IN RE K. M. ET AL.*
(AC 45269)

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

Syllabus

The respondent father appealed to this court from the judgments of the trial court vacating prior visitation orders and entering new visitation orders with respect to his minor children, A and B. The children had been adjudicated neglected and committed to the care of the petitioner, the Commissioner of Children and Families, after the Department of Children and Families had engaged the family concerning neglect and

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

abuse. While the children were under protective supervision, and A was committed to the department, the father moved for therapeutic visitation, which the trial court granted. The petitioner thereafter filed a motion to suspend paternal visitation, asserting that the children did not want to visit the father or his family, and attached a letter from the children's clinical social worker, who recommended that visitation should be suspended. The father subsequently filed a motion for supplemental orders regarding therapeutic visitation, and a motion to enforce prior existing visitation orders. After hearings on these motions, the trial court granted the petitioner's motion, finding credible the testimony of the children's guardian ad litem that they did not want to visit or have contact with the father or his family. The trial court denied in part the father's motion for supplemental orders regarding therapeutic visitation and denied the father's motion to enforce compliance with court visitation orders. The trial court ordered that the father's visitation with the children may resume when he has provided documentation to the children's therapists that he had engaged in and had made significant progress on the clinical issues that had been identified by the court-appointed psychologist. Thereafter, the court granted the motion of the children's mother, which was supported by the petitioner, to terminate protective supervision of the children. The court vested custody of the children with the mother, after finding that the mother had, inter alia, made substantial progress with parenting as well as meeting the children's needs, and that the children had improved significantly while in the mother's care. The court found that the father had not presented evidence that he had engaged in the clinical work that had been previously ordered and reiterated that his visitation with the children may resume when he has provided documentation that he had done so. *Held* that the trial court did not abuse its discretion in modifying the visitation orders pursuant to statute (§ 46b-121): the record reflected that the court carefully considered the entirety of the evidence before it and properly modified its order regarding the father's visitation in accordance with the best interests of the children, the court credited the expert testimony of a psychologist, who conducted court-ordered evaluations of the family and whose testimony thoroughly was supported by the testimony of a licensed clinical social worker and the children's guardian ad litem, and the court did not abuse its discretion in relying on that evidence in making its visitation orders; moreover, the court recognized that the children had an array of mental health, medical, and developmental needs, which required significant caregiver support, considered the children's desire not to have contact with their father or the father's family, considered the acrimonious relationship between the father and the mother, and considered the father's capacity to meet the needs of the children in light of expert testimony that the father lacked insight into his behavior as well as how his actions and behavior impacted his children, and found that the father, having been previously permitted

to have therapeutic visitation on the condition that he comply with court-ordered therapy and demonstrate substantial progress on the clinical issues that had been identified, failed to present any evidence that he has done so, and, instead, merely provided general evidence that he had engaged in therapy, successfully completed a parenting program, and submitted supportive documents that pertained to events, reports, and services prior to the children's refusal to visit with him, all of which were not specific to the court's order, and, accordingly, the trial court's finding that he had not presented evidence of compliance with services was not clearly erroneous; furthermore, the record sufficiently demonstrated that, contrary to the father's contention, the trial court considered the relationship between the children and the paternal family as part of its best interests analysis when it modified its visitation orders.

Argued November 15, 2022—officially released February 21, 2023**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the court, *Aaron, J.*, adjudicated the minor children neglected and committed them to the care of the petitioner; thereafter, the younger child was returned to the respondent mother's care under protective supervision; subsequently, the older child was returned to the respondent mother's care under commitment; thereafter, the court, *Grogins, J.*, granted the respondent father's motion for therapeutic visitation; subsequently, the court, *Hon. John Turner*, judge trial referee, granted the petitioner's motion to suspend paternal visitation, denied in part the respondent father's motion for supplemental orders regarding therapeutic visitation, denied the respondent father's motion to enforce prior existing visitation orders, and opened and modified the dispositional order regarding the older child and placed the minor children under protective supervision with custody vested in the respondent mother, and the respondent father filed an appeal to this court; thereafter, the court, *Hon. John*

** February 21, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Turner, judge trial referee, granted the respondent mother's motion to terminate protective supervision, and the respondent father filed an amended appeal. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

John E. Tucker, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent father, Michael M.,[1] appeals from the judgments of the trial court in which the court denied in part the respondent's motion for supplemental orders regarding therapeutic visitation, denied the respondent's motion to enforce compliance with court orders, and granted the motion of the petitioner, the Commissioner of Children and Families, to suspend the respondent's visitation with his minor children, A and B.[2] The respondent's sole claim on appeal is that the trial court erred in vacating prior visitation orders and entering new visitation orders.[3] We affirm the judgments of the trial court.

[1] Katherine M., the mother of A and B, also was named as a respondent in the neglect petitions filed by the petitioner. We hereinafter refer to the respondent father as the respondent and to Katherine by her first name.

[2] According to the respondent's appeal form, he also purports to appeal from the court's granting of the petitioner's motion to revoke commitment of A and B and terminate their protective supervision. The respondent, however, has not briefed any specific claims of error with respect to these rulings and, thus, has abandoned those aspects of his appeal. See *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 772 n.1, 241 A.3d 717 (2020). "It is necessary to this court's review of a party's claims on appeal that his brief contain, inter alia, argument and analysis regarding the alleged errors of the trial court, with appropriate references to the facts bearing on the issues raised." *Zappola* v. *Zappola*, 159 Conn. App. 84, 86, 122 A.3d 267 (2015).

[3] Pursuant to Practice Book §§ 67-13 and 79a-6 (c), both the attorney for the minor children and the children's guardian ad litem filed statements adopting the brief filed by the petitioner. Additionally, the attorney for Katherine filed a statement adopting the brief filed by the petitioner.

The following facts, as found by the trial court, and procedural history are relevant to this appeal. The respondent and Katherine were married in August, 2006, and their marriage was dissolved in 2016. The respondent and Katherine have two minor children issue of the marriage, A, born in 2008, and B, born in 2010.[4] Pursuant to the separation agreement incorporated into the dissolution judgment, the respondent and Katherine shared joint legal custody of the children, Katherine was awarded primary physical custody of the children, and the respondent "was awarded reasonable and flexible visitation."

The Department of Children and Families (department) has been engaged with the respondent and Katherine since 2010.[5] On March 15, 2019, the petitioner filed neglect petitions on behalf of A and B,[6] and, on October 3, 2019, the children were adjudicated neglected and placed under a six month period of protective supervision with Katherine. On April 1, 2020, the period of protective supervision was extended "until further order of the court." On August 20, 2020, the petitioner moved to revoke the protective supervision and sought a court order of temporary custody for A and B. On September 1, 2020, A and B were adjudicated neglected and were committed to the care of the petitioner.

[4] The respondent is also father to an older child, C, who is not at issue in this action. Therefore, hereinafter, all references to the children are to A and B.

[5] Since 2010, there have been twenty-four referrals called into the department concerning physical neglect and abuse, emotional neglect and abuse, moral neglect, and sexual abuse of A and B. The department has also conducted seven Family Assessment Response investigations and seventeen other investigations, twelve of which were unsubstantiated and five of which were substantiated.

[6] The petitioner had previously filed neglect petitions on behalf of A and B in December, 2014. Thereafter, the children were adjudicated neglected on May 27, 2015, and placed under a period of protective supervision. The period of protective supervision "was allowed to expire on November 27, 2015."

On November 13, 2020, the petitioner moved to revoke commitment of B because "[t]he grounds for the [order of temporary custody] no longer exist since there are no safety concerns or issues." By agreement of the parties, the court revoked the commitment of B, and she was returned to Katherine's care under a six month period of protective supervision.[7] Additionally, the court entered an order for B to engage in supervised visitation with the respondent.

That same day, November 13, 2020, the petitioner filed a motion to revoke commitment of A, asserting that "a cause for commitment no longer exists and revocation of commitment and reunification with [Katherine] under orders of protective supervision is in the best interest of the child." On December 24, 2020, the petitioner returned A to Katherine's care, although A remained committed to the petitioner.

On March 18, 2021, the respondent filed a motion for therapeutic visitation, in which he "move[d] for an order allowing him therapeutic visitation with his . . . minor children [A and B] . . . [and] further move[d] for an order directing the [department] to pay for the therapeutic visitation." The court granted the respondent's motion on April 1, 2021.

One week later, on April 8, 2021, the petitioner filed a motion to suspend paternal visitation, asserting that "[t]he children have expressed that they do not wish to visit with [the] respondent." Additionally, the petitioner attached to the motion a letter from Trina Shuptar, a licensed clinical social worker, who was engaged by the department to provide therapeutic visitation "at the respondent father's request." The letter from Shuptar "[recommended] that visitation be suspended, citing safety concerns."

[7] On April 29, 2021, the court extended the period of protective supervision of B until further order of the court.

On May 4, 2021, hearings began on a panoply of outstanding motions. The court heard testimony over the course of five days, May 4, May 6, May 24, July 28 and November 15, 2021, and the court issued a memorandum of decision dated December 22, 2021. Throughout the course of the hearings, the petitioner, the respondent, Katherine, and the children's attorney, among others, filed various additional motions and objections thereto.[8] As relevant to the present appeal, on June 11, 2021, the respondent filed a motion for order, in which he "move[d] for an order to preserve his relationship with his . . . minor children," and averred that he had not had contact with A or B "since in or about March, 2021, nor has he been informed of their health and well-being." Thereafter, on September 9, 2021, the respondent filed a motion "for supplemental orders in connection with this court's order of March 18, 2021, directing that the respondent father have therapeutic visitation with his . . . minor children, and that the petitioner pay the cost of the therapeutic visitation." Finally, on September 17, 2021, the respondent filed a motion to enforce compliance with court orders, specifically its visitation orders, in which he renewed his assertion that he "has had no visitation at all with his children since in or about March, 2021," and asserted that "[t]he integrity of the court's orders in this case has been disregarded in that the orders are not being followed, but ignored, as if they do not exist."

During the hearings, the petitioner presented testimony from Shuptar; Suzanne Ciaramella, a psychologist; and Kevin Berry.[9] Dr. Ciaramella testified as an

[8] Both the respondent and Katherine were represented by counsel during the hearings.

[9] The petitioner also presented the testimony of Patrick Higgins and Anthony Ross. Higgins was contracted through the department to provide therapeutic services to A, address A's behavioral issues, conduct prosocial activities with A, and develop A's prosocial behavior within the home. [Ross is a social worker for the department who was assigned to the family's case from October, 2020, through March, 2021.

expert in the fields of clinical psychology, forensic psychology, and in the evaluation of children and families. Additionally, she conducted court-ordered evaluations of the family in March, 2020, and July, 2021. Berry is a department social worker who was assigned to the family's case in March, 2021.

The respondent presented testimony from Heather LaSelle and the respondent's parents, A and B's paternal grandmother and grandfather.[10] LaSelle is a clinical social worker and the executive director of an outpatient behavioral health clinic who treated B from March, 2019, through September, 2020. Prior to hearing oral argument from the parties, the children's guardian ad litem gave a report and subsequently was questioned by counsel for the petitioner, the respondent, Katherine, and the children.

The court issued a memorandum of decision, dated December 22, 2021, in which, relevant to the present appeal, the court granted the petitioner's motion to suspend paternal visitation, denied in part the respondent's motion for supplemental orders regarding therapeutic visitation, and denied the respondent's motion to enforce compliance with court visitation orders. In support of its decision, the court found that the respondent "has been diagnosed with generalized anxiety disorder and [post-traumatic stress disorder (PTSD)]" and that Katherine "is diagnosed with anxiety and . . . PTSD." The court further found that the respondent and Katherine have a "markedly unhealthy" relationship, which "has been and continues to be acrimonious and toxic and has adversely affected their children," and that they "have struggled unsuccessfully to co-parent effectively" and "have involved their children in their continuing very contentious relationship."

[10] The respondent also presented the testimony of two friends and Sergeant Sereniti Dobson of the Westport Police Department.

The court noted that "both [B] and [A] have resided exclusively and continuously with [Katherine] since November and December, 2020." The court found that A is engaged in individual and family therapy,[11] receives support at Transgender Youth and Family Coaching,[12] and also receives in-home Applied Behavior Analysis services. The court further found that A is consistent with therapy and services and is "doing well." Additionally, the court noted that A "attends a therapeutic school and is doing quite well behaviorally and academically." The court found that B is engaged in therapeutic counseling,[13] equine therapy, and "has weekly pediatric appointments for weight checks." The court also found that B "is bright and doing very well at school behaviorally and academically." Additionally, the court noted that B is engaged in extracurricular activities, including soccer, swimming, and yearbook club. The court further found that "[B] is happy and has been doing very well in [Katherine's] care since November, 2020."

The court found that in January, 2021, A and B "were both happy to have an in-person visit with [the respondent] and wanted visits with him to continue." The court noted that shortly thereafter, however, A and B "no longer wanted visitation or any contact with [the respondent] or with the paternal side of the family." The court stated that "[A] and [B] are very verbal and expressive . . . and described [the respondent] as critical, angry, and blaming. They've expressed fear of him

[11] The court found that A "is diagnosed with disruptive mood dysregulation disorder, nonverbal learning disorder, [attention deficit hyperactivity disorder (ADHD)] combined, [and] autism spectrum disorder." Additionally, the court noted that A "has been hospitalized five times since June 14, 2016, for psychiatric care." The court further found that from October 31, 2018, through March 5, 2019, A "was placed in a subacute setting due to physically aggressive behaviors."

[12] The court's memorandum of decision reflects that A is transgender.

[13] The court found that B "is diagnosed with an adjustment disorder, posttraumatic stress disorder, generalized anxiety, attention deficit hyperactivity disorder (ADHD), and she suffers with an eating disorder."

because they feel he's easily angered, and they never know when it's going to happen." The court found that A believes that the respondent does not "understand [A] and has made disparaging comments about [A] and [Katherine]." The court also noted that B believes that the respondent "does not listen to her, try to understand her perspective, or validate her concerns or feelings." Additionally, the court found that A "refuses in-person and virtual visits with [the respondent]" and that B "struggles with the relationship with [the respondent]." The court stated that A and B do not want to see the respondent "until they know he has changed." Additionally, despite having had a good relationship with their paternal grandparents since they were young, the court found that A and B no longer want to have visitation with the paternal side of their family. The court stated that A and B "have come to believe that [their paternal grandparents] cannot keep appropriate boundaries with [the respondent] . . . often justify [the respondent's] behaviors and interactions, [and] . . . cannot and will not protect them from [the respondent]."

The court found that Katherine "has consistently participated in many recommended services, has made significant progress, and is doing well." Additionally, the court recognized that Katherine "is able to advocate and protect [A] and [B] [and] [s]he has satisfactorily met their needs since they were returned to her care more than one year ago." As a result, the court concluded that "there has been significant improvement in [Katherine's] ability to meet the needs of the children, and the children are doing well and flourishing in her home." The court noted that the respondent "has not provided any updated information regarding his progress or services in which he has been participating" and "has refused to provide [the department] with any documentation or releases for the [department] . . . to ascertain whether he has engaged in recommended

services and has made significant progress." The court credited "Dr. Ciaramella's expert testimony that [the respondent] lacks insight into his behaviors and how his actions and behaviors impact his children." Moreover, the court noted that, "[o]n April 23, 2021, the children participated in an interactional assessment conducted by Dr. Ciaramella with [Katherine] . . . [but] they adamantly refused to participate in an interactional assessment with [the respondent]."

In setting forth its orders, the court stated that the respondent "may have therapeutic visits with [A] and/or [B] after he has provided documentation to the children's therapists evidencing that he has engaged in and has made significant progress in the clinical work identified by Dr. Ciaramella and the children's therapists as necessary before therapeutic visits with him can begin. Therapeutic visits shall be conducted with clinical oversight and as recommended by their [therapists] including time, place, frequency, and duration." Additionally, the court found "that cause for the continued commitment of [A] to [the department] no longer exists and it is in the child's best interest to revoke the commitment." Accordingly, the court reunified A with Katherine under orders of three months of protective supervision. Additionally, the court placed B under an additional three month period of protective supervision to align with A's period of protective supervision. The respondent filed an appeal following the court's decision.

On February 4, 2022, Katherine filed a motion for termination of protective supervision, in which she requested, inter alia, "that this court end protective supervision as scheduled and award [Katherine] and [the respondent] joint legal custody of the minor children, [A] and [B]; and grant [Katherine] primary/final decision-making authority." The respondent filed an objection to Katherine's motion to terminate protective supervision, in which he argued that Katherine's "motion,

styled as one to terminate protective supervision, is really a motion to modify the disposition in this case; however, the motion fails to allege a material change in circumstances warranting a modification of the court's dispositional orders [dated] December 22, 2021." Additionally, he asserted that he "is in the process of working with his therapist to comply with the court's decision in this matter," he "has had no contact with his children in almost one year upon claims that the children do not wish to see him or communicate with him," and that "[l]eaving final decision making in [Katherine] would be inequitable in that [Katherine] is hostile to the presence of the respondent . . . in the children's lives."

On February 18, 2022, the petitioner filed a response to Katherine's motion for termination of protective supervision in which she supported Katherine's motion to allow protective supervision to expire as scheduled. Additionally, the petitioner asserted that "there needs to be orders that remain in place following the expiration of protective supervision as follows: (1) that the children remain in the sole physical custody of [Katherine] with final decision-making [authority] vested in [Katherine], (2) that visitation be clinically supervised and only resume when respondent father has demonstrated that he has made substantial progress on the clinical issues identified by the court-appointed psychologist."

On March 9 and 14, 2022, the court held an evidentiary hearing on the motions.[14] In support of his objection to Katherine's motion to terminate protective supervision, the respondent presented the testimony of LaSelle and his mother. In support of her motion, Katherine testified

[14] Prior to the start of the evidentiary hearing, the court heard argument on several other outstanding motions and objections that had been filed since the court's memorandum of decision was issued on December 21, 2021, which matters are not relevant to this appeal.

and called Berry as a witness. Thereafter, the respondent recalled his mother in rebuttal to the testimony presented by Katherine and Berry. Finally, the court heard testimony from the children's guardian ad litem, who was called by Katherine. Additionally, the parties submitted five exhibits into evidence.

On March 22, 2022, the court issued a memorandum of decision in which it noted that it had reviewed the exhibits submitted by the parties, "carefully considered the testimony of the witnesses," and taken judicial notice of the "orders, decisions, pleadings, and the contents thereof in the court's file . . . including the court's memorandum of decision issued December 21, 2021."[15] As to Katherine, the court stated that "she has made significant and substantial progress strengthening her parenting skills, addressing certain anxieties, improving her coping skills, and managing life stressors." Additionally, the court recognized that A and B "have improved very much mentally, emotionally, socially, and academically while in her care since December, 2020." Furthermore, the court found "credible [Katherine's] assurances to [the department] that she will continue to participate in and cooperate with her service providers, and that she will continue to engage [A] and [B] in recommended services and participate in same as recommended by them." In conclusion, the court found that "there is no longer any cause or need for continued [protective supervision] of [A] and/or [B]. It is in their best interest to terminate [protective supervision] immediately."

Regarding the children's visitation with the respondent, the court stated that the children's guardian ad litem "credibly and convincingly testified that [A] and [B] still do not want to visit or otherwise have contact with [the respondent]." Additionally, after reiterating

[15] The court's first memorandum of decision, although dated December 22, 2021, was issued on December 21, 2021.

the order from its previous decision dated December 22, 2021, extending to the respondent therapeutic visitation with A and B after he provided the requisite documentation to the children's therapists evidencing significant progress in his clinical work, the court stated that the respondent "has failed to present evidence [that] he has complied with this order."

In setting forth its orders, the court reiterated that the respondent's "visitation with [A] and [B] may resume when he has complied with the conditions set forth in the court's decision, dated December [22], 2021, and he has demonstrated substantial progress on the clinical issues identified by the court-appointed psychologist." Finally, the court ordered that "[t]he Juvenile Court does not retain jurisdiction over this matter. These orders are subject to modification by the Family Court."[16] Thereafter, the respondent amended his appeal of the December 21, 2021 decision, to include a challenge to the March 22, 2022 decision. Additional facts and procedural history will be set forth as necessary.

On appeal, the respondent claims that the trial court erred in vacating the "existing visitation orders and [entering] an order that . . . for there to be visitation [with A and B] . . . the respondent . . . would have to comply with the recommendation from the court-ordered evaluation."[17] In support of his claim, the

[16] The court's reference to the "family court" refers to potential postjudgment proceedings in the marital dissolution action. See *Katherine M.* v. *Michael M.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-15-6024118-S.

[17] The respondent also raises various arguments in which he expresses dissatisfaction with the department and the judicial system. Specifically, the respondent argues that "[t]he court heard extensive testimony about the services provided for the children individually and in [Katherine's] home to address their issues, but the petitioner never made similar services available to the respondent so that he could better understand his children's needs, work proactively on addressing his issues and in conjunction with the children's issues" and "[t]he prolonged separation without appropriate services in place only exacerbates the parental alienation which no one disputes exists in this case, which has now been worsened by the petitioner,

respondent argues that several of the court's factual findings are clearly erroneous. The petitioner responds that "[t]he [respondent's] claim . . . ignores the central and undisputed fact in this case that [A] and [B] consistently and adamantly refuse to visit with [him]." We conclude that the court did not abuse its discretion in setting forth its visitation orders.

We first set forth the applicable legal principles and standard of review that guide our resolution of this appeal. General Statutes § 46b-121 (b) (1) provides that "[i]n juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction . . . ." Our Supreme Court has held that § 46b-121 (b) (1) grants "the trial [court] broad authority in juvenile matters . . . to make and enforce such orders . . . including orders impacting parental rights, such as termination and visitation." (Citation omitted;

and the court betraying the family relationships and unity." He further argues that he filed various motions "asking the court to issue orders to preserve the parent-child relationship . . . [and] for supplemental orders for therapeutic visitation, which . . . were all very reasonable requests to address the outstanding issues regarding the relationship between the respondent and his children, but none of these requests were fully pursued nor actively encouraged . . . ." The respondent asserts that he "has no confidence in the judicial system and its integrity when what was once a positive happy relationship no longer exists due to the failure of the system to provide reasonable, adequate, and timely services."

On appeal, this court is "not privileged to usurp [the trial court's] authority or to substitute ourselves for the trial court . . . [and] [g]reat weight is given to the judgment of the trial court . . . ." (Internal quotation marks omitted.) *In re Kadon M.*, 194 Conn. App. 100, 108, 219 A.3d 985 (2019). The respondent's assertions of deficiencies in the department and the trial court falter on the fact that the respondent has failed to direct us to any evidence that tends to support those claims. Rather, for the reasons set forth in this opinion, we conclude that the trial court did not abuse its discretion and properly considered the best interests of the children in modifying the visitation orders.

internal quotation marks omitted.) *In re Annessa J.*, 343 Conn. 642, 668, 284 A.3d 562 (2022); see also *In re Ava W.*, 336 Conn. 545, 572–76, 248 A.3d 675 (2020).

"[T]he primary focus of the court is the best interests of the child, the child's interest in sustained growth, development, well-being, and in the continuity and stability of its environment." *In re Alexander C.*, 60 Conn. App. 555, 559, 760 A.2d 532 (2000). "We have stated that when making a determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances . . . is not conferred upon this court, but upon the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court. . . . A mere difference of opinion or judgment cannot justify our intervention. Nothing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did. . . . [G]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . [Appellate courts] are not in a position to second-guess the opinions of witnesses, professional or otherwise, nor the observations and conclusions of the [trial court] when they are based on reliable evidence." (Internal quotation marks omitted.) *In re Kadon M.*, 194 Conn. App. 100, 108, 219 A.3d 985 (2019).

The record reflects that the court carefully considered the entirety of the evidence before it and properly modified its order regarding the respondent's visitation in accordance with the best interests of the children. During the trial, the court heard testimony from Dr. Ciaramella, the court-appointed psychologist. She testified that, in March, 2020, she conducted a court-ordered

evaluation of the family, which included individual evaluations of the respondent, Katherine, and the children, and interactional assessments between the parents and children. As part of the March, 2020 evaluation, she identified concerns with the respondent's "present[ation] . . . his behavior, and [his] lack [of] insight into how his behavior was received or perceived by others." Dr. Ciaramella testified that those concerns impacted the respondent's "ability to not only parent the children safely," but also his ability to understand "the impact of that behavior and his presentation on the children's mental health issues and the ability to then therefore meet those needs."

Dr. Ciaramella further testified that she conducted an updated evaluation in July, 2021, in which she was directed to review her prior recommendations from March, 2020, consider updated information and provider reports, and conduct updated interactional assessments. She successfully completed an interactional assessment of Katherine and the children, but the interactional assessment between the respondent and the children "did not move forward." She testified that upon reviewing recent documentation, she learned that the children were refusing visitation with the respondent, and when she met with the children to "see if moving forward would be clinically appropriate," the children "both declined fairly adamantly to move forward with an interactional [assessment] with [the respondent]." Thereafter, Dr. Ciaramella opined that it would not be "in the children's best interests clinically, emotionally, psychologically, somewhat globally to be forced to visit with [the respondent]." In support of her opinion, she testified that she believed the children have developed "awareness that the way that [the respondent] conducts himself in the way that they have been interacting with him or, in certain cases, treated by him have been uncomfortable

and unhealthy for the children." Additionally, Dr. Ciaramella recognized that the children have "specific concerns about [the respondent's] ability to validate them, to be supportive, to stay in control, to manage his anger, [which] are all things that have become clinically very disruptive for them." Accordingly, she opined "that if [the respondent] has not made progress into those areas, has not been able to demonstrate any insight into how his behavior affects other people, in particular children who have special needs, in particular one child with very specific and chronic special needs, that continuing to subject them to that kind of behavior from a parent who lacks insight and awareness would be detrimental to their well-being in general."

Dr. Ciaramella also opined that, in order to resume paternal visitation, the respondent should participate in services that address the clinical issues she identified in her evaluation, particularly, "his lacking insight . . . [h]is inability to reflect, his inability to take responsibility, the ongoing issues of being justified and rationalized and aberrant behavior because he feels he is right." Additionally, she testified that "it would . . . be . . . important that the clinicians involved collaborate so that they can speak to each other and they can get a sense of what's happening for the children, how they're progressing, what's happening for [the respondent] and how he's progressing, and then to be able to create a structure and a path moving forward as to what would be the most appropriate way to reintroduce first contact and then in-person time together, you know, hopefully through clinical oversight."

The court also heard testimony from Shuptar, who stated that she met with Katherine in early April, 2021, to obtain background and developmental information regarding the children. Shortly thereafter, Shuptar met with the children "to understand from their perspective what their understanding of the situation [regarding

paternal visitation] is, their feelings about it and how it's affecting them to be able to move forward together." Shuptar testified that, despite never having previously met the children, they readily entered her office and "their very first statement was that they did not want to have visitation with their father." Further, Shuptar testified that "[t]he most profound thing that . . . the children said to me at the end of the session is that they . . . couldn't go forward with any visit. They didn't want to be involved in any visits unless they knew that their father had changed something. . . . [T]hey wanted to know . . . has he received help somewhere? Has he been to a doctor? Has he seen somebody for some help?" On the basis of her consultation with the children, Shuptar opined that the children's visits with the respondent "should be suspended . . . until we have further information to help us to evaluate the best way to go forward with visits . . . [and] how to help the children better."

The court also heard testimony from the children's guardian ad litem, who echoed the statements and opinions of Dr. Ciaramella and Shuptar and supported Dr. Ciaramella's recommendations regarding visitation. See *In re Kadon M.*, supra, 194 Conn. App. 107 ("'a guardian ad litem must promote and protect the best interest of a child' "). The children's guardian ad litem reported to the court that "[n]either child at this point has a desire to have any contact with the paternal . . . side of the family. I don't think that that's in their best interest going forward. However, there is a recommendation by a court-ordered psychologist, Dr. Ciaramella. The recommendation is for [the respondent] to engage in therapy. And the purpose of [him] engaging in therapy is so that he can understand from the children's perspective, how they see things. Right or wrong. I think it's important that the [respondent] validate how the children see things and understand how they see things

and come to terms with how the children see things and how to deal with that going forward. I will say that with the children, that a lot of their concern, while it may be couched . . . they use the word that they don't feel safe. I think a lot of it has to do with their disappointment that [the respondent] does not understand their perspective in certain issues and does not valid[ate] their concerns." Thereafter, the guardian ad litem opined that "what should happen at the very least, is that there be . . . some type of indication from a properly credentialed therapist . . . [that] [h]as engaged [the respondent] in services, and [that he] has completed or substantially completed the recommendations of Dr. Ciaramella. I think once that's done, as soon as possible thereafter, that the department [should] look at and engage in ways to commence visitation between [him] and the children." Additionally, on direct examination by the attorney for the petitioner, the children's guardian ad litem testified that visitation between the children and the respondent "should be suspended right now until such time as [the respondent is] able to produce documentation from a properly credentialed licensed therapist." Although the guardian ad litem recognized that the decision regarding visitation should not "be solely within the children's say so," he emphasized that the court "[has] to take into account these two children's mental health needs in deciding what's in their best interests."

In its memorandum of decision dated December 22, 2021, the court ordered that the respondent "may have therapeutic visits with [A] and/or [B] after he has provided documentation to the children's therapists evidencing that he has engaged in and has made significant progress in the clinical work identified by Dr. Ciaramella and the children's therapists as necessary, before therapeutic visits with him can begin. Therapeutic visits

shall be conducted with clinical oversight and as recommended by [the children's] therapists including time, place, frequency, and duration."[18] "It is well established that, [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . It is the

[18] On appeal, the respondent repeatedly argues that "no evidence was ever presented that the first court-ordered evaluation with its recommendation from 2020 [was] ever provided to any of the service providers, nor was there any evidence nor testimony that the children's therapists would be able to work with the children in addressing the issues, nor was there any evidence nor testimony that the [respondent's] therapist would be able to utilize these recommendations."

We first address the respondent's argument that no evidence was ever presented that Dr. Ciaramella's reports were in fact provided to the service providers in this case. The petitioner argues that the respondent's speculations that the reports were not sent has "no place in appellate review." See *In re Samantha S.*, 120 Conn. App. 755, 759, 994 A.2d 259 (2010), appeal dismissed, 300 Conn. 586, 15 A.3d 1062 (2011). Second, the petitioner argues that it filed a motion to release Dr. Ciaramella's first report to the clinicians involved with the children, the respondent, and Katherine, and that motion was granted on November 13, 2020. Additionally, the petitioner notes that it filed another motion to release both Dr. Ciaramella's original and updated evaluation to the clinicians involved with the children, the respondent, and Katherine, which the court granted by consent on July 26, 2021. Accordingly, the petitioner contends that, "[g]iven that the department sought and obtained at different times two orders allowing the release of Dr. Ciaramella's reports to [the respondent's] clinician, it is reasonable to infer that the reports were in fact sent to the clinician." We agree with the petitioner that the inference of receipt by the respondent's clinician is reasonable.

We next address the respondent's argument that no evidence was presented that the service providers would be able to use the information from Dr. Ciaramella's reports. The respondent does not explain why he believes that the service providers would be unable to use Dr. Ciaramella's reports, nor has he provided any evidence that supports his contention, and, thus, his argument is pure speculation. See *Konefal* v. *Konefal*, 107 Conn. App. 354, 360, 945 A.2d 484 ("'[s]peculation and conjecture . . . have no place in appellate review' "), cert. denied, 288 Conn. 902, 952 A.2d 810 (2008).

quintessential function of the fact finder to reject or accept certain evidence, and to believe or disbelieve any expert testimony. . . . The trier may accept or reject, in whole or in part, the testimony of an expert offered by one party or the other." (Internal quotation marks omitted.) *In re G. H.*, 216 Conn. App. 671, 688, 286 A.3d 944 (2022). The court clearly credited Dr. Ciaramella's testimony, which thoroughly was supported by the testimony of Shuptar and the children's guardian ad litem, and the court did not abuse its discretion in relying on that evidence in making its visitation orders.[19]

Furthermore, the court recognized that A and B have an array of mental health, medical, and developmental needs, which require significant caregiver support. Additionally, the court emphasized that the children are "very verbal and expressive" and report that "they no longer want visitation or any contact with [the respondent] or with the paternal side of the family." See *In re Kadon M.*, supra, 194 Conn. App. 108–109 ("[i]t is the province of the trial court to determine the best interests of the minor child . . . including . . . evidence of the child's wishes").

The children's preference was not the only factor the court considered in formulating its orders. See *In re Paulo T.*, 213 Conn. App. 858, 887 n.17, 279 A.3d 766 ("[w]e recognize that, [a]lthough the child's wish is one

[19] In his principal brief, the respondent argues that the court's decision is neither "legally nor logically correct" because Shuptar "did not have all the information that would have been helpful in assessing and setting up a proper therapeutic visitation plan" and "Dr. Ciaramella testified that there was triangulation leading to parental alienation and that the custodial parent had an advantage over the non-custodial parent in being able to influence the children." We repeat the well settled principle that "[i]t is within the province of the trial court . . . to weigh the evidence presented and determine the credibility and effect to be given the evidence." *Brown* v. *Brown*, 132 Conn. App. 30, 40, 31 A.3d 55 (2011). Accordingly, and for the reasons set forth previously in this opinion, we are unpersuaded by the respondent's argument.

factor for the court to consider in making [its] decision, it is certainly not the only one" (internal quotation marks omitted)), cert. granted, 344 Conn. 904, 281 A.3d 460 (2022). The court acknowledged that the relationship between the respondent and Katherine "has been and continues to be acrimonious and toxic and has adversely affected their children" and that the parents "have involved their children in their continuing very contentious relationship." After acknowledging the difficult relationship between the parents, the court recognized that Katherine has taken significant steps to parent effectively, that she "has consistently participated in many recommended services, has made significant progress, and is doing well." Notably, the court found that "there has been significant improvement in [Katherine's] ability to meet the needs of the children, and the children are doing well and flourishing in her home."

However, turning to the respondent's capacity to meet the needs of his children, the court relied on and "[credited] Dr. Ciaramella's expert testimony that [the respondent] lacks insight into his behaviors and how his actions and behaviors impact his children." See *In re G. H.*, supra, 216 Conn. App. 688 ("[i]t is the quintessential function of the fact finder . . . to believe or disbelieve any expert testimony"). In addition, the court found that the respondent "has refused to provide [the department] with any documentation or releases for [the department] to speak with his therapist and/or other providers to ascertain whether he has engaged in recommended services and has made significant progress." Therefore, in its memorandum of decision dated December 22, 2021, the court properly modified the visitation orders to permit the respondent therapeutic visitation on the condition that he comply with the recommended orders to best serve the children's " 'interest[s] in sustained growth, development, well-being, and in the con-

tinuity and stability of [their] environment.' "[20] *In re Alexander C.*, supra, 60 Conn. App. 559.

On March 22, 2022, the court issued a second memorandum of decision in which it repeated, in its orders, that the respondent's "visitation with [A] and [B] may resume when [the respondent] has complied with the conditions set forth in the court's decision, dated December [22], 2021, and he has demonstrated substantial progress on the clinical issues identified by the court-appointed psychologist." As relevant to the present appeal, prior to setting forth its orders, the court stated that the respondent "has failed to present evidence he has complied with [the December 21, 2021] order, or the court-ordered specific steps, or with recommendations contained in the psychological evaluations dated March 18, 2020, and July 21, 2021." Additionally, the court found that the children's guardian ad litem "credibly and convincingly testified that [A] and [B] still do not want to visit or otherwise have contact with [the respondent]." Finally, the court ordered that "[t]he Juvenile Court does not retain jurisdiction over

[20] In his brief, the respondent asserts that "[t]he guardian ad litem and everyone agreed that it is in the best interests of the children that they should have a healthy relationship with the [respondent] and other paternal family members. However, with the present court orders, that will not [be] possible."

We acknowledge that there was testimony from the children's guardian ad litem that it would be in the children's best interests to have a "healthy relationship" with the respondent and their paternal family. Such an aspirational goal, however, does not detract from the overwhelming testimony that it would not be in the children's *present* best interests to have visitation with the respondent without evidence that he successfully pursued the recommendations of the court-appointed psychologist. See *In re Joshua S.*, 260 Conn. 182, 209–10, 796 A.2d 1141 (2002) ("the [trial] court was bound to consider the child's *present* best interests" (emphasis in original)); see also *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 664, 420 A.2d 875 (1979). Therefore, we disagree with the respondent's contention that the court's modification has made it "not . . . possible" for the children to have a "healthy" relationship with the respondent and their paternal family.

this matter. These orders are subject to modification by the Family Court."[21]

Therefore, because the respondent failed to present the court with any evidence that, between the issuance of the court's order on December 21, 2021, and the conclusion of the evidentiary hearing on March 14, 2022, he had "engaged in and . . . made significant progress in the clinical work identified by Dr. Ciaramella and the children's therapists," and for the reasons set forth previously in this opinion, we conclude that the trial court did not abuse its discretion in modifying the visitation orders.

The respondent additionally argues that several of the court's factual findings were clearly erroneous and that "[t]he trial court's decisions here are neither 'legally nor logically correct.' " At the outset, we note that "[t]o the extent that the [respondent] claims that the trial court should have credited certain evidence over other evidence that the court did credit, it is well settled that such matters are exclusively within the province of the trial court." (Internal quotation marks omitted.) *Weaver* v. *Sena*, 199 Conn. App. 852, 860, 238 A.3d 103 (2020).

Specifically, we are unpersuaded by the respondent's argument that the court's findings "that [he] had not presented any evidence of compliance with services and progress" and that he "was not in therapy" were clearly erroneous. In support of this argument, the respondent points to three documents that he submitted

[21] We emphasize that, following the issuance of this opinion, in which we affirm the judgments of the court with respect to its visitation orders, should the respondent wish to demonstrate compliance with and, therefore, modify those orders, he may file a postjudgment motion in the dissolution matter. In its consideration of any motion to modify visitation, the family court will consider the March 22, 2022 orders as the operative orders regarding visitation and related matters.

as evidence[22] and the testimony of LaSelle, who "testified how the [respondent] became more engaged with treatment for [B] and that he would take the initiative to address concerns regarding [B]." The evidence on which the respondent relies pertains to events, reports, and services provided prior to the children's refusal to visit with the respondent. The court explicitly set this temporal marker by stating that, "[i]n January, 2021, [the children] were both happy to have an in-person visit with their father and wanted visits with him to continue . . . [but] [s]hortly thereafter, they no longer wanted visitation or any contact with him." Moreover, the respondent confuses the specifications of the court's order, requiring him to provide evidence "that he has engaged in and has made significant progress *in the clinical work identified by Dr. Ciaramella and the children's therapists*," with general evidence that he has engaged in therapy and successfully completed one or more parenting programs. (Emphasis added.) Accordingly, the court's finding that the respondent "has failed to present evidence [that] he has complied with [its] order" is not clearly erroneous.

Last, the respondent argues that the trial court ignored the relationship that existed between the children and their paternal family "in reaching its conclusions and orders to the detriment of the [paternal] family and children." To the extent that the respondent is

[22] The three documents that the respondent refers to are: (1) a letter dated August 23, 2016, from an investigative social worker who reported that "there were no safety concerns for the children to go to [the respondent's] home for visits"; (2) a "report of his discharge from the Circle of Security Parenting Program dated March 5, 2020, which noted that the [respondent] had a strength in a tight-knit family and that he tries to communicate with his children when they're in his custody"; and (3) "a letter dated May 8, 2020, from social worker Margaret Greene informing the [respondent] that the [department] would be closing [a separate and unrelated] case [involving C] because the [respondent] had successfully achieved the case plan goals and objectives to ensure [C's] safety."

arguing that the court failed to consider the relationship between the children and the paternal family as part of its best interest analysis, the record belies the respondent's contention.[23] The court explicitly stated that the children "had a good relationship with their [paternal grandparents]" and that "[t]hey loved their [paternal grandparents] and [B] had a special bond with her [paternal grandmother]." The court then recognized that the children "have come to believe that the [paternal grandparents] cannot keep appropriate boundaries with [the respondent] and often justify his behaviors and interactions . . . [and] [t]hey believe that the [paternal grandparents] cannot and will not protect them from him." Thereafter, the court stated that the children "no longer desire to have visitation or other contact with their paternal side of the family." The court's conclusion is supported by the testimony of the children's guardian ad litem who testified on November 15, 2021, that "the children did express that they no longer desired contact with the paternal family." See *Cottrell* v. *Cottrell*, 133 Conn. App. 52, 65, 33 A.3d 839 (2012) ("[i]t is axiomatic that the trial court is free to accept or reject, in whole or in part, the evidence presented by any witness" (internal quotation marks omitted)). Accordingly, we reject the respondent's contention that the court ignored the relationship that existed between the children and the paternal family because the court considered the relationship when modifying its visitation orders with respect to the respondent.

[23] We note that, on November 15, 2021, during the pendency of the proceedings at issue on appeal, the paternal grandmother filed a motion to intervene in which she set forth that she wanted "to be heard concerning visitation with the [children]." That same day, the court orally heard the paternal grandmother's motion, to which the petitioner, Katherine, and the attorney for the minor children objected. The court denied without prejudice the paternal grandmother's motion to intervene for the purpose of having visitation. The court's decision with respect to the paternal grandmother's motion is not at issue in this appeal.

For the foregoing reasons, we conclude that the court did not abuse its discretion in modifying the visitation orders because its factual findings were not clearly erroneous and it properly credited evidence in the record to support its determinations regarding the best interests of the children.

The judgments are affirmed.

In this opinion the other judges concurred.

---

9 PETTIPAUG, LLC, ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE BOROUGH OF FENWICK
(AC 45200)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiffs, two entities that own real property in the borough of Fenwick, appealed to the Superior Court from the decision of the defendant planning and zoning commission approving an amendment to Fenwick's zoning regulations that would allow property owners in Fenwick to rent their premises subject to certain conditions. The defendant filed a motion to dismiss, arguing that the complaint should be dismissed for lack of subject matter jurisdiction because, inter alia, the appeal was untimely, as it had not been filed in accordance with the statute (§ 8-8 (b)) that requires that an appeal from a decision of a zoning board or commission be commenced within fifteen days from the date that notice of the decision was published. The plaintiffs objected, claiming that, because the notice was defective in that it failed to comply with the substantial circulation requirement in the notice statute (§ 8-3 (d)), the fifteen day time period in § 8-8 (b) did not apply and, instead, § 8-8 (r) applied, which provides for a one year appeal period when a defendant fails to comply with certain statutory requirements regarding notice. The trial court denied the motion to dismiss, finding that the newspaper in which notice was published, The Middletown Press, did not have "substantial circulation" in Fenwick and, accordingly, the plaintiffs' appeal to the Superior Court was timely pursuant to § 8-8 (r). Thereafter, the plaintiffs filed a motion for summary judgment arguing that, because the court, in its decision denying the motion to dismiss, determined that notice

of the adoption of the zoning amendment was not published in accordance with the requirements of § 8-3 (d), they were entitled to a declaration that the zoning amendment was unlawfully enacted and was never in effect. In its objection to the motion for summary judgment, the defendant acknowledged that the court's denial of the motion to dismiss disposed of the same substantive issue raised by the plaintiffs in their motion for summary judgment but contended that the court could reconsider its determination of that issue. The defendant further contended that the plaintiffs failed to prove that The Middletown Press lacked substantial circulation in Fenwick. The trial court, having found that, because the defendant essentially set forth the same arguments advanced in its motion to dismiss, the defendant's objection to the motion for summary judgment was akin to a motion for reconsideration of the court's decision on the motion to dismiss, granted the plaintiffs' motion for summary judgment. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on its claim that the trial court improperly granted the plaintiffs' motion for summary judgment because the defendant's publication of the amendment to Fenwick's zoning regulations in The Middletown Press satisfied the "substantial circulation" requirement of § 8-3 (d): the phrase "substantial circulation" is not ambiguous, it requires that there be considerable or ample dissemination of a publication to readers, there was evidence that no Fenwick resident subscribed to The Middletown Press, and the online availability of The Middletown Press did not constitute substantial circulation because, according to common usage, substantial circulation requires more than general online availability, it requires, inter alia, substantial dissemination or distribution of printed material among readers and/or substantial distribution of online information to readers, and the defendant failed to present any evidence of online viewing numbers for The Middletown Press; furthermore, there was nothing in § 8-3 (d) or our case law interpreting it to suggest that the fact that The Middletown Press had been used by Fenwick officials in the past to publish notices and that some Fenwick residents may be aware of such past use satisfied the notice requirement; additionally, although compliance with the substantial circulation requirement in § 8-3 (d) by commissions in small boroughs may be difficult, this court could not conclude that it necessarily led to an absurd result or was unworkable.

2. The defendant could not prevail on its claim that the trial court improperly shifted the burden of proof to the defendant with regard to whether The Middletown Press had a substantial circulation in Fenwick: the trial court considered the evidence presented by the plaintiffs that there were no subscribers to The Middletown Press in Fenwick to be sufficient to demonstrate a lack of substantial circulation, the burden was on the defendant to create a genuine issue of material fact regarding the issue by offering facts to challenge those offered by the plaintiffs, and the

evidence presented by the defendant regarding, inter alia, the online availability of The Middletown Press did not change the trial court's determination by raising a genuine issue of material fact so as to preclude summary judgment.

Argued November 10, 2022—officially released February 28, 2023

Procedural History

Appeal from the decision of the defendant approving an amendment to its zoning regulations, and for other relief, brought to the Superior Court in the judicial district of Middlesex and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the court, *Baio*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Baio*, *J.*, granted the plaintiffs' motion for summary judgment and rendered judgment thereon, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Michael A. Zizka, for the appellant (defendant).

Richard P. Weinstein, with whom, on the brief, was *Sarah Black Lingenheld*, for the appellees (plaintiffs).

Opinion

DiPENTIMA, J. In this certified zoning appeal, we consider whether a zoning body has complied with the statutory notice requirement in General Statutes § 8-3 (d)[1] if it published notice in a newspaper that had no subscribers in the relevant municipality but was available on the Internet. The defendant, the Planning and Zoning Commission of the Borough of Fenwick, appeals

[1] General Statutes § 8-3 (d) provides in relevant part: "Zoning regulations . . . or changes therein shall become effective at such time as is fixed by the zoning commission, provided a copy of such regulation . . . or change shall be filed in the office of the . . . borough clerk . . . and notice of the decision of such commission shall have been published in a newspaper having a substantial circulation in the municipality before such effective date. . . ."

from the summary judgment of the Superior Court rendered in favor of the plaintiffs, 9 Pettipaug, LLC, and Eniotna, LLP,[2] holding that the defendant's zoning amendment was invalid because the defendant failed to comply with the applicable statutory notice requirement. On appeal, the defendant claims that the court improperly (1) determined that the defendant failed to satisfy the "substantial circulation" component of the notice requirement in § 8-3 (d), and (2) shifted the burden of proof to the defendant. We affirm the judgment of the Superior Court.

The following stipulated facts, as recounted by the court in its memorandum of decision on the plaintiffs' motion for summary judgment, and procedural history are relevant.[3] Fenwick is a legally established borough of the town of Old Saybrook; it has its own planning and zoning commission and zoning regulations. By way of a July 20, 2019 decision, the defendant approved an amendment to Fenwick's zoning regulations, which became effective October 1, 2019. The amendment permits property owners in Fenwick to rent their premises for up to ten times per year for a minimum of two week intervals. Notice of the July 20, 2019 decision was published in The Middletown Press on July 25, 2019.

On October 25, 2019, the plaintiffs filed a two count complaint in the Superior Court appealing the July 20, 2019 decision of the defendant. Count one, which challenged the adoption of the zoning amendment, was withdrawn prior to judgment. Count two alleged that the amendment had not been enacted lawfully because the defendant's publication of notice of the zoning amendment failed to comply with § 8-3 (d), which requires that notice of zoning amendments be published

[2] 9 Pettipaug, LLC, and Eniotna, LLP, are business entities that own houses in the borough of Fenwick.

[3] On September 24, 2020, the parties filed a signed joint stipulation of facts.

in a newspaper having "substantial circulation" in Fenwick. The plaintiffs sought a declaratory judgment that the short-term rental amendment to Fenwick's zoning regulations was enacted unlawfully and therefore was not in effect. On February 3, 2020, the defendant filed a motion to dismiss and an accompanying memorandum of law, arguing that the complaint should be dismissed for lack of subject matter jurisdiction because, inter alia, the appeal was untimely, as it had not been filed in accordance with General Statutes § 8-8 (b), which requires that an appeal from a decision of a zoning board or commission be commenced within fifteen days from the date that notice of the decision was published as required by the General Statutes.[4] In their objection to the motion to dismiss, the plaintiffs argued that the appeal was timely. Specifically, they claimed that, because the notice was defective in that it failed to comply with the substantial circulation requirement in § 8-3 (d), the fifteen day time period in § 8-8 (b) did not apply but, rather, § 8-8 (r) applied, which provides for a one year appeal period when a defendant fails to comply with certain statutory requirements regarding notice.

On February 16, 2021, the court, *Baio*, *J.*, issued a memorandum of decision denying the motion to dismiss. The court stated that the key issue in determining whether the appeal was untimely was whether the defendant's publication of notice complied with the requirement in § 8-3 (d) that the newspaper in which notice was published, The Middletown Press, has "substantial circulation" in Fenwick. The court noted that,

[4] General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a board . . . may take an appeal . . . . The appeal shall be commenced by service of process . . . within fifteen days from the date that notice of the decision was published as required by the general statutes. . . ."

in his affidavit, Michael DeLuca,[5] the president and publisher of Hearst Connecticut Media Group, which publishes The Middletown Press, averred that there are nine locations in Old Saybrook where individual copies of The Middletown Press are available for purchase and the circulation of The Middletown Press in Old Saybrook is 0.53 percent, but no households in Fenwick subscribe to The Middletown Press. The court noted that, "[c]ompared to Fenwick's eighty-three households, there are 4354 households in Old Saybrook" and that "[t]here were no facts presented to support whether any of the single copy sales in Old Saybrook were made to Fenwick residents." The court concluded that publication did not comply with the plain language of § 8-3 (d), and, accordingly, the plaintiffs' appeal to the Superior Court was timely pursuant to § 8-8 (r).

In their single count amended complaint, filed on March 4, 2021, the plaintiffs continued to maintain, as they had done in count two of the original complaint, that notice by publication in The Middletown Press did not satisfy the "substantial circulation" requirement in § 8-3 (d). The plaintiffs filed a motion for summary judgment arguing that, because the court in its decision denying the motion to dismiss determined that notice of the adoption of the zoning amendment was not published in accordance with the requirements of § 8-3 (d), they were entitled to a declaration that the zoning amendment was unlawfully enacted and was never in effect. In its objection to the motion for summary judgment, the defendant, while acknowledging that the court's denial of the motion to dismiss disposed of the same substantive issue raised by the plaintiffs in their

[5] The plaintiffs attached DeLuca's affidavit to their memorandum in opposition to the defendant's motion to dismiss. The Hearst Connecticut Media Group is the operating unit of newspapers that are published by Hearst Media Services Connecticut, LLC (Hearst Connecticut), which is a wholly owned indirect subsidiary of the Hearst Corporation. Hearst Connecticut publishes eight daily newspapers, including The Middletown Press.

motion for summary judgment, contended that the court could reconsider its determination of that issue. The defendant further contended that the plaintiffs failed to prove that The Middletown Press lacked substantial circulation in Fenwick.

In a July 30, 2021 memorandum of decision, the court, *Baio*, *J.*, granted the plaintiffs' motion for summary judgment. In its decision, the court stated: "Here, the plaintiffs argue that because the motion to dismiss, addressing the same issue of the validity of the notice, was denied, there is no longer an issue of fact, as it has been determined that the amendment was not published in a proper publication having substantial circulation. Having not been published properly and in compliance with the statute, the plaintiffs argue [that] the amendment is not valid. The defendant, in opposition, acknowledges [that] the decision on the motion to dismiss is contrary to its position but submits that the court can reconsider its decision. . . . The defendant essentially sets forth the same arguments advanced in its motion to dismiss. Hence, as the plaintiffs correctly point out, the defendant's objection to the motion for summary judgment is akin to a motion for reconsideration of the court's decision on the motion to dismiss (the actual motion for reconsideration having been withdrawn).

"The defendant is correct that the court has already addressed this issue in deciding the motion to dismiss. In addressing that motion, the court set forth the rationale, facts and law upon which the decision was based. The defendant submits that the court could 'choose to reach a contrary conclusion on an issue of law previously decided if the judge is convinced that the prior ruling was wrong or following it would work an injustice.' . . . Such is not the case here. The court's decision on the motion to dismiss, decided just months ago and which is still the decision of this court, is the law

of the case." (Citations omitted.) The court, in referencing the law of the case doctrine,[6] based its decision granting the plaintiffs' motion for summary judgment on its prior determination that notice was defective, which was made in connection with its denial of the defendant's motion to dismiss. The defendant filed a petition for certification to appeal to this court. The petition was granted, and this appeal followed.

At the outset, we note that our analysis of the claims presented on appeal is complicated by the unusual procedural history of the present case and the fact that the court, in granting the plaintiffs' motion for summary judgment, relied on its decision on the motion to dismiss. "A trial court applies different principles and a different analysis when ruling on a motion to dismiss as opposed to a motion for summary judgment." *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 339, 85 A.3d 53 (2014). Nevertheless, in the present case, the court had before it the same evidence when ruling on both motions. Specifically, in connection with the motion to dismiss, the parties had submitted a stipulation of facts as well as affidavits concerning, inter alia, the defendant's jurisdictional argument that the appeal was untimely and the plaintiffs' counterargument that the appeal was timely because the defendant's publication of notice was defective. Moreover, the affidavits submitted did not contain conflicting facts, and the court had

[6] "The law of the case doctrine provides that [w]here a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge is not bound to follow the decisions of another judge made at an earlier stage of the proceedings, and if the same point is again raised he has the same right to reconsider the question as if he had himself made the original decision. . . . [O]ne judge may, in a proper case, vacate, modify, or depart from an interlocutory order or ruling of another judge in the same case, upon a question of law." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Henderson* v. *Lagoudis*, 148 Conn. App. 330, 338–39, 85 A.3d 53 (2014).

before it one set of facts regarding the number of subscribers to The Middletown Press in Fenwick, as well as undisputed information about online access to notices in that newspaper. Accordingly, despite the differing standards that apply to motions to dismiss and motions for summary judgment, because the court had before it the same evidence when deciding both motions, its reliance on its prior determination made in connection with the motion to dismiss in granting the motion for summary judgment, although adding an additional layer of complexity to our analysis of the defendant's claims on appeal, does not change the outcome.

On appeal from a court's decision granting a motion for summary judgment, "we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant [a moving party's] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Williams* v. *Housing Authority*, 159 Conn. App. 679, 689, 124 A.3d 537 (2015), aff'd, 327 Conn. 338, 174 A.3d 137 (2017); see also Practice Book § 17-49. Against this backdrop, we turn to the defendant's claims.

I

The defendant claims that the court improperly granted the plaintiffs' motion for summary judgment because the defendant's publication of the amendment to Fenwick's zoning regulations in The Middletown Press satisfied the "substantial circulation" requirement of § 8-3 (d). The defendant makes a number of arguments, some of which are in the alternative, in support of its claim. It contends that (1) the meaning of "substantial circulation" in § 8-3 (d) is not plain and unambiguous and thus other evidence of legislative intent

must be considered, (2) the legislative intent of notice statutes is for constructive notice, not actual notice, (3) the publication of Fenwick's legal notices in The Middletown Press provided adequate constructive notice of Fenwick's legal actions, (4) dictionaries and law from other states support the idea that a newspaper that is readily available for purchase or review in an area is one of "general circulation" in that area, (5) the phrase "substantial circulation" should not be deemed to require a greater level of distribution than the phrase "general circulation," (6) evidence of subscriptions was unnecessary to prove "substantial circulation," (7) publication in The Middletown Press satisfied the statutory purpose of the "substantial circulation" requirement in § 8-3 (d), to provide constructive notice to as much of the populace as possible, and (8) the trial court's interpretation of "substantial circulation" creates impractical and unworkable results.

We begin by addressing the defendant's first argument, namely, that the phrase "substantial circulation" is ambiguous. The meaning of the term "substantial circulation" in § 8-3 (d) is a question of statutory interpretation and, therefore, is a question of law over which we exercise plenary review. See, e.g., *Athena Holdings, LLC* v. *Marcus*, 160 Conn. App. 470, 475, 125 A.3d 290, cert. denied, 320 Conn. 908, 128 A.3d 952 (2015) (proper construction and meaning to be afforded to statutory language is question of law over which we exercise plenary review). "Whether a newspaper's circulation is substantial is a factual determination . . . ." *Fisette* v. *DiPietro*, 28 Conn. App. 379, 383, 611 A.2d 417 (1992). The relevant inquiry regarding the motion for summary judgment, then, is what constitutes "substantial circulation" and whether a genuine issue of material fact exists as to whether The Middletown Press had substantial circulation in Fenwick.

Section 8-3 (d) provides in relevant part: "Zoning regulations . . . or changes therein shall become effective at such time as is fixed by the zoning commission, provided a copy of such regulation . . . or change shall be filed in the office of the . . . borough clerk . . . and notice of the decision of such commission shall have been published in a newspaper having a substantial circulation in the municipality before such effective date. . . ."[7] The question presented concerns the requirement in § 8-3 (d) of publication "in a newspaper having a substantial circulation in the municipality . . . ." Section 8-3 (d) does not define "substantial circulation" and, "[i]n the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 322, 258 A.3d 1 (2021); see *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384–85 (relying on dictionary definitions to define "substantial circulation," noting that, "[b]ecause our courts have not determined what constitutes substantial circulation, we look to decisions of other courts as well as to dictionaries in order to determine commonly accepted usage"); see also General Statutes §§ 1-1 (a) and 1-2z.[8]

[7] The parties stipulated that Fenwick has been a legally established borough since the 1800s. There is no dispute that Fenwick is a distinct municipality from Old Saybrook.

[8] General Statutes § 1-1 (a) provides: "In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly."

General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and

In *Fisette*, this court analyzed the ordinary dictionary meaning of "substantial circulation" in the context of a prior revision of § 8-3 (d). The court examined the provision of notice regarding changes in zoning districts and regulations in the 1991 revision of § 8-3 (a), "which authorizes notice by publication in a newspaper having a substantial circulation in the municipality." *Fisette* v. *DiPietro*, supra, 28 Conn. App. 383. In determining commonly accepted usage, this court stated that "Webster New World Dictionary (2d College Ed.) gives as one definition of 'substantial' that it is something 'considerable' or 'ample.' Webster, Third New International Dictionary defines it as 'considerable in amount, value, or worth.' Similarly, in common legal usage, the term 'substantial' has been defined as 'of real worth and importance.' Black's Law Dictionary (6th Ed.). In any event, the term 'substantial circulation' is relative. See *In re Carson Bulletin*, [85 Cal. App. 3d 785, 795, 149 Cal. Rptr. 764 (1978)] (paid circulation to 12 people in a city of 79,000 not 'substantial')." *Fisette* v. *DiPietro*, supra, 384; see id., 384–85 (affirming trial court's finding that New Britain Herald had substantial circulation in Rocky Hill because it circulated to 16 percent of occupied households in Rocky Hill, indexed Rocky Hill news on its front page, reported news of town government meetings in Rocky Hill news sections, and printed public notices on same page).

The defendant's argument focuses on the word "circulation," which is neither defined in the statute nor specifically addressed in *Fisette*, and so we look to dictionary definitions to ascertain its common usage. See *Meriden* v. *Freedom of Information Commission*, supra, 338 Conn. 322; see also General Statutes § 1-1 (a). Merriam-Webster defines "circulation" as "the extent of dissemination: such as . . . the average number of

does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

copies of a publication sold over a given period . . . .'' Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/circulation (last visited February 9, 2023). The Free Dictionary defines ''circulation'' as ''[d]issemination of printed material, especially copies of newspapers or magazines, among readers. . . . The number of copies of a publication sold or distributed.'' The Free Dictionary, available at http://www.thefreedictionary.com/circulation (last visited February 9, 2023). The American Heritage Dictionary, Second College Edition, defines ''circulation'' as ''[t]he distribution of printed material, esp. copies of newspapers or magazines, among readers. . . . The number of copies of a publication sold or distributed.'' American Heritage Dictionary (2d College Ed. 1985) p. 275. Cambridge Dictionary defines ''circulation'' as ''the number of people that a newspaper or magazine is regularly sold to'' and states, ''[i]f something is in circulation, it is available . . . . If something is out of circulation, it is not available . . . .'' Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/circulation (last visited February 9, 2023). In sum, the definitions of ''circulation'' that relate to newspapers cite, as examples of circulation, the number of subscriptions or copies sold. The overriding consideration is the extent of dissemination of the publication to readers. We conclude, on the basis of *Fisette* and the common usage of the term ''circulation,'' that the phrase ''substantial circulation'' in § 8-3 (d) is unambiguous and evidence of legislative intent need not be considered. The term ''substantial circulation'' in § 8-3 (d) requires considerable or ample dissemination of the publication to readers. As stated in *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384, the term is relative.

Regarding the defendant's second and third arguments, which pertain to constructive notice, we note that the defendant is correct that constructive notice,

rather than actual notice received by the plaintiffs, is required. See id., 383. The fact that constructive notice is required, however, does not alter the language of § 8-3 (d).

Concerning its fourth and fifth arguments, the defendant contends that a newspaper that is readily available for purchase or review in an area is one of "general circulation" in that area and that "substantial circulation" does not require a greater level of distribution than "general circulation" because nothing in the General Statutes indicates that the legislature intended the two phrases to be treated differently.

We disagree. If the legislature meant to say "general circulation" in § 8-3 (d) it would have done so, as it did in § 8-3 (g) (1) ("commission shall publish notice of the approval or denial of site plans in a newspaper having a general circulation in the municipality"). The legislature's use of both "general circulation" and "substantial circulation" in the same statute indicates an intent for the terms to have different meanings. See General Statutes § 8-3 (d) and (g) (1). "[T]he use of . . . different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings . . . ." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008).

As to the defendant's sixth argument, that evidence of subscriptions was unnecessary to prove "substantial circulation," the court in the present case stated that it took "into account evidence submitted as it relates to 'circulation,' albeit limited, including not just subscriptions, but individual online sales and access. Having done so, the court [found] that publication did not

take place, as required, in a newspaper of substantial circulation."[9]

At oral argument before this court, the defendant clarified that "substantial circulation" should be analyzed not under a "subscription standard," which solely focuses on the number of subscriptions but, rather, according to an "availability standard" in which circulation is defined as "availability." The law does not, however, preclude the court from considering evidence pertaining to subscriptions. See *Fisette* v. *DiPietro*, supra, 28 Conn. App. 383–85 (affirming trial court's reliance on number of subscriptions to determine whether newspaper had substantial circulation). The defendant further contends that, "[i]n the trial court, the plaintiffs posed only one basic claim regarding The Middletown Press: if there are no subscribers in Fenwick, the paper cannot be one having a substantial circulation in the borough. The plaintiffs' argument is based on the following non sequitur: (1) several Connecticut cases involving 'substantial circulation' were resolved by counting subscriptions; therefore (2) at least some subscriptions must be required. However, a court's finding that subscription data was sufficient does not mean that it was necessary to prove substantial circulation." (Emphasis omitted.) The defendant further argues that "a newspaper that is readily available to residents of a municipality and is well known for its use for public notices provides constructive notice of its contents and thereby fully satisfies the statutory goal. Whether or not residents choose to subscribe should not be a factor in the analysis." The plaintiffs counter that "[t]here can be no dispute that, based on the evidence submitted

[9] The defendant submitted affidavits from Charles Chadwick, the chairman of the defendant, and Marilyn Ozols, the zoning enforcement officer of Fenwick, averring that The Middletown Press was available online. As stated by the court regarding online access to notices in The Middletown Press, "[n]o evidence relating to the viewing numbers was provided."

by the parties, there are no subscribers in Fenwick to The Middletown Press. Under such circumstances, The Middletown Press cannot be a newspaper having a substantial circulation in Fenwick pursuant to the plain language of the statute."

Regarding the issue of "substantial circulation," the court had before it: (1) DeLuca's affidavit in which he stated that The Middletown Press has zero subscribers in Fenwick; (2) an affidavit of Charles Chadwick, the chairman of the defendant, in which he stated that it was his belief that a substantial portion of Fenwick residents are aware that Fenwick agencies use The Middletown Press for public notices and that such notices are available online without a subscription;[10] and (3) an affidavit of Marilyn Ozols,[11] the zoning enforcement officer of Fenwick, who stated that the legal notices of the defendant's public hearings and decisions historically have been published in The Middletown Press.[12]

The defendant contends that a newspaper may be distributed or disseminated through online availability and that such online availability of The Middletown Press in the present case constitutes substantial circulation. This argument discounts that virtually every newspaper with an accessible online presence could be considered generally available in any municipality with

[10] The defendant attached to its reply memorandum to the plaintiffs' objection to its motion to dismiss the affidavit of Chadwick, in which he stated that, because the residents of "56.8 percent of the homes within [Fenwick]" have served on Fenwick agencies and because the legal notices of all [Fenwick] agencies have been published in The Middletown Press, it was his "belief that a substantial portion of the population of [Fenwick] is aware that The Middletown Press is the newspaper [Fenwick] uses for public notices."

[11] Ozols' affidavit was attached to the defendant's reply to the plaintiffs' objection to its motion to dismiss.

[12] The court also had before it the parties' stipulation of facts, affidavits of members of the plaintiffs regarding ownership of property in Fenwick, an affidavit concerning the circulation of the Hartford Courant, and a letter regarding the circulation in Fenwick of, inter alia, Shore Publishing, LLC.

Internet access. "Substantial circulation," according to common usage, requires more than general online availability: it requires, for example, substantial dissemination or distribution of printed material among readers and/or substantial distribution of online information to readers. The court noted that the defendant did not present any evidence of online viewing numbers of The Middletown Press.

As we previously stated, the phrase "substantial circulation" in § 8-3 (d) requires considerable or ample dissemination of the publication to readers. In denying the motion to dismiss, the court noted that it took into account the limited evidence relating to circulation, including subscriptions, and individual online sales and access, and concluded that publication did not take place, as required, in a newspaper of substantial circulation. The court further stated that the defendant did not present any evidence of online viewing numbers of The Middletown Press. As noted previously, the court had before it the same evidence in denying the motion to dismiss as it did in granting the plaintiffs' motion for summary judgment. The stipulated facts and affidavits presented by the parties did not create any genuine issues of material fact. In his affidavit, DeLuca stated that "[n]o households in the Borough of Fenwick, which I understand to be a community within Old Saybrook that serves as a summer home for many and has a population of approximately 52 persons, subscribe to The Middletown Press." The defendant offered no evidence to contradict this. Although the term "substantial circulation" in § 8-3 (d) is relative; see *Fisette* v. *DiPietro*, supra, 28 Conn. App. 384; we agree with the court that there was no genuine issue of material fact that the publication of notice in The Middletown Press did not satisfy that requirement because no Fenwick residents subscribed to The Middletown Press, and evidence of online availability did not alter that determination.

In its seventh argument, the defendant contends that Fenwick's "consistent, well-known use of a readily available newspaper that also allows free online access to its legal notices is the best way 'to notify *constructively* as much of [Fenwick's citizenry] as possible.' The widespread knowledge of Fenwick's choice for legal notices is particularly significant because the great majority of Fenwick's property owners do not live in the borough on a full-time basis . . . and, therefore, have less reason to maintain an annual subscription to *any* local newspaper." (Citation omitted; emphasis in original.) We are not persuaded that this satisfies the requirements under § 8-3 (d).

As we noted in addressing the defendant's second and third arguments, § 8-3 (d) contains express requirements for providing constructive notice. There is nothing in the statute or our case law interpreting it to suggest that the fact that The Middletown Press had been used by Fenwick officials in the past to publish notices and that some Fenwick residents may be aware of such past use satisfies the notice requirement; rather, the requirement is publication in a newspaper having "substantial circulation" within the municipality, or, in other words, a newspaper having a sufficient level of distribution or dissemination to readers throughout a specified area. The law is well established that there must be strict compliance with this statutory requirement. See *Lauver* v. *Planning & Zoning Commission*, 60 Conn. App. 504, 509, 760 A.2d 513 (2000) ("[s]trict compliance with statutory mandates regarding notice to the public is necessary" (internal quotation marks omitted)); see also *Wilson* v. *Planning & Zoning Commission*, 260 Conn. 399, 400–401, 796 A.2d 1187 (2002) (publication of notice requirement in § 8-3 (d) is mandatory and failure to comply renders zone change void).

In its eighth argument, the defendant highlights some of the potential difficulties[13] with a statutory notice requirement of a specific type of circulation, particularly in the digital age, as it relates to smaller boroughs such as Fenwick. The defendant contends that, "[i]f the trial court's decision were correct, there would be no practical way for Fenwick or other municipalities to safely determine which newspaper it could use for public notices. A municipality cannot compel anyone to purchase or subscribe to a particular newspaper or even to disclose which newspapers they may be reading. In addition, subscribers may come and go, readership statistics may vary widely throughout the year." The defendant notes that the trial court's result is "particularly unworkable for tiny municipalities such as Fenwick, which are entirely residential and have no newspaper sales outlets within their borders."[14]

Such practical difficulties encountered by the defendant in meeting its obligation to publish notice in a newspaper having substantial circulation in Fenwick, however, do not absolve it from complying with the language of the statute. Although compliance with the "substantial circulation" requirement by commissions in small boroughs may be difficult, we cannot conclude that it necessarily leads to an absurd result or is unworkable. See *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 21, 12 A.3d 865 (2011) (harsh outcomes of

[13] See L. Rieders, note, "Old Principles, New Technology, and the Future of Notice in Newspapers," 38 Hofstra L. Rev. 1009, 1035–36 (2010) (discussing difficulties encountered by online newspapers in attempting to satisfy statutory notice requirements of specific circulation).

[14] Ozols stated in her affidavit that Fenwick is entirely residential, that there are no places within Fenwick at which any newspaper is sold, that "[m]ost of the homes within the Borough of Fenwick are second homes, and [that] few of the Borough's residents occupy their homes on a year-round basis." Chadwick stated in his affidavit that there are sixty-seven seasonal homes in Fenwick and that fourteen homes are occupied year-round.

strict adherence to statute not necessarily absurd or unworkable). First, we note that circulation to Fenwick residents may not be entirely impractical. Exhibit 2 to the plaintiffs' surreply to the defendant's motion to dismiss consists of a letter dated February 25, 2020, addressed to the plaintiffs' counsel from Nadine D. McBride, chief financial officer and treasurer of The Day Publishing Company. Notably, McBride wrote that she was in receipt of a subpoena from the plaintiffs' attorney issued to The Day regarding subscription information and that a search of the subscription database reveals that a paper published by Shore Publishing, LLC, of which The Day Publishing Co. is the sole member, reflects distribution to sixteen households in Fenwick.[15] Although we need not decide whether the publication of notice in the paper published by Shore Publishing, LLC, would have met the defendant's statutory obligation, we simply note that The Middletown Press may not be the only option for the defendant.

Second, we recognize that the newspaper industry has undergone significant changes since the legislature first imposed the obligation on municipalities to publish notice in a newspaper with "substantial circulation" in the municipality. We also are mindful, of course, that the widespread availability of access to the Internet may justify, from a public policy perspective, permitting a municipality to publish legal notices on its website. Nonetheless, it is within the province of the legislature, and not this court, to make such determinations and to amend § 8-3 (d) if it deems that such changes are necessary or warranted. This court must apply the statute as it is written.

[15] The evidence of the existence of the paper published by Shore Publishing, LLC, does not affect our analysis. We mention this evidence simply to show that the requirement of publication in a newspaper of substantial circulation, although perhaps difficult in small boroughs, does not necessarily lead to an absurd or unworkable result.

For the foregoing reasons, including the undisputed fact that no Fenwick resident subscribes to The Middletown Press, the trial court properly determined that publication of the amendment to Fenwick's zoning regulations in The Middletown Press failed to satisfy the "substantial circulation" requirement of § 8-3 (d). See, e.g., *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003) ("summary judgment is appropriate only if a fair and reasonable person could conclude only one way" (internal quotation marks omitted)). We, therefore, conclude that the court properly granted the motion for summary judgment as a matter of law.

II

The defendant also claims that, in concluding "that there was not enough other evidence of actual sales to warrant a finding of 'substantial circulation' . . . the trial court effectively reversed the burden of proof." (Citation omitted.) We disagree.

"When a party contests the burden of proof applied by the court, the standard of review is de novo because the matter is a question of law." (Internal quotation marks omitted.) *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 595–96, 930 A.2d 768, cert. denied, 284 Conn. 930, 934 A.2d 245 (2007).

The defendant contends that, although DeLuca's affidavit "presumably" demonstrates that there were no subscribers to The Middletown Press in Fenwick as of April 1, 2020, it was not sufficient to prove that there were no such subscribers seven months earlier, on July 25, 2019, when notice was published in The Middletown Press, particularly because most of the houses in Fenwick are owner-occupied only in the summer months.[16]

[16] In their memorandum of law in support of their motion for summary judgment, the plaintiffs incorporated, among other things, their objection to the motion to dismiss "and supporting documents." One such supporting document was the affidavit of DeLuca, which was signed and dated April

Regardless of what standard is applied, that of a motion to dismiss or that of summary judgment, we conclude that the court did not improperly place the burden of proof on the defendant. Under a motion to dismiss standard, the plaintiffs would need to prove that the court did not lack subject matter jurisdiction over their appeal, or, in other words, that their appeal, which was filed more than fifteen days after the publication of notice in The Middletown Press; see General Statutes § 8-8 (b); was not untimely because the defendant's notice was defective. See General Statutes § 8-8 (r);[17] see, e.g., General Statutes § 8-8 (j) ("Any defendant may, at any time after the return date of appeal, make a motion to dismiss the appeal. If the basis of the motion is a claim that the appellant lacks standing to appeal, the appellant shall have the burden of proving standing."). Under a summary judgment standard, the plaintiffs, as the moving parties, have the burden of showing an absence of a genuine issue of material fact and entitlement to judgment as a matter of law, and the defendant, as the nonmovant, has the burden of establishing a genuine issue of material fact by, in this case, reciting specific facts to contradict those stated in DeLuca's affidavit that was submitted by the plaintiffs. See *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 645–46, 127 A.3d 257 (2015).

1, 2020, in which DeLuca stated that no households in Fenwick subscribe to The Middletown Press.

[17] "Jurisdiction over appeals from the decisions of zoning entities is conferred on the Superior Court by statute. . . . [I]f the appeal period has expired when an appeal is filed the trial court lacks jurisdiction over the appeal." (Citations omitted; internal quotation marks omitted.) *Windsor Locks Associates* v. *Planning & Zoning Commission*, 90 Conn. App. 242, 248, 876 A.2d 614 (2005). "A statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created. . . . If the appeal period has expired when an appeal is filed the trial court lacks jurisdiction over the appeal." (Citation omitted; internal quotation marks omitted.) *Cardoza* v. *Zoning Commission*, 211 Conn. 78, 82, 557 A.2d 545 (1989).

The court did not require the defendant to prove substantial circulation. Rather, it considered the evidence presented by the plaintiffs, by way of DeLuca's affidavit, that there were no subscribers to The Middletown Press in Fenwick to be sufficient to demonstrate a lack of substantial circulation. It then determined that the evidence presented by the defendant regarding, inter alia, the online availability of The Middletown Press did not change that determination by raising a genuine issue of material fact.[18] Additionally, it is too speculative to assume that, because DeLuca's affidavit was signed and dated April 1, 2020, his statement that no Fenwick residents subscribe to The Middletown Press could reasonably be interpreted to mean that some residents of Fenwick may have subscribed to The Middletown Press in July, 2019. See, e.g., *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008) ("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" (internal quotation marks omitted)).

The defendant further argues that nothing in DeLuca's affidavit addresses the issue "that at least some Fenwick property owners were subscribing [to The Middletown Press] with a non-Fenwick address," and the plaintiffs "made no apparent effort to contact the nearest local newspaper sales outlets to determine whether Fenwick residents or homeowners may regularly purchase The Middletown Press at those outlets." The burden was on the defendant to create a genuine issue of material fact by offering facts to challenge those in DeLuca's affidavit. The court properly determined that the plaintiffs satisfied their burden by virtue of DeLuca's affidavit, and the defendant did not provide affidavits or other evidence in opposing the motion for summary

[18] The parties stated in their stipulation that the court could consider the affidavits submitted by both parties.

judgment to create a genuine issue of material fact. The defendant's claim that the court improperly shifted the burden of proof fails.

The judgment is affirmed.

In this opinion the other judges concurred.

PRIME MANAGEMENT, LLC *v.* JESSICA ARTHUR ET AL.
(AC 45330)

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

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain residential property that was occupied by the defendant tenant. The plaintiff and the defendant were parties to a written, one year lease that commenced on November 1, 2017, which provided that, if it was not renewed, it would convert to a month-to-month lease with all terms and conditions remaining in effect. On July 22, 2021, the plaintiff served the defendant with a notice to quit possession or occupancy of the premises on or before August 24, 2021, which included a disclaimer providing that any payment tendered after service of the notice to quit would not be accepted as rent. Before August 24, 2021, the plaintiff accepted a rental payment tendered by a rental assistance program in which the defendant participated. On September 27, 2021, the trial court granted the plaintiff's motion for default judgment for failure to appear and for possession and rendered a judgment of possession in favor of the plaintiff on the basis of lapse of time. The defendant thereafter filed a motion to open and an amended motion to dismiss the summary process action for lack of subject matter jurisdiction, arguing, inter alia, that the plaintiff's use and occupancy disclaimer violated an executive order issued by the governor limiting evictions. The court interpreted Executive Order No. 12D, § 2 (b), to conclude that the August, 2021 payment to the plaintiff was neither a use and occupancy payment nor a rental payment and denied the defendant's motions. On the defendant's appeal to this court, *held* that the trial court improperly denied the defendant's motion to open the default judgment and the defendant's amended motion to dismiss: the terms of Executive Order No. 12D, § 2 (b), provide plainly and unambiguously that a notice to quit claiming lapse of time cannot function to terminate a rental agreement before the quit date and any use and occupancy disclaimer included in the notice to quit is ineffective until after either the quit date or the date

of completion of any pretermination process required by federal law or regulations, whichever is later, and, consequently, the parties were bound by the terms of the rental agreement, thus, the August, 2021 payment constituted rent and the plaintiff's acceptance of it rendered the July, 2021 notice to quit equivocal and deprived the court of subject matter jurisdiction over the summary process action; accordingly, the judgment was reversed.

Argued January 5—officially released February 28, 2023

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the court, *Cirello*, *J.*, granted the plaintiff's motion for default for failure to appear and rendered a judgment of possession in favor of the plaintiff; thereafter, the court denied the named defendant's motions to open and to dismiss, and the named defendant appealed to this court. *Reversed*; *judgment directed.*

Shelley A. White, for the appellant (named defendant).

David E. Rosenberg, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant Jessica Arthur[1] appeals from the judgment of the trial court denying her (1) motion to open a default judgment and (2) motion to dismiss the summary process action filed by the plaintiff, Prime Management, LLC. On appeal, the defendant claims that the court incorrectly interpreted Executive Order No. 12D, issued by Governor Ned Lamont on June 30, 2021, in concluding that it had subject matter jurisdiction over

[1] The plaintiff's complaint also named a John Doe defendant and a Jane Doe defendant. On September 14, 2021, the plaintiff withdrew the action as to Jane Doe. John Doe, against whom a judgment of possession was rendered after he had been defaulted for failure to appear, is not participating in this appeal. Accordingly, we refer in this opinion to Jessica Arthur as the defendant.

the summary process action. We agree and, accordingly, reverse the judgment of the trial court.

The following procedural history is relevant to our resolution of this appeal. On September 1, 2021, the plaintiff commenced the present summary process action. The plaintiff's complaint set forth the following relevant allegations. On or about October 31, 2017, the plaintiff and the defendant entered into a written lease agreement with respect to an apartment located in West Haven for a term of one year, from November 1, 2017, to October 31, 2018. The lease, a copy of which was appended to the complaint, further provided that, if not renewed, the lease would convert to a month-to-month lease with all of the terms and conditions remaining in effect. On July 22, 2021, the plaintiff served the defendant with a notice to quit possession or occupancy of the premises on or before August 24, 2021, on the basis of (1) lapse of time or (2) in the alternative, termination of the right or privilege to occupy the premises. The notice to quit included a use and occupancy disclaimer providing that "[a]ny payment tendered after service of this notice to quit, pursuant to [Executive Order No. 13, issued by Governor Lamont on July 19, 2021, and Executive Order No. 12D, § 2 (b)], will be accepted as use and occupancy only and not for rent and as costs of the proceeding only with a full reservation of rights to institute and maintain a summary process action." The plaintiff filed the present summary process action following the defendant's failure to quit possession or occupancy of the premises.

On September 17, 2021, the plaintiff filed a motion for default for failure to appear and for a judgment of possession. See General Statutes § 47a-26.[2] On September 27, 2021, the trial court, *Cirello*, *J.*, granted the

[2] General Statutes § 47a-26 provides: "If the defendant does not appear within two days after the return day and a motion for judgment for failure to appear and an endorsed copy of the notice to quit is filed with the clerk, the court shall, not later than the first court day after the filing of such motion,

plaintiff's motion and rendered a judgment of possession in favor of the plaintiff on the basis of lapse of time.

On October 1, 2021, the defendant filed an appearance as a self-represented party and filed an application for a waiver of fees in order to file a motion to open the default judgment. On October 4, 2021, the court granted the defendant's fee waiver application, and the defendant's motion to open was docketed. In support of the motion to open, the defendant asserted that she had "never [received] the summons for an eviction process."

On October 19, 2021, after counsel had filed an appearance on her behalf, the defendant filed a motion to dismiss the summary process action for lack of subject matter jurisdiction on the basis that the July, 2021 notice to quit was defective on its face. The defendant contended that the use and occupancy disclaimer set forth in the notice to quit violated Executive Order No. 12D, § 2 (b), by indicating that (1) the defendant's tenancy was terminated upon service of the notice to quit, rather than after the August 24, 2021 quit date, and (2) payments tendered by the defendant to the plaintiff in between the date of service of the notice to quit and the August 24, 2021 quit date would not be accepted as rent. On December 1, 2021, the defendant filed an amended motion to dismiss, raising the additional claim that the notice to quit had been rendered equivocal because, prior to the August 24, 2021 quit date, the plaintiff had accepted a rental payment for the month of August, 2021, tendered to it by a Section 8 rental assistance program in which the defendant participates.[3] The defendant further argued that, pursuant to § 2 (b), the tender of the August, 2021 payment

enter judgment that the complainant recover possession or occupancy of the premises with the complainant's costs, and execution shall issue subject to the provisions of sections 47a-35 to 47a-41, inclusive."

[3] The defendant appended to the amended motion to dismiss a personal affidavit averring that, to the best of her knowledge, her rent for August, 2021, had been paid in full by the entity administering the Section 8 rental assistance program.

operated to cure the lapse of time claimed by the plaintiff. On December 8, 2021, the plaintiff filed an objection to the defendant's amended motion to dismiss.

On February 22, 2022, the court denied the defendant's amended motion to dismiss, relying on the reasoning set forth in its decision denying a motion to dismiss filed in an unrelated summary process action, *Rowan* v. *Sallm*, Superior Court, judicial district of New Haven, Housing Session, Docket No. CV-21-6014104-S (November 29, 2021). On the same day, the court denied the defendant's motion to open the default judgment, concluding that (1) the defendant had not alleged that a good defense to the plaintiff's claims exists, and (2) the defendant was not prevented from appearing by mistake, accident, or other reasonable cause. This appeal followed.[4]

[4] The defendant's appeal form identifies the denial of her motion to open the default judgment as the only decision from which she is appealing. The defendant's preliminary statement of the issues, filed in accordance with Practice Book § 63-4 (a) (1), sets forth one issue: "Whether the trial court erred as a matter of law in denying [the defendant's] motion to open on the grounds that the court had subject matter jurisdiction over [the plaintiff's] summary process action, thereby rejecting the defendant's claims that [1] the notice to quit served on [the defendant] did not comply with the requirements [of] Executive Order [No.] 12D, and [2] [the defendant's] payment of rent to the [plaintiff] in the month of August, 2021, reinstated the defendant's lease, precluding commencement of [the plaintiff's] summary process action." In her appellate brief, the defendant states that she is challenging on appeal both the denial of her motion to open and the denial of her amended motion to dismiss, with the caveat that her "challenge to the denial of her motion to open is based solely on error in the denial of her amended motion to dismiss and the lack of subject matter jurisdiction." Notwithstanding the defendant's failure to identify the denial of her amended motion to dismiss in her appeal form as a decision from which she is appealing, to avoid elevating form over substance, we treat this appeal as being taken both from the denial of the motion to open and the denial of the amended motion to dismiss, with the resolution of the appeal hinging on whether the court correctly rejected the defendant's claim that it lacked subject matter jurisdiction to entertain the present summary process action. See *Levine* v. *418 Meadow Street Associates, LLC*, 163 Conn. App. 701, 710, 137 A.3d 88 (2016) (defendants' preliminary statement of issues established their intent to challenge denials of motion to set aside verdict and motion for

We begin by setting forth the applicable standard of review and the relevant legal background. "Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts. . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Nationstar Mortgage, LLC* v. *Gabriel*, 201 Conn. App. 39, 43, 241 A.3d 763 (2020). Insofar as we address the denial of the defendant's motion to open the default judgment; see footnote 4 of this opinion; we also exercise plenary review under the circumstances of this case. See *Pennymac Corp.* v. *Tarzia*, 215 Conn. App. 190, 200 n.8, 281 A.3d 469 (2022) (Although this court "ordinarily review[s] a [trial] court's ruling on a motion to open a judgment for an abuse of discretion . . . the dispositive issue in this appeal is not whether the trial court properly exercised its discretion in denying the motion to open but, rather, whether the trial court properly determined that it had subject matter jurisdiction under the circumstances of this case. . . . The issue of subject matter jurisdiction is not a matter of discretion." (Citations omitted.)).

General Statutes § 47a-23 provides in relevant part: "(a) When the owner or lessor . . . desires to obtain possession or occupancy of . . . any apartment in any building . . . and . . . when a rental agreement or lease of such property, whether in writing or by parol, terminates for any of the [reasons enumerated, including lapse of time and nonpayment of rent] . . . such

remittitur, notwithstanding their failure to list those decisions on appeal form).

owner or lessor . . . shall give notice to each lessee or occupant to quit possession or occupancy of such . . . apartment . . . at least three days before the termination of the rental agreement or lease, if any, or before the time specified in the notice for the lessee or occupant to quit possession or occupancy. . . .

"(e) A termination notice required pursuant to federal law and regulations may be included in or combined with the notice required pursuant to this section and such inclusion or combination does not thereby render the notice required pursuant to this section equivocal, provided the rental agreement or lease shall not terminate until after the date specified in the notice for the lessee or occupant to quit possession or occupancy or the date of completion of the pretermination process, whichever is later. A use and occupancy disclaimer may be included in or combined with such notice, provided that such disclaimer does not take effect until after the date specified in the notice for the lessee or occupant to quit possession or occupancy or the date of the completion of the pretermination process, whichever is later. Such inclusion or combination does not thereby render the notice required pursuant to this section equivocal. Such disclaimer shall be in substantially the following form: 'Any payments tendered after the date specified to quit possession or occupancy, or the date of the completion of the pretermination process if that is later, will be accepted for use and occupancy only and not for rent, with full reservation of rights to continue with the eviction action.' "

General Statutes § 47a-23a provides in relevant part: "(a) If, at the expiration of the three days prescribed in section 47a-23, the lessee or occupant neglects or refuses to quit possession or occupancy of the premises, any commissioner of the Superior Court may issue a writ, summons and complaint which shall be in the form and nature of an ordinary writ, summons and

complaint in a civil process, but which shall set forth facts justifying a judgment for immediate possession or occupancy of the premises and make a claim for possession or occupancy of the premises. . . .''

''On March 10, 2020, [i]n response to the global pandemic of [COVID-19], Governor Lamont declare[d] a public health emergency and civil preparedness emergency throughout the [s]tate, pursuant to [General Statutes §§] 19a-131a and 28-9 . . . . Governor Lamont has renewed the declaration of both emergencies several times.'' (Internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 5–6, A.3d (2023). As our Supreme Court has summarized, ''following the proclamation of a civil preparedness emergency pursuant to § 28-9 (a), subsection (b) (1) empowers the governor to modify or suspend any statute, regulation or requirement that conflicts with the efficient and expeditious execution of civil preparedness functions or the protection of the public health. Subsection (b) (7) additionally empowers the governor to take other steps that are reasonably necessary in light of the emergency to protect the health, safety, and welfare of the people of the state.'' *Casey* v. *Lamont*, 338 Conn. 479, 499, 258 A.3d 647 (2021).

Following his declaration of the public health and civil preparedness emergencies, Governor Lamont issued a series of executive orders that placed limitations on evictions in the state. Pursuant to § 1 (a) of Executive Order No. 7X, issued on April 10, 2020, § 47a-23 was modified to add subsection (f), which provides in relevant part that ''[n]o landlord of a dwelling unit . . . shall, before July 1, 2020, deliver or cause to be delivered a notice to quit or serve or return a summary process action, for any reason set forth in this chapter or in sections 21-80 et seq. of the Connecticut General

Statutes, except for serious nuisance as defined in section 47a-15 of the Connecticut General Statutes." Subsequent executive orders continued the eviction moratorium but eased the restrictions. Pursuant to § 3 of Executive Order No. 10A, issued on February 8, 2021, the eviction moratorium was (1) extended for the duration of the public health and civil preparedness emergencies and (2) lifted for cases involving claims asserting (a) nonpayment of rent due on or before February 29, 2020, (b) serious nonpayment of rent as defined in the order, (c) serious nuisance as defined in General Statutes § 47a-15, or (d) a bona fide intention by the landlord to use the dwelling unit at issue as the landlord's principal residence, provided the notice to quit is not delivered during the term of any existing rental agreement. On May 20, 2021, Governor Lamont extended Executive Order No. 10A, § 3, through June 30, 2021, and indicated that another executive order would follow concerning the eviction moratorium. See Executive Order No. 12B, §§ 3 and 8 (May 20, 2021).

On June 30, 2021, Governor Lamont issued Executive Order No. 12D. Section 2 (a) provides in relevant part: "Notwithstanding any contrary provision of sections 47a-23 and 47a-23a of the Connecticut General Statutes, when the owner or lessor . . . desires to obtain possession or occupancy of . . . any apartment in any building . . . and . . . when a rental agreement or lease of such property, whether in writing or by parol, terminates by (I) lapse of time or (II) for nonpayment of rent . . . such owner or lessor . . . shall give notice to each lessee or occupant to quit possession or occupancy of such . . . apartment . . . at least thirty days before the time specified in the notice for the lessee or occupant to quit possession or occupancy."

Section 2 (b) of Executive Order No. 12 D, titled "Opportunity to Cure," provides in relevant part: "Notwithstanding any contrary provision of sections 47a-23

and 47a-23a of the Connecticut General Statutes, a notice to quit for a reason stated in paragraph (a) of this subsection shall not permit the termination of the rental agreement until after the date specified to each lessee or occupant to quit possession or occupancy of such . . . apartment . . . . A use and occupancy disclaimer included in or combined with such notice to quit shall not take effect until after the date specified in the notice for the lessee or occupant to quit possession or occupancy or the date of the completion of any pretermination process required by federal law or regulations, whichever is later. If, at the expiration of the thirty days prescribed herein, the lessee or occupant has not remedied any nonpayment of rent, including but not limited to through the approval of an application for rental assistance from UniteCT,[5] and neglects or refuses to quit possession or occupancy of the premises, any commissioner of the Superior Court may issue a writ, summons and complaint in accordance with the provisions of Section 47a-23 of the Connecticut General Statutes."[6] (Footnote added.) Governor Lamont twice

[5] UniteCT is the state's "program to implement the emergency rental assistance programs established by section 501 of Division N of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (December 27, 2020) and section 3201 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2 (March 11, 2021)." Executive Order No. 12D, § 1 (June 30, 2021).

[6] Executive Order No. 12D contains three other sections. Section 1 provides in relevant part that, before delivering a notice to quit for nonpayment of rent, the owner or lessor "shall complete and submit the landlord's portion of an application to UniteCT . . . ." See footnote 5 of this opinion. Section 3 identifies certain documents that must accompany residential notices to quit. Section 4 provides that any summary process proceeding, other than one asserting a claim of serious nuisance as defined in General Statutes § 21-80 or § 47a-15, will be stayed if an application to UniteCT is filed by the landlord or the tenant during the proceeding, with the stay lasting for thirty days or until the application is resolved, whichever occurs earlier. Section 4 further provides that if the application to UniteCT is approved, then the summary process proceeding remains stayed "until such UniteCT payment is made and the summary process action is withdrawn or dismissed." None of these other sections is germane to this appeal.

extended Executive Order No. 12D, once through September 30, 2021; see Executive Order No. 13, § 1 (July 19, 2021); and again through February 15, 2022. See Executive Order No. 14A, § 1 (September 30, 2021). Executive Order No. 12D was in effect when the plaintiff served the defendant with the notice to quit in July, 2021, as well as when the plaintiff commenced the present summary process action in September, 2021.

In denying the defendant's amended motion to dismiss, the court relied on the rationale of its decision denying a motion to dismiss a separate summary process action, *Rowan* v. *Sallm*, supra, Superior Court, Docket No. CV-21-6014104-S. In *Rowan*, the plaintiffs served the defendants with a notice to quit on August 10, 2021, with a quit date of September 15, 2021, on the basis of lapse of time of the parties' oral month-to-month lease. The notice to quit contained a use and occupancy disclaimer providing that "[a]ny payment tendered after service of this notice to quit will be accepted as use and occupancy and as costs of proceeding only, and not for rent, with a full reservation of rights to institute and maintain a summary process action." On September 1, 2021, prior to the quit date in the notice to quit, the plaintiffs received an electronic payment in the amount of the defendants' rent due for the month of September, 2021, from a rental assistance program of which the defendants were participants. Following the September 15, 2021 quit date, the plaintiffs commenced a summary process action against the defendants. The defendants moved to dismiss the summary process action for lack of subject matter jurisdiction, asserting that, pursuant to Executive Order No. 12D, § 2 (b), the September, 2021 payment had to be considered rent, thereby rendering the notice to quit equivocal and "curing" the lapse of time.

In denying the defendants' motion to dismiss in *Rowan*, the court stated that "[i]t is clear that the governor intended to allow a cause of action for lapse of time

in Executive Order No. 12D. It is clearly enumerated in § 1 (a).[7] Section 2 (b) . . . does state that a 'use and occupancy disclaimer included in or combined with such notice to quit shall not take effect until after the date specified in the notice for the lessee or occupant to quit possession,' but that is followed by the phrase, '[i]f, at the expiration of the thirty days prescribed herein, the lessee or occupant has not remedied *any nonpayment* of rent . . . .' Considering the two phrases together, the governor's intent is clear, § 2 (b) is addressing nonpayment of rent claims that can be cured through payments through UniteCT.

"Actually, the whole . . . of § 2 (b) refers to the nonpayment of rent, and applications for UniteCT. The section does not address any of the other causes of action enumerated in [§ 2 (a)]. As such, the court construes § 2 (b) to encourage the parties to explore UniteCT to cure a nonpayment claim.

"The court further finds that the term 'Cure' in the heading of § 2 (b) is not to be interpreted . . . [to provide for] the creation of a new tenancy. An 'opportunity to cure' is what [it] is. An opportunity to cure a nonpayment eviction by utilizing funds available from UniteCT. The portions of the section related to the use and occupancy disclaimer are there to ensure that an application and funding from UniteCT will be more successful." (Emphasis in original; footnote added.) The court further rejected the defendants' reliance on § 2 (b) to argue that the September 1, 2021 payment had to be deemed to be rent, determining that § 2 (b) did "not automatically make the September 1, 2021 payment rent. It cannot be considered use and occupancy, but [Executive Order No. 12D] does not state that it must be considered rent."

[7] We deem the court's reference to "§ 1 (a)" of Executive Order No. 12D to be a scrivener's error because § 1 does not contain any subsections and plainly concerns cases predicated on claims of nonpayment of rent only. We presume that the court intended to cite § 2 (a).

The dispositive claim raised by the defendant in the present case is that the court incorrectly interpreted Executive Order No. 12D, § 2 (b), to conclude that the August, 2021 payment, remitted to and accepted by the plaintiff,[8] was not a rental payment. The defendant asserts that the August, 2021 payment constituted rent and that the plaintiff's acceptance of the payment rendered the July, 2021 notice to quit equivocal, such that the court lacked subject matter jurisdiction over the present summary process action. We agree.[9]

It is well settled that "[a] landlord's service of a notice to quit is an act that is sufficiently unequivocal to terminate tenancy. . . . A notice to quit is a condition precedent to a summary process action and, if defective, deprives the court of subject matter jurisdiction." (Citation omitted; internal quotation marks omitted.) *J. M.* v. *E. M.*, 216 Conn. App. 814, 820, 286 A.3d 929 (2022); see also *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 584, 548 A.2d 744 ("[t]he necessary and only basis of a summary process proceeding is that the lease has terminated" (internal quotation marks omitted)), cert. denied, 209 Conn. 826, 552 A.2d 432 (1988). "Notwithstanding an unequivocal notice to quit, a landlord's acceptance of rent prior to the quit date contained in the notice to quit can render the landlord's intent to terminate the tenancy equivocal, repudiate the intent to terminate set forth in the notice

[8] The parties do not dispute that the August, 2021 payment was tendered prior to the August 24, 2021 quit date set forth in the July, 2021 notice to quit. In addition, the record reveals repeated assertions by the defendant that the plaintiff accepted the tender of the August, 2021 payment. The plaintiff did not deny those assertions in its briefing or during oral argument on appeal. Thus, on the basis of the record, we discern no dispute that the plaintiff accepted the August, 2021 payment.

[9] The defendant also claims that the court improperly denied her amended motion to dismiss because the notice to quit was defective on its face, thereby depriving the court of subject matter jurisdiction. We need not address the merits of this claim in light of our resolution of the defendant's dispositive claim.

to quit, and reinstate the lease." *J. M.* v. *E. M.*, supra, 820. Thus, if the August, 2021 payment constituted rent, then the plaintiff's acceptance of the payment rendered the notice to quit equivocal and deprived the court of subject matter jurisdiction to entertain the present summary process action.

In the *Rowan* decision, which the court incorporated into its denial of the defendant's amended motion to dismiss, the court concluded that, pursuant to Executive Order No. 12D, § 2 (b), a payment made by a tenant in the interim between the service of a notice to quit for lapse of time and the quit date was not a use and occupancy payment; however, the court further concluded that § 2 (b) did not provide that such a payment must be considered rent. In essence, the court concluded that the August, 2021 payment was neither a rental payment nor a use and occupancy payment but, rather, fell into an undefined third category. We disagree with the court's reasoning.

Our analysis requires us to interpret Executive Order No. 12D, § 2, in particular, subsection (b). Applying the principles of statutory interpretation to the executive order is apropos because the order has the full force and effect of law. See General Statutes § 28-9 (b) (1) (any order issued by governor pursuant to § 28-9 (b) (1) "shall have the full force and effect of law upon the filing of the full text of such order in the office of the Secretary of the State"); see also *Matter of Murack*, 957 N.W.2d 124, 128 (Minn. App. 2021) (applying principles of statutory interpretation to emergency executive orders issued by Governor of Minnesota because orders had " 'the full force and effect of law,' " and observing that "courts of other jurisdictions have applied principles of statutory interpretation in interpreting executive orders").

General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from

the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." "[W]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Lawrence* v. *Gude*, 216 Conn. App. 624, 629, 285 A.3d 1198 (2022).

Guided by the aforementioned tenets, we read Executive Order No. 12D, § 2 (b), to provide, plainly and unambiguously, in relevant part that (1) a notice to quit claiming, inter alia, lapse of time cannot function to terminate a rental agreement on or before the quit date, and (2) any use and occupancy disclaimer included in the notice to quit is ineffective until after either the quit date or the date of completion of any pretermination process required by federal law or regulations, whichever is later.[10] Thus, pursuant to § 2 (b), the August, 2021 payment could not be deemed to be a use and occupancy payment. Although the court correctly observed that there is no express provision in § 2 (b) mandating that the August, 2021 payment be construed as rent, we do not agree that such an express declaration

[10] Insofar as the court concluded that Executive Order No. 12D, § 2 (b), in its entirety, applies exclusively to nonpayment of rent claims, that conclusion is untenable. Section 2 (b) provides in relevant part that "a notice to quit *for a reason stated in paragraph* (*a*) *of this subsection* [*including lapse of time*] shall not permit the termination of the rental agreement until after the date specified to each lessee or occupant to quit possession or occupancy of such . . . apartment . . . . A use and occupancy disclaimer included in or combined *with such notice to quit* shall not take effect until after the date specified in the notice for the lessee or occupant to quit possession or occupancy or the date of the completion of any pretermination process required by federal law or regulations, whichever is later. . . ." (Emphasis added.) As we explain later in this opinion, however, we construe § 2 (b) to provide that only a nonpayment of rent claim is capable of being "cured" if the nonpayment of rent is remedied on or before the quit date.

is necessary. In accordance with the first sentence of § 2 (b), the parties' rental agreement could not be terminated on or before the August 24, 2021 quit date. Consequently, the parties were bound by the rental agreement, the terms of which provided for the creation of a month-to-month tenancy following the expiration of the initial lease period, at the time that the August, 2021 payment was remitted and accepted. " 'Rent,' " as used in § 47a-23 among other statutes, is statutorily defined as "all periodic payments to be made to the landlord under the rental agreement." General Statutes § 47a-1 (h). Accordingly, we conclude that the August, 2021 payment constituted rent, and we reject the notion that the payment could have been of some other, undefined nature.[11] Consequently, we conclude that, as a result of the plaintiff's acceptance of the August, 2021 payment, the July, 2021 notice to quit became equivocal, thereby depriving the court of subject matter jurisdiction over the present summary process action.

At this juncture, we clarify that we are *not* concluding that, pursuant to Executive Order No. 12D, § 2 (b), the defendant's tender of the August, 2021 payment, in and of itself, operated to "cure" the lapse of time claimed by the plaintiff and to preclude the plaintiff from initiating summary process proceedings, which is an issue that the parties briefed and argued extensively. The third and final sentence of § 2 (b) provides that, "[i]f, at the expiration of the thirty days prescribed herein, *the lessee or occupant has not remedied any nonpayment of rent, including but not limited to through the approval*

[11] We also note that General Statutes § 47a-23 (e) provides that use and occupancy disclaimers "shall be in substantially the following form: 'Any payments tendered after the date specified to quit possession or occupancy, or the date of the completion of the pretermination process if that is later, will be accepted *for use and occupancy only and not for rent*, with full reservation of rights to continue with the eviction action.' " (Emphasis added.) This language contemplates two categories of payments only, namely, (1) use and occupancy payments and (2) rental payments.

of an application for rental assistance from UniteCT, and neglects or refuses to quit possession or occupancy of the premises, any commissioner of the Superior Court may issue a writ, summons and complaint in accordance with the provisions of Section 47a-23 of the Connecticut General Statutes." (Emphasis added.) The defendant interprets § 2 (b) to provide that the tender of rent on or before the quit date in a notice to quit predicated on lapse of time operates to "cure" the lapse of time. We do not agree with that construction. We interpret § 2 (b) to provide that, if a *nonpayment of rent claim* is remedied by the tender of rent on or before the quit date, then no summary process action can be initiated *for nonpayment of rent*. In other words, only a nonpayment of rent claim can be "cured" under § 2 (b). Reading § 2 (b) to enable the mere tender of a rental payment to "cure" a lapse of time claim would yield absurd or unworkable results because, in effect, landlords would be prevented from terminating leases for lapse of time if the tenants continued to pay rent notwithstanding the fact that § 2 (a) expressly lifted the eviction moratorium as to lapse of time claims.

Our conclusion that Executive Order No. 12D, § 2 (b), does not enable tenants to "cure" lapse of time claims by *tendering* rental payments is not in conflict with our analysis regarding the July, 2021 notice to quit being rendered equivocal on the basis of the plaintiff's *acceptance* of the August, 2021 payment. Executive Order No. 12D does not alter the requirement that an *unequivocal* notice to quit must precede the commencement of a summary process action. The July, 2021 notice to quit became equivocal as a result of the plaintiff's acceptance of the August, 2021 payment, and, therefore, the court lacked subject matter jurisdiction over the present summary process action. Accordingly, we conclude that the court improperly denied the defendant's

motion to open the default judgment and the defendant's amended motion to dismiss.

The judgment is reversed and the case is remanded with direction to grant the defendant's motion to open the default judgment and to grant the defendant's amended motion to dismiss the summary process action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

AURORA HOUGHTALING *v.* KIMBERLY BENEVIDES ET AL.
(AC 45568)

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

Syllabus

The plaintiff sought to recover damages from the defendants, B, a dog owner, and M, who the plaintiff alleged lived with B, pursuant to the statute (§ 22-357) that imposes liability on the owner or keeper of a dog for harm caused by the dog. B permitted the plaintiff to borrow a car to attend a meeting in another town, and the plaintiff agreed to take B's dog with her. When the plaintiff returned to the car after the meeting and partially opened the car door, B's dog jumped from the car and ran, wrapping the leash around the plaintiff's legs and causing her to fall to the ground and sustain injuries. The trial court granted the motion for summary judgment filed by M, concluding that there was no genuine issue of material fact that the plaintiff was the keeper of the dog at the time of the incident, and determined that, as such, she was barred from recovery under § 22-357. On the plaintiff's appeal to this court, *held* that the trial court properly rendered summary judgment in favor of M, there being no genuine issue of material fact that the plaintiff had the dog in her possession at the time of the incident and, accordingly, that she was a keeper of the dog, precluding her from recovering from M pursuant to § 22-357; at the time of the incident, the plaintiff exerted the degree of care and control over the dog similar to that of the owner, she voluntarily agreed to take the dog with her in the car, she had sole possession of the dog and no one else was in the car with her, it was clear that the plaintiff was charged with the responsibility and care of the dog during the time that she had the dog with her, the plaintiff exercised control over the dog's actions from the moment that she took the dog in the car to the moment she was injured, and she transported the dog away from the owner, driving from one town to another town;

moreover, although the dog was in B's car, the plaintiff was in possession of both the car and the dog at a location away from B's property; furthermore, a keeper of a dog is not within the class of persons that the legislature intended to protect by enacting § 22-357.

Argued February 1—officially released February 28, 2023

Procedural History

Action to recover damages for personal injuries sustained as a result of an incident with a dog owned by the named defendant, brought to the Superior Court in the judicial district of New London, where the named defendant was defaulted for failure to plead; thereafter, the court, *Goodrow*, *J.*, granted the motion for summary judgment filed by the defendant Jakub Micengendler and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher D. DePalma, for the appellant (plaintiff).

Daniel J. Krisch, with whom, on the brief, was *Jesse D. Conrad*, for the appellee (defendant Jakub Micengendler).

Opinion

ALVORD, J. The plaintiff, Aurora Houghtaling, appeals from the judgment of the trial court granting the motion for summary judgment filed by the defendant Jakub Micengendler[1] in this tort action, commenced pursuant to General Statutes § 22-357, commonly known as the dog bite statute. On appeal, the plaintiff claims that the court erred in rendering summary judgment because the underlying facts do not support the court's conclusion that there was no genuine issue of material fact that the plaintiff was a "keeper" of the dog that allegedly caused her to sustain an injury, thus precluding her

[1] In her complaint, the plaintiff also named Kimberly Benevides, the dog's owner, as a defendant. On February 10, 2022, the plaintiff filed a motion for default for failure to plead as to Benevides, which was granted on February 25, 2022. For ease of reference, we refer in this opinion to Micengendler as the defendant and Benevides by name.

from recovery pursuant to § 22-357. 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 our resolution of this appeal. On December 4, 2018, the plaintiff borrowed a vehicle from Kimberly Benevides in Colchester to attend a meeting with the plaintiff's probation officer in Norwich. The plaintiff agreed to take Benevides' dog with her in the car. The dog was leashed while riding in the car, and no one else was in the car with the plaintiff and the dog.

The plaintiff left the dog in the car while she met with her probation officer. After her meeting, the plaintiff returned to the car. When she partially opened the door, the dog, still leashed, jumped from the car and ran in different directions. The dog's leash became wrapped around the plaintiff's legs, causing her to fall to the ground and sustain injuries.

In March, 2021, the plaintiff commenced the present action against the defendant and Benevides. The operative complaint, amended in April, 2021, alleged two counts pursuant to § 22-357, which imposes strict liability on the owner or keeper of a dog for any damage to the body or property of any person caused by the dog, with limited exceptions. In count one, the plaintiff alleged that Benevides was the "owner and/or keeper" of the dog. She alleged that Benevides told the plaintiff that she could use her vehicle on December 4, 2018, if the plaintiff took the dog with her. The plaintiff alleged that when she attempted to enter the vehicle after her appointment, the dog "bolted from the vehicle causing its leash to get tangled up with the plaintiff and causing her to be dragged to the ground." As a result, the plaintiff alleged that she suffered "severe and permanent injuries" including fractures of the right distal radius and ulnar styloid, deformities of the right wrist and elbow,

scarring of her right arm and wrist, and loss of strength and mobility in her right arm. The plaintiff alleged that she has incurred medical and surgical expenses and has endured pain and suffering and loss of enjoyment in her normal life activities. The plaintiff alleged that she was not teasing, tormenting, or abusing the dog, and was not committing a trespass or other tort. She alleged that Benevides was strictly liable for the plaintiff's injuries pursuant to § 22-357.

In count two, the plaintiff incorporated by reference the allegations of count one. She alleged that the defendant also was "the owner and/or keeper" of the dog. Specifically, the plaintiff alleged that, on the date of the incident, the defendant "was living with . . . Benevides and was providing room and board for the dog . . . and was also a keeper of said dog and thereby jointly responsible with . . . Benevides, pursuant to § 22-357 . . . ." On May 3, 2021, the defendant filed an answer, including special defenses,[2] in which he denied the allegations that he was the owner and/or keeper of the dog and that he was living with Benevides or providing room and board for the dog. The plaintiff thereafter filed a reply to the defendant's special defenses.

On February 14, 2022, the defendant filed a motion for summary judgment as to count two of the complaint and a memorandum of law in support of that motion. Therein, he argued that he was not the owner or keeper of the dog and, therefore, he could not be liable pursuant to § 22-357. Alternatively, he argued that, because the plaintiff was the keeper of the dog at the time of the incident, she could not recover pursuant to § 22-357.

The defendant attached to his memorandum of law: his own affidavit, the affidavit of Benevides, the plaintiff's responses to the defendant's requests for admission, and the plaintiff's responses to the defendant's

[2] The defendant alleged in his special defenses that the plaintiff's injuries were caused by her own actions and that the plaintiff's claim against the

interrogatories.[3] In the defendant's affidavit, he averred that he lived in Colchester at the time of the incident, he owns the property in Mansfield where Benevides lives, and he rents that property to her. The defendant averred that he has never owned or cared for the dog. Benevides averred that she lives in Mansfield and that the defendant never has lived at the home in Mansfield. Benevides averred that she purchased and owns the dog, cares for the dog, and the dog is solely her property. She averred that the defendant did not purchase, own, or care for the dog. In her responses to the defendant's requests for admission, the plaintiff admitted that she borrowed a vehicle from Benevides and the dog was in the vehicle that she borrowed. In her discovery responses, the plaintiff stated that she "believe[d] the owner of the vehicle was . . . Benevides."

On May 13, 2022, the plaintiff filed an objection to the defendant's motion for summary judgment, in which she argued that her "seemingly temporary relationship" with the dog was not sufficient to transform her into a keeper of the dog. (Emphasis omitted.) She argued that the defendant was a keeper of the dog. She attached her own affidavit, in which she averred that, on the date of the incident, she was living in Colchester and walked to 147 South Main Street, where Benevides and the defendant were living together. She averred that the two had a romantic relationship and that the defendant provided financial support to Benevides and provided "lodging, refuge, and care for the dog . . . ." She further averred that the defendant would care for the dog while Benevides was incarcerated and that the plaintiff

defendant was "barred by the applicable statute of limitations for an alleged injury by a dog of a tenant as against the landowner."

[3] The defendant also attached the sworn statement of Richard Pezzente, a cousin of Benevides. Pezzente stated that he was called by the plaintiff to retrieve the dog from the hospital where the plaintiff had driven herself and the dog. He brought the dog to Benevides. He stated that Benevides bought the dog in 2015 and still owned the dog.

had been to the defendant's house in Colchester where the defendant was caring for the dog by himself. The plaintiff averred that she never had control of the dog "at any time prior to the incident." The plaintiff also appended to her objection various documents, including printouts of the Judicial Branch's criminal/motor vehicle conviction case details, a police press release, and a news bulletin entry, all purporting to show that Benevides lived at the address of 147 South Main Street in Colchester. In her objection, the plaintiff argued, based on the documents she submitted, that "[i]t appears [that Benevides] was in jail on multiple occasions wherein the defendant . . . was the sole keeper [of the dog] as asserted by the plaintiff." On May 20, 2022, the defendant filed a reply, reiterating his earlier positions. The court held oral argument on the motion for summary judgment on May 24, 2022.

On June 3, 2022, the court issued its memorandum of decision. The court concluded that there was no genuine issue of material fact that the plaintiff was the keeper of the dog at the time of the incident. Specifically, the court stated that the plaintiff, at the time of the incident, "had sole possession" of the dog, "accepted responsibility for the dog's care, and exercised dominion and control over the dog's actions." Accordingly, the court determined that the plaintiff was barred from recovery under § 22-357. Because it concluded that the plaintiff was a keeper of the dog at the time of the incident, the court declined to decide whether there was a genuine issue of material fact that the defendant was an owner or keeper of the dog.[4] This appeal followed.

[4] On appeal, the defendant claims, as an alternative basis on which to affirm the judgment of the trial court, that he was not the dog's keeper. Because we disagree with the plaintiff's claim on appeal, we need not consider the proposed alternative ground for affirmance.

Before turning to the plaintiff's claim on appeal, we first set forth our standard of review. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant 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 [or to deny a] motion for summary judgment is plenary." (Footnote omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 539–40, 285 A.3d 1128 (2022).

On appeal, the plaintiff claims that the court erred in concluding that there was no genuine issue of material fact that the plaintiff was a keeper of the dog at

the time of the incident. Specifically, she maintains that, "[a]t most, the plaintiff had temporary physical custody of [the dog]. This temporary physical custody . . . does not rise to the level of possession for purpose[s] of § 22-357." The defendant responds that "[t]he trial court properly held that the undisputed fact that the plaintiff had exclusive possession of [the dog] when she tripped over his leash entitles [the defendant] to judgment as a matter of law." We agree with the defendant.

We first review the substantive law governing liability pursuant to § 22-357, which provides in relevant part: "If any dog does any damage to either the body or property of any person, the owner or keeper . . . shall be liable for the amount of such damage, except when such damage has been occasioned to the body or property of a person who, at the time such damage was sustained, was committing a trespass or other tort, or was teasing, tormenting or abusing such dog. . . ." General Statutes § 22-357 (b). General Statutes § 22-327 (6) defines "[k]eeper" as "any person, other than the owner, harboring *or* having in his possession any dog . . . ." (Emphasis added.) "[Section] 22-357 imposes strict liability on the owner or keeper of a dog for harm caused by the dog, with limited exceptions."[5] (Internal quotation marks omitted.) *Coppedge* v. *Travis*, 187 Conn. App. 528, 533, 202 A.3d 1116 (2019). A "keeper" of a dog is precluded from recovery under § 22-357. *Murphy* v. *Buonato*, 42 Conn. App. 239, 250–51, 679 A.2d 411 (1996), aff'd, 241 Conn. 319, 696 A.2d 320 (1997).

[5] "[The] principal purpose and effect [of § 22-357] was to abrogate the common-law doctrine of scienter as applied to damage by dogs to persons and property, so that liability of the owner or keeper became no longer dependent upon his knowledge of the dog's ferocity or mischievous propensity; literally construed the statute would impose an obligation on him to pay for any and all damage the dog may do of its own volition." (Internal quotation marks omitted.) *Coppedge* v. *Travis*, 187 Conn. App. 528, 533, 202 A.3d 1116 (2019).

Because the defendant argued that the plaintiff was a keeper by virtue of having the dog in her possession, and the court rendered summary judgment on that basis, our discussion focuses on the concept of possession. "[P]ossession [of a dog] cannot be fairly construed as anything short of the exercise of dominion and control similar to and in substitution for that which ordinarily would be exerted by the owner in possession." (Internal quotation marks omitted.) *Auster* v. *Norwalk United Methodist Church*, 286 Conn. 152, 160, 943 A.2d 391 (2008). "[A] person will not be deemed to be a keeper of a dog under § 22-357 unless that person exercises control over the dog in a manner similar to that which would ordinarily be exerted by the owner. . . . In other words, a nonowner of a dog cannot be held strictly liable for damage done by the dog to another in the absence of evidence that the nonowner was responsible for maintaining and controlling the dog at the time the damage was done. . . . [S]uch proof generally will consist of evidence that the nonowner was feeding, giving water to, exercising, sheltering or otherwise caring for the dog when the incident occurred." (Citations omitted; internal quotation marks omitted.) Id., 161–62.

Our Supreme Court previously has had occasion to construe the term keeper under different factual scenarios. The plaintiff relies principally on *Hancock* v. *Finch*, 126 Conn. 121, 9 A.2d 811 (1939). In that case, the plaintiff agreed to feed and provide water to the defendant's three dogs, who were kept in a kennel and runway behind the defendant's house, for five days while the defendant traveled. Id., 122. The plaintiff was instructed not to let the dogs out of the runway. Id. On the second day, while the plaintiff was preparing the dogs' food, he let the dogs out, and the dogs attacked and injured both the plaintiff and his wife. Id. Our Supreme Court determined that the trial court correctly

declined to submit the defendant's special defense, which alleged that the plaintiff was a keeper of the dogs, to the jury. Id., 123. In support of its conclusion, the court stated that the plaintiff did not have possession of the dogs, in that he did not exert dominion and control similar to that which ordinarily would be exerted by the owner. Id. The court then reasoned that "[t]o subject one in the position of this plaintiff, having the temporary custody of a dog, to the heavy liability imposed by the statute would be to go far beyond its apparent object." Id.

Our Supreme Court reached the same conclusion in *Falby* v. *Zarembski*, 221 Conn. 14, 602 A.2d 1 (1992), on which the plaintiff also relies. There, the question for the court was whether there had been sufficient evidence presented at trial to establish that the defendant remodeling company was liable as a keeper of a dog who was owned by an employee of the remodeling company and brought to the work site by that employee. Id., 16–18. The employee had received permission from the company's president to bring the dog with him to the sites at which he would be working, and he frequently brought the dog to the sites, allowing him to run loose there. Id., 17. On one such occasion, the dog attacked a postal carrier delivering mail to a home at which the company was working. Id. On appeal following the jury verdict returned in favor of the plaintiff postal carrier, our Supreme Court determined that the remodeling company did not harbor or have possession of the dog. Id., 19. In support of its conclusion, the court stated that there was no evidence that the company exercised any control over the actions of the dog. Id. It further noted a lack of any evidence that the company fed, watered, housed or otherwise cared for the dog. Id. Accordingly, the court reversed the judgment holding the company strictly liable as a keeper under § 22-357. Id., 20.

Finally, in *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 154, the defendant church appealed following a jury verdict in favor of the plaintiff, arguing that there was insufficient evidence to support a finding that the defendant was a keeper of a dog, which was owned by the defendant's employee and kept at the parish house where the employee lived. This court agreed with the defendant's claim and reversed the judgment of the trial court. Id., 156. Following certification, our Supreme Court affirmed the judgment of this court, reiterating that "ownership of the premises where a dog lives, unaccompanied by any evidence of caretaking of the dog or actual control over its actions . . . is not enough to hold a landlord or other property owner strictly liable for damage caused by the dog. This is true whether the dog's owner is a live-in employee, a tenant or merely a friend of the landlord." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id.,163–64. Because there was no evidence that the defendant church had exerted control over the dog in a manner similar to that of an owner, the court determined that the plaintiff had failed to establish that the defendant was a keeper of the dog. Id., 164–65.

The defendant relies principally on *Murphy* v. *Buonato*, supra, 42 Conn. App. 240–41, in which this court concluded that the plaintiff was a keeper of a dog that he agreed to provide care for while the defendant traveled. This court recounted the following relevant facts: "On the evening before his departure, the defendant delivered the dog to the plaintiff, at the plaintiff's residence, and provided the plaintiff with dog food and a chain to secure the dog in the plaintiff's yard. The defendant instructed the plaintiff not to allow the dog to roam. The plaintiff took possession of the dog upon its delivery and, in doing so, assumed sole responsibility to feed and water it, to provide shelter for it, and to walk it.

Furthermore, on the day he was bitten, it was the plaintiff who had tied the dog to a tree, later untied it and took hold of its collar to prevent the dog from running away." Id., 244. On the basis of these subordinate facts, this court determined that the plaintiff both harbored the dog, by providing it lodging and shelter, and exercised exclusive dominion and control over it. Id. Specifically, it considered that "the plaintiff . . . had sole possession of the defendant's dog, allowed it to live at his own residence, provided it with shelter and lodging, accepted full responsibility for its care and controlled each of the dog's actions from the moment the defendant delivered it until the moment the plaintiff was bitten." (Emphasis omitted.) Id., 246. Last, this court rejected as unpersuasive the plaintiff's argument that he was not a keeper because his injuries occurred less than twenty-four hours after the dog was delivered to him and he was either asleep or at work for most of that time. Id. This court reaffirmed that "the determination of whether a person is a keeper turns on whether, and to what extent, a person in possession of a dog exercises dominion and control over it." Id.

Applying the principles expressed in our appellate case law to the facts of this case, we agree with the trial court that no genuine issue of material fact existed that the plaintiff had the dog in her possession at the time of the incident and, accordingly, she was a keeper of the dog. The facts of the present case are substantially dissimilar from those of *Hancock* v. *Finch*, supra, 126 Conn. 121, *Falby* v. *Zarembski*, supra, 221 Conn. 14, and *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 152, because in each of those cases the party alleged to be a keeper had care and control of the dog only to a limited degree or not at all. Instead, the present case is on all fours with *Murphy* v. *Buonato*, supra, 42 Conn. App. 239, in that the plaintiff, at the time of the incident, exerted the degree of care and control over

the dog similar to that of the owner. First, the plaintiff voluntarily agreed to take the dog with her to her probation appointment in the car that she borrowed from Benevides. Second, the plaintiff had sole possession of the dog—no one else was in the car with the plaintiff and the dog. Thus, it was clear that the plaintiff was charged with the responsibility and care of the dog during the time that the plaintiff had the dog with her. Third, the plaintiff exercised control over the dog's actions from the moment that she took the dog in Benevides' car to the moment she was injured. Finally, the plaintiff transported the dog away from the owner, driving the dog from Colchester to Norwich; although the dog was in the owner's car, the plaintiff was in possession of both the car and the dog at a location away from the owner's property. Accordingly, we agree with the trial court that there existed no genuine issue of material fact that the plaintiff was a keeper of the dog at the time of the incident.

The plaintiff's arguments in support of her contention that she was not a keeper of the dog are unpersuasive. First, she focuses on the "temporary" nature of the relationship between her and the dog. The fact that the plaintiff may have been in charge of the dog only for the duration of the outing, however, in no way diminished her position of control over the dog at the time of the incident. Second, she argues that she "did not lodge, shelter or give refuge to the . . . dog." This argument is misplaced because it is premised on actions that could form the basis of a conclusion that a person harbored a dog, which is "to afford lodging, shelter or refuge to it." (Internal quotation marks omitted.) *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 160. The definition of "[k]eeper," however, includes both a person "harboring *or* having in his possession any dog . . . ." (Emphasis added.) General Statutes

§ 22-327 (6). Thus, the defendant was not required to demonstrate that the plaintiff harbored the dog.

Finally, as the plaintiff concedes, "[a] keeper of a dog is not within the class of persons that the legislature intended to protect by enacting § 22-357. Section 22-357 is drastic, and its purport is that a person who owns a dog does so at his peril. The same is true as to a keeper, so long as he remains a keeper." (Internal quotation marks omitted.) *Murphy* v. *Buonato*, supra, 42 Conn. App. 250–51. Because the plaintiff's status as a keeper precludes her from recovering from the defendant pursuant to § 22-357, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

STEPHEN C. FREIDHEIM *v.* EDWARD F. MCLAUGHLIN, TRUSTEE (EDWARD F. MCLAUGHLIN REVOCABLE TRUST), ET AL.
(AC 44731)

Prescott, Elgo and DiPentima, Js.

Syllabus

The plaintiff, who owned waterfront property abutting that of the defendants, sought, inter alia, injunctive relief in connection with the defendants' alleged obstruction of his view of Long Island Sound under an easement in the deed to the defendants' property. The original deed to the defendants' property, first conveyed in 1924, contained restrictions stating that the grantee could "not erect or maintain any division fences or hedges between said premises and the adjoining land," and that division fences or hedges on the property could not exceed five feet in height. The deed, which stated that the restrictions were to run with the land, also contained requirements as to the placement and approval of outbuildings on the property. The defendants initially took steps to bring hedges on their property into conformance with the height restriction but later planted hedges of evergreen trees that violated the view easement restriction. The plaintiff thereafter brought the present action, seeking,

inter alia, to quiet title to the easement and to enforce its height restrictions as to the hedges, including the evergreen trees, and as to a pool house on the defendants' property that he claimed was in violation of the outbuilding restriction and obstructed his water view. The plaintiff further sought injunctive relief pursuant to statute (§ 52-480), claiming that the defendants had maliciously planted the evergreen trees in violation of statute (§ 52-570) for the purpose of impairing his view. The trial court denied the plaintiff's motion for summary judgment and granted the motion for summary judgment filed by the defendants, determining, inter alia, that, although the plaintiff had established the existence of the easement and that the defendants were obstructing his water view, the restrictions in the easement applied only to a fence or hedge along the boundary line between the parties' properties. The court further determined that the applicable statute of limitations (§ 52-575a) barred the plaintiff's claim as to the pool house but made no mention of his claim regarding the planting of the evergreen trees. The court thereafter denied the plaintiff's motion for reargument without addressing the issue of the evergreen trees and rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The trial court, having properly determined that the view easement existed in the deed to the defendants' property and that the defendants were obstructing the plaintiff's water view, should not have granted the defendants' motion for summary judgment as to that count of the plaintiff's complaint seeking to quiet title to the easement and, instead, should have granted the plaintiff's motion for summary judgment as to that claim.
2. The trial court improperly rendered summary judgment for the defendants as to the scope of the view easement, which was based on the court's erroneous determination that the language in the defendant's deed was clear and unambiguous:

   a. The trial court's determination as a matter of law that the easement limited the height of a fence or hedge only along the property line between the parties' parcels but not hedges beyond the property line was improper, as the deed's language reasonably could be read to apply to all hedges between the defendants" property and the plaintiff's property, and the language of the height restriction did not clearly and unambiguously require that the word "division" modify both fences and hedges, as the court found, as that would render superfluous language in the easement following the word hedges, namely, "between said premises and the adjoining land"; moreover, there was no authority for the plaintiff's claim that a division fence can be a fence located anywhere on the defendants' property in light of case law and because the term division fence at the time of the 1924 deed had a common, natural and ordinary meaning as a fence along a boundary line between two adjoining parcels of real property; accordingly, because the court failed to consider the height restriction in light of the surrounding circumstances when it was imposed, the case had to be remanded for a determination of the scope of

the easement and the plaintiff's rights thereunder, as that determination required a fact intensive inquiry that must be made by the trier of fact and not as a matter of law.

b. The trial court improperly determined that § 52-575a barred the plaintiff's claim that the defendants' pool house violated the easement's outbuilding restriction: although the parties did not dispute that the pool house had existed for more than three years before the plaintiff commenced this action, § 52-575a pertains to private restrictions and, therefore, was inapplicable to the easement at issue, which was not a private restriction and was intended to run with the defendants' land.

3. The defendants could not prevail on their claim that the trial court properly rendered summary judgment in their favor as to the claim that they maliciously planted evergreen trees that violated the easement's height restriction for the purpose of obstructing the plaintiff's water view: neither the trial court's memorandum of decision nor its ruling on the plaintiff's motion for reargument addressed the plaintiff's claims pertaining to the evergreen trees, and, without the necessary factual findings or a statement by the court that no genuine issue of material fact existed with respect to the elements of those claims, this court had no basis from which to conclude that the trial court properly rendered summary judgment on those claims; moreover, the defendants' assertion that they did not erect any structure for the purposes of §§ 52-570 and 52-480 because the pool house and any hedges near the pool were present when they purchased their property was of no consequence to the plaintiff's claim, which pertained to the evergreen trees the defendants planted after the plaintiff purchased his property.

Argued September 12, 2022—officially released February 28, 2023

Procedural History

Action, inter alia, to quiet title to a certain view easement that was allegedly being obstructed by the defendants and to determine the parties' rights under the view easement, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hernandez*, *J.*, granted the defendants' motion for summary judgment, denied the plaintiff's motion for summary judgment and rendered judgment for the defendants, from which the plaintiff appealed to this court; thereafter, Patricia Ann McLaughlin et al. were substituted as successor defendant cotrustees of the Edward F. McLaughlin Revocable Trust. *Reversed in part*; *further proceedings*.

Linda L. Morkan, with whom was *Brian R. Smith*, for the appellant (plaintiff).

John F. Carberry, with whom was *M. Juliet Bonazzoli*, for the appellees (defendant Patricia Ann McLaughlin et al.).

Opinion

DiPENTIMA, J. In this action concerning a dispute between the plaintiff, Stephen C. Freidheim, and the defendant adjoining landowners, Edward F. McLaughlin, in his capacity as trustee for the Edward F. McLaughlin Revocable Trust (trust), and Patricia Ann McLaughlin,[1] regarding an alleged view easement, the plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendants on all five counts of the plaintiff's complaint. On appeal, the plaintiff claims that the court improperly (1) granted the defendants' motion for summary judgment after determining that the plaintiff had established the existence of a view easement that was being obstructed by the defendants, (2) misapplied the scope of the view easement restrictions when it determined that those restrictions applied only to a fence or hedge along the boundary line between the parties' properties, (3) determined that the plaintiff's claim that a "pool changing/utility outbuilding" (pool house) on the defendants' property violates an outbuilding restriction of the view easement was barred by the statute of limitations in General Statutes § 52-575a and (4) rendered summary judgment in favor of the defendants as to count three of the complaint, which alleges a violation of General Statutes § 52-570 for malicious planting of hedges that exceed a five foot

[1] Edward F. McLaughlin died during the pendency of this action. Thereafter, Howard V. Sontag and Patricia Ann McLaughlin, as successor cotrustees of the trust, were substituted as defendants in this action in lieu of Edward F. McLaughlin, trustee. For simplicity, our references to the defendants are to the original defendants and to the substitute cotrustees and Patricia Ann McLaughlin collectively when appropriate.

height restriction of the view easement, and as to count four, which seeks injunctive relief pursuant to General Statutes § 52-480 related to the malicious planting of the hedges. We affirm the judgment only with respect to the court's determination that a view easement exists. We reverse the summary judgment rendered in favor of the defendants in all other respects and remand the case for further proceedings.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The plaintiff owns a parcel of real property located at 1 Smith Road in Greenwich, which he purchased via a warranty deed dated April 6, 2000 (plaintiff's parcel). The defendants purchased an adjacent parcel of real property located at 9 Smith Road in Greenwich via a warranty deed dated April 28, 1995 (defendants' parcel). Both parcels directly abut the waterfront and have views of Greenwich Harbor and Long Island Sound. In the early 1920s, the parcels were part of a larger parcel of undeveloped land owned by Oliver D. Mead, which forms what is now known as Field Point Circle. In connection with his development of the parcel in the 1920s, Mead subdivided the parcel into residential lots, created a road known as Smith Road, and filed a map titled, "Property of Oliver D. Mead, Greenwich Conn[ecticut]," with the town clerk on December 16, 1924, which became designated as map number 989 (Mead map). See Appendix to this opinion. On the Mead map, the plaintiff's parcel, now 1 Smith Road, is comprised of lots 4 and 5 and is situated to the north of the defendants' parcel, now 9 Smith Road, which is designated as lot 3. To the south of the defendants' parcel are lot 2, which is now 17 Smith Road, and lot 1, which is now 23 Smith Road. All five lots are bordered on the west by Smith Road and to the east by Greenwich Harbor. The original home located on the plaintiff's parcel was oriented to face in a southeastward direction, so as

to fully capture the view of the waterfront across the neighboring properties. The current home on the plaintiffs' parcel is in the same location as the original home and is similarly oriented to face Long Island Sound.

In 1924, the first lot Mead conveyed was lot 3, the defendants' parcel, via a deed to Ella Rossiter (Rossiter deed) dated December 16, 1924. The Rossiter deed includes a number of restrictions relevant to this case and provides in relevant part: "The Grantee for herself, her heirs, executors, administrators, and assigns hereby covenants and agrees with the Grantor his heirs, executors, administrators and assigns as follows . . . (2) That she will not erect or maintain any division fences or hedges between said premises and the adjoining land other than a stone fence, brick fence or hedge; and if stone, brick or hedge is used, it is not to be over five feet in height [height restriction]. . . . (4) That she . . . agrees to submit all plans and elevations for dwelling house or other outbuilding to be erected on said lot for the approval of the grantor, John Faher, S. K. Minor, Douglass Grahame Smyth, Grace E. Dalgleish and the grantee or a majority of them [approval restriction] . . . and the grantor agrees to restrict the remaining lots on the shore in like manner, to wit: lots 1 [and] 2. (5) That . . . no dwelling house, garage or employee's cottage or any other outbuilding, other than a boat house of one story shall be erected on any of said lots, any part of which shall be more distant than 200 feet from the easterly line of said proposed road [Smith Road] [outbuilding restriction], and the grantor agrees to restrict lots 1 [and] 2 in like manner. And the above covenants shall run with the land hereby conveyed." The restrictions in the Rossiter deed are contained in all deeds thereafter conveying ownership of 9 Smith Road, including the defendants' deed.

On December 24, 1924, Mead conveyed lots 4 and 5, which now are owned by the plaintiff, to Louise A.

Smyth (Smyth deed). The Smyth deed contains the same height restriction for any "division fences or hedges" as the one in the Rossiter deed but does not include the approval restriction or the outbuilding restriction from the Rossiter deed, although it provides that the grantor would include those restrictions in any deed of conveyance of lots 1, 2, and 3, as was done in the conveyance to Rossiter and as shown in the deeds conveying lots 2 and 1. The plaintiff's deed provides that the subject premises being conveyed is subject to the "[r]estrictive covenants and agreements contained" in the Smyth deed. Thus, the deeds for the plaintiff's parcel, the defendants' parcel, and lots 1 and 2 all contain the height restriction for division fences and hedges, whereas only the defendants' parcel and lots 1 and 2 are subject to the approval and outbuilding restrictions as well.

The plaintiff brought this action via a complaint dated March 2, 2017, in which he alleged five counts against the defendants. The basis for this action is the plaintiff's claim that the original landowner of the parties' properties, Mead, sought to protect views of Long Island Sound for future landowners by establishing a view easement in the deeds conveying each of the five residential lots, as evidenced by the inclusion of the height and outbuilding restrictions in certain of those deeds. The plaintiff alleges that, in November, 2001, he requested that the defendants abide by the view easement by maintaining hedges on their property to the five foot height restriction. The defendants responded by a letter dated January 18, 2002, in which they acknowledged the view easement and agreed to maintain the height of the hedges to five feet but declined to apply the height restriction to certain evergreen plantings because they did not constitute a "hedge . . . ." Although the defendants initially took steps to bring the hedges in conformity with the view easement, in May, 2002, the defendants planted two new rows of evergreen trees, the

height of which violated the view easement, and have since refused to abide by the view easement restrictions with respect to various hedges on their property. The plaintiff further alleges that a pool house on the defendants' parcel is an outbuilding that is more than 200 feet from the easterly line of Smith Road in violation of the outbuilding restriction, and that plans for the pool house were never submitted for approval as required by the approval restriction.

In count one, the plaintiff sought a judgment quieting title with respect to the view easement restrictions over 9 Smith Road as those restrictions pertain to all hedges, fences and walls, as well as the pool house. In count two, he requested a declaratory judgment determining the parties' rights, obligations, and interests under the view easement. The plaintiff alleged a violation of § 52-570 in count three premised on the evergreen trees that had been planted by the defendants, which the plaintiff claimed constituted a hedge that was maliciously erected and impaired his view. In count four, the plaintiff sought injunctive relief pursuant to § 52-480 for the malicious plantings as alleged in count three, and in count five, he sought a permanent injunction enforcing the view easement.

Thereafter, the plaintiff filed a motion for summary judgment as to counts one, two and five of the complaint. In support of his motion, the plaintiff submitted documentary evidence, including the Mead map; maps of the plaintiff's parcel; relevant deeds conveying the lots depicted on the Mead map; aerial photographs of the properties, as well as photographs depicting the view toward the water from the plaintiff's parcel and various plantings and the pool house on the defendants' parcel; affidavits; and letters and notes exchanged between the parties[2] relating to their disagreement over

[2] We note, with some bemusement, that the record contains correspondence between Patricia McLaughlin and her neighbor to the south at 17 Smith Road, which indicates that Patricia McLaughlin had advised her neighbor

the alleged view easement obstructions. The defendants countered by filing a motion for summary judgment as to all counts and submitted relevant deeds, maps, photographs, correspondence, and an affidavit in support of their motion. Following argument on the motions, the court issued a memorandum of decision on September 30, 2019, granting the defendants' motion for summary judgment as to all counts and denying the plaintiff's motion for summary judgment. Subsequently, the court denied the plaintiff's motion for reargument, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

We first set forth our well established standard of review pertaining to a trial court's decision to grant a motion for summary judgment. "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. . . . Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing 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. . . . 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

to "read your [d]eed and the height restrictions we are all subject to" and requested that the neighbor attend to certain overgrown landscaping on the neighbor's property. At the behest of Patricia McLaughlin, the neighbor removed a single olive tree and other "bushes/trees" that were not located on the boundary line but which allegedly obstructed the defendants' view of Long Island Sound.

presented to the court [in support of a motion for summary judgment]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Idlibi* v. *Hartford Courant Co.*, 216 Conn. App. 851, 860, 287 A.3d 177 (2022). "[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." (Internal quotation marks omitted.) *Laiuppa* v. *Moritz*, 216 Conn. App. 344, 356, 285 A.3d 391 (2022). On appeal, we "must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 792, 185 A.3d 643 (2018).

I

The plaintiff's first claim is that the court, having determined that the plaintiff established the existence of a view easement that was being obstructed by the defendants, improperly rendered summary judgment in the defendants' favor as to count one, at a minimum. At oral argument before this court, counsel for the defendants acknowledged that the judgment needs to be corrected to reflect judgment for the plaintiff on count one that there is a view easement.

In count one, the plaintiff sought a judgment quieting title with respect to the view easement as it pertains to all hedges, fences, walls and the pool house. The trial court specifically found that "the restrictive covenant [height restriction] burdening the defendants' property is a view easement" that was being impaired and ordered the defendants, in accordance with that easement, to take corrective action and "to trim the hedges along the property line to a height not exceeding five

feet." On appeal, the defendants conceded at oral argument before this court that such a view easement exists. Accordingly, in light of the court's determination that a view easement exists and was being obstructed by the defendants, the court should not have granted the defendants' motion for summary judgment as to count one to the extent that it seeks to quiet title to the view easement and, instead, should have granted the plaintiff's motion for summary judgment[3] in part as to count one.

II

The plaintiff next claims that the court (1) misapplied the scope of the view easement restrictions when it determined that those restrictions applied only to a fence or hedge along the boundary line between the parties' properties and (2) improperly determined that the plaintiff's claim that a pool house on the defendants' property violated the outbuilding restriction of the view easement was barred by the statute of limitations in § 52-575a. We agree with both claims and address them in turn.

Before we reach the merits of the plaintiff's claims, we first set forth our standard of review and fundamental principles of law governing easements and the construction of deeds. "The principles guiding our construction of land conveyance instruments, such as the [deeds] at issue in this appeal, are well established. The construction of a deed . . . presents a question of law which we have plenary power to resolve." (Internal quotation marks omitted.) *Stefanoni* v. *Duncan*, 282

[3] We note that, "[a]lthough the denial of a motion for summary judgment is not ordinarily a final judgment and, thus, not immediately appealable, 'if parties file . . . motions for summary judgment and the court grants one and denies the other, this court has jurisdiction to consider both rulings on appeal.' " *Dunn* v. *Northeast Helicopters Flight Services, LLC*, 206 Conn. App. 412, 415–16 n.2, 261 A.3d 15, cert. granted, 338 Conn. 915, 259 A.3d 1180 (2021).

Conn. 686, 704, 923 A.2d 737 (2007). "In construing a deed, a court must consider the language and terms of the instrument as a whole. . . . Our basic rule of construction is that recognition will be given to the expressed intention of the parties to a deed or other conveyance, and that it shall, if possible, be so construed as to effectuate the intent of the parties. . . . In arriving at the intent expressed . . . in the language used, however, it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . The construction of a deed in order to ascertain the intent expressed in the deed presents a question of law and requires consideration of all its relevant provisions in the light of the surrounding circumstances. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . . Finally, our review of the trial court's construction of the instrument is plenary." (Citations omitted; internal quotation marks omitted.) *Il Giardino, LLC* v. *Belle Haven Land Co.*, 254 Conn. 502, 510–11, 757 A.2d 1103 (2000).

"It is well settled that [a]n easement . . . obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . . In determining the character and extent of an easement created by deed, the ordinary import of the language will be accepted as indicative of the intention of the parties, unless there is something

in the situation of the property or the surrounding circumstances that calls for a different interpretation. . . . Except as limited by the terms of the servitude . . . the holder of an easement . . . is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. . . . Likewise, [e]xcept as limited by the terms of the servitude . . . the holder of the servient estate is entitled to make any use of the servient estate that does not reasonably interfere with enjoyment of the servitude." (Citations omitted; internal quotation marks omitted.) *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, 184 Conn. App. 834, 841, 195 A.3d 1143 (2018).

Because the term "view easement" is not explicitly used in the deeds, the present case involves an implied easement, which "is typically found when land in one ownership is divided into separately owned parts by a conveyance, and at the time of the conveyance a permanent servitude exists as to one part of the property in favor of another which servitude is reasonably necessary for the fair enjoyment of the latter property." (Internal quotation marks omitted.) *Sanders* v. *Dias*, 108 Conn. App. 283, 293, 947 A.2d 1026 (2008); see *Schwartz* v. *Murphy*, 74 Conn. App. 286, 297, 812 A.2d 87 (2002) ("[t]he law is settled that the obligation of the owner of the servient estate, as regards an easement, is not to maintain it, but to refrain from doing or suffering something to be done which results in an impairment of it" (internal quotation marks omitted)), cert. denied, 263 Conn. 908, 819 A.2d 841 (2003), cert. denied, 546 U.S. 820, 126 S. Ct. 352, 163 L. Ed. 2d 61 (2005).

A

The first part of the plaintiff's claim concerns the court's misapplication of the view easement as it relates to the height restriction. Because the defendants concede that a view easement exists and do not challenge

the court's determination to that effect on appeal, we limit our analysis to the issue of the scope of the view easement. Next, we set forth the language of the height restriction in the view easement that is at issue in this appeal. Starting with the Rossiter deed and continuing with every deed thereafter conveying 9 Smith Road, including the defendants' deed, the grantee agreed "not [to] erect or maintain any division fences or hedges between said premises and the adjoining land other than a stone fence, brick fence or hedge; and if stone, brick or hedge is used, it is not to be over five feet in height . . . ." Mead, the original grantor of the defendants' parcel, also included that restriction in the deeds conveying the plaintiff's parcel, as well as lots 2 and 1, which are located to the south of the defendants' parcel.

The trial court construed the language of the deed restriction to be clear and unambiguous as limiting the height of landscaping only along the property line between the plaintiff's and the defendants' parcels. In making that conclusion, the court rejected the plaintiff's argument that the scope of the view easement extends "beyond the property line hedges to include any landscaping throughout the property that is obstructing the plaintiff's view of . . . Long Island Sound." On appeal, the plaintiff contends that the court's interpretation renders the view easement meaningless, as the defendants were ordered to trim back hedges along the property line only but are not required to do so with respect to other plantings or hedges that are "only inches away" from the property line. The plaintiff asserts that he presented "undisputed evidence that the defendants had planted a second line of evergreens running parallel to the previously planted hedge on the property line . . . all of which was overgrown and exceed[ed] five feet . . . ." (Citation omitted.) The defendants argue that the court was correct in its interpretation of the

limited scope of the view easement. The scope of the easement, therefore, is the primary issue in this appeal.

" 'Intent as expressed in deeds and other recorded documents is a matter of law. *Contegni* v. *Payne*, 18 Conn. App. 47, 51, 557 A.2d 122, cert. denied, 211 Conn. 806, 559 A.2d 1140 (1989); *Grady* v. *Schmitz*, 16 Conn. App. 292, 295–96, 547 A.2d 563, cert. denied, 209 Conn. 822, 551 A.2d 755 (1988).' *Perkins* v. *Fasig*, 57 Conn. App. 71, 76, 747 A.2d 54 (2000). If, after a plenary review, an appellate court concludes that deeded easements exist, their nature and extent usually must be decided by a trial court, and ordinarily a remand is required for a finding of relevant facts to establish their boundaries. See *Bolan* v. *Avalon Farms Property Owners Assn., Inc.*, 250 Conn. 135, 146–47, 735 A.2d 798 (1999). Although the intent to create an easement by recorded instruments is a question of law, the deeds, maps and recorded instruments that created the easement must be considered in light of the surrounding circumstances to determine the nature and extent of the easement. *Perkins* v. *Fasig*, supra, 76." *Mandes* v. *Godiksen*, 57 Conn. App. 79, 82–83, 747 A.2d 47, cert. denied, 253 Conn. 915, 754 A.2d 164 (2000); see also *Stefanoni* v. *Duncan*, supra, 282 Conn. 699 ("Although in most contexts the issue of intent is a factual question on which our scope of review is limited . . . the determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is plenary. . . . Nevertheless, [t]he determination of the scope of an easement is a question of fact . . . ." (Citation omitted; internal quotation marks omitted.)).

Although a reviewing court customarily does not give deference to a trial court's construction of the language of a deed; see *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, supra, 184 Conn. App. 840; as we stated previously in this opinion, the trial court

found the existence of a view easement in the deed and the defendants have not challenged that finding on appeal. The focus of the parties' disagreement concerns the scope of that easement. Thus, the question before this court is whether the trial court properly determined, as a matter of law on the defendants' motion for summary judgment, that the language of the height restriction in the view easement was clear and unambiguous and was limited to the hedges on the property line between the plaintiff's and the defendants' parcels.

When considering whether an ambiguity exists in a deed, a court does "not decide which party has the better interpretation, only whether there is more than one reasonable interpretation of the . . . language at issue. If we conclude that the language allows for more than one reasonable interpretation, the contract is ambiguous and the trial court's decision to render summary judgment, based on the conclusion that the contract is unambiguous, must be reversed and the matter remanded for a trial. Conversely, if the contract is unambiguous, its interpretation and application is a question of law for the court, permitting the court to resolve a [claim concerning the contract] on summary judgment if there is no genuine dispute of material fact." *Salce* v. *Wolczek*, 314 Conn. 675, 683, 104 A.3d 694 (2014); see also *Wells Fargo Bank, N.A.* v. *Fitzpatrick*, 190 Conn. App. 231, 238–39, 210 A.3d 88 (construction of deed is governed by same rules of interpretation that apply to written instruments or contracts, with primary goal being to ascertain intention of parties), cert. denied, 332 Conn. 912, 209 A.3d 1232 (2019); *Bueno* v. *Firgeleski*, 180 Conn. App. 384, 405, 183 A.3d 1176 (2018) ("[w]here a deed is ambiguous the intention of the parties is a decisive question of fact" (internal quotation marks omitted)).

Moreover, "[t]he determination as to whether language of a contract [or deed] is plain and unambiguous

is a question of law subject to plenary review. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Fiorillo* v. *Hartford*, 212 Conn. App. 291, 302, 275 A.3d 628 (2022). "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *New Milford* v. *Standard Demolition Services, Inc.*, 212 Conn. App. 30, 56, 274 A.3d 911, cert. denied, 345 Conn. 908, 283 A.3d 506 (2022). Our Supreme Court has cautioned that "[t]he intention of the parties, gathered from their words, is gathered not by reading a single clause of the covenant but . . . by reading its entire context." *Moore* v. *Serafin*, 163 Conn. 1, 10, 301 A.2d 238 (1972); see also *National Associated Properties* v. *Planning & Zoning Commission*, 37 Conn. App. 788, 795, 658 A.2d 114 (same), cert. denied, 234 Conn. 915, 660 A.2d 356 (1995); *Russo* v. *Stepp*, 2 Conn. App. 4, 6, 475 A.2d 331 (1984) ("It is not always easy to determine what was intended by the parties. The language employed is not the only criterion. The language used therefore must be considered with reference to the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties. *Mackin* v. *Mackin*, 186 Conn. 185, 189, 439 A.2d 1086 (1982).").

In the present case, the court addressed the issue of whether the view easement extended beyond the property line hedges and concluded: "In accordance with the clear terms set forth in the deed, the court finds that it cannot extend the meaning of the covenant to include landscaping growth in areas beyond the property line hedges." In the court's perspective, the language of the height restriction of the view easement

clearly and unambiguously applied to the property line hedges only. In the absence of any other findings or explanation by the court, we can only surmise from the court's decision that the court found the word "division" in the height restriction to modify both fences and hedges. As we will explain more fully in this opinion, we do not agree that the language of the height restriction clearly and unambiguously requires such a conclusion.

The term "division fences" is not defined in the deed, and, therefore, we must look to the ordinary meaning of the term. See *NPC Offices, LLC* v. *Kowaleski*, 320 Conn. 519, 527–28, 131 A.3d 1144 (2016); see also *Cohen* v. *Hartford*, 244 Conn. 206, 215, 710 A.2d 746 (1998) ("the words [in a deed] are to be given their ordinary popular meaning, unless their context, or the circumstances, show that a special meaning was intended" (internal quotation marks omitted)). In doing so, "[w]e often consult dictionaries . . . to determine whether the ordinary meanings of the words used . . . are plain and unambiguous, or conversely, have varying definitions in common parlance." (Internal quotation marks omitted.) *NPC Offices, LLC* v. *Kowaleski*, supra, 528; see also *Avery* v. *Medina*, 151 Conn. App. 433, 442, 94 A.3d 1241 (2014) ("[w]hether . . . a term is ambiguous turns on whether it has varying definitions in common parlance" (internal quotation marks omitted)). Ballentine's Law Dictionary (2d Ed. 1948) "defines a division fence as a fence erected on the boundary line between adjoining proprietors. The term does not, however, apply to such fences as may be erected by each proprietor on his own land, though near and parallel to the boundary line." (Internal quotation marks omitted.) *Grosby* v. *Harper*, 4 Conn. Cir. 196, 199, 228 A.2d 563, cert. denied, 154 Conn. 718, 222 A.2d 810 (1966).

The plaintiff argues for a very broad interpretation of the term division fence, asserting that a division fence includes "a fence located *anywhere* on a property

. . . .'' (Emphasis in original.) In doing so, the plaintiff relies on the definition of a division fence in the Merriam-Webster Dictionary as ''a fence separating adjacent areas of the same farm or ranch . . . distinguished from line fence,'' which is defined in the Merriam-Webster Dictionary as ''a fence built along the boundary or property line of a farm or ranch.'' Merriam-Webster Online Dictionary, available at https://www.merriam-webster.com/dictionary/division%20fence and https://www.merriam-webster.com/dictionary/line%20fence (last visited February 21, 2023). The plaintiff also directs our attention to a number of random, secondary sources, which include references by the United States Bureau of Land Management to a division fence to describe fencing to control livestock within a pasture; a registration form from the National Register of Historic Places, which refers to a division fence as being between areas of the same cemetery; an excerpt from a book about Kentucky beef that distinguishes between boundary and division fences; an appropriations bill from the United States Department of the Interior, which refers to division fences as being needed for an interior lot to separate cattle; a chart prepared by a subcommittee of the United States House of Representatives that distinguishes between boundary and division fences; and an advertisement for a certain fence that references a division fence between a barnyard and a house yard. It appears that most of the sources relied on by the plaintiff reference division fences in the context of farming, specifically, corralling or controlling livestock.

This court has stated previously that ''[t]he language [in a deed] should be interpreted to accord with the meaning an ordinary purchaser would ascribe to it *in the context of the parcels of land involved*.'' (Emphasis added; internal quotation marks omitted.) *Jepsen* v. *Camassar*, 181 Conn. App. 492, 517, 187 A.3d 486, cert. denied, 329 Conn. 909, 186 A.3d 12 (2018); see also

Castonguay v. *Plourde*, 46 Conn. App. 251, 263, 699 A.2d 226 ("[t]he terms of a covenant . . . cannot be construed in a vacuum, but are to be understood in context"), cert. denied, 243 Conn. 931, 701 A.2d 660 (1997). The present case does not involve a farm or ranch, or any livestock; rather, it concerns a deeded view easement in deeds to waterfront properties that were once part of a single parcel of land. Moreover, in our review of the limited Connecticut authority addressing division fences, we have found no authority for the plaintiff's proposition that a division fence can be a fence located anywhere on a property. Instead, it can be inferred from many of the cases, some of which were decided near or before the time of the deeds at issue in the present case, that a division fence is one that is erected on a property line between adjoining landowners. See *Christen* v. *Ruppe*, 131 Conn. 149, 152, 38 A.2d 439 (1944) (suggesting that division fence is fence located on boundary line by statement that "no division fence or other structure . . . evidenced the location of the westerly boundary of the defendant's land"); *Bland* v. *Bregman*, 123 Conn. 61, 64, 192 A. 703 (1937) (plaintiff attempted to establish boundary line with evidence of location of division fence); *Milardo* v. *Branciforte*, 109 Conn. 693, 696, 145 A. 573 (1929) (it was "necessary inference" that fence built on property line between two adjoining landowners was division fence); *Cooke* v. *McShane*, 108 Conn. 97, 98, 142 A. 460 (1928) (stating that hedge that followed boundary line "was considered by both parties as a division fence" and that "hedge may be a division fence, if its middle be upon the boundary line"); *Millner* v. *Elias*, 101 Conn. 280, 286–87, 125 A. 470 (1924) (in charge to jury, court instructed that jury had to determine whether fence at issue was divisional fence and stated that evidence was offered suggesting that fence was not located on property line to disprove claim that fence was divisional

fence); *Wooding* v. *Michael*, 89 Conn. 704, 706, 96 A. 170 (1915) (fence was not division fence because it was "not quite on the division line"); *Murray* v. *Aparicio*, Docket No. CV-12-6014866-S, 2016 WL 4497603, *3 n.6 (Conn. Super. July 20, 2016) ("a division fence . . . is a fence dividing two adjoining properties"); *Pereira* v. *E & E Builders, Inc.*, Docket No. CV-93-0044086-S, 1996 WL 469738, *1 (Conn. Super. August 6, 1996) (because "center line of [stone] wall constituted the property line . . . the wall as built was on both properties and could be considered a division fence").

That definition also is consistent with the one in Ballentine's Law Dictionary and with a Connecticut statute governing division fences, General Statutes § 47-43, which provides in relevant part: "The proprietors of lands shall make and maintain sufficient fences to secure their particular fields. . . . Adjoining proprietors shall each make and maintain half of a divisional fence, *the middle line of which shall be on the dividing line* . . . ." (Emphasis added.) Although the present case involves our construction of language in a deed and not a statute, the statutory language is informative to our determination of the definition of a division fence.

Although the plaintiff urges us to adopt a definition of "division fence" that includes interior fencing on real property, we decline to do so. Instead, we conclude, on the basis of Connecticut authority and Ballentine's Law Dictionary, that the term "division fence," as used in the 1924 deed, had at that time a common, natural and ordinary meaning as a fence along a boundary line between two parcels of real property. Given that definition, it necessarily follows that, if "division" also modifies "hedges" in the language of the view easement, a division hedge is a hedge located on a boundary line between adjoining landowners. That interpretation, however, would render superfluous the language that

follows "hedges" in the view easement—"between said premises and the adjoining land . . . ." See *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 416, 102 A.3d 87 ("[t]he law of contract interpretation militates against interpreting a contract in a way that renders a provision superfluous" (internal quotation marks omitted)), cert. denied, 315 Conn. 901, 104 A.3d 106 (2014). Moreover, the language of the view easement must be construed so as "to effectuate the intent of the parties." (Internal quotation marks omitted.) *NPC Offices, LLC* v. *Kowaleski*, supra, 320 Conn. 526. With that in mind, and giving effect to every provision in the restriction, we conclude that the height restriction reasonably can be read as applying to "division fences" and to "hedges between said premises and the adjoining land . . . ." Because the deed language is susceptible to more than one reasonable interpretation, it is ambiguous. See id., 529. The trial court, therefore, improperly rendered summary judgment in favor of the defendants on the basis of its erroneous determination that the language of the deed was clear and unambiguous.

Our Supreme Court has stated that, "[i]n arriving at the intent expressed . . . in the language used [in a deed] . . . it is always admissible to consider the situation of the parties and the circumstances connected with the transaction, and every part of the writing should be considered with the help of that evidence. . . . Thus, if the meaning of the language contained in a deed or conveyance is not clear, the trial court is bound to consider any relevant extrinsic evidence presented by the parties for the purpose of clarifying the ambiguity. . . . [Appellate] review of the trial court's construction of the instrument is plenary." (Citation omitted; internal quotation marks omitted.) *Lakeview Associates* v. *Woodlake Master Condominium Assn., Inc.*, 239 Conn. 769, 780–81, 687 A.2d 1270 (1997); see

also *Bueno* v. *Firgeleski*, supra, 180 Conn. App. 404–405 ("[L]anguage in a deed that purports to create a restrictive covenant must be construed in light of the circumstances attending and surrounding the transaction . . . . The primary rule of interpretation of such [restrictive] covenants is to gather the intention of the parties from their words, by reading, not simply a single clause of the agreement but the entire context, and where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met." (Emphasis omitted; internal quotation marks omitted.)).

In determining the scope of the easement in the present case, the trial court, on the basis of its erroneous finding that the deed language was unambiguous, relied on the language of the deed only. Consequently, the court's failure to consider the restrictions in light of the surrounding circumstances when they were imposed was error.

Moreover, the fact intensive nature of the inquiry as to the scope of the view easement renders it ill-suited for summary adjudication. The appellate courts of this state repeatedly have held that " '[t]he determination of the scope of an easement is a question of fact.' " *Simone* v. *Miller*, 91 Conn. App. 98, 111, 881 A.2d 397 (2005); see also *NPC Offices, LLC* v. *Kowaleski*, supra, 320 Conn. 526 ("[t]he determination of the scope of an easement is a question of fact . . . [and] is for the trier of fact" (internal quotation marks omitted)); *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015) (same); *Deane* v. *Kahn*, supra, 167 n.6 ("determining the location, scope, and use of an . . . easement is a fact-intensive inquiry"); *McBurney* v. *Paquin*, 302 Conn. 359, 367, 28 A.3d 272 (2011) (determination of scope of easement is question of fact); *Stefanoni* v. *Duncan*, supra, 282 Conn. 703–704 ("[t]he determination of the scope of an easement . . . is necessarily fact driven," and "the

meaning of [an] ambiguous term in a deed is an issue 'of fact for the trial court' "); *Sack Properties, LLC* v. *Martel Real Estate, LLC*, 191 Conn. App. 383, 389, 214 A.3d 912 (2019) ("the determination of whether one has interfered with the use of an easement is a question of fact"); *Thurlow* v. *Hulten*, 130 Conn. App. 1, 2, 21 A.3d 535 (determination of scope of easement is question of fact for trier of fact), cert. denied, 302 Conn. 925, 28 A.3d 337 (2011); *Sanders* v. *Dias*, supra, 108 Conn. App. 295 (same).

"Additionally . . . [t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit. . . . The decision as to what would constitute a reasonable use of [an easement] is for the trier of fact . . . ." (Internal quotation marks omitted.) *Simone* v. *Miller*, supra, 91 Conn. App. 111; see also *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, supra, 184 Conn. App. 847. Indeed, this court has explained that "[f]actual findings are a necessary prerequisite to determine the scope and extent of [a plaintiff's] rights with respect to [an] easement. It is well established that appellate courts are not triers of fact and rely on the trial court's findings and conclusions related thereto." (Internal quotation marks omitted.) *Simone* v. *Miller*, supra, 111–12. "We cannot ourselves determine the precise scope of the easement on the basis of the evidence before the court because to do so would require us to make findings of fact." *First Union National Bank* v. *Eppoliti Realty Co.*, 99 Conn. App. 603, 610, 915 A.2d 338 (2007) (*First Union*).

This abundant authority leads us to the ineluctable conclusion that the fact intensive inquiry regarding the scope of the view easement must be made by the trier of fact and not as a matter of law. As was done by

this court in *First Union* and *Simone*, we remand[4] the present case for further proceedings limited to the determination of the scope of the view easement and the plaintiff's rights thereunder. See id., 611; *Simone* v. *Miller*, supra, 91 Conn. App. 112. In making the determination as to the character and extent of the easement, the trier of fact must "look to the language of the deed, the situation of the property and the surrounding circumstances in order to ascertain the intention of the parties"; (internal quotation marks omitted) *Fitch* v. *Forsthoefel*, 194 Conn. App. 230, 236, 220 A.3d 876 (2019); and be mindful that, in giving meaning to the language of the deed, "we presume that the parties did not intend to create an absurd result." (Internal quotation marks omitted.) *South End Plaza Assn., Inc.* v. *Cote*, 52 Conn. App. 374, 378, 727 A.2d 231 (1999). Thus, because the court did not look beyond the language of the deed, on remand the trier of fact must consider the language of the deed in light of the circumstances surrounding and attending the transaction.

B

The plaintiff also claims that the court improperly determined that the statute of limitations in § 52-575a barred his claim that the pool house on the defendants' property violates the outbuilding restriction of the view easement. We agree.

The following additional facts are relevant to this claim. In connection with his claim that the trial court misapplied the view easement, the plaintiff argues that the court improperly denied his request for relief with respect to the pool house on the defendants' property, which he claims impairs his view easement. The court addressed this issue in its memorandum of decision,

[4] We note that, in *Mandes* v. *Godiksen*, supra, 57 Conn. App. 83, a remand was not necessary because the trial court in that case already had "defined the precise limits of the easements."

stating: "The plaintiff also contends that the defendants violated the view easement by constructing a pool house/changing room on their property that obstructs the plaintiff's water view. The defendants, again, counter that the view easement does not burden their property beyond the limits of the height restriction to the property line hedges. The defendants further contend that the plaintiff's argument as to the pool house/changing room is barred by the three year statute of limitations set forth in . . . § 52-575a. Section 52-575a provides in relevant part: '[N]o action or any other type of court proceeding shall be brought to enforce a private restriction recorded in the land records of the municipality in which the property is located . . . unless such action or proceeding shall be commenced within three years of the time that the person seeking to enforce such restriction had actual or constructive knowledge of such violation.' The evidence in the record clearly establishes, and the parties do not dispute, that the subject pool house had been in existence for more than three years before commencement of the instant action. Accordingly, the court finds that the three year statute of limitations is applicable to this cause of action, and, therefore, the plaintiff's claim regarding the pool house/changing room is not viable and is hereby denied." The plaintiff argues that, because the view easement is not a "private restriction," it is not subject to the statute of limitations in § 52-575a.

The resolution of this claim is guided by our decision in *Kepple* v. *Dohrmann*, 141 Conn. App. 238, 60 A.3d 1031 (2013). In *Kepple*, the plaintiffs had brought an action against the defendant adjoining landowners for interference with a claimed view easement over the defendants' properties. Id., 241. In response, the defendants filed an answer and special defense, alleging that the plaintiffs had a private restriction, rather than a view easement, and that the action was barred by the

statute of limitations in § 52-575a. Id. The trial court agreed with the defendants and rendered judgment in their favor. Id., 242. On appeal, this court reversed the judgment of the trial court, concluding that the covenant document at issue, which provided that the restrictions therein were restrictions that run with the land, granted the plaintiffs a view easement. Id., 244–45.

In reaching that decision, this court in *Kepple* explained that "[a] view easement generally is considered to be a negative easement. Negative easements prevent specific activities by the servient property such as a prohibition against certain types of improvements in order to protect the easement owner's right to sunlight or scenic views." (Internal quotation marks omitted.) Id., 247. We stated further: "Although an easement does not create an ownership interest in the servient estate but creates a mere privilege to use the servient estate in a particular manner, an easement involves limited rights to enjoy or to restrict another's use of property. . . . If an easement is created to benefit and does benefit the possessor of the land in his use of the land, the benefit of that easement is appurtenant to the land. The land is being benefited by the easement in the neighboring property. . . . An important characteristic of appurtenant easements is that they continue in the respective properties, rather than being merely personal rights of the parties involved. The easement's benefit or its burden passes with every conveyance affecting either the servient or dominant property." (Citation omitted; internal quotation marks omitted.) Id., 249–50. Accordingly, this court, having found that the covenant document granted the plaintiffs a view easement, concluded in *Kepple* that "the statute of limitations contained in § 52-575a, concerning private restrictions, [was] not applicable in [that] case." Id., 251.

We agree with the plaintiff that *Kepple* controls the outcome of this issue. "A reservation in a covenant will

be interpreted as appurtenant if, from the surrounding circumstances and other relevant provisions in the deed, the parties intended it to run with the land. . . . cf. *Blanchard* v. *Maxson*, 84 Conn. 429, 433, 80 A. 206 (1911) (easement of way will never be presumed to be personal when it can fairly be construed to be appurtenant to land). The only certain method of avoiding controversy and making sure that an easement or a covenant in an instrument . . . will be construed as other than personal is to use appropriate language to make the intention clear. . . . [W]here a restrictive covenant contains words of succession . . . a presumption is created that the parties intended the restrictive covenant to run with the land." (Citations omitted; internal quotation marks omitted.) *Castonguay* v. *Plourde*, supra, 46 Conn. App. 258.

In the present case, the language of the deed expressly indicates that the restrictions are intended to run with the land and are binding on the successors or assigns of the grantor and the heirs or assigns of the grantees. As we concluded in *Kepple*, § 52-575a, which applies to private restrictions, is not applicable to the easement at issue in the present case. The court, therefore, improperly rendered summary judgment in favor of the defendants on the basis of its determination that the statute of limitations barred the plaintiff's claim that the pool house obstructed the view easement. On remand, findings must be made as to whether the pool house falls within the scope of the view easement and, if so, whether it impairs the plaintiff's view easement.

III

The plaintiff's final claim is that the court improperly rendered summary judgment in favor of the defendants as to count three of the complaint, which alleges a violation of § 52-570 for malicious planting of hedges that exceed the five foot height restriction of the view

easement, and as to count four, which seeks injunctive relief pursuant to § 52-480 for the malicious plantings. We agree and remand the case for a trial on those counts.

Pursuant to § 52-570, "[a]n action may be maintained by the proprietor of any land against the owner or lessee of land adjacent, who maliciously erects any structure thereon, with intent to annoy or injure the plaintiff in his use or disposition of his land." In count three of his complaint, the plaintiff alleges a violation of § 52-570 by the defendants, claiming that a hedge of evergreen trees on the defendants' property constitutes a structure that was maliciously erected for the purpose of impairing the plaintiff's view easement. Specifically, paragraph 13 of the complaint alleges that, "[s]ometime after May, 2002, without the consent or knowledge of [the] plaintiff, [the] defendant[s] planted two new hedges of evergreen trees, which now also violate the view easement restrictions and obstruct [the] plaintiff's view of Long Island Sound . . . ." In count four, the plaintiff seeks injunctive relief pursuant to § 52-480[5] on the basis of the violation alleged in count three. In their memorandum of law in support of their motion for summary judgment, the defendants argued that a hedge is not a malicious structure under the statute and that the plaintiff could not satisfy the elements of § 52-570.[6]

[5] General Statutes § 52-480 provides: "An injunction may be granted against the malicious erection, by or with the consent of an owner, lessee or person entitled to the possession of land, of any structure upon it, intended to annoy and injure any owner or lessee of adjacent land in respect to his use or disposition of the same."

Thus, § 52-480 provides equitable relief for the same act for which § 52-570 provides a legal remedy in damages. See *Foldeak* v. *Incerto*, 6 Conn. Cir. 416, 427–28, 274 A.2d 724, cert. denied, 160 Conn. 567, 269 A.2d 293 (1970). The "two statutes have been on our books for about one hundred years and have been unchanged since 1875, but have been cited in comparatively few cases." (Internal quotation marks omitted.) Id., 428.

[6] In their memorandum of law in support of their motion for summary judgment, the defendants also argued that the three year statute of limitations set forth in General Statutes § 52-577 barred the plaintiff's claim because

The trial court's memorandum of decision granting the defendants' motion for summary judgment as to all counts makes no reference to the claims in counts three and four concerning §§ 52-570 and 52-480. The plaintiff alerted the court to its omission in a motion to reargue dated October 21, 2019. The court, however, denied the plaintiff's motion to reargue without addressing the omission.[7] For the following reasons, we conclude that the court improperly granted the defendants' motion for summary judgment with respect to counts three and four of the complaint.

The necessary elements to establish a cause of action under §§ 52-570 and 52-480 are the same and include the following: "(1) a structure erected on the [defendant's]

he had "been aware of the pool, the adjoining structure and hedges since he purchased [1] Smith [Road] in 2000." The defendants also have asserted this argument in their appellate brief. The defendants, however, never raised the statute of limitations in § 52-577 as a special defense in their answer and special defenses, as required by Practice Book § 10-50, and the trial court made no reference to § 52-577 in its memorandum of decision. When a statute of limitations is not jurisdictional in nature, it may be waived when not specially pleaded. See *Martino* v. *Scalzo*, 113 Conn. App. 240, 247, 966 A.2d 339, cert. denied, 293 Conn. 904, 976 A.2d 705 (2009); see also *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688, 698, 719 A.2d 66 (because defendant failed to specifically plead statute of limitations in § 52-577, it waived right to have defense considered by trial court), cert. denied, 247 Conn. 946, 723 A.2d 320 (1998), and cert. denied, 247 Conn. 946, 723 A.2d 320 (1998). Accordingly, we decline to consider the defendants' statute of limitations claim pertaining to counts three and four of the complaint. See *Alfred Chiulli & Sons, Inc.* v. *Hanover Ins. Co.*, 294 Conn. 689, 694, 987 A.2d 343 (2010) (plaintiff was not entitled to raise claim that counterclaim for equitable subrogation was time barred when plaintiff failed to raise statute of limitations as special defense prior to trial as required by Practice Book § 10-50); *Heim* v. *California Federal Bank*, 78 Conn. App. 351, 374–75, 828 A.2d 129 (declining to review statute of limitations defense raised for first time on appeal when statute of limitations provision at issue was not jurisdictional in nature), cert. denied, 266 Conn. 911, 832 A.2d 70 (2003).

[7] The court issued a one sentence decision denying the motion to reargue, which stated: "The movant has failed to demonstrate that the court misapprehended a material fact or otherwise failed to consider an applicable principle of law."

land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure is useless to the defendant; and (6) the enjoyment of the adjacent landowner's land is in fact impaired." (Internal quotation marks omitted.) *Errichetti* v. *Botoff*, 185 Conn. App. 119, 125, 196 A.3d 1199 (2018).

It is evident from case law that, unless a complaint is devoid of the necessary allegations for a cause of action under §§ 52-570 and 52-480,[8] any inquiry into whether a plaintiff has established a claim under §§ 52-570 and 52-480 for the malicious erection of a structure is necessarily fact driven, as a court must make factual findings as to whether the defendants erected a structure on their land and, if so, whether it was done maliciously, with the intent to injure the plaintiff's enjoyment of his land, whether the structure impairs the value of the adjoining land, whether the structure is useless to the defendant, and whether the structure, in fact, impaired the plaintiff's enjoyment of his land. See id., 132, 135 (trial court's factual findings regarding usefulness of alleged spite fence and that fence impaired plaintiff's enjoyment of his property were not clearly erroneous); *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, 138 Conn. App. 289, 303, 50 A.3d 968 (2012) (determining that trial court's factual findings that alleged spite fence was useless to defendant and did not negatively affect defendant's property were not clearly erroneous).

Moreover, in determining whether the structure was erected maliciously, a court must consider the "character, location and use"; *DeCecco* v. *Beach*, 174 Conn.

[8] Notably, the defendants have not claimed that the complaint lacks such necessary allegations.

29, 32, 381 A.2d 543 (1977); of the structure, which inherently requires factual findings made on the basis of the evidence presented. These factual inquiries also may involve an assessment of the credibility of testimony of witnesses, which must be determined by the trier of fact. See *Statewide Grievance Committee* v. *Dixon*, 62 Conn. App. 507, 511, 772 A.2d 160 (2001) ("[t]he weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact" (internal quotation marks omitted)); *In re Felicia B.*, 56 Conn. App. 525, 526, 743 A.2d 1160 ("This court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.)), cert. denied, 252 Conn. 951, 748 A.2d 298 (2000).

As we stated previously in this opinion, the trial court neither addressed nor referenced the claims in counts three and four in its decision. Without the necessary factual findings or a statement by the court that no genuine issue of material fact existed with respect to each of the elements of the claims pursuant to §§ 52-570 and 52-480, we have no basis on which to conclude that the motion for summary judgment was properly granted as to counts three and four.

The defendants essentially argue that the court properly rendered summary judgment in their favor on counts three and four because the plaintiff cannot, as a matter of law, establish two elements of a claim under § 52-570.[9] Specifically, the defendants argue that (1) a hedge cannot constitute a "structure" under § 52-570,

[9] We note that the defendants' claim pertaining to § 52-570 applies equally to the claim pursuant to § 52-480, as the elements of a claim under both statutes are the same. See *Errichetti* v. *Botoff*, supra, 185 Conn. App. 125.

and (2) they did not *erect* any structure for purposes of the statute because the pool house and any hedges near the pool were present when they purchased their property in 1995. Accordingly, the defendants claim that they could not have maliciously erected any structures that already existed on their property when they purchased it. We disagree with both claims.

First, in support of their argument that a hedge cannot constitute a structure under the statute, the defendants rely solely on *Dalton* v. *Bua*, 47 Conn. Supp. 645, 822 A.2d 392 (2003). The defendants' reliance on *Dalton*, however, is misplaced. We begin our discussion by noting that no appellate court of this state has yet determined whether a hedge or line of trees can constitute a "structure" for purposes of § 52-570. We also note that we are not bound by decisions of the Superior Court. See *Cavanagh* v. *Richichi*, 212 Conn. App. 402, 416 n.7, 275 A.3d 701 (2022). In *Dalton*, the trial court, *Blue*, *J.*, addressed the issue of whether a hedge is a structure for purposes of §§ 52-480 and 52-570.[10] *Dalton* v. *Bua*, supra, 645. In answering that question in the negative, Judge Blue reasoned: "The walls and fences at issue in the malicious structure cases decided since 1867 have been constructions built by persons. When a construction is malicious, the law says, 'Don't build it.' Hedges, however, grow naturally. *There is no suggestion that the hedge in question here was maliciously planted.* The suggestion, rather, is that it has maliciously been allowed to grow. . . . The complaint is not that the [defendants] have done something. The complaint, rather, is that they have not done something. Whatever the problems of the action/inaction distinction in the tort or criminal law . . . that distinction lies as the

[10] In *Dalton*, the plaintiffs had alleged that the defendants "out of animosity . . . allowed [one hedge] to grow to a height of eight to nine feet . . . directly across from the [plaintiffs' property], creating a visual barrier that . . . obstruct[ed] and hinder[ed] the plaintiffs from viewing Long Island Sound from their property." *Dalton* v. *Bua*, supra, 47 Conn. Supp. 646.

textual heart of the malicious structure statutes in question here. These statutes prohibit malicious 'structures' from being 'erected.' They do not require naturally growing plantings to be affirmatively trimmed." (Emphasis altered.) Id., 648.

Significantly, in the present case, the plaintiff expressly alleges in his complaint that, sometime after May, 2002, after the parties had engaged in discussions concerning the view easement and the defendants had taken steps to bring all hedges, including evergreen plantings, in conformity with the view easement restrictions, they planted two new hedges of evergreen trees in violation of the view easement. Thus, unlike in *Dalton*, in which "there was no suggestion that the hedge in question . . . was maliciously planted"; id.; the present case includes such an allegation. Moreover, in *Dalton*, Judge Blue repeatedly referred to the hedge at issue in that case as a naturally growing planting, stating: "The natural growth of trees is an inescapable fact of life. The law is reluctant to compel possessors of land to alter the natural condition of their property . . . ." (Citation omitted.) Id., 648–49. The present case, in contrast, involves a hedge of trees that allegedly was planted by the defendants and was not an existing natural condition of their property.[11]

This issue also was addressed by the United States District Court for the District of Connecticut in *Wil-*

[11] Other Superior Court decisions in Connecticut similarly have distinguished *Dalton*. For example, in *Lucas Point Assn.* v. *17950 Lake Estates Drive Realty, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6041009-S (June 29, 2020) (70 Conn. L. Rptr. 52), the defendant filed a motion to strike challenging the legal sufficiency of the second and third counts of the complaint, which alleged violations of §§ 52-570 and 52-480, arguing that a row of trees planted by a property owner cannot constitute a structure for purposes of those statutes. Id., 54. The court in *Lucas Point Assn.*, after setting forth a number of trial court decisions that have addressed the question of whether trees can constitute a structure for purposes of the malicious structure statutes, concluded that those statutes "can be applied to a situation involving the planting of mature trees." Id., 55. The court distinguished *Dalton*, which did not involve an

liams v. *Bean*, Docket No. 16-CV-1633 (VAB), 2017 WL 5179231, *14–15 (D. Conn. November 8, 2017). In that case, the defendants claimed that the plaintiffs maliciously " 'erected structures' on their property in the form of a uniform row of [thirty] trees" that were "fourteen feet in height . . . and designed to eliminate the [w]ater [v]iews that 'enticed' the [defendants] to purchase [their] property in the first instance." (Citation omitted.) Id., *14. The defendants argued further that the trees served no useful purpose to the plaintiffs "other than to annoy and injure the [defendants]" by eliminating the property's water views and impairing its fair market value. Id. The District Court concluded that the defendants' claims could proceed, as they plausibly had alleged a violation of §§ 52-570 and 52-480. Id. In distinguishing *Dalton*, the court explained: "*Dalton* . . . does not require a different outcome. . . . While *Dalton* notes that '[a]n obstruction that is not "artificially built up" is not a "structure"' . . . here, the [defendants] have plausibly alleged that the [t]ree

allegation "that the vegetation was planted out of malice but rather that it was 'allowed' to grow to an unacceptable height." Id.

Likewise, in *Patrell* v. *Gaudio*, Superior Court, judicial district of New London, Docket No. CV-95-012873-S (December 15, 2010) (51 Conn. L. Rptr. 163), the court rejected an argument raised by the defendant, citing *Dalton*, that hedges and trees cannot constitute structures under §§ 52-570 and 52-480 "because they are not artificial or man-made constructions." Id., 164. In doing so, the court reasoned: "*Dalton* does not stand for the proposition that there is some inherent quality of a hedge that categorically puts it outside of the definition of 'structure.' Instead, it stands for the proposition that the malicious erection statute does not impose an affirmative duty on a landowner to maintain naturally occurring objects on his or her property so that they do not injure another's use and enjoyment of his or her own property. . . . In the present case, it is undisputed that the defendant created a five foot high berm and then planted ten foot tall trees on top of the berm in a line. It could hardly be said that this obstruction was not 'artificially built up' or 'composed of parts and joined together in some definite manner.' Unlike in *Dalton*, the plaintiffs here are not seeking to affirmatively compel the defendant to maintain a naturally occurring tree line so as to not exceed a certain height; they are seeking to compel the defendant to remove an obstruction that she affirmatively created. That the obstruction consisted of naturally occurring elements, i.e. dirt and trees, is inapposite." (Citation omitted.) Id.

[w]all, 'composed of parts and joined together in some definite manner' is 'artificially built up' to obstruct the [defendants'] use [or] enjoyment of their [p]roperty. . . . While the [plaintiffs] may foreseeably claim that they built the [t]ree [w]all with the intention of ensuring their ability to enjoy their property in privacy, it does not follow that they could not have acted with the malicious intention to also injure the [defendants] or that the entirety of the [t]ree [w]all is therefore of use to the [plaintiffs]." (Citations omitted.) Id., *15. In light of these authorities, we are not persuaded by the defendants' claim that a hedge of trees planted by a landowner can never constitute a "structure" for purposes of the malicious structure statutes.

As noted previously, we are not bound by the decision in *Dalton*. Nonetheless, we conclude that it is distinguishable from the present case; accordingly, the defendants' sole reliance thereon to support their claim that a hedge cannot be a structure under §§ 52-570 and 52-480 is unavailing. We find equally unavailing the defendants' claim that they did not *erect* any structure for purposes of the statutes because the pool house and any hedges near the pool were present when they purchased their property in 1995. A plain reading of the complaint indicates that the allegations of counts three and four pertain to two new hedges of evergreen trees allegedly planted by the defendants in 2002, and not to the pool house or any hedges near the pool. The defendants' assertion, therefore, that the pool house existed on their property at the time of purchase is of no consequence to the allegations of counts three and four pertaining to the two new hedges of evergreen trees. The defendants, therefore, have failed to demonstrate that summary judgment was properly rendered in their favor as to counts three and four. Accordingly, we reverse the summary judgment on those counts and remand the matter for a trial thereon, at which the court can make the requisite findings pertaining to the claims under §§ 52-570 and 52-480.

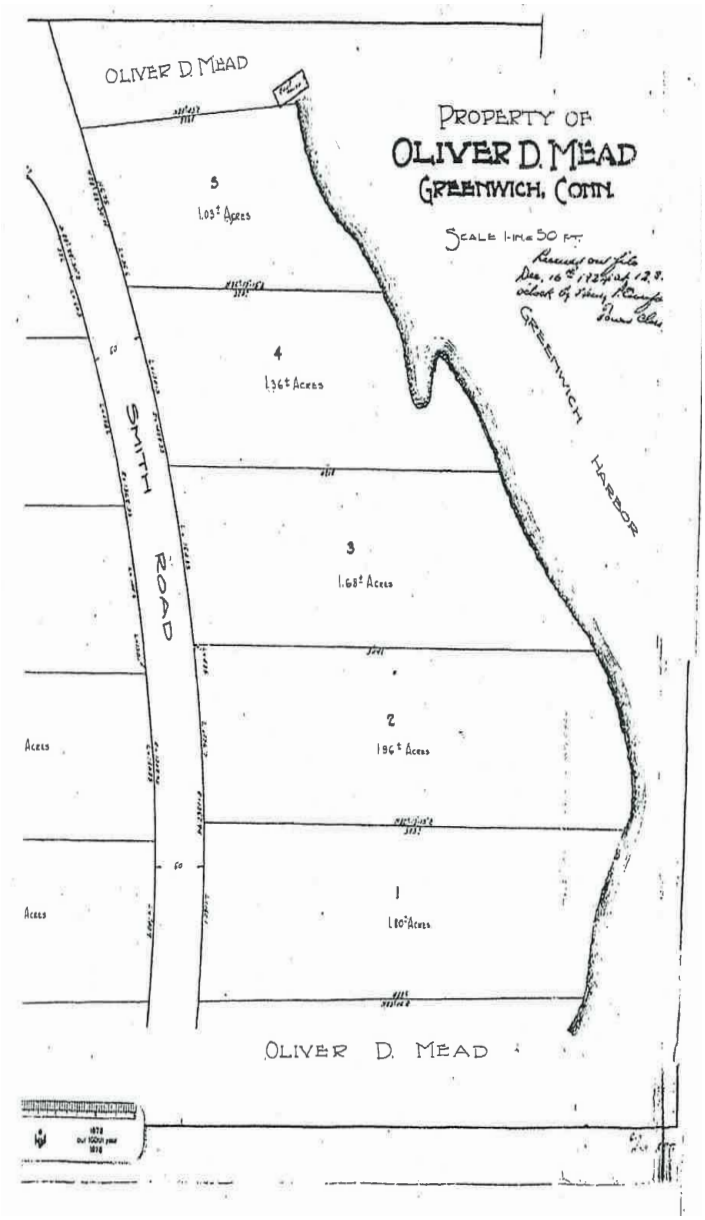
In summary, we reverse the summary judgment rendered in favor of the defendants with respect to count one, in part, as it relates to the claim seeking to quiet title as to the view easement. The court determined that a view easement exists that was being obstructed by the defendants, and that determination has not been challenged on appeal. Accordingly, the court should have rendered summary judgment in the plaintiff's favor as to that claim in count one. Moreover, with respect to the remaining allegations[12] of counts one, and to counts two and five, the trial court improperly determined, as a matter of law on the defendants' motion for summary judgment, that the language of the height restriction in the view easement is clear and unambiguous and is limited to the hedges on the property line between the plaintiff's and the defendants' parcels. The court also improperly failed to address or make any findings relating to the pool house and whether it violates the view easement. Therefore, the case must be remanded for further proceedings relating to counts one, two and five only to determine the scope of the view easement and the plaintiff's rights with respect thereto, including which hedges fall within its scope, whether the pool house falls within the purview of the view easement, and, if so, whether it impairs the plaintiff's view easement. Finally, we reverse the summary judgment rendered in favor of the defendants as to counts three and four and remand the case for a trial on those counts.

The judgment is reversed in part and the case is remanded for further proceedings consistent with the preceding paragraph; the judgment is affirmed only with respect to the trial court's determination that a view easement exists.

In this opinion the other judges concurred.

[12] Count one also seeks to quiet title "concerning the view easement restrictions over [the defendants' parcel] concerning all hedges, fences and walls, and the pool outbuilding." Any claims beyond the assertion that a view easement exists concern the scope of that easement, which must be resolved on remand.

APPENDIX


OLIVER D. MEAD
PROPERTY OF
OLIVER D. MEAD
GREENWICH, CONN.
SCALE 1-IN=50 FT.
5
1.03± Acres
4
1.36± Acres
3
1.68± Acres
2
1.96± Acres
1
1.80± Acres
SMITH ROAD
GREENWICH HARBOR
OLIVER D. MEAD

STEVEN KEITH STANLEY *v.* COMMISSIONER OF CORRECTION
(AC 42876)

Prescott, Elgo and Moll, Js.

Syllabus

The petitioner sought a writ of habeas corpus, alleging, inter alia, that the prosecutor engaged in prosecutorial misconduct during the petitioner's criminal trial. Following a trial, the habeas court rendered judgment denying the habeas petition, and, thereafter, denied the petition for certification to appeal. On the petitioner's appeal to this court, *held* that the petitioner was not entitled to appellate review of his claim that the habeas court improperly denied his amended petition, as he failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal.

Argued February 7—officially released February 28, 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, *Newson, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Steven Keith Stanley, self-represented, the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Angela R. Macchiarulo*, supervisory assistant state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The self-represented petitioner, Steven Keith Stanley, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his petition for a writ of habeas corpus. Although the petitioner challenges the

merits of the habeas court's denial of his petition, he has failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal. Accordingly, we dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. On March 28, 2018, the self-represented petitioner, a sentenced prisoner, filed a petition for a writ of habeas corpus in which he asserted two claims, distilled by the habeas court as follows: (1) the prosecutor engaged in prosecutorial misconduct during the petitioner's criminal trial and his underlying arrest was based on a warrant that relied on illegally obtained evidence; and (2) a state's attorney had engaged in prosecutorial misconduct during a prior habeas trial. On February 26, 2019, following a trial and having given the parties the opportunity to submit posttrial briefs on whether the petitioner's claims should be dismissed on res judicata grounds, the habeas court denied the petition. Specifically, the court dismissed the petitioner's first claim on res judicata grounds and rejected the petitioner's second claim on the merits, stating, inter alia, that the petitioner "has failed to present a single witness, or the slightest crumb of any other evidence, that any [of the alleged] conduct occurred at [a prior] habeas trial or any other trial." On March 7, 2019, the petitioner filed a petition for certification to appeal. The court denied his petition, and this appeal followed.[1]

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn.

[1] On October 10, 2019, the habeas court issued a corrected memorandum of decision to correct the spelling of the petitioner's first name in the caption.

178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Citation omitted; internal quotation marks omitted.) *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 750–51, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011).

In his briefing to this court, the petitioner has failed to "expressly allege and explain in his brief how the habeas court abused its discretion in denying certification." *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 512–13, 267 A.3d 831 (2021). Under these circumstances, this court repeatedly has concluded, and our Supreme Court has agreed, that a petitioner who has failed to brief this threshold issue is not entitled to appellate review. See *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 505, 225 A.3d 977 (2020), aff'd, 341 Conn. 508, 267 A.3d 831 (2021); see also, e.g., *Simonoff* v. *Commissioner of Correction*, 216 Conn. App. 824, 826–27, 286 A.3d 500 (2022); *Cordero* v. *Commissioner of Correction*, 193 Conn. App. 902, 902–903, 215 A.3d 1282, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019); *Thorpe* v. *Commissioner of Correction*, 165 Conn. App. 731, 733, 140 A.3d 319, cert. denied, 323

Conn. 903, 150 A.3d 681 (2016); *Mitchell* v. *Commissioner of Correction*, 68 Conn. App. 1, 8, 790 A.2d 463, cert. denied, 260 Conn. 903, 793 A.2d 1089 (2002); *Reddick* v. *Commissioner of Correction*, 51 Conn. App. 474, 477, 722 A.2d 286 (1999). Although we acknowledge that self-represented litigants like the petitioner are afforded some latitude with respect to the construction of their pleadings, such accommodation is not permitted where a fundamental issue is neither raised nor briefed, as is the case here. See *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005) ("[a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law" (internal quotation marks omitted)). As stated by our Supreme Court, "there is no exception to the requirement that a habeas petitioner must expressly allege that the habeas court abused its discretion in denying the petition for certification to appeal when the petitioner is self-represented." *Goguen* v. *Commissioner of Correction*, supra, 341 Conn. 524.

Because the petitioner has failed to meet the first prong of *Simms* v. *Warden*, supra, 230 Conn. 612, by demonstrating that the denial of his petition for certification to appeal constituted an abuse of discretion, we decline to review his claims on appeal.

The appeal is dismissed.