the trial court's competency determination, the habeas court having found the petitioner's testimony in that regard not to be credible, and, as it was the habeas court's function to weigh the evidence and determine credibility, this court gave great deference to its findings.

Argued October 12, 2022—officially released February 21, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Seeley*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Nicole P. Britt, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

James M. Ralls, special assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*,

state's attorney, and *David M. Carlucci*, former assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Michael R. Foster, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus alleging ineffective assistance of counsel. On appeal, the petitioner claims that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing (1) to advise the petitioner to reject the plea offer because it was effectively a life sentence, (2) to advise the petitioner to reject the plea offer because he would lose his right to appeal the trial court's determination that the petitioner was competent to stand trial, and (3) to preserve the petitioner's right to appeal from the trial court's determination that the petitioner was competent to stand trial. We affirm the judgment of the habeas court.

The following facts, as set forth by the habeas court, and procedural history are relevant to the petitioner's claims on appeal. On September 9, 2005, the petitioner arrived at the victim's house carrying a crowbar and bug spray. The petitioner rang the victim's doorbell, and, when the victim came to the door, the petitioner sprayed bug spray at her and beat her with the crowbar. The victim fled from her home to her neighbors' house, but the petitioner followed her into the neighbors' house and continued the assault. One of the victim's neighbors intervened, threatening to shoot the petitioner if he did not cease his attack on the victim. When the petitioner did not relent, the neighbor fired his single-shot rifle at the petitioner. Although the shot struck the petitioner in the back of his head, the bullet did not penetrate his skull, and he continued his attack. As the petitioner

continued to hit the victim with the crowbar, the neighbor reloaded his rifle and fired again, this time striking the victim. The victim died from her injuries. An autopsy revealed the victim's cause of death was both blunt force trauma to the head—caused by the petitioner's attack with the crowbar—and a gunshot wound to the heart.

The petitioner left the neighbors' residence and returned to the parked vehicle that he had driven to the victim's home. Later, the police found the petitioner sitting inside the vehicle. The police took the petitioner into custody, and, upon discovering the petitioner's head injury, the petitioner was transported to a hospital for medical treatment. While at the hospital, the petitioner "reported some degree of post-traumatic amnesia in relation to the events surrounding his injury."

The petitioner was subsequently arrested and charged with murder in violation of General Statutes § 53a-54a,[1] among other offenses.[2] Attorney Todd Edgington represented the petitioner throughout the criminal trial proceedings. In light of the head injury the petitioner sustained during the commission of the underlying offense, as well as the petitioner's claims of amnesia, Edgington referred the petitioner to David Lovejoy, a clinical neuropsychologist, who performed an assessment on the petitioner on March 16, 2006. Lovejoy determined that the petitioner's description of his memory loss indicated

[1] General Statutes § 53a-54a (a) provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person . . . ."

[2] The petitioner was also charged with felony murder in violation of General Statutes § 53a-54c, assault in the first degree in violation of General Statutes § 53a-59, assault in the second degree in violation of General Statutes § 53a-60d, assault in the second degree on a person over sixty years old in violation of General Statutes § 53a-60b, possession of a pistol without a permit in violation of General Statutes (Rev. to 2005) § 53a-217c, and, two counts of burglary in the first degree in violation of General Statutes (Rev. to 2005) § 53a-101.

more than twelve hours of anterograde amnesia—an inability to recall postincident events—and two to three hours of retrograde amnesia—an inability to recall preincident events. Additionally, Lovejoy reported that the last memory the petitioner had prior to the onset of his amnesia was of leaving his home to buy a dehumidifier for his wife. However, despite the petitioner's traumatic brain injury and resulting amnesia, Lovejoy concluded that the petitioner had otherwise recovered and displayed no other psychological deficits.

Edgington subsequently requested that the petitioner be evaluated for competency to stand trial. On May 15, 2006, the trial court, *Clifford*, *J.*, ordered a competency evaluation of the petitioner pursuant to General Statutes § 54-56d.[3] A clinical team of three professionals from the Office of Court Evaluations assessed the petitioner and determined that he "was able to understand the proceedings against him and was able to assist in his own defense," noting that "[h]is thinking is rational, his communication abilities are intact and he is motivated to defend himself." (Internal quotation marks omitted.)

In August, 2006, the trial court, *D'Addabbo*, *J.*, held a competency hearing over three days during which Edgington argued that the petitioner was not competent to stand trial because he was unable to assist in his own defense due to his memory loss during the time period before and after the offense. On November 16,

[3] General Statutes § 54-56d provides in relevant part: "(a) A defendant shall not be tried, convicted or sentenced while the defendant is not competent. . . . [A] defendant is not competent if the defendant is unable to understand the proceedings against him or her or to assist in his or her own defense. . . .

"(c) If, at any time during a criminal proceeding, it appears that the defendant is not competent, counsel for the defendant or for the state, or the court, on its own motion, may request an examination to determine the defendant's competency. . . ."

2006, the court issued an oral decision finding the petitioner competent to stand trial. In so doing, the court applied the test adopted in *State* v. *Gilbert*, 229 Conn. 228, 640 A.2d 61 (1994),[4] to determine the extent to which the petitioner's amnesia rendered him unable to assist in his own defense. The court concluded that, "[u]nder the *Gilbert* analysis in this pretrial setting . . . the claimed loss of memory does not prevent the state from prosecuting the [petitioner] [and that] the [petitioner] . . . [is] competent as he is able to understand the proceedings against him and to assist in his own defense." (Internal quotation marks omitted.)

Then, on November 20, 2007, the petitioner pleaded guilty, pursuant to the *Alford* doctrine[5], to murder in violation of § 53a-54a. In exchange for his plea, the petitioner agreed to a sentence of no greater than fifty years of incarceration, with the right to argue for a lesser sentence of forty years of incarceration. During the court's canvass, the petitioner acknowledged that, had he gone to trial, there was a likelihood that he would be convicted of the crime of murder, as well as the other charged offenses, and possibly receive a

[4] In *Gilbert*, our Supreme Court identified six factors, adopted from *Wilson* v. *United States*, 391 F.2d 460 (D.C. Cir. 1968), to assist courts in determining the effect of amnesia on the trial's fairness: "(1) the extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer [separate and apart from his memory loss]; (2) the extent to which the amnesia affected the defendant's ability to testify on his own behalf [on matters other than the event that gave rise to his amnesia]; (3) the extent to which the evidence in the suit could be extrinsically reconstructed in view of the defendant's amnesia, including evidence relating to the crime itself as well as any reasonably possible alibi; (4) the extent to which the government assisted the defendant and his counsel in that reconstruction; (5) the strength of the prosecution's case, with the most important consideration pertaining to whether the government's case is such as to negate all reasonable hypotheses of innocence; and (6) any other facts and circumstances that would indicate whether or not the defendant had a fair trial." *State* v. *Gilbert*, supra, 229 Conn. 233.

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

greater sentence thereafter.[6] He further admitted during the canvass that his reason for entering a guilty plea was to avoid the risk of a longer sentence following a trial. The court, *Alexander*, *J.*, following a sentencing hearing, sentenced the petitioner to a total effective sentence of fifty years of incarceration on January 25, 2008. The state entered a nolle prosequi on the remaining charges.

On or about June 9, 2016, the petitioner filed a petition for writ of habeas corpus. After the petitioner was appointed counsel, he filed an amended petition on February 15, 2019, in which he claimed that Edgington's representation of him was constitutionally deficient in that he failed to advise him not to plead guilty. He also alleged that his guilty plea was not voluntary.[7]

The petitioner's claims were tried to the habeas court, *Seeley*, *J.*, on March 4, 2020.[8] The habeas court filed a memorandum of decision on October 4, 2021, in which it found the following facts: "The petitioner's trial counsel in the criminal case was Todd Edgington, an experienced criminal defense attorney who was employed as a public defender at the time he represented the petitioner. He had represented numerous clients over his thirty year career in which competency was an issue. After the trial court found the [petitioner] competent to stand trial, Edgington consulted with attorneys

[6] At the habeas trial, Edgington testified that, prior to the plea hearing, he informed the petitioner that he faced a maximum exposure of 135 years of imprisonment if he was convicted at trial.

[7] The petitioner also asserted in his petition a violation of his right to due process. The habeas court concluded that the petitioner's due process claim was "inextricably interwoven with the petitioner's claim of ineffective assistance of counsel" and resultantly rejected the due process claim for the same reasons it rejected the ineffective assistance of counsel claim. The petitioner does not challenge the denial of his due process claim on appeal.

[8] The petitioner, Edgington, and the expert for the defense, Attorney John Drapp, testified at the hearing. Drapp testified as to how Edgington could have preserved the court's competency decision for appeal.

within the appellate unit of the Office of the Public Defender regarding the viability of success on appeal relating to the trial's court's finding of competency and application of the *Gilbert* factors. He was told there was no indication that the Connecticut Supreme Court would revisit its decision in *Gilbert*. He also made a determination that he did not believe the issue would be successful on appeal.

"Edgington had a positive relationship with the petitioner throughout his representation of him. Edgington did not have a plan to proceed to trial because from a very early stage in his representation, the petitioner did not want a trial. The petitioner recognized that there was certain information that would have come out at trial that would have been very damaging to his family. The petitioner's marriage with his wife was 'good,' he 'worshipped' her and there was no other woman for him. The petitioner . . . did not want to put his wife and children through a trial, nor did he want to expose his wife to possible prosecution relating to illegal drugs in their residence.[9]

"Prior to the petitioner pleading guilty to murder, Edgington met with the petitioner numerous times at the correctional facility and never felt rushed. He discussed the state's evidence with the petitioner, as well as what the state would have to prove in order to obtain a conviction at trial, and the maximum exposure he would face if he proceeded to trial. Edgington determined that it was a strong case for the state in light of witnesses who observed the petitioner repeatedly striking the victim with a tire iron. It was Edgington's practice to explain the offer to his client, and then point out the consequences if a client were to accept the offer

[9] "The petitioner testified that he would not have pleaded guilty if he had known that by doing so, he would lose his right to appeal the court's competency decision. The [habeas] court does not find the petitioner's testimony credible."

and enter a guilty plea, and the consequences if the client rejected the offer and proceeded to trial. Furthermore, it was his practice to advise a client that by pleading guilty, the client would lose his appellate rights, as well as to discuss possible defenses. Edgington discussed the necessary issues with the petitioner over a period of time, and not just before the petitioner entered his guilty plea. This court finds credible Edgington's testimony that he would have explained to the petitioner that, by pleading guilty, he would be losing his appellate rights, since that was part of his standard advice when preparing a client to plead guilty." (Footnote in original; footnote omitted.)

On the basis of the foregoing facts, the habeas court concluded, first, that "[t]he petitioner [had] not offered any credible evidence that [Edgington's] performance fell below an objective standard of reasonableness." Second, the habeas court concluded that the petitioner failed to satisfy the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), because he "failed to establish a reasonable probability that, but for counsel's errors, he would not have pleaded guilty to the charge of murder under the *Alford* doctrine, and would have insisted on entering a nolo contendere plea pursuant to General Statutes § 54-94a, conditioned on the right to appeal the trial court's denial of the motion to dismiss." The court found that "[t]he credible evidence presented establishes the petitioner entered his guilty plea under the *Alford* doctrine because he did not want to run the risk that the state would pursue charges against his wife. There is no credible evidence presented that the petitioner would have insisted on entering a conditional nolo contendere plea so that he could have appealed the trial court's finding of competency." Relying on these independent grounds, the habeas court denied the petitioner's petition for writ of habeas corpus. The

habeas court thereafter granted certification to appeal, and this appeal followed.

The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. "When reviewing the decision of a habeas court, the facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The issue, however, of [w]hether the representation [that] a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . Under the *Strickland* test, when a petitioner alleges ineffective assistance of counsel, he must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . Furthermore, because a successful petitioner must satisfy both prongs of the *Strickland* test, failure to satisfy either prong is fatal to a habeas petition. . . .

"To satisfy the first prong, that his counsel's performance was deficient, the petitioner must establish that his counsel made errors so serious that [counsel] was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment. . . . The petitioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Furthermore, the right to counsel is not the right to perfect

counsel." (Citations omitted; internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 212–13, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Lance W.* v. *Commissioner of Correction*, 204 Conn. App. 346, 355, 251 A.3d 619, cert. denied, 337 Conn. 902, 252 A.3d 363 (2021).

The habeas court denied the petitioner's petition on the ground that he failed to satisfy both the performance prong and the prejudice prong. In challenging that determination, the petitioner argues that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing (1) to advise the petitioner to reject the plea offer because it was effectively a life sentence, (2) to advise the petitioner to reject the plea offer because he would lose his right to appeal the trial court's determination that the petitioner was competent to stand trial, and (3) to preserve the petitioner's right to appeal from the trial court's determination that the petitioner was competent to stand trial.

On appeal, we need not decide whether the petitioner's trial counsel rendered deficient performance because, even if we assume that the alleged performance was deficient, all three claims raised by the petitioner fail because the petitioner failed to prove that he was prejudiced by his trial counsel's conduct. See *Santiago* v.

Commissioner of Correction, 213 Conn. App. 358, 366, 277 A.3d 924 ("[b]ecause both [the deficient performance and prejudice] prongs [of the *Strickland* test] . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 345 Conn. 903, 282 A.3d 466 (2022).

With respect to the prejudice prong, the petitioner argues that, had trial counsel informed and advised him appropriately, the petitioner would have pleaded differently. We are not persuaded.

In the context of a habeas petition claiming ineffective assistance of counsel where the petitioner pleaded guilty, a petitioner satisfies the prejudice prong of the *Strickland* test if he reasonably demonstrates that, but for the conduct of counsel, the petitioner would not have pleaded guilty. See *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018). However, a petitioner "must make more than a bare allegation that he would have pleaded differently" to demonstrate prejudice; (internal quotation marks omitted) id.; because "such a statement suffers from obvious credibility problems and must be evaluated in light of the circumstances the defendant would have faced at the time of his decision." *Hooper* v. *Garraghty*, 845 F.2d 471, 475 (4th Cir.), cert. denied, 488 U.S. 843, 109 S. Ct. 117, 102 L. Ed. 2d 91 (1988).

"It is well established that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge,

as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, supra, 213 Conn. App. 368–69.

As noted earlier in this opinion, the habeas court found that the petitioner entered his guilty plea under the *Alford* doctrine because he did not want to run the risk that the state would pursue charges against his wife and did not want to put his family through a trial. The habeas court further found that no credible evidence supported his claim that he would have insisted on entering a conditional plea of nolo contendere in order to preserve an appeal of the trial court's competency determination.

Following our careful review of the record, we conclude that the habeas court's findings are supported by the evidence in the record, and we are not left with the definite and firm conviction that a mistake has been committed. At the habeas trial, the petitioner testified that he "didn't want to put [his] wife and children through" a trial because he believed his wife would have to testify about "weapons in [their] home, illegal drugs in [their] home . . . which [the] prosecution will charge her with. . . ." The petitioner further testified that he did not want to proceed to trial because he believed his wife would go to jail as a result, and that his "children will end up in the foster care system." Although the petitioner made a bare assertion at the habeas trial that he would not have pleaded guilty if he had known that, by doing so, he would lose his right

to appeal the court's competency decision, the court did not find the petitioner's testimony in this regard to be credible. See *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 357, 273 A.3d 680 (2022) ("[b]ecause it is the [habeas] court's function to weigh the evidence and determine credibility, we give great deference to its findings" (internal quotation marks omitted)).

On the basis of the foregoing, the petitioner's claims necessarily fail because he has not demonstrated that, but for his trial counsel's conduct, he would not have pleaded guilty. The petitioner, therefore, has failed to prove that he suffered prejudice under *Strickland*. Accordingly, we conclude that the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

BYRON HERRERA *v.* MEADOW HILL, INC., ET AL.
(AC 44949)

Alvord, Seeley and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, two companies that possessed, controlled, managed and maintained certain condominium premises, for personal injuries he sustained in connection with an alleged slip and fall as a result of untreated ice on the premises. The trial court granted the defendants' motion for summary judgment, in which they argued that there was an ongoing storm at the time of the plaintiff's alleged fall or that a reasonable time had not elapsed following the completion of the storm for them to have remediated the snowy or icy condition. On the plaintiff's appeal to this court, *held*:

1. This court declined to review the plaintiff's unpreserved claim that issues of material fact remained as to whether the defendants had a reasonable time between the end of the precipitation and the plaintiff's fall to have remediated the icy condition, as that claim was never distinctly raised before the trial court.

2. The trial court properly granted the defendants' motion for summary judgment because the defendants met their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm at the time of the plaintiff's fall or that a reasonable time had not elapsed following the conclusion of the storm within which they should have remediated the snowy or icy condition, and the plaintiff thereafter failed to sustain his burden to raise a triable issue of fact as to whether the precipitation from the storm was not the cause of the accident, specifically, that the defendants created or exacerbated the allegedly dangerous condition on the steps where he fell by engaging in remediation efforts during the storm: the defendants submitted admissible evidence, including a local ordinance, showing it was undisputed that the two hour period between the end of the precipitation event and the plaintiff's fall was not a reasonable time for them to have remedied any dangerous conditions, and the plaintiff failed to demonstrate the existence of a genuine issue of fact as to whether the allegedly negligent actions of the defendants with respect to snow or ice removal caused his fall, as his evidentiary submissions were based on mere speculation or conjecture.

Argued October 6, 2022—officially released February 21, 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 Hartford, where the court, *Noble*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher G. Brown, for the appellant (plaintiff).

Kathleen F. Adams, with whom, on the brief, was *Michael T. Lynch*, for the appellees (defendants).

Opinion

SEELEY, J. The plaintiff, Byron Herrera, appeals from the summary judgment rendered by the trial court in favor of the defendants, Meadow Hill, Inc. (Meadow Hill), and Imagineers, LLC, in this premises liability action arising out of the plaintiff's alleged slip and fall on ice on property possessed and controlled by the

defendants. On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendants because the documents submitted in support of the defendants' motion for summary judgment did not eliminate all questions of material fact about (1) whether they had a reasonable time to remediate the snowy or icy condition prior to the plaintiff's fall, or (2) whether, if they did have a reasonable time to remediate that condition before the plaintiff's fall, they failed to do so or did so negligently. We affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are necessary for the resolution of this appeal. In his complaint, the plaintiff alleged that, on February 8, 2018, at approximately 12:30 a.m., he was returning home to his condominium unit located at 76 Hollister Way South in Glastonbury (premises) when he slipped and fell due to the icy condition of the exterior steps and walkway on the premises. The plaintiff alleged that the defendants possessed and controlled the premises. The plaintiff further alleged that, as a result of his fall, he suffered various physical injuries and incurred, and may continue to incur, medical expenses, a loss of wages and earning capacity, and loss of the ability to participate in life's usual activities. The defendants filed an answer and asserted, as a special defense, that the plaintiff's alleged injuries were caused by his own negligence.

On December 18, 2020, the defendants filed a motion for summary judgment, accompanied by a supporting memorandum of law, arguing that there was an ongoing storm at the time of the subject incident or that a reasonable time had not elapsed following the completion of the storm for them to have remediated the snowy or icy condition. The defendants argued, therefore, that they were not liable to the plaintiff as a matter of law pursuant to the ongoing storm doctrine set forth in

Kraus v. *Newton*, 211 Conn. 191, 197–98, 558 A.2d 240 (1989), which provides that a property owner "may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps."[1] In support of their motion for summary judgment, the defendants submitted excerpts from the plaintiff's deposition testimony, a copy of article IV, § 17-52, of the Glastonbury Code of Ordinances, which provides a twenty-four hour grace period for the removal of snow, sleet and ice after the cessation of precipitation,[2] and the affidavit of meteorologist Robert Cox, who opined about the weather conditions in Glastonbury on February 7, 2018, and February 8, 2018. Cox

[1] In *Kraus* v. *Newton*, supra, 211 Conn. 191, our Supreme Court held that, "in the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps. To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical. Our decision, however, does not foreclose submission to the jury, on a proper evidentiary foundation, of the factual determinations of whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." (Footnote omitted.) Id., 197–98.

[2] The Glastonbury Code of Ordinances provides in relevant part:

"Sec 17-52—Removal of snow, ice, debris, vegetative growth and other obstructions.

"(a) The owner, agent of the owner, or occupant of any property bordering upon any street, square or public place within the town where there is a paved or concrete sidewalk shall cause to be removed therefrom any and all snow, sleet, ice, debris, vegetative growth and other obstructions. Nothing in this section shall be deemed to remove or alleviate the owner's responsibility and liability for correcting hazardous conditions on their property.

"(1) *Removal of snow, sleet and ice shall be done within twenty-four (24) hours after the same shall have fallen*, been deposited or found, or in the case of ice that cannot be removed, such ice shall be covered with sand or some other suitable substance to cause such sidewalk to be made safe and convenient within such time period. Removal of snow and ice shall mean the removal of snow and ice to the full width of the sidewalk." (Emphasis added.)

The defendants also submitted the ordinances of the neighboring towns of Rocky Hill, East Hartford and Manchester.

averred that there was snow and freezing rain during this time, that the last snow ended at 10:11 p.m. on February 7, 2018, and that many surfaces would have been icy at 12:30 a.m. on February 8, 2018, due to the precipitation that ended approximately two to two and one-half hours earlier.[3]

On August 11, 2021, the plaintiff filed an objection to the defendants' motion for summary judgment. In his objection, the plaintiff argued that an exception to the ongoing storm doctrine applied because the defendants undertook snow removal and salt application during the storm. The plaintiff contended that, because the defendants undertook these remediation efforts while the storm was ongoing, genuine issues of material fact existed regarding the nature and extent of the remediation process and whether it was done in a nonnegligent manner. As evidentiary support for his argument, the plaintiff appended to his objection the deposition transcript of Darien Covert, the superintendent of Meadow Hill,[4] and Michael Curtis, the assistant superintendent of Meadow Hill, regarding their remediation efforts during the storm in question. The defendants thereafter filed a reply to the plaintiff's objection, and the plaintiff filed a supplemental objection to the defendants' motion.

On August 20, 2021, the trial court granted the defendants' motion for summary judgment. In its memorandum of decision, the court concluded that liability may

[3] Cox's affidavit provides in relevant part:

"6. On February 7, 2018, between 9:44 a.m. and 1:10 p.m., snow fell in Glastonbury, Connecticut. The snow accumulated 0.5"–1.0."

"7. On February 7, 2018, between 1:10 p.m. and 9:52 p.m., freezing rain fell in Glastonbury, Connecticut.

"8. On February 7, 2018, between 9:52 p.m. and 10:11 p.m., snow fell in Glastonbury, Connecticut.

"9. On February 8, 2018, at 12:30 a.m., many surfaces would have been icy due to the precipitation that ended about 2.0–2.5 hours earlier."

[4] Meadow Hill is the association for the condominium complex in which the premises is located.

be imposed for snow or ice remediation that occurs during a storm if it is done in a negligent manner. The court noted that the plaintiff had offered no evidence to rebut the defendants' proffer of § 17-52 of the Glastonbury Code of Ordinances as evidence of the standard of care. The court further concluded that the plaintiff had failed to establish that the defendants' snow remediation efforts were in any way negligent. Accordingly, "[b]ecause the defendants . . . offered unrebutted evidence of the standard of care and because of the plaintiff's inability to demonstrate that the negligence of the defendants' employees resulted in his injuries," the court granted the defendants' motion for summary judgment. The plaintiff then filed the present appeal.

I

On appeal, the plaintiff argues that the evidence submitted by the defendants in support of their motion for summary judgment did not eliminate all questions of material fact as to whether the defendants had had a reasonable time to remediate the ice on the walkway before the plaintiff fell. He contends that what constitutes a reasonable time is a question of fact dependent on the circumstances, that the Glastonbury ordinance attached to the defendants' motion for summary judgment was not evidence of a reasonable time to remediate the icy condition, and that the defendants' proof did not establish the time at which the storm ended.[5] The plaintiff did not make these arguments either in his objection or his supplemental objection to the motion for summary judgment or at the hearing on the motion for summary judgment. In fact, at the hearing on the motion for summary judgment, counsel for the

[5] In support of this argument, the plaintiff points out that, although Cox averred in his affidavit that the precipitation ended in Glastonbury at 10:11 p.m. on February 7, 2018, the plaintiff testified in his deposition that the precipitation ended in Middletown at approximately 7 p.m. or 8 p.m. that night.

plaintiff specifically stated that the reasonable time window "isn't the appropriate question" and that "the question is if you're going to do [it], you should do it appropriately." He conceded that two hours was a "short window" and that the court "would not want to set a precedent that that window was enough time."[6]

"Our appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . [A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The purpose of our preservation

[6] The transcript of the hearing on the defendants' motion for summary judgment reveals the following:

"The Court: [Counsel], do you concede that there was a reasonable time between the stop of the precipitation and the following—that the two hour period wasn't—was—it would be unreasonable to expect the defendants to have cleared the ice and snow and were salted?

"[The Plaintiff's Counsel]: Your Honor, the—*I have to concede that that is a short amount of time, and the court would—would not want to set a precedent that that window was enough time. So, I can't—that's not my argument.*

"To answer your question, *it's a short window. My argument is different.* My argument relies on the cases that it doesn't—*I'm not talking about the window*—first I have to commit to Your Honor and the court that *the window isn't the appropriate question, the question is if you're going to do* [*it*], *you should do it appropriately.* And what—what's here, when you ask the maintenance men how much salt did you apply, how much shoveling did you do, where did you do it, what areas did you do it, they don't document it. There is no way—they testified to that, but there is no documentation as to during this eleven hours, this is what we did on hour one, two, three and four. My client says it wasn't done. They said it was done, and that's the issue we believe that [we] should bring . . . to a jury." (Emphasis added.)

requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties. . . . These requirements are not simply formalities. They serve to alert the court to potential error while there is still time for the court to act." (Emphasis in original; internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 229–30, 131 A.3d 771 (2016).

Having thoroughly reviewed the pleadings, the filings the plaintiff made in opposition to the defendants' motion for summary judgment, and other submissions before the court, as well as the transcript of the oral argument on the motion for summary judgment, we conclude that the plaintiff failed to argue distinctly that issues of material fact remained regarding whether the defendants had a reasonable time between the end of the precipitation and the plaintiff's fall to have remediated the icy condition. Because the issues raised by the plaintiff on appeal were not expressly raised before the trial court, we decline to consider these issues on appeal.[7]

[7] The plaintiff also argues that, even if the claims raised on appeal are not sufficiently the same as the claims raised before the trial court, review pursuant to the plain error doctrine is appropriate. We disagree.

"[The plain error] doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . It is a rule of reversibility . . . that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernible on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable." (Citation omitted; internal quotation marks omitted.) *O'Rourke* v. *Dept. of Labor*, 210 Conn. App. 836, 855 n.15, 271 A.3d 700 (2022). "[T]he plain error doctrine is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *Wright* v. *Dzurenda*, 207 Conn. App. 228, 240, 271 A.3d 664 (2021). After a thorough review of the record, we conclude that the plaintiff has failed to demonstrate that there was an error "so clear, obvious and indisputable

II

The plaintiff next argues that his rebuttal proof showed that the defendants had a reasonable time to remediate the icy condition but either did not do so or did so negligently. He contends that, "[v]iewing the evidence most favorably to [the plaintiff], a reasonable person could conclude that the defendants, despite being present with ample time and personnel, either did not salt as they claim that they did or did not salt adequately. That creates a genuine issue of material fact about whether the defendants were negligent in their postprecipitation remediation effort."

In considering this claim, we note that there is a split of authority in the Superior Court as to whether there is an exception to *Kraus* v. *Newton*, supra, 211 Conn. 197–98, that would permit liability to be imposed for snow or ice remediation that occurs during a storm if it is done negligently. Compare *Zyskowska* v. *Danbury Mall, LLC*, Superior Court, judicial district of Danbury, Docket No. CV-18-6029256-S (March 9, 2020) (recognizing exception "upon the principle of Connecticut law that a party who undertakes an act gratuitously is liable for performing it negligently"), with *Rodriguez* v. *Midstate Medical Center*, Docket No. CV-07-5002619, 2008 WL 2745173, *3 (Conn. Super. June 17, 2008) (declining to recognize exception and concluding that "[t]o suggest that one should not begin to plow because they may then become liable for an icy condition during the snowstorm is contrary to the holding of *Kraus*, which did not find a duty to clear snow or to spread sand or ashes while a storm continues" (emphasis omitted; internal quotation marks omitted)). In the present case, the court recognized the exception but concluded that the plaintiff had failed to demonstrate that the defendants' remediation efforts were in any way negligent.

as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) Id., 241.

We need not decide whether the court correctly recognized this exception to the ongoing storm doctrine because, even if the court correctly recognized the exception, the plaintiff did not present evidence demonstrating the existence of a disputed issue of material fact in opposition to the defendants' motion for summary judgment.

We first set forth the relevant standard of review. "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. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, 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 under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 124, 261 A.3d 1 (2021).

In *Belevich*, this court considered the application of the ongoing storm doctrine in the context of summary judgment and its attendant burden shifting. Id., 125. Noting the scant authority from other jurisdictions on the issue of the ongoing storm doctrine in the context of summary judgment, this court adopted, as a matter of Connecticut common law, the approach taken by the New York Appellate Division in *Meyers* v. *Big Six Towers, Inc.*, 85 App. Div. 3d 877, 877–78, 925 N.Y.S.2d 607 (2011), which held that, "[a]s the proponent of the motion for summary judgment, the defendant ha[s] to establish, prima facie, that it neither created the snow and ice condition nor had actual or constructive notice of the condition . . . . [T]he defendant [may sustain] this burden by presenting evidence that there was a storm in progress when the plaintiff fell . . . . [Upon the defendant meeting its burden], the burden shift[s] to the plaintiff to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident . . . . To do so, the plaintiff [is] required to raise a triable issue of fact as to whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition . . . . " (Internal quotation marks omitted.) *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 127–28.

In the present case, the trial court, relying on Cox's affidavit and § 17-52 of the Glastonbury Code of Ordinances, concluded that the defendants had satisfied their initial burden to demonstrate that there was no genuine issue of material fact that there was an ongoing storm or that a reasonable time had not elapsed following the conclusion of the storm within which the defendants should have remediated the snowy or icy condi-

tion.[8] The court stated that "the defendants proffer § 17-52 as evidence of the standard of care. Specifically, this is evidence that the two hour period between the end of the precipitation event and the fall is not [a reasonable] period of time for them to have remedied any dangerous conditions. The plaintiff offers no evidence to dispute this and as such the defendants would be entitled to summary judgment if the plaintiff's counterargument regarding the inadequacy of snow remediation fails."

In accordance with *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 127, the burden then shifted to the plaintiff "to raise a triable issue of fact as to whether the precipitation from the storm in progress was not the cause of his accident." To do so, "the plaintiff was required to demonstrate the existence of a triable issue of fact as to whether the snow abatement efforts engaged in by [the defendants] exacerbated the natural hazard created by the snowstorm." *Ali* v. *Pleasantville*, 95 App. Div. 3d 796, 797, 943 N.Y.S.2d 582 (2012).[9] Accordingly, we must determine whether the plaintiff provided any evidence that the allegedly negligent actions of the defendants with respect to the snow or ice removal caused the plaintiff's fall.

The trial court determined that the plaintiff had not satisfied this burden, concluding that he "offered no evidence as to the time the salt had been applied or whether the efficacy of the salt application was deteriorated by continued precipitation. The plaintiff fails also to demonstrate any evidence that the result of the application of salt rendered the condition more defective or

[8] As it was undisputed in *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 128, that there was an ongoing storm at the time of the plaintiff's alleged fall, it was unnecessary for this court to consider in that case whether a reasonable time had elapsed following the conclusion of the storm within which the defendant could have remediated the ice and snow.

[9] As we did in *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 126–27, we turn to the body of law from New York for guidance on this issue.

dangerous than if they had not applied salt. In short, the plaintiff has failed to establish that the defendants' efforts at snow remediation were in any way negligent." On the basis of our plenary review of the pleadings and documentary submissions, we agree with the trial court that the plaintiff failed to raise a triable issue of fact as to whether the precipitation from the storm was not the cause of the accident.

As stated earlier in this opinion, the plaintiff submitted the deposition testimony of Covert and Curtis in support of his objection to the defendants' motion. According to Covert, the condominium complex is comprised of thirty-three acres and is divided into three sections, a gray section, a red section, and a brown section. The plaintiff's fall occurred in the gray section. Covert and Curtis both testified that they shoveled and applied salt at the complex on February 7, 2018, until approximately 11 p.m. or 11:30 p.m. and returned at approximately 4 a.m. on February 8, 2018, to complete the job.[10] Covert testified that they did not document when they put salt down during this storm; rather, they did a walk-through when they were done to make sure that they did not miss any locations. Although Covert

[10] Covert testified as follows:

"Q. Okay. And do you recall what your plan was with regard to this particular storm and applying salt on the walkways?

"A. I do.

"Q. What was that?

"A. After we had removed the snow, I believe it transitioned to freezing rain, and it—I believe—I'm trying to go by my memory—that it did turn back to snow again, and I believe we went out and salted before we left during—when the storm was still coming down.

"We had to get some rest. I believe we left somewheres around 11 o'clock with a return to work time of 4 a.m. So, off the property—we were off the property from a little after 11, back on property 4 a.m.

"Q. That's 11 p.m.?

"A. Correct.

"Q. Okay. And is it your memory that—I think you said that during the storm, or during the transition, salt was applied?

"A. Correct."

testified that rock salt is used for heavy storms, he could not recall what type of salt he used for this storm. Looking at a photograph showing the walkway where the plaintiff fell, Covert identified the area where he and Curtis had put salt down. Covert testified that he trained Curtis to put down salt "like [he] didn't pay for it" and that they "take a lot of pride in making sure [their] complex is safe." With regard to the gray area of the complex, Covert testified that they "put down a majority of salt on [the] walkways."[11] He could not recall how many times he and Curtis applied salt to this area of the complex.

Curtis recalled that he and his crew of part-time employees shoveled the pathways and stoops on February 7, 2018. He recalled that, at some point, the snow changed over to freezing rain and that they applied salt before leaving the premises.[12] He recalled putting salt down two times during the storm. He testified that he came back in the morning after only "a couple of hours of sleep" to complete the job.

Although Covert and Curtis both testified regarding their remediation efforts during the storm in question,

[11] Covert testified as follows:

"Q. And in terms of what you did to the gray area of the complex before 11 p.m., are you able to tell me what you did in terms of fighting the storm?

"A. We took care of all of the snow on the walkways. As I previously stated, if you leave the snow and freezing rain comes onto it, it turns into a block of ice. To make our jobs easier we make sure we get rid of the snow before the transition or during the transition. I do remember that night being very cold and us being very wet doing it. We put down a majority of salt on all these walkways."

[12] Curtis testified as follows:

"Q. And do you recall what you did to deal with the storm on Friday, February 7, 2018?

"A. I recall coming in. There was a minimal amount of snow, one or two inches. Me and my crew all shoveled, pathways and stoops. It stopped for a period of time, changed over to freezing rain. We went out again after a nice break and got some food. Went through it again, dropped the shovels. Then at the end, we went through and salted. Finished around 11, 11:30.

"Q. When you say with 'your crew,' you're talking about the part-time help?

"A. Yes. Shovelers only."

the plaintiff testified in his deposition that snow removal and salt application had not been performed on the steps where he fell.[13] The plaintiff attached, as exhibits to his supplemental objection to the defendants' motion for summary judgment, photographs that he had taken after his fall; the plaintiff contended that these photographs, which were marked as exhibits at the plaintiff's deposition, arguably showed that salt had not been applied to the walkways of the complex. At the hearing on the motion for summary judgment, counsel for the plaintiff argued that "[the plaintiff] says it wasn't done. [The defendants] said it was done, and that's the issue we believe that [we] should bring . . . to a jury." In its decision, the court stated that, "[i]n essence, the plaintiff's argument is that his lack of observation of any conditions indicating plowing, shoveling of snow or application of salt or other treatment ipso facto raises an issue of material fact as to whether such efforts were negligently performed."

As noted by the trial court, the evidence is unclear as to when and if Covert and Curtis applied salt to the precise steps on which the plaintiff fell. Even if the plaintiff is correct that the defendants did not salt the precise steps where he fell, he has failed to raise a triable issue of fact as to whether the defendants created or exacerbated the allegedly dangerous condition by engaging in remediation efforts during the storm. "The mere failure of a defendant to remove all of the snow and ice, without more, does not establish that the defendant increased the risk of harm." (Internal

[13] Specifically, when asked what he did when he got out of his car just before he fell, the plaintiff testified: "I did [try] to walk slowly because I knew they didn't do anything, they didn't plow, they didn't shovel or put anything on it so I just walked nice and easy tippy-toed just to be careful of what I was walking on. Once I got to the stairs the stairs were icy so I grabbed to the railing and I went up slowly, but as soon as I got to the last step, the last spot to grab and I had nothing else to grab and . . . that's when I slipped."

quotation marks omitted.) *Henenlotter* v. *Union Free School District No. 23*, 210 App. Div. 3d 657, 658, 177 N.Y.S.3d 156 (2022); see also *Glover* v. *Botsford*, 109 App. Div. 3d 1182, 1184, 971 N.Y.S.2d 771 (2013) ("the mere failure to remove all snow and ice from a sidewalk . . . does not constitute negligence and does not constitute creation of a hazard" (emphasis omitted; internal quotation marks omitted)); *Ali* v. *Pleasantville*, supra, 95 App. Div. 3d 797 ("[the defendant's] alleged failure to remove snow that had fallen during the course of the storm and its alleged failure to apply salt or sand to the sidewalk, do not constitute affirmative acts of negligence").

Furthermore, "[a] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 456, 197 A.3d 919 (2018). The plaintiff in the present case points to his testimony and the photographs marked as exhibits at his deposition to support his claim that the defendants did not salt adequately; according to the plaintiff, this creates a genuine issue of material fact about whether the defendants were negligent in their postprecipitation remediation efforts. We disagree and conclude that the plaintiff's claims are based on mere speculation or conjecture and, therefore, that the plaintiff has failed to substantiate his adverse claim in his objection to the defendants' motion for summary judgment. See *Aronov* v. *St. Vincent's Housing Development Fund Co.*, 145 App. Div. 3d 648, 650, 43 N.Y.S.3d 99 (2016) (summary judgment for defendants properly granted

when "[t]he plaintiff offered nothing more than conjecture and speculation as to how the defendants' efforts to remove snow from the sidewalk created or exacerbated the icy condition upon which she allegedly slipped and fell"); *Scher* v. *Kiryas Joel Housing Development Fund Co.*, 17 App. Div. 3d 660, 661, 794 N.Y.S.2d 112 (2005) ("the plaintiff merely speculated that the defendants created the icy condition by negligently shoveling the walkway [and] [s]uch speculation was insufficient to raise a triable issue of fact to defeat the motions [for summary judgment]").

In light of the foregoing, and on the basis of our plenary review of the pleadings and documentary submissions, we conclude that the trial court properly concluded that the plaintiff had failed to raise a triable issue of fact in opposition to the defendants' motion for summary judgment and, therefore, properly granted the defendants' motion.

The judgment is affirmed.

In this opinion the other judges concurred.