IN RE OLIVIA W.*
(AC 46196)

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

Syllabus

The respondent parents appealed to this court from the judgment of the trial court adjudicating their minor child, O, to be neglected and committing her to the custody of the petitioner, the Commissioner of Children and Families. The Department of Children and Families received a report alleging emotional abuse and maltreatment of O by the respondent father, which was submitted after O's school had discovered an electronic document written by O indicating that the father had abused her. Approximately two weeks later, in November, 2021, while the first report was being investigated by the department, the department received a second report alleging abuse of O by the father, which indicated that the father had dropped O off at the emergency department of a local children's hospital for concerns of her mental health and behavior. The report further indicated that O had told hospital staff that the physical injuries that she had sustained, from her head down to her left shin, had been inflicted by the father and that there had been physical altercations going on for a while between herself and the father. O was initially released from the children's hospital into the respondent mother's care, but the following day, after a safety assessment, the department determined that O's situation was unsafe and invoked a ninety-six hour hold on O. The petitioner subsequently applied for an ex parte order of temporary custody, which was granted by the court and sustained by

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

the agreement of the parties. The petitioner filed a neglect petition on the grounds that O was being denied proper care and attention, physically, educationally, emotionally, or morally, or permitted to live under conditions, circumstances, or associations injurious to her well-being. In May, 2022, O was admitted to the adolescent unit of another hospital, and she remained in that hospital's care for the duration of the trial on the neglect petition, which spanned from May, 2022, through the middle of December, 2022. Each parent was represented at trial by an attorney until the end of November, 2022, when, on the fourteenth day of trial and during their case-in-chief, the parents filed appearances in lieu of their respective attorneys and proceeded to represent themselves for the remainder of the trial. Several days later, while the neglect trial was ongoing, the petitioner filed an emergency motion for an evidentiary hearing and an order authorizing the department to make medical, psychological, and educational decisions on behalf of O, which the court granted after conducting an evidentiary hearing and hearing argument from the parties. On the parents' appeal to this court, *held*:

1. The respondent parents could not prevail on their claim that there was insufficient evidence to support the trial court's determination that O was neglected: after a careful review of the record, this court concluded that the trial court's factual findings with regard to its neglect determination were supported by sufficient evidence in the record, including, but not limited to, medical records, the testimony of the investigative social worker and his investigation protocol, and the photographs depicting O's injuries; moreover, this court further concluded, as a matter of law, that the facts properly found by the trial court, which demonstrated that the respondent father had physical altercations with O and verbally demeaned her prior to November, 2021, that, in November, 2021, after, in his own words, having "lost his shit," the father inflicted excessive physical injuries on O, and that the respondent mother did not intervene to protect O, were sufficient to support the court's neglect determination.
2. The trial court did not abuse its discretion in determining that it was in O's best interest to be committed to the custody of the petitioner: in support of its determination, the court found that O suffered from severe mental health and behavioral problems that required long-term intensive care and therapy, the respondent parents engaged in conduct that was detrimental to O's well-being following her May, 2022 hospitalization, particularly by rescinding medical releases, which prevented the department from communicating with O's treatment providers and extended O's hospitalization when other treatment was more appropriate, and, notwithstanding the respondent father's completion of parenting classes and his participation in therapy, the parents' relationship with O was fractured, as evidenced by the father's physical actions toward O committed with the respondent mother's approval, the father's decision to leave O alone at the children's hospital in November, 2021, and the father demeaning O verbally during her later hospitalization; moreover,

the court also expressed concern that, with the mother's acquiescence, the father again would react in a physical manner toward O if a situation similar to the incident in November, 2021, occurred in the future; furthermore, the court's findings were supported by sufficient evidence in the record, including, but not limited to, the testimony of medical personnel, department personnel, and the guardian ad litem.

3. The respondent parents could not prevail on their claim that they were denied equitable treatment stemming from numerous procedural or evidentiary errors that purportedly occurred during the neglect proceedings:

a. The parents failed to adequately brief their claims that the trial court improperly precluded them from submitting certain evidence into the record, that the court impermissibly curtailed their right to recall witnesses during their case-in-chief, that the court improperly failed to invalidate a hospital record admitted into evidence that the petitioner had allegedly inappropriately obtained, and that the court impermissibly declined an oral request by the respondent father to permit his former attorney to remain available to him as advisory counsel, and, therefore, this court considered those claims to be abandoned.

b. The parents' claim that the court improperly made comments that prompted the petitioner to file the emergency motion was not supported by the record.

c. Contrary to the parents' claims, the trial court did not abuse its discretion when it precluded the parents, on the last day of their case-in-chief, from seeking to subpoena two children's hospital employees as witnesses, when it declined the father's offer on the last day of trial to introduce into evidence an audio recording of an incident that occurred outside of the courtroom on the fourteenth day of trial, which ultimately resulted in the remainder of the trial being held remotely, when it permitted the petitioner to call certain witnesses during the evidentiary hearing on the emergency motion notwithstanding that the petitioner had failed to disclose them in advance of the hearing, or when it permitted the petitioner to offer certain evidence into the record that the respondent mother did not receive in advance of the evidentiary hearing, given that the petitioner's counsel represented that the document had been emailed to the mother, it was discovered that the petitioner's counsel had emailed the document to an outdated email address of the mother, and the petitioner's counsel represented that she would email the document to the mother's current email address immediately.

d. The trial court properly exercised its discretion to deny the parents' motion for a continuance to allow them to retain new counsel that they filed in December, 2022, on the eighteenth day of trial, on the basis of its reasoning that O's needs required the neglect proceedings to be completed promptly, trial had been ongoing since May, 2022, and it had canvassed the parents when they elected to represent themselves and cautioned them about the perils of self-representation.

e. The parents' claim that they were not given equitable access to department records despite having submitted certain records requests to the department was untenable because the court, in fact, ordered the petitioner to provide the records to the parents, and at no point during the remainder of the trial did the parents indicate to the court that the petitioner had failed to comply with the court's order.

f. The parents failed to demonstrate any impropriety committed by the judge who presided over the pretrial in the underlying action, as their assertion that the pretrial judge engaged in ex parte communications with the petitioner and with a department social worker was belied by the transcript of the hearing, which indicated that the proceeding concerned neglect petitions filed as to the parents' other two children, and any claimed error was outside of the scope of the present matter; moreover, although the pretrial judge granted preliminary relief prior to the evidentiary hearing on the emergency motion, the trial court judge who presided over the neglect trial conducted the evidentiary hearing and ultimately granted the emergency motion.

Argued October 12, 2023—officially released January 4, 2024**

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment adjudicating the minor child neglected and committing the minor child to the custody of the Commissioner of Children and Families, from which the respondent father appealed to this court; thereafter, the respondent mother was granted permission to join the respondent father's appeal. *Affirmed.*

Kristen W., self-represented, the appellant (respondent father).

Katrina W., self-represented, the appellant (respondent mother).

Nisa Khan, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and

** January 4, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Evan O'Roark and *Albert J. Oneto IV*, assistant attorneys general, for the appellee (petitioner).

Opinion

PER CURIAM. The self-represented respondents, Kristen W. (father) and Katrina W. (mother), appeal[1] from the judgment of the trial court adjudicating their minor child, Olivia W., to be neglected and committing her to the custody of the petitioner, the Commissioner of Children and Families. On appeal, the respondents raise numerous claims, which we interpret as asserting that (1) there was insufficient evidence to support the court's neglect determination, (2) the court improperly determined that committing Olivia to the custody of the petitioner was in her best interest, and (3) they "were denied equitable treatment" as a result of various procedural or evidentiary errors that purportedly occurred during the neglect proceedings.[2] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On November 5, 2021, the Department of Children and Families (department) invoked a ninety-six hour hold on Olivia, who was fourteen years old at the time. On November 9, 2021, the petitioner applied for an ex parte order of temporary custody. On the same day, the trial court, *Hon. Stephen F. Frazzini*, judge trial referee, issued an order of temporary custody, which the court, *Dannehy, J.*, sustained by the agreement of the parties on November 19, 2021.

Additionally, on November 9, 2021, the petitioner filed a neglect petition on the grounds that Olivia was

[1] This appeal was filed by the father only. On October 11, 2023, the respondents filed a motion to permit the mother to join the appeal as an appellant, which we granted on the same day.

[2] For ease of discussion, we address the respondents' claims in a different order than they are set forth in their appellate brief.

being (1) denied proper care and attention, physically, educationally, emotionally, or morally, or (2) permitted to live under conditions, circumstances, or associations injurious to her well-being. Along with the neglect petition, the petitioner filed a summary of facts substantiating the allegations of neglect, which set forth the following relevant allegations. On October 14, 2021, the department received a report alleging "[e]motional [a]buse/[m]altreatment" of Olivia by the father, which was submitted after Olivia's school had discovered an electronic document written by Olivia indicating that the father had abused her. Specifically, Olivia wrote that (1) " '[the father's] ways of punishment never work when it causes pain,' " (2) the father called her names "such as 'retarded' and 'a disgrace,' " and (3) the father got " 'physical' " with her at times by "throwing objects." When approached by school staff about the electronic document, Olivia began crying and making suicidal statements, which resulted in Emergency Mobile Psychiatric Services responding and evaluating her.

On October 21, 2021, the department conducted a response visit, during which the father conveyed that he did not believe that Olivia was suicidal but, rather, that her "issues stem[med] from [her] being 'unmotivated and lazy.' " During the same visit, Olivia appeared "fearful" of the father as evidenced by "heavy breathing, nervousness and motioning to the responding social worker not to share the things in the [October 14, 2021] report with [the] [f]ather."

On November 2, 2021, the department received a second report alleging abuse of Olivia by the father. Per the report, on the morning of November 2, 2021, the father brought Olivia to the emergency department of the Connecticut Children's Medical Center (CCMC) "for concerns of her mental health and behavior," where he expressed that he " 'just want[ed] the [s]tate to take

[Olivia]' and to 'put her in foster care.' " An evaluation at the emergency department revealed that Olivia had sustained "physical injuries on her body from her head down to her left shin . . . ."[3] Olivia stated that the father had caused her injuries and that "there ha[d] been physical altercations 'going on for a while' " between herself and the father. Olivia further stated that (1) the father had slammed and broken her computer during the prior evening and (2) the father had " 'anger issues.' "

The father's initial explanation of the events preceding Olivia's arrival at CCMC was that (1) "Olivia was 'being mean to [the] mother, swearing and giving [the mother] the finger,' " (2) there was a "verbal altercation" about Olivia finishing her schoolwork, and (3) the father " 'lost his shit' and pushed Olivia into a closet where she fell and tried to get [up] and fell again a few times." In subsequent communications, however, the respondents stated that the father's physical altercation with Olivia that resulted in her injuries "occurred as a reaction to protect [one of Olivia's younger brothers] from [her]." The father stated that, in the moment, "he felt as though he had 'no other choice' " and admitted to physically injuring Olivia. The mother, who was present at the time of the incident but did not intervene to protect Olivia, supported the father's account of the incident, "stating that [the] [f]ather stepped in to 'protect [Olivia's younger brother],' and that Olivia ha[d] a recent history of aggressive and threatening behavior."[4]

[3] The petitioner alleged that Olivia was found to have (1) " 'a patch of red marks on the right side of her scalp from where [she] reported [the] [f]ather pulling her hair,' " (2) " 'a 2 [centimeter] abrasion to her right eye on the outside near her eyebrow,' " (3) " 'a 2 [centimeter] x 1 [centimeter] abrasion to [the] right side of her neck,' " (4) " 'large patches of redness and bruising to her upper back shoulder,' " (5) " 'bruising on her upper and lower right arms [and] multiple linear abrasions on her left upper arm,' " and (6) " 'older brownish bruises on her body.' "

[4] The petitioner further alleged that (1) Olivia's two younger brothers were present in the family home at the time of the incident between Olivia and the father on November 2, 2021, (2) both brothers reported hearing the

On November 4, 2021, the respondents presented a safety plan that included (1) Olivia being discharged from CCMC into the mother's care and (2) the father leaving the family home temporarily. Olivia was discharged from CCMC on the same day. Later that evening, the mother contacted a department social worker "insist[ing] that [the] [f]ather and Olivia have contact [that night] despite Olivia's protest, due to th[e] situation being difficult for [the] [f]ather." The next day, Olivia reported that the father was present in the family's car when she was discharged from CCMC. The father later (1) told a department social worker that, notwithstanding the safety plan, he did not leave the family home until 11:45 p.m. on November 4, 2021, after Olivia had fallen asleep, and he returned to the home at 4:45 a.m. the following morning, before Olivia had woken up for school, (2) requested that the department or another agency visit the family home to review the respondents' rules with Olivia and to direct her to abide by them, and (3) asserted that the safety plan would not be successful because (a) the mother was afraid to be in the family home alone with Olivia and her two brothers and (b) he was unable to spend a significant amount of time outside of the home. On November 5, 2021, following a safety assessment, the department determined Olivia's situation was unsafe as a result of (1) the respondents' violation of the safety plan, (2) the mother's inability to maintain boundaries between Olivia and the father, and (3) the father's statements questioning the viability of the safety plan.

The trial on the neglect petition spanned twenty days between May 26 and December 14, 2022. Numerous

incident, which included the father threatening to remove Olivia from the family home, and observing portions of the incident, (3) one of the brothers reported going to his bedroom because he " 'didn't want to see what happened next,' " and (4) the other brother reported that the November 2, 2021 incident was "the second time something like this ha[d] occurred between Olivia and [the] [f]ather . . . ."

witnesses testified at trial, including medical personnel, department personnel, and the respondents, and the court, *Hon. Stephen F. Frazzini*, judge trial referee, admitted many exhibits in full into the record. Each respondent was represented by an attorney until November 29, 2022, the fourteenth day of trial, when, during their case-in-chief,[5] the respondents filed appearances in lieu of their respective attorneys and proceeded to represent themselves for the remainder of trial.[6]

On December 5, 2022, while the neglect trial was ongoing, the petitioner filed an emergency motion for an evidentiary hearing and an order authorizing the department to make medical, psychological, and educational decisions on behalf of Olivia (emergency motion). On December 8, 2022, after conducting an evidentiary hearing on December 7, 2022, and hearing argument from the parties, the court granted the emergency motion.[7]

On December 14, 2022, the evidentiary portion of the neglect trial was concluded and the court heard closing arguments from the parties. Thereafter, the court issued an oral decision on the record adjudicating Olivia to be neglected and committing her to the custody of the petitioner.[8] This appeal followed.[9] Additional procedural history will be set forth as necessary.

[5] The petitioner rested her case-in-chief on October 14, 2022, the tenth day of trial.

[6] After having canvassed the respondents, the court accepted their respective decisions to represent themselves and determined that each respondent had knowingly, intelligently, and voluntarily waived his or her right to counsel.

[7] During trial on December 13, 2022, the court ruled that, in lieu of the petitioner presenting rebuttal evidence, the court would incorporate the evidence admitted during the evidentiary hearing on the emergency motion into the record for the neglect proceedings.

[8] On June 6, 2023, the respondents filed a notice pursuant to Practice Book § 64-1 requesting that the trial court file a signed transcript of its oral decision issued on December 14, 2022. On June 7, 2023, the court filed a signed transcript of its decision.

[9] The attorney for Olivia has adopted the petitioner's appellate brief.

The self-represented respondents on appeal raise various claims, which we distill to be that (1) there was insufficient evidence to support the court's neglect determination, (2) the court incorrectly determined that it was in Olivia's best interest to commit her to the custody of the petitioner, and (3) they "were denied equitable treatment" because of a litany of procedural or evidentiary errors that purportedly occurred during the neglect proceedings. We address these claims in turn.

Before examining the respondents' claims, we observe that, "[a]lthough self-represented parties are not excused from complying with relevant rules of procedural and substantive law, [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Thus, like the trial court, [this court] will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Nonetheless, [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 . . . and [w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of

error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Citations omitted; internal quotation marks omitted.) *Randolph* v. *Mambrino*, 216 Conn. App. 126, 151–52, 284 A.3d 645 (2022).

I

We first address the respondents' claims that (1) there was insufficient evidence to support the trial court's neglect determination and (2) the court improperly determined that it was in Olivia's best interest to be committed to the custody of the petitioner. We are not persuaded.

"Neglect proceedings, under . . . [General Statutes] § 46b-129, are comprised of two parts, adjudication and disposition. . . . The standard of proof applicable to nonpermanent custody proceedings, such as neglect proceedings, is a fair preponderance of the evidence." (Internal quotation marks omitted.) *In re Ja-lyn R.*, 132 Conn. App. 314, 318, 31 A.3d 441 (2011).

A

The respondents assert that the court's determination that Olivia was neglected was not supported by sufficient evidence. We do not agree.

"During the adjudicatory phase, the court determines if the child was neglected. Practice Book § 35a-7 (a) provides in relevant part: In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment. . . . [General Statutes § 46b-120 (4)] provides that a child may be found neglected if the child is being denied proper care and attention, physically, educationally, emotionally or morally, or is being permitted to live under conditions, circumstances, or associations injurious to the well-being of the child or youth . . . .

"When considering a challenge to the sufficiency of the evidence, the function of an appellate court is to review the findings of the trial court, not to retry the case. . . . [W]e must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment. . . . [W]e give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . ." (Citation omitted; internal quotation marks omitted.) Id., 318–19.

During the adjudicatory phase, the court stated in relevant part as follows. "[T]he evidence established [that] in October of 2021 Olivia told authorities at school that [the] father 'becomes physical' toward her. The evidence shows that at times she was distraught and in distress and expressing suicidal thoughts and feelings as a result of [the] father's treatment of her. She told her counselor at school on October [21, 2021] that [the father] would throw objects at her and call her a 'disgrace' and 'retarded.'

"[The department] was in the process of investigating that report when it received a report from [CCMC] . . . on November [2, 2021] that . . . the father had dropped Olivia off at [CCMC]; that she had multiple bruises and abrasions on her arms, legs, back, and head; and that she had told [CCMC] staff that [the] father had beaten her up and 'stomped on her.' . . .

"[The father] himself told [CCMC] staff that he had . . . intervened in a dispute between Olivia and [the] mother, and he had 'lost,' 'his,' 'shit' and pushed [Olivia] in a closet. . . .

"At trial [the mother] testified that [the father] had intervened during an incident in which Olivia had been threatening a younger brother with a sharp object and that the father had pushed her into a closet, that she had fallen to the floor after slipping on a dog bed near the closet. But the mother denied that the father had neglected or improperly harmed [Olivia] . . . [and] basically said that all his actions that day were justified and necessary.

"[The father] . . . did testify [at trial] but didn't discuss what happened in the incident. I'm not going to hold . . . his failure to discuss that against him. . . .

"[T]he essential issue here for adjudicatory purposes is whether the physical conduct of the father and the mother's inaction during that conduct was reasonable or, while taking into consideration the [respondents'] constitutionally protected right to care for their child, excessive. And the courts have long recognized that there's no precise rule about what is excessive physical discipline. Each case must be examined on its own facts.[10]

"So the evidence the court . . . has here about the injuries and what happened are the medical reports; the testimony of the father and [the] mother . . . the testimony from [Greyson Houle] the investigative social worker and [an] investigat[ion] protocol he wrote; information that's in [a] social work affidavit . . . introduced into evidence here that was used in support of

[10] The trial court cited this court's decision in *Lovan C.* v. *Dept. of Children & Families*, 86 Conn. App. 290, 860 A.2d 1283 (2004), for the proposition that "[t]here exists a parental right to punish children for their own welfare, to control and restrain them and to adopt disciplinary measures in the exercise of that right . . . . Limits on the right of parents to punish their children do, however, exist. The common law rule and the provisions of [General Statutes (Rev. to 2003)] § 53a-18 (1) require that the use of physical force administered upon a minor child be reasonable. . . . Whether that limit has been reached in any particular case is a factual determination to be made by the trier of fact." (Citation omitted; internal quotation marks omitted.) Id., 299.

the [order of temporary custody]; and photographs of the bruises and abrasions that were taken at [CCMC]. And I've looked at those photographs. They show bruises, abrasions on [Olivia's] arms, legs, head, shoulders, neck.

"At one point during the trial, the [respondents] also introduced into evidence the boots that were being worn [on November 2, 2021] by the father. [The mother] said that the marks on Olivia's body would not correspond . . . to the toes on the boots. But I've looked at the treads on the father's boots, and on at least two of the photographs there are marks on Olivia's body that correspond to the type of mark that could be left by a tread, but . . . I didn't measure them . . . . I don't accept the mother's statement that those marks . . . don't show that the injuries were caused by his boots. [Olivia] at [CCMC] said that [the] father stomped on her.

"Now, there's also evidence that Olivia can become impulsive, that she can lose self-control. There's evidence that she's acted in a threatening manner towards other people, and it was argued by the [respondents] that Olivia was acting in a way to hurt her brother. The father at [CCMC] said that he had lost his shit, and . . . I regard that as an admission by him effectively that he had lost control of his actions that day while inflicting these injuries on Olivia. And they refute the mother's testimony that his actions were justified and necessary. That type of remark is the remark of somebody acknowledging that they lost self-control.

"I don't intend to discuss in great detail an analysis of the injuries, but the evidence does show that the physical injuries inflicted on Olivia that day were excessive. They exceeded the bounds of the [respondents'] lawful right to protect other children or to discipline and parent Olivia; that both [respondents] denied [Olivia]

proper care and attention during this incident and the days preceding when the father had disciplined [Olivia] and the mother did not take action to protect [Olivia]; and that [Olivia] was living under conditions injurious to her well-being.

"And I therefore find neglect, as pleaded and proven by a fair preponderance of the evidence." (Footnote added.)

After a careful review of the record, we conclude that the court's factual findings with regard to its neglect determination were supported by sufficient evidence in the record, including but not limited to medical records, Houle's testimony and his investigation protocol, and the photographs depicting Olivia's injuries.[11] We further conclude that, as a matter of law, the facts properly found by the court, which demonstrate that (1) prior

[11] The respondents challenge the court's factual finding that the father stated, at CCMC on November 2, 2021, that he "lost his shit" during the physical altercation with Olivia on that day, asserting that (1) the father did not make that statement and (2) there was no evidence demonstrating that he made that statement *at CCMC*. The record supports the court's finding that the father made the statement at issue. Ann Gorjanc, a pediatric physician's assistant at CCMC, testified during trial that the father told her, during a telephone conversation, that he "lost his shit and he pushed [Olivia] in the closet," which statement to Gorjanc was also documented in (1) notes prepared by Gorjanc that were a part of medical records and (2) Houle's investigation protocol, both of which were admitted in full into evidence. In addition, Jilienne Charter, an ongoing department social worker, testified during trial that the father had "reported to the department [that] he lost his shit and . . . physically put his hands on [Olivia] . . . ." Insofar as the record does not reflect that the father made the statement *at CCMC*, we cannot discern any harm stemming therefrom. See *DiNapoli* v. *Doudera*, 28 Conn. App. 108, 112, 609 A.2d 1061 (1992) ("[w]here . . . some of the facts found are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole"). On the basis of the court's decision, the court considered the father's statement itself to be relevant, not the location where the statement was made.

Insofar as the respondents maintain that other factual findings by the court with respect to its neglect determination were clearly erroneous, as we explain in this opinion, the record supports the court's findings.

to November 2, 2021, the father had physical altercations with Olivia and verbally demeaned her, (2) on November 2, 2021, after, in his own words, having "lost his shit," the father inflicted excessive physical injuries on Olivia, and (3) the mother did not intervene to protect Olivia, were sufficient to support the court's neglect determination.

In sum, we conclude that the court did not commit error in adjudicating Olivia to be neglected.[12]

B

The respondents also assert that the court incorrectly determined that committing Olivia to the custody of the petitioner was in her best interest. We disagree.

"[W]hen making the determination of what is in the best interest of the child, [t]he authority to exercise the judicial discretion under the circumstances revealed by the finding is not conferred upon this court, but upon

[12] The respondents raise a number of discrete arguments that we discern to be directed to the court's neglect adjudication and that, in essence, ask this court to reweigh the evidence in the record in their favor. "This we will not do, as it is not the function of a court of review to retry the facts." *In re Kamari C-L.*, 122 Conn. App. 815, 826, 2 A.3d 13, cert. denied, 298 Conn. 927, 5 A.3d 487 (2010).

The respondents also argue that the ninety-six hour hold and the order of temporary custody "were authorized without a complete investigation." In *In re Carl O.*, 10 Conn. App. 428, 523 A.2d 1339, cert. denied, 204 Conn. 802, 525 A.2d 964 (1987), and cert. denied, 204 Conn. 802, 525 A.2d 964 (1987), an appeal in part from an order of temporary custody, this court held that the appellants' claim of error as to the order of temporary custody was moot because the order of temporary custody had expired when the child was adjudicated to be uncared for and committed to the petitioner's custody. Id., 433–34; see also *In re Forrest B.*, 109 Conn. App. 772, 776, 953 A.2d 887 (2008) ("[o]ur case law specifically conceives of appeals from temporary custody orders as moot when the children involved are adjudicated neglected"). Thus, if the respondents are attempting to argue, following the neglect determination, that the order of temporary custody constituted error, then that argument is not viable. If, in the alternative, the respondents' argument is directed to the propriety of the court's neglect determination, then we are not persuaded that it undermines that determination.

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. . . .

"After an adjudication of neglect is made, a court may (1) commit the child to the [petitioner], (2) vest guardianship in a third party or (3) permit the parent to retain custody with or without protective supervision. General Statutes § 46b-129 (j)." (Citation omitted; internal quotation marks omitted.) *In re Ja-lyn R.*, supra, 132 Conn. App. 323. "In determining the disposition portion of the neglect proceeding, the court must decide which of the various custody alternatives are in the best interest of the child. To determine whether a custodial placement is in the best interest of the child, the court uses its broad discretion to choose a place that will foster the child's interest in sustained growth, development, well-being, and in the continuity and stability of [the child's] environment." (Internal quotation marks omitted.) Id., 323–24.

During the dispositional phase, the court stated in relevant part as follows. "In making a decision about [Olivia's] best interest, the court has to use its own broad discretion to choose . . . the placement that will best foster [her] interest in sustained growth, development, and well-being. . . . [T]his is an inherently flexible and fact-specific standard. It gives the court broad discretion to consider all the different and individualized facts that may affect a specific child's welfare. . . .

"Evidence shows that Olivia has many serious mental health and behavioral health problems. In the thirteen

months since removal from [the respondents], she has been hospitalized several times for emergency situations; she's need[ed] partial hospitalization and intensive outpatient services; and she's been, since May of [2022], in the adolescent unit of the Manchester Memorial Hospital [(hospital)]. For many months she was on a waiting list for admission to a higher level of care at a psychiatric residential treatment facility, PRTF. She needs long-term, intensive care and therapy to help her learn how to control and manage her moods, emotions, and behaviors.

"The [respondents] urge that they know what is best for Olivia; that they've historically used and would still use a system of rewards, structure, and discipline to help Olivia manage her emotional and behavioral difficulties if she were returned home. And they believe that she needs continued inpatient treatment in the interim before she returns home. But the evidence shows that, while Olivia was hospitalized at [the hospital], the [respondents] did not act in her best interest. [The respondents'] distrust of [the department] is so great that it led them to make decisions that were detrimental to Olivia. They rescinded the releases that would have enabled Olivia's treatment providers to communicate with [the department]. Doing so led to Olivia being kept at [the hospital] when that facility was no longer appropriate [for] her. It prevented her from being admitted to a PRTF. It caused distress to Olivia, and it harmed her emotionally and physically. I'm horrified to learn that she may even now be a diabetic.

"Moreover, the evidence shows that Olivia did not know that it was [the respondents'] decision-making that was causing her to languish in the [hospital]. And while it's probably appropriate that children and youths not be aware of all the factors leading to their parents' decision-making, in this particular instance that lack of knowledge probably played a part in the fact that

[Olivia] blames [the department] for keeping her from her family when, in fact . . . if [the respondents] had not rescinded the releases, she may well have been now back in the community if she had been admitted to the PRTF [in] May [of 2022], received treatment there enabling her to regulate her emotions and behaviors, and if [the respondents], as part of the family work at PRTF, had become better able to manage and parent her safely and appropriately, maybe even back with [the respondents].

"[Olivia's] lawyer advocated forcefully and eloquently on her behalf that Olivia trusts [the respondents] to make all her decisions and wants [the respondents] to be her advocates. And usually those are feelings and beliefs that are healthy to children because a child or a youth needs to be able to feel that their caregiver will take care of them and keep them safe and will allow them increasing amounts of independence as it becomes appropriate, based on the child's development. But here, [Olivia's] trust in [the respondents'] decision-making is not informed by the decisions the [respondents] made here.

"I also have to consider the fact about the events that led to Olivia being removed from [the respondents'] custody. [The father] engaged in excessive and harmful physical punishment and interactions with [Olivia], and [the] mother did not intervene. . . . [T]he mother's testimony about that event can only lead to the conclusion that she approved of [the father's] conduct during that incident.

"[The father] then took [Olivia] to [CCMC] and, even while she was feeling suicidal, left her there. But a child in the emotional state that the evidence shows that Olivia was in when she was taken to [CCMC] needed a parent there with her. There's been no evidence presented that the father or [the] mother understood the

gravity of what happened in their home or in the father's decision to leave Olivia by herself at [CCMC] or that [the respondents have] taken any steps to address the inadequacies and deficiencies in their parenting of [Olivia].

"The evidence shows and I'm fully persuaded that [the respondents] both love [Olivia] dearly. The evidence shows that Olivia can be very difficult to manage, both in terms of her emotions and behaviors. But, unfortunately, there's no evidence to conclude that if Olivia once again became emotionally distraught or even if she became physically out of control that the [respondents] would not again respond in a similar manner. If Olivia can become impulsive, if she sometimes lacks emotional and behavioral self-control, the evidence shows, at least on the incident on November [2, 2021], that the father acted similarly, causing injuries to her with the acquiescence and passive acceptance of the mother.

"There's also evidence that [the father] talked harshly and demeaningly to Olivia when she was hospitalized. And there's only limited amounts of evidence about those interactions, so I don't have a lot of information about them. I recognize that [Olivia] was distraught at times [at] the hospital . . . [and] that she can be troubling and difficult to interact with, so I'm not drawing the worst of conclusions about the evidence about what the father is reported to have said. But from the evidence about what he said . . . I do conclude that the rosy depiction that the [respondents] present of their actions, of their interactions and relationship with Olivia does not accurately portray the fact that their relationship and their interactions with her are in serious need of repair and need extensive professional assistance and guidance.

"For example, although [the father] testified that he had participated in and successfully completed parenting classes, and although [a] social study [admitted into

evidence] reports that he was in therapy, the court concludes that both [respondents], as of the end of trial, still need more professional assistance in learning how to interact appropriately and safely with [Olivia].

"So, despite the love that is manifest and has been manifest on every single minute of this trial, that the [respondents] have displayed . . . [and] I've no doubt that they're dedicated to [Olivia], but I also have no doubt here that [Olivia's] best interest lies in her being committed to the [petitioner], which . . . I find to be in her best interest and order that as the disposition in this case."[13]

Upon a careful review of the record, we conclude that the court reasonably determined that it was in Olivia's best interest to commit her to the custody of the petitioner. In support of this determination, the court found that (1) Olivia suffers from severe mental health and behavioral problems that require long-term intensive care and therapy, (2) the respondents engaged in conduct that was detrimental to Olivia's well-being following her hospitalization in May, 2022, particularly by rescinding medical releases, which (a) prevented the department from communicating with Olivia's treatment providers and (b) extended Olivia's hospitalization when other treatment was more appropriate, and (3) notwithstanding the father's completion of parenting classes and his participation in therapy, the respondents' relationship with Olivia is fractured, as evidenced by (a) the father's physical actions toward Olivia committed with the mother's approval, (b) the father's decision to leave Olivia alone at CCMC on November 2, 2021, and (c) the father demeaning Olivia verbally during her hospitalization. The court also expressed concern that, with the mother's acquiescence, the father again would

[13] The court also adopted specific steps, which previously had been ordered, to facilitate reunification between Olivia and the respondents.

react in a physical manner toward Olivia if a situation similar to the incident on November 2, 2021, occurred in the future. These findings were supported by sufficient evidence in the record, including but not limited to the testimony of medical personnel, department personnel, and the guardian ad litem appointed in this action, and the court reasonably relied on these findings to determine that committing Olivia to the petitioner's custody was in her best interest.[14]

In sum, we conclude that the court did not abuse its discretion in committing Olivia to the custody of the petitioner.[15]

[14] The respondents challenge certain factual findings made by the court during the dispositional phase, citing evidence in the record purportedly contradicting the court's findings. We iterate that "[w]e give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . ." (Internal quotation marks omitted.) *In re Ja-lyn R.*, supra, 132 Conn. App. 319; see also *In re Quidanny L.*, 159 Conn. App. 363, 375, 122 A.3d 1281 ("[i]t is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses" (internal quotation marks omitted)), cert. denied, 319 Conn. 906, 122 A.3d 639 (2015). As we conclude in this opinion, the court's factual findings in support of its dispositional determination were supported by evidence in the record, and, therefore, we decline to disturb them.

[15] As with the court's neglect determination; see footnote 12 of this opinion; the respondents raise discrete arguments that we construe to be directed to the court's dispositional determination and that, in substance, ask this court to reweigh the evidence in the record in their favor. "This we will not do, as it is not the function of a court of review to retry the facts." *In re Kamari C-L.*, supra, 122 Conn. App. 826.

In addition, we note that, at the outset of the dispositional phase, the court stated that "placing guardianship in a third party is not really—there's no evidence to support that here, and the practical alternatives are whether to commit [Olivia] to [the petitioner] or [to] place [Olivia] back with the [respondents] under protective supervision." The respondents assert that the court "should have taken the initiative to bring this consideration for a third-party disposition to light," as they were unaware that placing guardianship in a third party was a dispositional option. The respondents have not presented any substantive legal analysis in support of this claim, and, therefore, we deem it to be abandoned. See *Randolph* v. *Mambrino*, supra, 216 Conn. App. 151–52.

II

We next address the respondents' claim that they "were denied equitable treatment" stemming from numerous procedural or evidentiary errors that purportedly occurred during the neglect proceedings. The petitioner maintains that this claim, including its various subparts, is inadequately briefed, and, therefore, we should decline to review it. For the reasons that follow, we conclude that (1) parts of this claim have been abandoned as inadequately briefed and (2) the remaining parts of this claim lack merit.

We iterate that self-represented parties, like the respondents, are not relieved of the obligation to adequately brief their claims on appeal. See *Randolph* v. *Mambrino*, supra, 216 Conn. App. 151–52; see also *Traylor* v. *State*, 332 Conn. 789, 807, 213 A.3d 467 (2019) ("[t]he solicitous treatment we afford a self-represented party does not allow us to address a claim on his behalf when he has failed to brief that claim"). Insofar as the respondents have adequately briefed claims of evidentiary errors, "[t]he court's evidentiary rulings must be viewed in the context of the proceedings. . . . The trial court has broad discretion in ruling on the admissibility of evidence. The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion . . . ." (Citation omitted; internal quotation marks omitted.) *In re Ryan C.*, 220 Conn. App. 507, 535, 299 A.3d 308, cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023). Mindful of these principles, we turn to the alleged errors identified by the respondents.

The respondents contend that the court improperly precluded them from submitting into evidence (1) certain audio recordings and (2) an email chain, which, they argue, "resulted in an incomplete submission of relevant facts" and prevented them from receiving a

"fair judgment." The record reveals, however, that the proposed evidence in question either (1) was not offered properly by the respondents or (2) was ruled by the court to be inadmissible, which the respondents do not address in their appellate brief. Moreover, beyond their bald assertion of harm, the respondents do not explain how the exclusion of this evidence was harmful to them. See *In re Nevaeh G.-M.*, 217 Conn. App. 854, 885–86, 290 A.3d 867 ("[i]t is well settled that even if [an evidentiary error is proven], the [party challenging the ruling] must also establish that the ruling was harmful and likely to affect the result of the trial" (emphasis omitted; internal quotation marks omitted)), cert. denied, 346 Conn. 925, 295 A.3d 418 (2023). Accordingly, we deem this claim to be abandoned.[16]

The respondents also assert that the court impermissibly curtailed their right to recall witnesses during their case-in-chief, notwithstanding that they had "reserve[d]" such a right earlier in the trial. The record reveals that,

[16] The respondents further assert that the court impermissibly denied them the ability to mark exhibits for identification only. In support of this claim, the respondents cite to portions of the trial transcripts; however, none of these transcript excerpts reflects a request by the respondents that an exhibit be marked for identification only and the court refusing such a request. One of the aforementioned excerpts establishes that during trial on December 13, 2022, the court explained to the respondents the difference between full exhibits and exhibits for identification only, and that exhibits contained in a party's exhibit list indicate exhibits that the party intends to offer, but such exhibits are not part of the record until they are presented to the court. Moreover, the record demonstrates that the court admitted several exhibits in full offered by the father after the respondents began representing themselves in the underlying action.

In addition, the respondents make isolated assertions that (1) they were not granted access to electronic filings in the neglect proceedings because they were self-represented parties and (2) they were required at a certain point to submit exhibits to the trial court clerk in person, notwithstanding that they previously had been permitted to submit exhibits via fax. Insofar as these are cognizable claims of error, these standalone contentions are not supported by any substantive legal analysis, and, therefore, we deem them to be abandoned.

during trial on December 13, 2022, the court declined the respondents' requests to recall Houle or Jilienne Charter, an ongoing department social worker, both of whom had been called as witnesses during the petitioner's case-in-chief and both of whom the respondents had the opportunity to cross-examine while represented by counsel. The court reasoned that the questions that the respondents sought to ask Houle and Charter could have been posed to them on cross-examination and were not relevant. The respondents fail to address the court's rationale for these evidentiary rulings in their appellate brief. Therefore, we conclude that the respondents have abandoned this claim.[17]

We next turn to the respondents' claim that the court improperly failed to "invalidate" a hospital record admitted into evidence that the petitioner allegedly had "inappropriately obtained . . . ." The record reveals that, during trial on December 13, 2022, the petitioner offered into evidence a hospital record, to which the respondents objected on the grounds of hearsay and undue prejudice. The court overruled the respondents' objections and admitted the hospital record in full into the record. The next day, the father indicated to the court that he believed that the hospital record should not have been admitted into evidence because it was not "authentic." Specifically, the father argued that the petitioner's counsel had obtained the hospital record "illegally" because she did not have access to the record at the time of the "run date" printed on the record, which was September 8, 2022. The petitioner's counsel represented that she had gained authorization to obtain the hospital record. The court proceeded to determine

[17] The respondents separately contend that the court improperly precluded them from introducing into evidence an audio recording of a conversation involving Charter that purportedly contradicted a portion of her testimony at trial. On the basis of the record, we construe the court as having determined such evidence to be irrelevant, which the respondents also fail to address in their appellate brief.

that the father had not raised a viable objection challenging the hospital record's authenticity. The court further stated that "[the father does not] think [that the petitioner's counsel] obtained the [hospital record] properly. And that's not something that I'm prepared to address here today; I don't think it's within the Superior Court's concern in the trial of this case." The respondents on appeal have failed to present any substantive legal analysis addressing the court's reasoning or supporting their position that the hospital record should have been "invalidate[d]." Accordingly, we conclude that the respondents have abandoned this claim.

In addition, the respondents assert that the court impermissibly declined an oral request by the father on November 29, 2022, made after he had filed an appearance in lieu of his former attorney, to permit his former attorney to remain available to him as an "advisory counsel." The court construed the father's statement to be requesting hybrid representation, which the court denied. The respondents have failed to provide any meaningful legal analysis in support of this claim, and, therefore, we deem it to be abandoned.

The respondents also contend that the court improperly declined the father's offer to introduce into evidence an audio recording of an incident that occurred outside of the courtroom on November 29, 2022, the fourteenth day of trial. The record reflects that, during a recess on that day, the court was informed by a judicial marshal that an incident had occurred outside of the courtroom involving the father and the petitioner's counsel. Following the recess, the petitioner's counsel represented to the court that, during the recess, in view of several others, the father threatened her, which led to the intervention of three judicial marshals. The petitioner's counsel requested that, in light of the father's threatening statements, the remainder of the trial be

conducted virtually following the conclusion of the proceeding that day. Over the respondents' objection,[18] the court granted that request.[19] Subsequently, on December 14, 2022, the last day of trial, before he had resumed his cross-examination of a witness following a recess, the father (1) asked the court to articulate what it believed he had said to the petitioner's attorney on November 29, 2022, to purportedly threaten her and (2) indicated that he had an audio recording of the incident, which, he posited, would verify that he did not say anything threatening to the petitioner's counsel. The court responded that the father had not "raised anything that [it] should address here" and directed the father to resume his cross-examination of the witness. The respondents argue on appeal that, to their "gross disadvantage . . . the court again abridged [them], based on an unfounded complaint and [they] were denied their . . . right [under the fifth amendment to the United States constitution] to face their accusers and to possible rebuttal." On the basis of the record, we conclude that the court acted reasonably in declining, on the last day of trial, to entertain additional argument or to hear evidence in relation to its ruling on November 29, 2022, switching the format of trial from in person to virtual.[20]

We next address the respondents' assertion that the court impermissibly denied a motion for a continuance that they filed on December 12, 2022, the eighteenth

[18] The guardian ad litem and Olivia's attorney did not object to the request.

[19] After indicating that it had received the report of the incident from the judicial marshal, the court commented: "I'm certainly not going to consider that report in making my decision about this case, but I want the lawyers to feel safe as they try this matter before me . . . ."

[20] Insofar as the respondents attempt to claim that their constitutional rights were infringed by the virtual format of trial following the court's ruling on November 29, 2022, the respondents' appellate brief is bereft of any substantive legal analysis on that issue, and, therefore, we conclude that the respondents have abandoned any such claim.

day of trial. The record reflects that, on December 8, 2022, after having granted the emergency motion, the court ordered that it would permit three additional days for trial on the neglect petition, concluding on December 14, 2022, with the respondents afforded two of those days to continue presenting their evidence, and that trial dates previously scheduled for January, 2023, were stricken. On December 12, 2022, the respondents moved for a continuance to allow them to retain new counsel. In support of the motion, the father argued in part that the respondents were disadvantaged by the court's new scheduling order entered on December 8, 2022, which limited their time to prepare for trial. The court denied the motion for a continuance, reasoning that (1) Olivia's needs required the neglect proceedings to be completed promptly, (2) trial had been ongoing since May, 2022, and (3) it had canvassed the respondents when they elected to represent themselves on November 29, 2022, and cautioned them about the perils of self-representation. The respondents maintain on appeal that they were prejudiced by the court's denial of their motion for a continuance, as they were "forc[ed] . . . to conclude their case-in-chief more than one month earlier than initially scheduled . . . ." On the basis of the record, we conclude that the court properly exercised its discretion to deny the motion for a continuance.[21] See *In re Shaquanna M.*, 61 Conn. App. 592, 604, 767 A.2d 155 (2001) ("Decisions to grant or to deny continuances are very often matters involving judicial economy, docket management or courtroom proceedings and, therefore, are particularly within the province of a trial court. . . . Whether to grant or to deny such motions clearly

[21] The respondents also assert that they "were forced to abide by" the court's granting of the emergency motion on December 8, 2022, "under duress." Insofar as this constitutes a cognizable claim of error, other than baldly asserting a violation of their constitutional rights, the respondents fail to set forth any substantive legal analysis in support of this claim. Therefore, we conclude that the respondents have abandoned this claim.

involves discretion, and a reviewing court should not disturb those decisions, unless there has been an abuse of that discretion, absent a showing that a specific constitutional right would be infringed." (Citation omitted.)).

The respondents also contend that the court improperly prevented them, during their case-in-chief, from seeking to present as witnesses two CCMC employees to whom the father had spoken when he brought Olivia to CCMC on November 2, 2021, and who, according to the respondents, would have provided testimony that contradicted other evidence regarding statements made by the father. The evidence that the respondents sought to discredit included Houle's investigation protocol, which was admitted as a full exhibit on July 12, 2022, and which documented statements made by the two CCMC employees.[22] The record reveals that, during trial on December 13, 2022, the respondents notified the court that they had submitted to the court a request to subpoena the two CCMC employees on December 12, 2022, to which the court responded: "Well, I told [you that] today is the last day for you to present evidence. So . . . it's a little late for that." The respondents argue that "the judge decided [that] it was more important to finish the trial than to allow the respondents to present testimony and rebuttal evidence from these two declarants . . . ." We conclude that the court acted reasonably in precluding the respondents, on the last day of their case-in-chief, from seeking to call the two CCMC employees as witnesses.

[22] The investigation protocol reflected that (1) one of the CCMC employees told Houle that, on November 2, 2021, the father (a) brought Olivia into CCMC, "pushing her towards the [reception] window and announced that he was [there] to 'drop her off for the [s]tate' and that he 'never wanted to see her again,' " and (b) refused to provide consent for Olivia to be treated, and (2) the other CCMC employee told Houle "that the father stated that he wanted to 'relinquish his rights.' "

In addition, the respondents claim that they "were placed in an ambush situation, which the court allowed," in three ways. First, the respondents contend that the court improperly made comments that "prompt[ed]" the petitioner to file the emergency motion on December 5, 2022. This contention is not supported by the record.[23] Second, the respondents assert that, during the evidentiary hearing on the emergency motion, the court improperly permitted the petitioner to call certain witnesses notwithstanding that the petitioner had failed to disclose them in advance of the hearing. The court rejected this argument after the father had raised it at the evidentiary hearing, reasoning that the argument did not present "any impediment to our proceeding on the [emergency] motion." The court maintained the discretion to allow testimony from the undisclosed witnesses; see *Natarajan* v. *Natarajan*, 107 Conn. App. 381, 389–90, 945 A.2d 540 (trial court did not abuse its discretion in admitting testimony of witness who had not been disclosed prior to trial), cert. denied, 287 Conn. 924, 951 A.2d 572 (2008); and we conclude that the respondents have failed to demonstrate that the court abused its discretion in this regard. Third, the respondents contend that the court improperly permitted the petitioner to offer certain evidence into the record that the mother did not receive in advance of the evidentiary hearing. The record reflects that, during the evidentiary hearing, the mother alerted the court that she had not received a certain document, which the petitioner was seeking to offer into evidence, notwithstanding the representation of the petitioner's

[23] The respondents point to comments that the court made during trial on November 30, 2022, (1) indicating that it wanted the parties to meet with a court services officer to "streamline . . . the court process," and (2) stating, in response to a question asked by the attorney for Olivia, that it would not rule out entering ex parte orders if such relief was sought pursuant to the rules of practice. These comments do not amount to the court "prompting" the petitioner to file the emergency motion.

counsel that the document had been emailed to her. Following additional discussion, it was discovered that the petitioner's counsel had emailed the document to an outdated email address of the mother. After that discovery, the petitioner's counsel represented that she would email the document to the mother's current email address immediately. Under these circumstances, we conclude that the court did not abuse its discretion in permitting the petitioner to submit evidence that the mother had not received in advance of the emergency hearing.

The respondents also claim that they "were not given equitable access to [department] records" despite having submitted certain records requests to the department. The record reflects that, on December 12, 2022, the respondents sought a continuance of the trial on the basis that the department had failed to respond to certain records requests. The petitioner's counsel represented that she was unaware of any such requests. The court declined to grant a continuance, but it ordered the respondents to provide immediately a list of the records that they were seeking to the petitioner's counsel, whom the court ordered "to notify her client to obtain [the records] and provide them to [the respondents] as expeditiously as possible." On the basis of the record, insofar as the respondents claim that they were denied access to the records in question, this claim is untenable because the court, in fact, ordered the petitioner to provide the records to the respondents, and at no point during the remainder of the trial did the respondents indicate to the court that the petitioner had failed to comply with the court's order.[24]

[24] For the first time on appeal, the respondents assert that "[p]ortions of [their records] request still were not fulfilled prior to the disposition [of the neglect proceedings], despite the judge's order." The respondents failed to present this claim to the trial court, and, therefore, it is not preserved for appellate review. See *In re Marie J.*, 219 Conn. App. 792, 816, 296 A.3d 308 (2023) ("[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited

Last, we address two claims of error raised by the respondents with respect to actions taken by Judge Dannehy, both of which warrant little discussion. First, the respondents assert that, during a hearing held on December 21, 2021, without the respondents present, Judge Dannehy engaged in ex parte communications with the petitioner and with a department social worker. The transcript of the December 21, 2021 hearing reflects that the proceeding held on that day concerned neglect petitions filed as to Olivia's two brothers. Thus, any claimed error regarding the December 21, 2021 hearing is outside of the scope of this appeal. Second, the respondents assert that, notwithstanding having "recused himself" from participating in the underlying proceedings, Judge Dannehy improperly ruled on the emergency motion. The record reflects that Judge Dannehy presided over pretrial proceedings in the underlying action and commented to the parties on the record on April 29, 2022, that another judge would preside over the trial on the neglect petition because "at this point [he had] gone too far into the case." In addition to presiding over the trial, Judge Frazzini conducted the evidentiary hearing on the emergency motion and ultimately granted the motion. At the outset of the evidentiary hearing, Judge Frazzini noted that "[t]he hearing was ordered for this morning. Judge Dannehy granted preliminary relief prior to . . . the hearing . . . ." On the basis of the record, the respondents have failed to demonstrate any impropriety committed by Judge Dannehy.

The judgment is affirmed.

to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.)). Even if the respondents had preserved this claim, they have not identified the records that they claim not to have received, thereby leaving us to speculate as to the harm stemming therefrom. See *In re Kiara Liz V.*, 203 Conn. App. 613, 624, 248 A.3d 813 ("[w]e frequently have stated that speculation and conjecture have no place in appellate review" (internal quotation marks omitted)), cert. denied, 337 Conn. 904, 252 A.3d 364 (2021).

ANGHAM ZAKKO *v.* LAITH KASIR
(AC 45315)

Clark, Seeley and DiPentima, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the revised financial orders issued by the trial court following its granting of the plaintiff's motion to open the dissolution judgment. In accordance with the parties' separation agreement, which was incorporated into the original dissolution judgment, the defendant was required to pay the plaintiff alimony in an amount equal to 30 percent of his gross earned income from work until he reached the age of sixty-five or, if he received veteran's disability income prior to turning sixty-five, 30 percent of his veteran's disability income plus 30 percent of any additional earned income. After the parties' marriage was dissolved, the defendant became disabled, stopped working, and began receiving Social Security disability benefits in addition to payments from a veteran's disability policy and a MassMutual disability insurance policy. As a result, the defendant's earned income decreased, and he began paying the plaintiff significantly less alimony. The defendant did not pay the plaintiff any portion of the income he received from the MassMutual policy because he did not believe that it constituted earned income for purposes of the dissolution judgment. The plaintiff filed a motion to open the dissolution judgment, arguing that it had been secured by fraud on the part of the defendant or, in the alternative, that it was obtained by the mutual mistake of the parties regarding the defendant's income and assets. At a hearing to determine whether the plaintiff was entitled to pursue discovery with respect to her fraud allegations, the plaintiff's counsel began questioning the defendant about the MassMutual policy. Following an objection by the defendant's counsel, the trial court started questioning the parties' attorneys and did not allow either counsel to further question the defendant or to present other evidence. The trial court then stated that it found that the defendant had not committed fraud because the defendant had listed the MassMutual policy on his financial affidavit and issued an order from the bench opening the judgment of dissolution with respect to financial orders on the basis of mutual mistake and fundamental fairness. Following a trial held for the purpose of issuing new financial orders, the trial court, inter alia, rejected the plaintiff's claim that the MassMutual policy constituted property subject to equitable division because the defendant's entitlement to benefits under that policy was inchoate at the time of the original dissolution judgment. The plaintiff appealed, and the defendant cross appealed, to this court. *Held* that the trial court deprived the defendant of his due process rights by not

allowing him to be heard in a meaningful manner on the plaintiff's motion to open the dissolution judgment: the trial court's actions prevented the defendant's counsel from examining his own client, who was the sole witness to testify at the hearing, and from introducing any evidence of his own in opposition to the plaintiff's motion; moreover, although the trial court stated that it was opening the judgment on the basis of a mutual mistake, it did not clearly identify the issue about which the parties were purportedly mistaken, and, due to its failure to provide the parties with a meaningful opportunity to introduce evidence, the record did not support a finding that the parties were mutually mistaken regarding whether the plaintiff was entitled to share in the value or proceeds of the MassMutual policy; furthermore, contrary to the plaintiff's assertion that the defendant's due process rights were not violated because there were no disputed issues of material fact concerning her claim of a mutual mistake, the transcript from the hearing at which the original dissolution judgment was rendered did not, by itself, establish that the parties were mutually mistaken about anything with respect to the MassMutual policy, an evidentiary hearing was required to resolve the plaintiff's motion to open, and, because the trial court failed to conduct an evidentiary hearing that comported with due process, it lacked the authority to issue the new financial orders that the plaintiff challenged on appeal; accordingly, this court reversed the judgment of the trial court and remanded the case with direction to reinstate the original financial orders and to hold a new hearing on the motion to open.

Argued October 11, 2023—officially released January 9, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Edward J. Dolan*, judge trial referee, granted the plaintiff's motion to open the judgment as to financial matters only, and the defendant appealed to this court, which granted the plaintiff's motion to dismiss the appeal; subsequently, the matter was tried to the court, *Klau*, *J.*; judgment revising certain financial orders, from which the plaintiff appealed and the defendant cross appealed to this court. *Reversed*; *further proceedings*.

David V. DeRosa, for the appellant-cross appellee (plaintiff).

Angham Zakko, self-represented, the appellant-cross appellee (plaintiff).

David A. McGrath, with whom was *Ashley Cervin*, for the appellee-cross appellant (defendant).

Opinion

CLARK, J. This appeal and cross appeal arise from the trial court's judgment granting a motion to open a dissolution judgment as to financial matters only filed by the plaintiff, Angham Zakko, and the subsequent entry of new financial orders. On appeal, the plaintiff claims that the trial court, *Klau*, *J.*, erred in fashioning revised financial orders by (1) failing to classify a private disability policy as a marital asset, subject to division under General Statutes § 46b-81, (2) crafting inequitable alimony orders, (3) ordering an inequitable property distribution, and (4) not compelling the defendant, Laith Kasir, to provide her with a signed authorization in order to complete discovery on alleged foreign bank accounts. On cross appeal, the defendant claims that the trial court, *Hon. Edward J. Dolan*, judge trial referee, erred in granting the plaintiff's motion to open the dissolution judgment in the first instance because (1) it deprived him of due process by failing to provide adequate notice that the judgment might be opened at a preliminary discovery hearing and a meaningful opportunity to be heard or to present evidence before granting the motion, and (2) there was no evidence to support the court's conclusion that there was a mutual mistake. We agree with the defendant that the trial court deprived him of his due process rights and, therefore, that it was improper for the court to grant the plaintiff's motion to open. Because it was improper for the court to open the dissolution judgment, we further conclude that the court lacked the authority to issue the new

financial orders that the plaintiff challenges on appeal. Accordingly, we reverse the judgment of the trial court and remand the case with direction to reinstate the April 5, 2016 financial orders and to hold a new hearing on the motion to open.

The following facts and procedural history are relevant to our resolution of this appeal and cross appeal. On April 5, 2016, the court, *Hon. Edward J. Dolan*, judge trial referee, rendered judgment dissolving the parties' marriage. The parties' separation agreement (agreement) was incorporated into the judgment of dissolution. The agreement divided the marital property and provided that the defendant would pay the plaintiff alimony of "30% of his gross earned income from work until such time as [the defendant] attains the age of 65. This is currently $1,142 a week. If, prior to attaining the age of 65, [the defendant] commences receiving Veteran's Disability Income, then [the defendant's] alimony obligation shall be reduced to 30% of his gross Veteran's Disability Income plus 30% of additional earned income, if any, he may have in addition to his Veteran's Disability."

After the dissolution of the parties' marriage, the defendant became disabled. His disability prevented him from working, but he began receiving Social Security disability benefits in addition to payments from a veteran's disability policy and a separate MassMutual disability insurance policy (MassMutual policy). Due to the defendant's disability and his inability to work, the defendant's earned income decreased significantly. As a result, he began paying the plaintiff significantly less in alimony. The defendant did not pay the plaintiff any portion of the income he received from the MassMutual policy because the dissolution judgment was silent as to that policy, and it was his position that the income he received from that policy did not constitute "earned income" for purposes of the dissolution judgment.

The plaintiff filed myriad postjudgment motions, including a motion to compel and a motion for modification filed on October 10, 2017, and two separate motions for contempt filed on November 13 and December 19, 2017. In these motions, the plaintiff argued, inter alia, that (1) the defendant was required to pay her 30 percent of the income he received under the MassMutual policy and (2) the defendant had failed to pay the plaintiff either 30 percent of his total veteran's disability benefits before the benefits were reduced by his Social Security disability benefits or 30 percent of his Social Security disability benefits. On December 22, 2017, the plaintiff filed a memorandum of law in support of her request to conduct postjudgment discovery, seeking information regarding the MassMutual policy.

On January 19, 2018, the defendant filed an objection to both the plaintiff's December 19, 2017 motion for contempt and the memorandum of law in support of the plaintiff's request for discovery in connection with her claim that she was entitled to 30 percent of the income the defendant received under the MassMutual policy. The defendant argued that the MassMutual policy did not constitute "earned income" under the agreement and the dissolution judgment and that the defendant, therefore, was not required to pay the plaintiff any portion of the income he received under that policy.

On January 23, 2018, the court, *Connors*, *J.*, issued an order sustaining the defendant's objection to the plaintiff's postjudgment discovery requests with respect to her pending motions. In so ruling, the court concluded that "[t]he language in the judgment [was] clear and unambiguous. Pursuant to the terms of the judgment, the plaintiff's alimony [was] limited to 30 percent of the defendant's veteran's disability benefits and 30 percent of any other earned income. Income from any other sources is therefore irrelevant."

Thereafter, on March 22, 2019, the plaintiff filed a motion to open the judgment, arguing that "the judgment was secured by fraud on the part of the defendant" or that, in the alternative, "the judgment was obtained by the mutual mistake of the parties regarding the defendant's income and assets." In her memorandum of law in support of her motion, the plaintiff claimed that the defendant had committed fraud by (1) "failing to list the veteran's [disability] policy as an asset on his financial affidavit," (2) "failing to value his [MassMutual policy]," (3) "failing to list the [dividends] he received from the MassMutual policy as income," (4) "failing to list the premiums he paid for the veteran's disability policy and the MassMutual polic[y] in expenses," and (5) "falsely stating that his disability income would be $118,000 for the first year and then $79,000 thereafter." In the alternative, the plaintiff asserted that the judgment should be opened due to the parties' mutual mistake. Specifically, the plaintiff argued that both parties "incorrectly calculated the defendant's income upon his disability and incorrectly believed that the defendant's assets and income were accurately represented on his financial affidavit" and that the defendant "mistakenly misstated his disability income and the value of his MassMutual policy on his financial affidavit . . . ." In his objection to the plaintiff's motion to open, the defendant maintained that there had been no fraud or mutual mistake. With respect to the MassMutual policy, the defendant argued that (1) "the MassMutual [policy] was fully disclosed and accurately represented on [the defendant's] financial affidavits" and (2) "[the defendant's] representations at the time of judgment as to the facts that then existed . . . were entirely accurate and not mistaken."

On June 25, 2019, the court, *Hon. Edward J. Dolan*, judge trial referee, held a hearing with respect to the plaintiff's motion to open. At that hearing, both parties

represented to the court that the purpose of the hearing was to determine whether the plaintiff was entitled to pursue discovery with respect to her fraud allegations by establishing that there was probable cause to believe that the defendant had committed fraud. See *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988).[1] After a brief hearing, which will be discussed in greater detail subsequently in this opinion, the court found that the defendant had not committed fraud but, nevertheless, issued an order opening the judgment of dissolution only with respect to the financial orders on the basis of mutual mistake. The defendant subsequently appealed the court's judgment granting the plaintiff's motion to open, but this court dismissed that appeal because it concluded that the court's order did

[1] "In *Oneglia* v. *Oneglia*, [supra, 14 Conn. App. 269–70], this court held that, in considering a motion to open on the basis of fraud, a court must first make a preliminary determination of whether there is probable cause to believe that the judgment was obtained by fraud. *Oneglia* and its progeny are grounded in the principle of the finality of judgments. . . . [T]he finality of judgments principle recognizes the interest of the public as well as that of the parties [that] there be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligations to act further by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . *Oneglia* carefully balanced that interest in finality with the reality that in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. . . . The court in *Oneglia* thus ratified the gatekeeping mechanism employed by the trial court, whereby a court presented with a motion to open by a party alleging fraud in a postjudgment dissolution proceeding conducts a preliminary hearing to determine whether the allegations are substantiated. . . . [I]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court [properly] would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after discovery had been completed and another hearing held. . . . This preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he [or she] will prevail, only that there is probable cause to sustain the validity of the claim." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Karen* v. *Loftus*, 210 Conn. App. 289, 297–98, 270 A.3d 126 (2022).

not constitute a final judgment. See *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 459, 239 A.3d 272 (2020) ("[i]t is well settled that, as a general rule, the granting of a motion to open renders a trial court's judgment nonfinal and, therefore, ineffective pending its resolution" (internal quotation marks omitted)).

Thereafter, the court held a trial for the purpose of issuing new financial orders. That trial took place over the course of five separate days between April and October, 2021. Following trial, the court, *Klau*, *J.*, issued a memorandum of decision dated February 3, 2022, acknowledging that the parties' marriage had been dissolved as of April 5, 2016, and rendering judgment issuing revised financial orders concerning both the parties' property and income. With respect to alimony, the court ordered the defendant to pay the plaintiff $500 per week, which the court found amounted to 38 percent of the parties' combined net weekly incomes. The court also rejected the plaintiff's claim that the MassMutual policy constituted property subject to equitable division pursuant to § 46b-81. The court reasoned that the defendant's entitlement to disability benefits under the MassMutual policy was inchoate at the time of the original dissolution judgment because he was not disabled at that time and the prospect of him receiving benefits under that policy was speculative.[2]

This appeal and cross appeal followed. Given the nature of the defendant's cross appeal, which challenges the court's decision to open the judgment of dissolution in the first instance, we address his claims first. Additional facts will be set forth as necessary.

[2] The court also stated that, after reviewing the case file in preparation for the trial, it was "firmly convinced" that any misunderstanding concerning the MassMutual policy was limited to the plaintiff and that there was at most a unilateral mistake, not a mutual mistake. Nevertheless, because it was unclear to the court whether it had the inherent authority to vacate another judge's earlier order opening a judgment, it proceeded with the trial of the opened dissolution matter.

On cross appeal, the defendant claims that the court violated his right to due process of law by not allowing him to be heard in a meaningful manner on the plaintiff's motion to open the 2016 dissolution judgment before the trial court granted the motion.[3] Specifically, the defendant claims that he was not afforded a reasonable opportunity to present evidence, to call his own witnesses, or to be examined by his attorney, as he was the sole witness allowed to testify at the hearing on the plaintiff's motion to open. We agree with the defendant.

We begin by setting forth our standard of review and the relevant legal principles governing the defendant's claim. "Whether the court violated the defendant's constitutional procedural due process rights is a question of law over which our review is plenary. . . . [F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his [or her] own

[3] The defendant also claims, and the parties seem to dispute, whether proper notice was given that the court would actually consider and rule on the plaintiff's motion to open the judgment rather than conduct a preliminary *Oneglia* hearing. See footnote 1 of this opinion. The defendant also argues that, because an *Oneglia* hearing is held only to determine whether there is probable cause to believe the original judgment was obtained by fraud, it was improper for the court to open the judgment at this type of hearing on the basis of a finding of mutual mistake. Because the record is unclear as to whether the hearing was scheduled solely for the purpose of addressing the narrow question of whether there was probable cause to believe that the defendant had committed fraud and because we nevertheless conclude that the court conducted the hearing in a manner that deprived the defendant of due process when it opened the judgment, we need not address these claims.

arguments and evidence orally." (Citation omitted; internal quotation marks omitted.) *Merkel* v. *Hill*, 189 Conn. App. 779, 786–87, 207 A.3d 1115 (2019).

"A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved. . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Where a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Internal quotation marks omitted.) *Morera* v. *Thurber*, 187 Conn. App. 795, 799–800, 204 A.3d 1 (2019).

It is axiomatic that parties have a right to present evidence on contested issues when at a hearing before the court. See *Eilers* v. *Eilers*, 89 Conn. App. 210, 218, 873 A.2d 185 (2005) ("we hold that a party has a due process right to present evidence on contested factual issues and that a court's annoyance or impatience with the pace and range of questioning or the court's disgust with a witness will not justify the termination of a hearing before a party has been given a reasonable opportunity to examine and to cross-examine witnesses on facts pertinent to the issues at hand"); *Szot* v. *Szot*, 41 Conn. App. 238, 242, 674 A.2d 1384 (1996) (trial court "did not have the right to terminate the hearing before the plaintiff had a fair opportunity to present evidence on

the contested issues'' where trial court had ended cross-examination and entire presentation of evidence due to its apparent frustration with plaintiff's counsel).

In the present case, the court did not allow the defendant's counsel to examine the one witness who testified at the hearing on the motion to open or to offer any of his own evidence in opposition to the plaintiff's motion to open. At the beginning of the hearing, the plaintiff's counsel, Attorney Alan Rome, called the defendant as a witness. Shortly after Rome began questioning the defendant about the underlying divorce proceedings and the MassMutual policy, the defendant's counsel, Attorney David McGrath, objected to the line of questioning. Rather than ruling on the objection, the court began questioning the attorneys and never allowed the parties to return to questioning the witness or to present additional evidence. During that exchange, and after reviewing the transcript from the hearing at which it had rendered the original dissolution judgment, the court made clear to the parties that, in its view, and contrary to the conclusion Judge Connors previously had reached when denying the plaintiff's request for postjudgment discovery in connection with the MassMutual policy, the original dissolution judgment required the defendant to pay the plaintiff 30 percent of the income he received from the MassMutual policy.[4]

[4] The court and the parties' attorneys engaged in the following colloquy:

"The Court: Here's the real question as far as I'm concerned. Let me take five minutes and read the transcript.

"[McGrath]: And Your Honor, both sides filed memoranda of law in preparation.

"The Court: I want to answer my question first. . . . If he is collecting on another disability policy, then he's got to pay her 30 percent of that. . . . It's income and he owes her 30 percent of it, period.

"[Rome]: I agree with you 100 percent, Your Honor.

"The Court: So, what are we talking about?

"[Rome]: So, let me explain what happened. . . . [The plaintiff] filed a motion for contempt and a motion for modification to get the 30 percent paid. Judge Abery-Wetstone ruled denying those motions because of the language in the separation agreement that says 'earned income,' and because the . . . MassMutual [policy] is paid with after tax dollars, it was not earned income . . . .

Thereafter, and without allowing the parties to introduce any further evidence, the court issued an order from the bench opening the judgment as to financial matters only, stating: "Go outside, act like grownups and settle this case. I'm going to reopen it. You have the right to pursue discovery and if you would rather pay your lawyer [than] give the money that will ultimately go to your kids, God bless you, and I can't stop you

* * *

"[McGrath]: So, Your Honor, if you look to the actual language of the judgment there were two versions of the agreement. One of which was crossed out and initialed by the parties and was replaced with another one. And what they initially bargained for was that [the defendant] would pay alimony up to age sixty-two and . . . it changed to sixty-five. . . . And, in addition to that change, with that change, what they bargained for was they changed the term 'any income or gross income' to 'earned income' and earned income explicitly included this [MassMutual policy]. . . . Judge Connors specifically . . . concluded and entered an order saying that earned income did not include any distributions from his MassMutual [policy]. He had that hearing. Evidence was presented, legal argument was made and Judge Connors found that that was not included and denied [the plaintiff's] motion for contempt. . . .

"The Court: But why am I doing this? . . .

"[Rome]: . . . The issue . . . is exactly your point, Your Honor, is that this intent and your language that you read in the transcript says exactly if you get any check, you pay her 30 percent. That was my client's understanding. He had a MassMutual policy at the day of the divorce. He was disabled at the day of the divorce according to his own testimony under oath today.

"The Court: Forget about being disabled. I don't care about any—you are making this ten times more complicated than it is. It is not complicated. He got a check. He owed her 30 percent as far as I'm concerned, but the question is, am I overruling somebody else's order?

"[Rome]: No. This is a new motion, Your Honor, and all today is about is whether we have probable cause to do additional discovery. They won't even turn over how much he's getting. . . .

"The Court: Sir, how much are you getting from MassMutual?

"[McGrath]: Your Honor, for the record I object.

"The Court: Fine. How much are you getting?

"[The Defendant]: About $6000 something per month.

"The Court: So, six—

"[The Defendant]: Between $6000 and $7000, I'm not sure exactly the number.

"The Court: All right. So, let's say it's $6000. So, 30 percent of $6000 is what?

"[Rome]: $1800, Your Honor.

"The Court: So, it's $1800 and you probably spent over [$15,000] on legal fees in this case already and terrific. This is absolutely ridiculous, absolutely ridiculous."

from being ridiculous." After making this statement, the court began to question both parties as to how much money they had paid their attorneys in legal fees, in comparison to how much money they were attempting to gain through a judgment in their favor, before reiterating that it was opening the judgment.[5] When the defendant's counsel asked the court to make it clear for the record whether it was making a finding that there was probable cause to believe that fraud existed, the court stated that it did not find that there was fraud because the defendant had listed the MassMutual policy on his financial affidavit. Instead, the court stated that it was opening the judgment on the basis of mutual mistake and fundamental fairness.[6]

On the record before us, it is clear that the defendant did not have a reasonable opportunity to be heard in opposition to the plaintiff's motion to open the dissolution judgment. The court's actions prevented the defendant's counsel from examining his own client, who was the sole witness to testify at the hearing, and from introducing any evidence whatsoever of his own. Moreover, although the court stated that it was opening the

[5] The court stated: "So, we're arguing over $18,000. You have each blown $15,000 and you are each guaranteed to pay another $15,000 based on my ruling today, which could be right or could be wrong, and if that's what you want to do with your money, God bless you, and there isn't a thing I can do to stop you. You're a doctor. You have a brain. This is purely a financial thing. Figure out a way to settle this case. I mean it's just ridiculous. But as far as the ruling is concerned, I've reopened it. And now you can either act like grownups and settle the case or you can appeal and if I get reversed on appeal you can come back and spend another $15,000 rearguing it. If that's what you want to do, go do it."

[6] The following colloquy took place:

"[McGrath]: For purposes of the record, are you making a finding that there is probable cause that a fraud existed here?

"The Court: No, not fraud, mutual mistake. I don't approve of the mentality of either of these people, but I don't think it was fraud because it was listed on his financial affidavit and it's even conceivable to me that it didn't even occur to him at that point that he was going to be able to collect on that policy. I'm not claiming fraud but on the question of fundamental fairness and mutual mistake she is entitled to that money."

judgment on the basis of a mutual mistake, the court did not clearly identify what the parties purportedly were mistaken about. Additionally, due to the court's failure to provide the parties with a meaningful opportunity to introduce evidence, the record does not support a finding that the parties were mutually mistaken about whether the plaintiff was entitled to share in the value or proceeds of the MassMutual policy. Indeed, it is difficult to conceive of how the court could make such a finding when the parties themselves were never even given the opportunity to testify about that question.

The plaintiff claims that the defendant's due process rights were not violated because there were no disputed issues of material fact concerning her claim that there had been a mutual mistake with respect to the MassMutual policy. In her view, the record supports the court's finding of mutual mistake because the court made that finding on the basis of its review of the transcript of the hearing at which it rendered the judgment of dissolution in 2016. As a result, she contends that no evidentiary hearing was required. We are not persuaded.

We have reviewed the transcript from the hearing at which the original dissolution judgment was rendered and conclude that it does not by itself establish that the parties were mutually mistaken about anything with respect to the MassMutual policy. First, because the court seemed to base its ruling on its own determination that the original dissolution judgment actually required the defendant to pay the plaintiff 30 percent of his income from the MassMutual policy, the court did not identify the mutual mistake. Consequently, it is not possible to conclude that the transcript from the hearing on the original dissolution judgment shows that the parties were mutually mistaken. Second, the plaintiff makes two differing arguments in support of her claim that there was a mutual mistake between the parties concerning the MassMutual policy. On the one hand,

she claims that, at the time of the original dissolution judgment, the MassMutual policy constituted marital property that was subject to equitable division and that both parties mistakenly assigned the policy no value. On the other hand, she also argues that the parties were mutually mistaken when they failed to include the income from the MassMutual policy in their calculation of her alimony benefit. Putting aside the fact that these two differing positions reflect that the plaintiff is unable to articulate clearly the purported mutual mistake, the transcript from the 2016 hearing at which the original dissolution judgment was rendered does not support either theory.[7]

Contrary to the plaintiff's assertions, therefore, we conclude that an evidentiary hearing was required to resolve the plaintiff's motion to open. That conclusion is consistent with our case law, which makes clear that when deciding a motion to open on the basis of mistake, due process generally requires that the parties be given an opportunity to present evidence. "A motion to open a stipulated judgment, when grounded on mistake or duress, necessarily requires the court to make a factual determination before it can exercise its discretion to grant or deny the motion . . . . In making its factual determination whether a stipulated judgment should be opened, the court must inquire into whether the decree

[7] Although there was an exchange on the record between the court and the parties about the defendant's obligation to pay some portion of his veteran disability benefits as alimony, there was no discussion whatsoever of the MassMutual policy:

"The Court: So, you—if you go and you get V.A. money, a V.A. disability, you have to give her 30 percent of the gross of that V.A. disability and then you have an affirmative obligation to provide her with copies of your tax returns every year. And if you find any employment to supplement your income, you have to pay her 30 percent of that . . . you understand that?

"[The Defendant]: Yes, Your Honor.

"The Court: And you understand what I've just said? You have to answer out loud.

"[The Plaintiff]: Yes, Your Honor, yes."

itself was obtained by fraud, duress, accident or mistake. . . . When such a factual determination must be made, due process requires a hearing to provide the parties with an opportunity to present evidence." (Citation omitted; internal quotation marks omitted.) *Housing Authority* v. *Goodwin*, 108 Conn. App. 500, 507, 949 A.2d 494 (2008).

Because the court failed to conduct an evidentiary hearing that comported with due process, its order opening the judgment as to financial matters must be reversed. In addition, because the court improperly opened the judgment, it lacked the authority to issue the new financial orders the plaintiff seeks to challenge in this appeal. See *Callahan* v. *Callahan*, 157 Conn. App. 78, 81, 116 A.3d 317 (court reversed judgment issuing substitute financial orders and remanded case with direction to reinstate original financial orders where trial court did not have authority to open dissolution judgment), cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015). Accordingly, we need not address the plaintiff's claims regarding those financial orders.

The judgment is reversed and the case is remanded with direction to reinstate the April 5, 2016 financial orders and to hold a new hearing on the motion to open.

In this opinion the other judges concurred.

BEULAH GARDNER *v.* DEPARTMENT OF MENTAL HEALTH AND ADDICTION SERVICES ET AL.
(AC 45594)

Moll, Cradle and Suarez, Js.

Syllabus

The plaintiff, who had sustained a compensable work-related injury during her employment, appealed to this court from the decision of the Compensation Review Board, which upheld the decision of the Workers' Compensation Commissioner granting the defendant employer's request to convert the plaintiff's benefits for temporary partial disability, pursuant to statute (§ 31-308 (a)), to permanent partial disability benefits, pursuant to § 31-308 (b), after medical examinations determined that the plaintiff had attained maximum medical improvement and had a light-duty work capacity. The plaintiff claimed that the board had improperly determined that, because she had reached maximum medical improvement, she could no longer receive temporary partial disability benefits pursuant to § 31-308 (a). Although the plaintiff contended that the Supreme Court in *Osterlund* v. *State* (129 Conn. 591) had recognized the discretion of a commissioner to award ongoing temporary partial disability benefits to a claimant who had reached maximum medical improvement, the board reasoned that, although the holding in *Osterlund* had been codified in § 31-308 (d), that statutory provision had been repealed by the legislature in 1993. On the plaintiff's appeal to this court, *held* that the board properly interpreted the authority afforded the commissioner pursuant to § 31-308 (a) and upheld the commissioner's determination: despite the plaintiff's claim that the commissioner had discretion pursuant to § 31-308 to award ongoing wage loss disability benefits in lieu of permanent partial disability benefits after she attained maximum medical improvement, this court determined that, although neither § 31-308 nor other provisions of the Workers' Compensation Act (§ 31-275 et seq.) expressly address whether a commissioner is authorized to continue to award temporary partial disability benefits in lieu of permanent partial disability benefits after the injured employee reaches maximum medical improvement, the legislature omitted such authority in 1993 when it revised § 31-308 to eliminate subsection (d) and has statutorily (§ 31-295 (c)) required that permanent partial disability benefits be paid after the date of maximum medical improvement; moreover, § 31-308 (a) limits the duration of disability benefits and § 31-295 (c) requires that permanent partial disability benefits pursuant to § 31-308 (b) shall be paid after the date of maximum medical improvement; furthermore, prior decisions of this state's courts bolstered this court's determination that temporary partial disability benefits are available under § 31-308 (a) only until the claimant reaches maximum medical improvement.

Argued September 11, 2023—officially released January 9, 2024

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District approving the conversion of the plaintiff's temporary partial disability benefits to permanent partial disability benefits and denying ongoing temporary partial disability benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Justin A. Raymond, for the appellant (plaintiff).

Lisa Guttenberg Weiss, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Matthew Larock*, deputy associate attorney general, for the appellee (named defendant).

Robert F. Carter filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Dana M. Hrelic and *Meagan A. Cauda* filed a brief for the Connecticut Business and Industry Association et al. as amici curiae.

Opinion

SUAREZ, J. In this workers' compensation dispute, the plaintiff, Beulah Gardner, appeals from the decision of the Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner for the Fifth District (commissioner) of the Workers' Compensation Commission[1] approving a

[1] General Statutes § 31-275d (a) (1), which became effective on October 1, 2021, provides in relevant part that, "[w]herever the words 'workers' compensation commissioner', 'compensation commissioner' or 'commissioner' are used to denote a workers' compensation commissioner in [several enumerated] sections of the general statutes, [including sections contained in the Workers' Compensation Act, § 31-275 et seq.] the words 'administrative law judge' shall be substituted in lieu thereof . . . ."

In light of the fact that the commissioner rendered his decision, as well as his ruling on the plaintiff's motion to correct his decision, prior to October 1, 2021, in the present case, we will refer to the workers' compensation commissioner who approved the defendants' form 36 in this matter as "the commissioner."

form 36[2] that was filed by the defendants, the Department of Mental Health and Addiction Services (department) and Gallagher-Bassett Services, Inc.,[3] and denying the plaintiff's claim for ongoing temporary partial disability benefits pursuant to General Statutes § 31-308 (a).[4] The plaintiff claims that the board improperly determined as a matter of law that, in light of the undisputed fact that she had reached maximum medical improvement, she could no longer receive benefits pursuant to § 31-308 (a). We affirm the decision of the board.

The commissioner set forth the following findings of fact. "On April 19, 2016, [the plaintiff] suffered a compensable work-related injury to her left wrist while employed with the [department]. The injury occurred while [the plaintiff] was restraining a patient when her hand became caught, causing inflammation and pain. . . .

"At the time of the injury, [the plaintiff] was employed as a forensic treatment specialist at Whiting Forensic Institute. Her job involved care and treatment of mentally ill patients. The [plaintiff] is eligible to receive 100 percent benefits pursuant to General Statutes § 5-142

[2] " 'A [f]orm 36 is a notice to the compensation commissioner and the [plaintiff] of the intention of the employer and its insurer to discontinue [or reduce] compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue [or reduce] payments.' . . . *Brinson* v. *Finlay Bros. Printing Co.*, 77 Conn. App. 319, 320 n.1, 823 A.2d 1223 (2003); General Statutes § 31-296 (b)." *Rivera* v. *Patient Care of Connecticut*, 188 Conn. App. 203, 204 n.1, 204 A.3d 761 (2019).

[3] Gallagher-Bassett Services, Inc., is a third-party administrator for the department. Because Gallagher-Bassett Services, Inc., has not participated in this appeal, we refer in this opinion to the department as the defendant and to the department and Gallagher-Bassett Services, Inc., as the defendants where appropriate.

[4] Although the legislature has amended § 31-308 (a) since the underlying events at issue; see Public Acts 2021, No. 21-196, § 59; that amendment has no bearing on the merits of this appeal. We therefore refer in this opinion to the current revision of § 31-308 (a).

(a) for injuries suffered as a result of physically restraining patients of the facility. . . .

"On May 8, 2018, [a workers' compensation commissioner] approved a voluntary agreement accepting compensability of the April 19, 2016 injury. Dr. Stanley Foster is listed as the authorized treating physician for the injury, listed as follows: Left nondominant wrist intersection syndrome and [carpal tunnel syndrome]. . . .

"The compensation rate for temporary total disability was established at $1256 [per week], based upon concurrent wages of $2440.30 per week. The compensation rate for temporary partial disability and permanent partial disability was agreed upon at $998 [per week]. . . .

"At the time of the compensable injury, [the plaintiff] was working concurrently for Sheriden Woods [Health Care Center] in Bristol . . . . These wages are factored in the voluntary agreement. . . .

"Following the incident, [the plaintiff] received conservative medical treatment and was paid indemnity benefits. On May 17, 2017, she underwent a left-hand trigger thumb release surgery by [Foster]. Following this procedure, the [plaintiff] continued to have persistent pain. She thereafter came under the care of Dr. Duffield Ashmead, who performed a second surgical procedure on March 8, 2019. Her symptoms improved thereafter. . . .

"On October 4, 2019, the [department] sent a separation letter to [the plaintiff] pursuant to General Statutes § 5-244. This letter indicated that, because she had been provided permanent restrictions by [Ashmead] that did not allow her to continue in her position at Whiting Forensic Hospital, she could be transferred to a less arduous position with another agency within the state of Connecticut. In addition, this communication provided

that [the plaintiff] could resign from her job or seek disability retirement. . . .

"On October 28, 2019, the [plaintiff] presented to Dr. Pavel Straznicky for an examination at the request of the [department]. As a result of the examination and review of records, [Straznicky] diagnosed post-traumatic chronic synovitis of the left wrist. [Straznicky] further opined that [the plaintiff] has attained maximum medical improvement relative to the compensable injury and resulting surgical procedures.[5] He opined that the [plaintiff] had a light-duty work capacity with a twenty pound lifting restriction on her left hand and indicated she could not restrain patients. . . .

"On March 11, 2020, [Ashmead] also opined that the [plaintiff] had attained maximum medical improvement, as it was nearly one year postsurgical intervention. He provided an 8 percent permanent partial impairment rating to the [plaintiff's] left wrist.[6] On work

[5] "The date of maximum medical improvement is the point at which the *permanency* of the condition and, hence, the *right* to permanent disability benefits, is established, and it is also the point at which the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations . . . ." (Emphasis in original.) *Brennan* v. *Waterbury*, 331 Conn. 672, 695–96, 207 A.3d 1 (2019); see also 3 A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 6.08, p. 981 ("[a]s a general proposition maximum medical improvement has been reached when the curative effect of medical treatment has plateaued").

[6] Permanent partial disability generally has been defined as "[a] disability partial in character but permanent in quality resulting from [the] loss or loss of use of body members or from the partial loss of use of the employee's body. . . . Where permanent partial disability is defined in terms of impairment, it is based on physical disability rather than loss of earning capacity, and higher post-injury wages than pre-injury wages do not bar compensation for permanent partial disability. The compensation is for permanent loss or impairment of a bodily function rather than for a wage loss." (Footnotes omitted.) 2 Modern Workers Compensation (November, 2023) § 200:9, Permanent partial disability, generally; see also *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 192, 8 A.3d 507 (2010) ("[p]ermanent partial schedule awards are based on medical condition after maximum improvement has been reached and ignore wage loss entirely" (internal quotation marks omitted)).

capacity, [Ashmead] indicated the following: [The plaintiff] is once again judged capable of work at a light level on nonhand intensive or repetitive physical demand, lifting, pushing, pulling, not to exceed twenty pounds. She seems an ideal candidate for vocational redirection. . . .

"On May 21, 2020, the [defendants] filed a form 36 Notice of Intention to Reduce or Discontinue Payments seeking to convert temporary partial disability benefits to permanent partial disability benefits due to [Ashmead's] opinion that the [plaintiff] had attained maximum medical improvement and had a light-duty work capacity. . . .

"In addition to the filing of the form 36, the [defendants] sent to the [plaintiff], through her attorney, voluntary agreements recognizing the 8 percent rating as provided by [Ashmead]. This agreement establishes March 11, 2020, as the date of maximum medical improvement." (Footnotes added.)

The plaintiff and the defendants appeared before the commissioner at a formal hearing on December 14, 2020. The commissioner framed the issues before him as (1) whether the form 36, which was filed on May 21, 2020, seeking to convert the plaintiff's indemnity benefits from temporary partial disability pursuant to § 31-308 (a) to permanent partial disability pursuant to § 31-308 (b) should be granted, and (2) whether the plaintiff was entitled to temporary partial disability payments pursuant to § 31-308 (a). The commissioner aptly summarized the positions of the parties: "It is the [plaintiff's] position that a workers' compensation commissioner has discretion pursuant to . . . § 31-308 to award ongoing wage loss disability benefits in lieu of permanent partial disability benefits after an injured worker has attained maximum medical improvement. In support of this position, the [plaintiff] is relying on

the Supreme Court's ruling in *Osterlund* v. *State*, 129 Conn. 591 [30 A.2d 393] (1943). It is her position that *Osterlund* holds that, when a claimant has been assigned a permanent partial disability, the words of the statute compel the conclusion that the commissioner has the discretion to award continuing wage loss benefits in lieu of permanent partial disability [benefits] based upon factors including work limitations, concurrent employment, loss of function, and its disparate impact on her earning potential. . . .

"In support of her position, the [plaintiff] entered evidence of records of employment contracts as proof of her inability to obtain employment as a direct result of the compensable injury. These job search forms represent approximately fifty-one weeks of unsuccessful attempts to garner employment within her level of disability. . . .

"It is the [defendants'] position that the [plaintiff] is not eligible for unlimited temporary partial disability benefits pursuant to § 31-308 (a) as a matter of law. They are of the position that wage loss benefits cease once an injured worker has been placed at maximum medical improvement and, at that point, permanent partial disability becomes due. After payment of this benefit expires, the injured worker has a right to seek additional discretionary wage loss benefits pursuant to General Statutes § 31-308a. However, these postspecific discretionary benefits have statutory limitations. The [defendants] are of the further position that the Supreme Court's decision in *Osterlund* only applies to temporary total disability benefits and that . . . § 31-308 (a) was enacted after *Osterlund*, thereby rendering the decision moot."

The commissioner, expressly relying on the reports and opinions of Ashmead and Straznicky, found that the plaintiff had attained maximum medical improvement

following the April 19, 2016 injury. The commissioner found that the plaintiff "has suffered permanent work restrictions directly related to her compensable injury that have rendered her incapable of returning to her job as a forensic treatment specialist." The commissioner rendered his decision on June 2, 2021, in which he approved the form 36, filed on May 21, 2020,[7] seeking to convert indemnity benefits from temporary partial disability pursuant to § 31-308 (a) to permanent partial disability pursuant to § 31-308 (b), effective May 21, 2020. The commissioner denied the plaintiff's claim for ongoing temporary partial disability benefits in reliance on § 31-308 (b).[8]

Thereafter, the plaintiff appealed from the commissioner's decision to the board. The plaintiff, in her appeal to the board, did not take issue with the commissioner's findings of fact but, rather, challenged the commissioner's interpretation of § 31-308. The board addressed the plaintiff's reliance on § 31-308 (b) and our Supreme Court's decision in *Osterlund*, which explicitly recognized the authority of a commissioner to award ongoing temporary partial disability benefits to a claimant who had reached maximum medical improvement. In interpreting language in § 31-308 (b) on which the plaintiff relied, however, the board was guided by the fact that, in 1967, *Osterlund*'s holding was subsequently

[7] After the commissioner rendered his decision, the plaintiff filed a motion to correct the decision. The commissioner granted the motion to correct in part and thereby rectified two scrivener's errors that appeared in his original memorandum of decision.

[8] Before the commissioner and, later, the board, the plaintiff relied on the portion of § 31-308 (b) that provides that, where a permanent partial loss of the use or function of a member exists, "the [commissioner] may, in the [commissioner's] discretion, in lieu of other compensation, award to the injured employee the proportion of the sum provided in this subsection . . . ." The plaintiff argued that this language should be interpreted such that it affords the commissioner the discretion to continue to award temporary partial disability benefits to a claimant in lieu of permanent partial disability benefits following maximum medical improvement.

codified in § 31-308 (d), but that, in 1993, our legislature repealed subsection (d) of the statute. See Public Acts 1993, No. 93-228 (P.A. 93-228). Considering this "legislative activity," the board, in a thorough analysis, rejected the plaintiff's reliance on *Osterlund* and her contention that § 31-308 (b) should be interpreted to afford the commissioner the authority to award ongoing temporary partial disability benefits under § 31-308 (a). This appeal followed.

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny. . . . Whe[n] . . . [a workers' compensation] appeal involves an issue of statutory construction that has not yet been subjected to judicial scrutiny, this court has plenary power to review the administrative decision." (Citation omitted; internal quotation marks omitted.) *Cochran* v. *Dept. of Transportation*, 220 Conn. App. 855, 865–66, 299 A.3d 1247 (2023).

The plaintiff's claim requires us to determine whether a commissioner has the authority pursuant to § 31-308 to award ongoing temporary partial disability benefits

to a claimant who has reached maximum medical improvement. Thus, the claim presents this court with an issue of statutory interpretation. The plaintiff does not challenge the facts found by the commissioner, on which the board relied, and the present claim does not hinge on whether the commissioner has correctly applied the correct and governing legal standard to the subordinate facts. Instead, the claim requires us to determine if the board correctly interpreted the governing statute that it then applied to the facts of the present case.

The department urges us to afford deference to the board's statutory interpretation, arguing that the commissioner and the board "adopted a time-tested interpretation [of § 31-308] that has been subjected to judicial scrutiny." In support of this contention, the department cites to this court's decision in *Testone* v. *C. R. Gibson Co.*, 114 Conn. App. 210, 969 A.2d 179, cert. denied, 292 Conn. 914, 973 A.2d 663 (2009). Although, in *Testone*, this court stated that "[t]emporary partial disability payments under . . . § 31-308 (a) are available until the injured worker has reached maximum medical improvement"; (internal quotation marks omitted) id., 220; it did so in the context of a claim concerning a workers' compensation commissioner's admission and reliance on three independent medical examination reports. Id., 215. The court in *Testone* was not called on to resolve the distinct issue of whether a commissioner has the authority under § 31-308 (a) to award temporary partial disability payments after a claimant has reached maximum medical improvement. On this ground, as well as our own research, we are not persuaded that the board followed a time-tested interpretation of the statute that has been subjected to judicial scrutiny. Because we are convinced that this appeal raises an issue of statutory interpretation of first impression, our review is plenary. See, e.g., *Bergeson* v. *New London*, 269 Conn. 763, 769, 850 A.2d 184 (2004).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . If, however, when considered in relation to other statutes, the statutory text at issue is susceptible to more than one plausible interpretation, we may appropriately consider extratextual evidence." (Citation omitted; internal quotation marks omitted.) *Williams* v. *New Haven*, 329 Conn. 366, 375, 186 A.3d 1158 (2018).

Before turning to the text of the statute, it is helpful to set forth the following relevant principles as explained by our Supreme Court: "[W]e are mindful of the distinction between incapacity benefits and disability benefits. Benefits available under the [Workers' Compensation Act (act), General Statutes § 31-275 et seq.] serve the dual function of compensating for the disability arising from the injury and for the loss of earning power resulting from that injury. . . . Compensation for the disability takes the form of payment of medical expenses; General Statutes § 31-294d; and specific indemnity awards, which compensate the injured employee for the lifetime handicap that results from the permanent loss of, or loss of use of, a scheduled body part. . . .

"Compensation for loss of earning power takes the form of partial or total incapacity benefits. . . . Incapacity, as that term is used under the [act], means incapacity to work, as distinguished from the loss or loss of use of a member of the body. . . .

"We have noted that § 31-308 specifically provides that compensation for permanent partial disability shall be in addition to the usual compensation for total incapacity. While we have held that the [act] prohibits concurrent payment of benefits for permanent partial disability and temporary total [incapacity] . . . it is clear that these two types of benefits compensate an employee for different types of loss . . . and that the payment of [General Statutes] § 31-307 temporary total [incapacity] benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future. . . .

"Because the two types of benefits compensate an employee for distinct losses, entitlement to the two benefits is triggered by different factors. Entitlement to incapacity benefits depends on the employee's capacity to work. General Statutes §§ 31-307 (a) and 31-308 (a). As for entitlement to disability benefits, because the extent of that award necessarily depends on both the establishment of a permanent disability and the extent of the disability, [w]e have long held that an injured worker has a right to a permanent partial disability award once he or she reaches maximum medical improvement. . . . In *Panico* v. *Sperry Engineering Co.*, [113 Conn. 707, 714, 156 A. 802 (1931)], we explained that a permanent partial award became due when the worker reached maximum improvement. See also *Stapf* v. *Savin*, 125 Conn. 563, 565, 7 A.2d 226 (1939). In *Osterlund* v. *State*, [supra, 129 Conn. 597–600], we overruled *Panico* and *Stapf* to the extent that they precluded a commissioner from exercising his or her discretion to continue total disability payments to

a worker who had reached maximum medical improvement but was still totally disabled from working. In *Osterlund*, we explained that there might be, in case of a partial loss of function, a great disproportion between the amount of specific compensation provided and the actual effect of the injury, either from the standpoint of the employee's earning capacity or the physical impairment he suffered. . . . We further explained, however, that in a case . . . in which the worker has reached maximum medical improvement and his permanent partial disability award has thereby vested . . . the commissioner does not have discretion to deny such an award if the worker requests that award . . . . Once an employee whose right to a disability benefit award has vested because that employee has reached maximum medical improvement requests payment of the disability benefits, the commissioner no longer has discretion to deny the award of the disability benefits, regardless of whether the employee remains totally incapacitated." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 192–95, 8 A.3d 507 (2010).

"Partial incapacity benefits are available when the employee is able to perform some employment, but [is] unable fully to perform his or her customary work . . . . The duration of partial incapacity benefits is limited by statute. . . . Conversely . . . [t]otal incapacity benefits, unlike partial incapacity benefits, are unrestricted as to duration." (Citations omitted; internal quotation marks omitted.) *Starks* v. *University of Connecticut*, 270 Conn. 1, 9, 850 A.2d 1013 (2004). "Partial incapacity benefits are available when the employee is able to perform some employment, but [is] unable fully to perform his or her customary work . . . . Although an employee who is partially incapacitated may, in fact, not be working, the employee must be available to work,

if suitable employment is available. . . . Accordingly, partial incapacity benefits are available when an actual wage loss has resulted from the injury, providing a wage supplement for the difference between the wages the worker would have earned, but for the injury, and the wages the worker currently is able to earn. . . . The duration of partial incapacity benefits is limited by statute. . . .

"Conversely, total incapacity is defined as the inability of the employee, because of his injuries, to work at his customary calling or at any other occupation which he might reasonably follow. . . . Total incapacity benefits, unlike partial incapacity benefits, are unrestricted as to duration." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Rayhall* v. *Akim Co.*, 263 Conn. 328, 350–51, 819 A.2d 803 (2003).

A commissioner has the authority to award *temporary partial disability* payments pursuant to § 31-308.[9]

[9] Previously in this opinion, we have discussed the material distinction between incapacity and disability benefits afforded by the act. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 192–95. Our Supreme Court, however, has noted that "the term ' "disability" ' can be used in the [act] to refer to a permanent impairment of a body part . . . or to incapacity to work . . . ." (Citation omitted.) *Pizzuto* v. *Commissioner of Mental Retardation*, 283 Conn. 257, 260 n.2, 927 A.2d 811 (2007). The court observed that "[t]he two types of temporary partial [incapacity] benefits provided within [c]hapter 568 are found at [§] 31-308 [a] and [§] 31-308a. [Section] 31-308 [a] benefits or pre-specific are awarded before the injured worker is eligible to receive or has been paid his or her [§] 31-308 [b] permanent partial [incapacity] benefits, while [§] 31-308a benefits or post-specific are awarded after the injured worker's eligibility to receive [§] 31-308 [b] benefits has been established and exhausted. . . . Indeed, the alternative maximum duration of benefits under § 31-308a of 520 weeks is the same maximum duration prescribed for partial incapacity benefits under § 31-308 (a)." (Internal quotation marks omitted.) Id., 279–80.

Although § 31-308 (a) compensates a claimant's temporary partial *incapacity*, or inability to fully perform his or her customary work, courts in prior appeals typically have referred to the benefit afforded by § 31-308 (a) as a temporary partial *disability* benefit. See, e.g., id., 279 ("[a]s for the two awards of temporary partial disability benefits [one pre-specific indemnity, one post-specific indemnity], both legally depend upon the claimant having suffered a loss in her earning capacity as a result of her compensable

Specifically, subsection (a) of § 31-308 provides: "If any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury, after such wages have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with [General Statutes §] 31-310, and the amount he is able to earn after the injury, after such amount has been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act in accordance with [§] 31-310, except that when (1) the physician, physician assistant or advanced practice registered nurse attending an injured employee certifies that the employee is unable to perform his usual work but is able to perform other work, (2) the employee is ready and willing to perform other work in the same locality and (3) no other work is available, the employee shall be paid his full weekly compensation subject to the provisions of this section. Compensation paid under this subsection shall not be

injury" (internal quotation marks omitted)); *Starks* v. *University of Connecticut*, supra, 270 Conn. 29 (referring to retirement credit for employees who were receiving "temporary partial disability under § 31-308 (a)"); *Testone* v. *C. R. Gibson Co.*, supra, 114 Conn. App. 220 ("[t]emporary partial disability benefits under . . . § 31-308 (a) are available until the injured worker has reached maximum medical improvement" (internal quotation marks omitted)); *Shepard* v. *Wethersfield Offset, Inc.*, 98 Conn. App. 682, 685, 910 A.2d 993 (2006) (referring to plaintiff's claim that commissioner improperly found "he was not entitled to temporary partial disability benefits under § 31-308 (a)"), cert. denied, 281 Conn. 911, 916 A.2d 51 (2007); *Shimko* v. *Ferro Corp.*, 40 Conn. App. 409, 411, 671 A.2d 376 (referring to plaintiff's claim for "temporary partial disability benefits under . . . § 31-308 (a)), cert. denied, 236 Conn. 916, 673 A.2d 1143 (1996). Consistent with this terminology, which is reflected in the decisions of the commissioner and the board in this case, as well as in the parties' briefs, we will refer to the benefit afforded by § 31-308 (a) as a temporary partial disability benefit.

more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, as determined in accordance with the provisions of [General Statutes §] 31-309, and shall continue during the period of partial incapacity, but no longer than five hundred twenty weeks. If the employer procures employment for an injured employee that is suitable to his capacity, the wages offered in such employment shall be taken as the earning capacity of the injured employee during the period of the employment."

A commissioner has the authority to award *permanent partial disability* payments pursuant to § 31-308 (b), which provides in relevant part: "With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five percent of the average weekly earnings of the injured employee . . . after such earnings have been reduced by any deduction for federal or state taxes, or both, and for the federal Insurance Contributions Act made from such employee's total wages received during the period of calculation of the employee's average weekly wage . . . but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state . . . or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to . . . .

"If the injury consists of the loss of a substantial part of a member resulting in a permanent partial loss of the use of a member, or if the injury results in a permanent partial loss of function, the [commissioner] may, in the [commissioner's] discretion, in lieu of other compensation, award to the injured employee the proportion of

the sum provided in this subsection for the total loss of, or the loss of use of, the member or for incapacity or both that represents the proportion of total loss or loss of use found to exist, and any voluntary agreement submitted in which the basis of settlement is such that proportionate payment may, if otherwise conformable to the provisions of this chapter, be approved by the [commissioner] in the [commissioner's] discretion. . . ."[10]

Our interpretation of the act "is guided by the principles underlying Connecticut practice in [workers'] compensation cases: that the legislation is remedial in nature . . . and that it should be broadly construed to accomplish its humanitarian purpose. . . . We, therefore, do not construe the [act] to impose limitations on benefits that the act itself does not specify clearly." (Internal quotation marks omitted.) *Rayhall* v. *Akim Co.*, supra, 263 Conn. 357–58.

As reflected in the statutory language previously set forth, the duration of partial disability benefits is limited by statute to the lesser duration of either the period of partial incapacity or 520 weeks. Moreover, General Statutes § 31-295 (c) provides that permanent partial disability benefits pursuant to § 31-308 (b) shall be paid after the date of maximum medical improvement of the injured employee.[11] As stated previously in this opinion, the act has been interpreted to preclude the concurrent

[10] Additionally, workers who are receiving permanent partial disability benefits but who cannot gain employment or who earn less wages than they would have been earning if they had not sustained injury may seek wage differential benefits, payable at the discretion of the commissioner, pursuant to § 31-308a.

[11] General Statutes § 31-295 (c) provides in relevant part: "If the employee is entitled to receive compensation for permanent disability to an injured member [of the body] in accordance with the provisions of subsection (b) of section 31-308, the compensation shall be paid to him beginning not later than thirty days following the date of the maximum improvement of the member or members and, if the compensation payments are not so paid, the employer shall, in addition to the compensation rate, pay interest at the rate of ten per cent per annum on such sum or sums from the date of

payment of incapacity benefits and disability benefits. Although the *duration* of partial disability benefits is expressly limited by the act, and the act provides that permanent partial disability payments become *payable* after an injured employee has attained maximum medical improvement, neither the plain language of § 31-308 nor the other provisions of the act expressly address whether a commissioner is authorized to continue to award temporary partial disability benefits in lieu of permanent partial disability benefits after an injured employee has reached maximum medical improvement. With respect to this issue, the act does not set forth either an express grant of authority or an express limitation of authority to a commissioner.

The legislative history of § 31-308 sheds light on the issue before us. In 1967, the legislature amended § 31-308 to expressly afford a workers' compensation commissioner the authority to award either ongoing temporary partial disability benefits or permanent partial disability payments after a claimant had reached maximum medical improvement. As a result of further revisions to the statute subsequent to the 1967 amendment, the legislature, through § 26 of No. 91-32 of the 1991 Public Acts, ultimately codified this grant of authority in subsection (d) of § 31-308.[12] Twenty-six years after the 1967

maximum improvement. The employer shall ascertain at least monthly whether employees are entitled to compensation because of a loss of wages as a result of the injury and, if there is a loss of wages, shall pay the compensation. . . ."

[12] See General Statutes (Rev. to 1993) § 31-308 (d), which provides: "In case of an injury to any portion of the body, referred to in subsection (b) of this section, or to a phalanx or phalanges of the thumb, finger or toe, the commissioner may, in his discretion, award compensation for the proportionate loss or loss of use of the member of the body affected by the injury. Where the injury results in a loss of earnings and it is in the interests of the injured workman to be paid on that basis notwithstanding that the injured member may have attained maximum improvement, the commissioner shall, in his discretion, direct that the claimant be paid partial compensation for loss of earnings, as provided in this section, if it is in the interest of the injured employee to be paid the partial compensation even if the injured member may have attained maximum improvement. Partial compensation

amendment, the legislature, as part of a series of cost-cutting reforms to the act, eliminated the then existing subsection (d) in its entirety.[13] See P.A. 93-228, § 19. Thus, the legislature revoked the grant of authority it had bestowed upon commissioners to award partial compensation for lost earnings after a claimant had reached maximum medical improvement.

In light of the fact that § 31-308 does not expressly authorize the payment of temporary partial disability payments to a claimant who has reached maximum medical improvement, and the legislative history strongly evinces the legislature's will to extinguish the authority of commissioners to award such benefits upon a claimant's having reached permanency status, we concur with the board's reasonable interpretation of the statute.

As she did before the board, the plaintiff argues that *Osterlund* v. *State*, supra, 129 Conn. 591, compels the opposite conclusion.[14] The plaintiff argues that, in *Osterlund*, our Supreme Court "held that, when a claimant

shall be paid under this subsection for as long as the loss of earnings continues. If the injured employee's loss of earnings ends, he shall be paid for permanent injuries in accordance with the provisions of subsection (b) of this section, minus any payments for partial compensation, for weeks subsequent to the date on which maximum improvement in the injured member had been attained. If there is no loss of earnings resulting from the injury, payments shall be made in accordance with the provisions of subsection (b) of this section."

[13] Our Supreme Court has noted that "the principal thrust of [the] reforms [undertaken by the legislature in 1993] was to cut costs in order to address the spiraling expenses required to maintain the system." *Rayhall* v. *Akim Co.*, supra, 263 Conn. 346. "[T]he legislature reformed the workers' compensation laws in 1993 with a fundamental purpose of effect[ing] a dramatic decrease in the cost of workers' compensation in Connecticut. . . . To reduce the cost of workers' compensation, the legislature introduced a number of systemic changes, including a reduction in the rate of compensation, the elimination of certain cost-of-living adjustments and a reduction in the number of compensable injuries." (Citation omitted; internal quotation marks omitted.) *Gartrell* v. *Dept. of Correction*, 259 Conn. 29, 42, 787 A.2d 541 (2002).

[14] We note that, in her argument before this court, the plaintiff also focuses on the following italicized portion of § 31-308 (b): "[The commissioner] may

has been assigned a permanent partial disability, the statute unequivocally grants the [commissioner] the discretion to award continuing wage loss benefits instead of permanent partial disability benefits."

In *Osterlund*, our Supreme Court stated that, "where there is a total or partial incapacity followed by a permanent partial loss of function the situation is governed by the portion of the statute we have quoted, which provides that, in such a case, the commissioner 'may, in his discretion, in lieu of other compensation' make an award of specific compensation. The thought back of this provision was evidently that there might be, in a case of partial loss of function, a great disproportion between the amount of specific compensation provided and the actual effect of the injury, either from the standpoint of the employee's earning capacity or the physical impairment he suffered. Thus, if a desk worker suffered such an injury, as did the plaintiff in this case, it might not at all affect his earning capacity and might constitute a very slight permanent injury from the standpoint of physical impairment. In other instances the reverse of this might be true. In the case of a partial loss of function of one of the members specified in the statute,

. . . *in lieu of other compensation*, award to the injured employee the proportion of the sum provided in this subsection for the total loss of, or the loss of the use of, the member or for incapacity or both that represents the proportion of total loss or loss of use found to exist . . . ." (Emphasis added.)

To the extent that the plaintiff argues that the language "in lieu of other compensation" reflects a legislative intent to authorize an award of temporary partial disability benefits even after a claimant has achieved maximum medical improvement, we observe that our Supreme Court has reasoned, contrary to the plaintiff's position, that an identical phrase, which appeared earlier in § 31-308 (b), "merely was intended to prohibit double payment of permanency awards and to address our case law precluding a claimant suffering incapacity following a permanent disability from being able to thereafter collect total incapacity benefits." *Rayhall* v. *Akim Co.*, supra, 263 Conn. 356. We are not persuaded that the statutory language on which the plaintiff relies should be afforded a different interpretation.

the commissioner is called upon, when the stage of maximum improvement has been reached, to exercise his sound judgment in deciding whether to award specific compensation upon the basis fixed in the statute or to permit the weekly compensation for incapacity to continue." *Osterlund* v. *State*, supra, 129 Conn. 600.

We are not persuaded by the plaintiff's reliance on *Osterlund*. To the extent that the plaintiff argues that *Osterlund* reasonably should be interpreted to apply to the commissioner's authority to award ongoing temporary partial disability benefits, it would be difficult to envision how any such authority could be deemed to exist after 1993, when, as we have already discussed in this opinion, our legislature revised § 31-308 to omit the authority to award such benefits that had been codified in subsection (d) of the statute.

Last, we note that our interpretation of the statutes is bolstered by the analysis set forth in prior opinions. In *Rayhall* v. *Akim Co.*, supra, 263 Conn. 328, our Supreme Court addressed the issue of "whether a claimant who has sustained injuries to two members of the body arising from the same incident must receive compensation for permanent partial disability as soon as the claimant has reached permanent status with respect to one member, even if the claimant is temporarily partially incapacitated with respect to the other member." Id., 353–54. In resolving this issue, our Supreme Court stated that it was "mindful . . . of two well settled principles: first, that double compensation is prohibited under the [act] and, second, that a claimant cannot receive concurrently a specific indemnity award and incapacity benefits for the same incident." Id., 354. The court reasoned that the plaintiff was entitled to receive incapacity benefits until he had achieved maximum medical improvement with respect to both legs. Id., 357. The court stated: "It is clear that if, as a result of the condition of his left leg, the plaintiff were temporarily

totally incapacitated, in other words, unable to work at all, he would be entitled to receive incapacity benefits regardless of whether his right leg had achieved maximum medical improvement. . . . We see no logic in treating the plaintiff's temporary partial incapacity in a substantively different manner." (Citation omitted; emphasis omitted.) Id. We agree with the department that, although our Supreme Court did not directly address the issue of whether a claimant could receive temporary partial disability benefits under § 31-308 (a), the very fact that the court deemed it necessary to address the issue before it reflects its adherence to the principle that the claimant is unable to receive such benefits upon reaching maximum medical improvement.

Also, as we have stated previously in this opinion, in *Testone*, this court, in analyzing a claim that certain medical reports should not have been admitted in a workers' compensation case, noted that "[t]emporary partial disability benefits under . . . § 31-308 (a) are available until the injured worker has reached maximum medical improvement . . . ." (Internal quotation marks omitted.) *Testone* v. *C. R. Gibson Co.*, supra, 114 Conn. App. 220. Relying on this principle, the court concluded under the facts of the case before it that "the commissioner was presented with sufficient evidence, absent the contested reports, to determine that the plaintiff had reached maximum medical improvement and was therefore not entitled to disability benefits under § 31-308 (a)." Id.

For the foregoing reasons, we agree with the board's interpretation of the authority afforded the commissioner pursuant to § 31-308 (a). Thus, we conclude that the board properly upheld the commissioner's approval of the form 36 that was filed by the defendants, and the commissioner's denial of the plaintiff's claim for

ongoing temporary partial disability benefits pursuant to § 31-308 (a).

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

MARTIN A. RADER, JR. *v.* PAUL J. VALERI ET AL.
(AC 45407)

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

Syllabus

The plaintiff stakeholder, an attorney who represented the defendant V in a real estate transaction in which V sold two real properties to the defendant M Co., brought an action for interpleader to determine the rights of V and M Co. to funds held in escrow until V obtained certain zoning approvals for the properties. The properties, which were adjacent to each other, were located in a federal opportunity zone, which provided the opportunity for tax deferment. M Co. made clear its intent to V that it desired to continue mixed commercial and residential use for the first property and to convert the second property from a single-family residence to a two-family residence. Various zoning and use approvals were required from the city of Danbury in order to use the second property as a two-family property. In order to qualify for the tax benefits of the opportunity zone, V and M Co. were required to close on the transaction within a six month window. In order to ensure the closing could take place within the time frame needed to obtain the tax deferment, the parties entered into a contract for sale containing a rider to the contract that called for the creation of an escrow agreement to hold $75,000 of the purchase price contingent on the receipt of specified zoning and use approvals on or before February 1, 2020. M Co. designated V as its agent relative to any application for a variance for the second property. The zoning board granted the application for the variance for the second property with the stipulation that there would be no street access to the front of the second property, the driveway to the front of the second property would need to be removed and replaced with grass, and access to parking for the second property would be available only through an easement over the first property in favor of the second property. M Co. did not agree to the creation of the easement. After trial, the court rendered judgment awarding the escrow funds to M Co. On appeal to this court, V claimed that the trial court made erroneous

factual findings and improperly concluded that he failed to satisfy the contingency set forth in the escrow agreement requiring that he obtain a use variance for the second property. *Held*:

1. M Co. could not prevail on its claim that V's appeal was moot because V did not challenge each independent basis for the trial court's judgment; if this court were to agree with V's claim that the trial court misconstrued the escrow agreement as a matter of law, there would be no other basis on which to affirm the trial court's judgment and this court could grant V practical relief by either directing judgment in his favor or by ordering a new trial.
2. V could not prevail on his claim that the trial court made clearly erroneous factual findings; even if this court assumed that the challenged findings were clearly erroneous, the trial court did not rely on either of those findings in reaching its conclusion that V failed to satisfy a condition of the escrow agreement and, thus, any alleged error was harmless.
3. The trial court properly concluded that V failed to satisfy a condition of the escrow agreement and awarded the escrow funds to M Co.: the contract for sale and the escrow agreement were connected by reference and subject matter and, when read together to determine the intent of V and M Co., were unambiguous that, although M Co. designated V as its agent to obtain a use variance for the second property, it did not grant V any authority that allowed him to encumber the first property in pursuit of a use variance for the second property; moreover, the use variance V obtained for the second property was conditioned on the granting of an easement over the first property, which did not satisfy the terms of the escrow agreement or the contract for sale, which expressly required that V convey the properties without private restrictive covenants or easements; furthermore, V's reliance on the fact that there was no dispute that the only access to the additional parking spaces behind the second property was across the first property as support for his suggestion that M Co. knew that a permanent easement would be required for the use variance for the second property lacked probative force because, with M Co. as the owner of both properties, no easement would be required to allow such access.

Argued September 18, 2023—officially released January 9, 2024

Procedural History

Action for interpleader to determine the defendants' rights to certain funds held in escrow in connection with the sale of two real properties, brought to the Superior Court in the judicial district of Danbury, where the court, *Kowalski, J.*, granted the plaintiff's motion for an interlocutory judgment of interpleader and ordered the plaintiff to deposit the funds with the clerk

of the court; thereafter, the case was tried to the court, *Shaban*, *J.*; judgment for the defendant MSPD Downs Street, LLC, from which the named defendant appealed to this court. *Affirmed.*

Alexander Copp, for the appellant (named defendant).

Brandon B. Fontaine, for the appellee (defendant MSPD Downs Street, LLC).

Opinion

BRIGHT, C. J. This interpleader action arises from a real estate transaction in which the defendant claimant, MSPD Downs Street, LLC (MSPD), purchased two properties located in Danbury from the defendant claimant, Paul J. Valeri.[1] The plaintiff stakeholder, Martin A. Rader, Jr., sought an order determining the rights of Valeri and MSPD to funds held in escrow until Valeri obtained certain zoning approvals for the properties.[2] Valeri appeals from the judgment of the trial court, rendered after a court trial, awarding MSPD the escrow funds and attorney's fees. On appeal, Valeri claims that the court (1) made clearly erroneous factual findings and (2) improperly concluded that he failed to satisfy one of the zoning contingencies set forth in the escrow agreement. We affirm the judgment of the trial court.

The following facts, either as found by the trial court or undisputed by the parties, and procedural history are relevant to Valeri's claims. "In 2019, MSPD sought to purchase from Valeri two properties located at 10 Downs Street [also referred to as 10 Downs] and 12

[1] For the sake of clarity, we refer to the parties by name.

[2] On August 21, 2020, the trial court, *Kowalski*, *J.*, granted Rader's motion for an interlocutory judgment of interpleader and ordered that his legal fees be paid and that the remaining balance of $73,398.80 be deposited with the court clerk. Rader was thereafter discharged from liability, and he is not participating in the present appeal.

Downs Street [also referred to as 12 Downs] [in] Danbury . . . . The two properties are adjacent to each other. 12 Downs is a corner lot, also bordering Smith Street, with parking in the rear of the building that is accessed from Smith Street. On that lot is a large house with 2838 square feet of living area. . . . While zoned as a commercial property for offices, it also houses a residential apartment. . . . The adjacent property at 10 Downs is a small residential ranch home. . . . Unlike 12 Downs, its use is limited to a one-family residential property." (Citations omitted.) 10 Downs Street has a front driveway that leads to a garage, and there is a parking area behind the building. In order to access the parking area behind 10 Downs Street, vehicles must enter from Smith Street and travel across the parking area behind 12 Downs Street.

"Valeri marketed the properties as being in a federal opportunity zone. Such designated zones are an economic development tool that encourages investment in distressed communities by providing the opportunity for tax deferment. In expressing its interest in the propert[ies] to Valeri, MSPD made clear that it desired to continue the mixed commercial and residential use of 12 Downs but also to convert 10 Downs from a single-family residence to a two-family rental property. To qualify for the tax benefits under the requirements of the opportunity zone, the parties had to close on the transaction within a six month window.

"In order to ensure that the closing could timely take place to obtain the tax deferment benefit, the parties entered into a contract for sale of 10 Downs and 12 Downs that was fully executed on September 23, 2019. . . . That contract called for a purchase price of $625,000. Nevertheless, knowing that a zoning variance and other approvals would be needed to meet the goals of MSPD as to the use of the properties, the parties

added a rider to the contract [that] called for the creation of an escrow agreement to hold $75,000 of the purchase price in escrow contingent upon the receipt of specified zoning and use approvals from the city of Danbury on or before February 1, 2020.

"To this end, paragraph 14 of the contract specifically states: 'Seller [Valeri] due diligence through 9/27/19 [initialed] w/City of Danbury regards escrow contingencies. Escrow agreement to be finalized by attorneys: contingent upon [Valeri] delivering 2 family status for #10 Downs [and] zoning use letter confirming #12 Downs for [apartment] over professional offices, both by 1/31/20.' . . . The parties also added a rider to the contract that . . . states: 'Supplementing paragraph 14, the sum of $75,000 shall be held in escrow until the zoning and use contingencies are satisfied. Seller [Valeri] and Purchaser [MSPD] shall execute a mutually agreeable form of escrow agreement at closing.' . . .

"[A]t the time of the closing on October 2, 2019, the parties entered into an escrow agreement as called for by the contract. The relevant portion of that agreement states:

" '2. The Escrow Agent shall hold said funds until satisfaction of the following conditions: a. The Seller obtains a zoning use letter from the Zoning Enforcement Officer of the City of Danbury, CT to the effect that under current zoning regulations the property known as #12 Downs Street may be used for professional office and residential use with one residential unit over the professional office space, and

" 'b. The Seller obtains a Use Variance for the property known as #10 Downs Street, Danbury, CT which variance permits the use of the property for two residential units, with the addition of a second floor to the existing building to accommodate the second residential unit.

" 'Notwithstanding the above, Seller may alternatively satisfy the zoning conditions by obtaining a zone change to R-3 residential plus such variances from the [zoning board] as would be required to add a second residential unit over the existing building at #10 Downs Street and permit the use of #12 Downs Street for professional office space with one residential unit over the professional office space or three residential units.

" '3. In the event that the conditions set forth above are not met before February 1, 2020 (Termination Date), then in that event the Escrow Funds shall be returned to the Buyer.' . . .

"Hence, the escrow agreement set forth two [conditions] that needed to be met in order to release the $75,000 to Valeri as the seller and set a deadline of February 1, 2020, for doing so. Because of his experience in the field of real estate as a broker for over forty years, MSPD agreed to designate Valeri as its agent relative to any application for a variance brought to the city of Danbury relative to 10 Downs. . . . There was no provision regarding any action by Valeri as MSPD's agent relative to 12 Downs.

"Following the execution of the contract and escrow agreement, the parties proceeded to close the transaction and Valeri commenced work on meeting the [conditions]. As to paragraph 2a of the agreement, Valeri obtained a letter from the zoning enforcement officer of the city of Danbury dated October 10, 2019, that confirmed that 12 Downs could continue to be used for professional office and residential use with one residential unit over the professional office space. . . . Therefore, that condition of the escrow agreement was timely met.

"As to paragraph 2b of the agreement, Valeri began his effort under the authority granted to him to act as agent for MSPD to obtain a use variance for 10 Downs.

Although already addressed in paragraph 7 of the escrow agreement, the parties subsequently executed a separate agency designation dated October 8, 2019. That designation states: 'The undersigned owner of #10 Downs Street, Danbury, CT [MSPD] does hereby authorize Paul J. Valeri to act as its agent to pursue a use variance from the [Danbury zoning board of appeals (zoning board)], which variance would allow the addition of a second story to the existing building and the use of the two-story building as a two-family residence, and to do all things reasonably necessary to achieve that purpose.' . . . Like paragraph 7 of the escrow agreement, this designation also made no mention of any authority relative to 12 Downs.

"On or about October 21, 2019, Valeri submitted an application to the Danbury zoning board . . . for a use variance on 10 Downs consistent with the intent of the parties as expressed in the contract for sale and the escrow agreement. . . . After consideration by the zoning board . . . on or about December 12, 2019, the application was denied without prejudice to the submission of a new application. . . . Thereafter, Valeri submitted a new application dated December 13, 2019, which proposed eliminating the driveway in front of 10 Downs and obtaining an easement over 12 Downs to allow access to parking behind 10 Downs. . . . This was based on Valeri's belief from comments by the zoning board during the hearing that these conditions would be required for an approval. As part of the process, Valeri submitted a survey map dated December 18, 2019, entitled 'Proposed Parking Layout & Easement Map.' That map showed an easement over 12 Downs in favor of 10 Downs. . . . The application also included an unsigned Declaration of Easement which Valeri indicated to the zoning board would be signed and recorded upon the granting of the variance. The

second application was assigned for a hearing in January, 2020, but [it] was continued until February 13, 2020, due to the lack of a quorum.

"Prior to the hearing, Valeri contacted MSPD to make them aware of [his] belief that both the removal of the driveway from 10 Downs and an easement over 12 Downs would be needed to obtain the variance. There was communication between the parties and their counsel on the subject and MSPD expressly made clear that it would not support the plan to remove the driveway and grant an easement. In an email exchange between Attorney Rader representing Valeri and Attorney Michael Wood on behalf of MSPD, just hours before the February 13, 2020 hearing before the zoning board, Rader wrote in part: 'Word was passed to Paul [Valeri] last night that we will have to give up access to Downs Street forever to get variance. They will want to hear us agree to that tonight before they vote. I also believe [the zoning board] will want a commitment that [the] owner will sign and record [the] easement and map.' In response, Wood wrote, 'Marty, [I] will give you a call but Joe, Michele and Peter [i.e., MSPD] are not willing to unconditionally make these commitments tying up the parcels.' . . . MSPD's reasoning for this was that, if done, it would effectively create a situation that would merge the lots and prevent them from being sold separately thereby reducing the collective value of the two parcels. Even with that position, MSPD allowed Valeri to go forward with the February 13, 2020 hearing before the zoning board but reserved its right to claim that Valeri had failed to comply with the February 1, 2020 deadline for the granting of the use variance.

"At the hearing, Valeri pursued the variance application based on the plan of removing the driveway to 10 Downs and granting an easement over 12 Downs for the purpose of ingress and egress to 10 Downs. Following the hearing, the use variance for 10 Downs was

granted based on those conditions. The relevant portion of the variance certificate issued by the zoning board . . . read[s] as follows: 'NATURE OF VARIANCE: GRANTED WITH STIPULATION: Use Variance, Sec. 5.A.2 to allow a two-family dwelling in a CG-20 Zoning District; Sec. 9.C.1.a. to change nonconforming, single-family dwelling into nonconforming, two-family dwelling; Sec. 9.C.2.b to extend or expand a nonconforming single-family dwelling to add second floor/second dwelling unit. The plan submitted, subject to the stipulation below, was entitled Proposed Parking Layout & Easement Map, No. 10 & No. 12 Downs Street, Danbury . . . . STIPULATION: The concrete area, formerly the driveway, will be eliminated and changed to grass, and there will be no entry onto Downs Street from 10 Downs Street.' . . . The variance was issued with the direction it be recorded on the land records.

"On March 12, 2020, following the expiration of the appeal period, Valeri provided the variance certificate to MSPD and asked that the $75,000 escrow be released to him. . . . In response, MSPD's counsel objected to the release of the escrow on the basis that '[t]he variance enclosed with your correspondence contains conditions and stipulations which are unacceptable to MSPD (and to which it notified Mr. Valeri it did not consent . . .). In addition, the variance was not obtained in a timely manner.' . . . Shortly thereafter, by email on March 16, 2020, on behalf of MSPD, Attorney Wood wrote to Attorney Rader relative to the conditional granting of the use variance and relayed that it was not acceptable to MSPD.

" 'I discussed with [Joseph Savino, a member of MSPD], your letter, and we respectfully disagree with both points. Joe was willing to allow the variance process to play out during February to see if [Valeri] would be able to deliver the approvals he repeatedly represented would be easily obtained. As you know, it

became clear that there would be restrictions on not only 10 Downs but 12 Downs as well. The requirement for an easement will tie the two properties together in perpetuity, which was never contemplated or agreed [to] as part of the transaction. As for any representation [Valeri] may have made to the [zoning board], he had been expressly informed by his principal prior to appearing that we did not agree to the conditions, and therefore was not acting within the scope of his agency by purporting to agree to them. To the contrary, he appears to have been pursuing only his own self-interests. The conditions in the variance and the easement requirement were never agreed to or contemplated, and had they been at the time, MSPD would not have agreed to the purchase price it did. Notwithstanding the foregoing, MSPD is open [to] discussing a negotiated resolution of this matter if [Valeri] is. All of MSPD's rights, remedies and defenses are expressly reserved.' . . .

"Although having received the variance certificate, MSPD has not recorded it, and it therefore has yet to take effect. With respect to any encumbrances against the property, paragraph 16 of the contract states that the seller shall provide a warranty deed at closing that is 'free and clear of all encumbrances except . . . (ii) restrictive covenants and easements of record . . . .' It also states that '[t]he Property shall be conveyed free of any violations of any governmental rules, regulations or limitations or private restrictive covenants or easements.' . . . Valeri credibly testified at trial that the title search done prior to the sale of the property revealed that there were no easements or other encumbrances on the property. As such, at the time of closing, the purchase price of the properties paid by MSPD did not involve 12 Downs [Street] being subject to any easements subservient to 10 Downs [Street]." (Citations omitted; emphasis omitted; footnotes omitted.)

Rader initiated the underlying interpleader action in May, 2020, and Valeri and MSPD filed competing statements of claim. Valeri claimed that he satisfied both conditions set forth in the escrow agreement, whereas MSPD claimed that the condition set forth in paragraph 2b of the escrow agreement had not been satisfied and that Valeri failed to satisfy both conditions before the February 1, 2020 deadline. After the court, *Kowalski*, *J.*, rendered an interlocutory judgment of interpleader; see footnote 2 of this opinion; the pleadings were closed, and the matter was tried to the court, *Shaban*, *J.*, on October 5, 2021. At trial, the court heard testimony from Valeri and his attorney, Rader, as well as from Savino, a member of MSPD, and MSPD's attorney. After trial, the court issued an order directing the parties to file posttrial briefs along with any claims for attorney's fees.

In his posttrial brief, Valeri claimed that he "fulfilled all of the conditions required in the escrow agreement . . . ." He argued that the contract for sale and the escrow agreement "do not contain a requirement that an easement or passway not be a condition for a use variance for 10 Downs Street. The language of the designation of agency authorized . . . Valeri to seek the variance doing all things reasonably necessary. The [contract for sale] and escrow agreement are . . . complete, thorough contracts. . . . There is a merger clause in the real estate contract at section 28 . . . . The presence of a merger clause in a written agreement establishes conclusive proof of the parties' intent to create a completely integrated contract and . . . any extrinsic evidence . . . should not be used to construe the contract." (Citations omitted.)

In its posttrial brief, MSPD claimed that the escrow agreement and contract for sale "are clear and unambiguous" and that Valeri "failed to comply with the clear terms and intentions of the parties' agreement . . . ."

It argued that it "never consented to [the zoning board's] conditions in any contract it signed, nor were such conditions implied or remotely reasonable after the fact. . . . That is particularly true here [because] an easement would be contrary to what MSPD bargained for at paragraph 16 of the [contract for sale]—a property without any easements. . . . Valeri should not get the financial benefit of the sale at full market value and then immediately depreciate the property after the fact to meet [the escrow] conditions, purely to [MSPD's] detriments. MSPD has the same common ownership that Valeri did and does not want an easement. . . . Clearly, the easement and driveway removal would devalue the properties and decrease marketability by tying them together . . . ." (Internal quotation marks omitted.)

On March 14, 2022, the court rendered judgment for MSPD, concluding that Valeri failed to satisfy the condition set forth in paragraph 2b of the escrow agreement requiring that he obtain a use variance for 10 Downs Street. In its memorandum of decision, the court reasoned that "Valeri was to obtain a variance to permit the use of the property for two residential units with the addition of a second floor to the existing building to accommodate the second residential unit. While receiving approval to do so, the approval was conditioned by the zoning board upon the grant of an easement over 12 Downs as well as the removal of the driveway from 10 Downs which was to then be covered with grass. These were conditions that were expressly not agreed to or authorized by MSPD after it became aware of the possibility [that] such conditions would either be sought by Valeri or imposed by the zoning board.

"While MSPD had designated Valeri as its agent to do what was 'reasonably necessary' to obtain the variance, the authorization to do so was limited to matters

involving 10 Downs, not 12 Downs. . . . Even if 'reasonably necessary' was interpreted to mean that the pursuit of the use variance to obtain an easement over 12 Downs for access to 10 Downs, and removing the driveway from 10 Downs, MSPD had made clear when the topic was first broached on or about December 20, 2019, following the first hearing before the zoning board, that it was not agreeable to such conditions. . . . Again, immediately prior to the February 13, 2020 hearing, MSPD's counsel, upon being advised by Valeri's counsel [that] the zoning board would likely require an easement over 12 Downs and giving up direct access to 10 Downs, specifically set forth in writing that MSPD was '*not* willing to unconditionally make these commitments tying up the parcels.' . . . Valeri acted contrary to the express direction of his principal and credibly testified at trial that he never received authorization from MSPD to seek an easement or [to] agree to one, nor did he receive any authorization to agree to removal of the driveway . . . .

"The designation of Valeri as MSPD's agent to do what was reasonably necessary to obtain a use variance for [10] Downs could not entail pursuit of any easement over 12 Downs as to do so would put Valeri in direct conflict with the terms of the contract. Paragraph 16 of the contract made clear that the sale of the properties was to be clear of any 'private restrictive covenants or easements.' . . . To encumber the property with an easement, without the express consent of MSPD, would result in MSPD receiving something other than what it had bargained for at the time of the sale and purchase." (Citations omitted; emphasis in original.) This appeal followed.[3]

[3] The trial court also concluded that MSPD failed to rebut the presumption that time was not of the essence as to the February 1, 2020 deadline. After Valeri filed the present appeal, MSPD filed a preliminary statement of the issues pursuant to Practice Book § 63-4 (a) (1), in which it indicated that it intended to raise the timeliness issue as an alternative ground for affirming the judgment in its favor. In his principal brief on appeal, Valeri argued that

I

Before addressing Valeri's claims, we first consider MSPD's claim that Valeri's appeal is moot because he has failed to challenge each independent basis for the judgment. See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal"); *Jacques* v. *Jacques*, 195 Conn. App. 59, 61–62, 223 A.3d 90 (2019) (same).

On appeal, Valeri claims that (1) the court made clearly erroneous findings as to the layout of 10 Downs Street and as to when MSPD first learned about the variance conditions imposed by the zoning board and (2) the court improperly concluded that he failed to satisfy paragraph 2b of the escrow agreement due to the variance conditions.

MSPD claims that the "court found that each of the two variance conditions—the easement over 12 Downs *and* the removal of the driveway at 10 Downs and covering with grass—were independently not authorized by MSPD, not 'reasonably necessary,' and not in compliance with paragraph 2b of the escrow agreement." (Emphasis in original.) Therefore, MSPD argues that "Valeri has not raised an adequate challenge to (1) the variance stipulation requiring removal of the front driveway from 10 Downs being noncompliant with paragraph 2b and (2) the court's factual finding that removal of each [of] the driveway and the easement were 'unreasonable.' " Valeri responds that the court did not find

the court properly concluded that time was not of the essence under the parties' agreement. Because MSPD has abandoned that issue by failing to address it in its appellee's brief and because Valeri is not aggrieved by that part of the court's decision, we do not consider it.

that the two conditions were unreasonable and that he has adequately challenged the court's interpretation of the escrow agreement, which was the basis for the court's decision. We agree with Valeri.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [this] court's subject matter jurisdiction . . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citation omitted; internal quotation marks omitted.) *L. L.* v. *M. B.*, 216 Conn. App. 731, 736, 286 A.3d 489 (2022). Insofar as MSPD's claim requires that we construe the court's judgment, our review is plenary. See *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 373, 254 A.3d 330 (2021) ("[b]ecause [t]he construction of a judgment is a question of law for the court . . . our review of the . . . claim is plenary" (internal quotation marks omitted)).

At the outset we note that the court did not, as MSPD contends, expressly find that both conditions for the variance were unreasonable. Instead, the court held that Valeri's authorization to act as MSPD's agent to obtain the variance "was limited to matters involving 10 Downs Street" and that Valeri "acted contrary to the express direction of his principal [because] he never received authorization from MSPD to" agree to the variance conditions. The court also held that "[t]he designation of Valeri as MSPD's agent to do what was reasonably necessary to obtain a use variance for [10] Downs could not entail pursuit of any easement over 12 Downs" because "[t]o encumber the property with an easement,

without the express consent of MSPD, would result in MSPD receiving something other than what it had bargained for at the time of the sale and purchase." Accordingly, there are three bases for the court's conclusion that Valeri failed to satisfy paragraph 2b of the escrow agreement: (1) Valeri exceeded his authority as to 10 Downs Street by agreeing to an easement over 12 Downs Street; (2) Valeri exceeded his authority by agreeing to the variance conditions to which MSPD objected; and (3) interpreting the agreement as allowing Valeri to encumber 12 Downs Street with an easement would contradict the express terms in the contract for sale requiring that 12 Downs Street be conveyed free of any encumbrances.

On appeal, Valeri claims that the court made clearly erroneous findings that justify a new trial and improperly concluded that he failed to satisfy paragraph 2b of the escrow agreement. He argues that "a variance with reasonable conditions is still a variance, and the variance [he] obtained . . . to allow a two-family house constituted a 'use variance' under the contract as a matter of law." If we agree with Valeri and conclude that the court misconstrued the escrow agreement as a matter of law, there would be no other basis on which to affirm the court's judgment, and we could grant Valeri practical relief by either directing judgment in his favor or ordering a new trial. Accordingly, his appeal is not moot. See, e.g., *L. L.* v. *M. B.*, supra, 216 Conn. App. 737 (appeal not moot if "successful appeal would benefit [the appellant]").

II

On appeal, Valeri challenges two of the court's factual findings. First, he claims that the court's finding that "10 Downs has a front driveway that leads to a garage in the back with a number of parking spots in the rear" is clearly erroneous, as "[t]he only vehicular access to

the back parking lot behind 10 Downs Street is through the back parking lot behind 12 Downs Street." Second, he claims that the court's finding that the conditions imposed by the zoning board were "first broached on or about December 20, 2019," is clearly erroneous because "the topic of driveway removal was broached on December 6, 2019, at the latest, while the topic of the easement was broached on December 13, 2019, at the latest." According to Valeri, "the trial court believed that the back parking area of 10 Downs Street could be accessed by vehicle over the unused, front driveway of 10 Downs Street, rather than solely through the back parking area of 12 Downs Street. As a result, the trial court failed to appreciate that the easement over 12 Downs Street was necessary to ensure access to adequate parking over 10 Downs Street. Especially when coupled with its factual errors concerning the timing of Mr. Valeri's notice of the required conditions to MSPD, taken as a whole, the erroneous factual findings justify a new trial."

For its part, MSPD concedes that the driveway for 10 Downs Street "does not lead to the parking spots in the rear" but notes that "[t]hat fact was never in dispute . . . ." MSPD claims that "the court's phrasing can only be fairly construed as a clerical error or misstatement that was not an erroneous factual finding" and, in the alternative, that any error as to the layout of the properties is harmless. Likewise, MSPD contends that any alleged error as to the precise date when Valeri first notified MSPD about the zoning board's conditions for the variance is harmless because, "[u]nder either scenario, MSPD learned of the variance conditions a few months *after* it purchased the property . . . ." (Emphasis in original.) We conclude that the challenged findings did not affect the court's conclusion and, consequently, that the alleged errors are harmless.

It is well established that "[a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Tilsen* v. *Benson*, 347 Conn. 758, 796–97, 299 A.3d 1096 (2023). "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020). In a civil case, "[t]he harmless error standard . . . is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Lakner*, 347 Conn. 476, 496, 298 A.3d 249 (2023).

As an initial matter, we are not persuaded that the court's inaccurate description of 10 Downs Street indicates a fundamental misunderstanding of the layout of the properties. Indeed, as noted by MSPD, there was no dispute that the parking area behind 12 Downs Street provided the only vehicular access to the parking area located behind 10 Downs Street. Valeri testified that "everybody understood. You know, you can't get a car from behind 10 [Downs Street] out to Smith Street with a helicopter. You've got to get there legally." Similarly, Savino, when asked if vehicles must drive across 12 Downs Street to access the parking behind 10 Downs Street, testified: "That's correct." MSPD, however, maintained that it could accommodate the necessary

parking spaces without recording an easement, just as Valeri had used the properties while he owned them.

Nevertheless, assuming arguendo that the challenged findings as to the layout of the properties and the timing of MSPD's awareness of the additional conditions for the variance are clearly erroneous, such errors are harmless because the court did not rely on either of those facts in reaching its conclusion that Valeri failed to satisfy paragraph 2b of the escrow agreement. Instead, as previously discussed in part I of this opinion, the court concluded that Valeri exceeded his authority as MSPD's agent by agreeing to conditions to which MSPD objected and that Valeri's authority under the escrow agreement could not entail encumbering 12 Downs Street. Notwithstanding Valeri's claim that the court's "erroneous factual findings justify a new trial," he appears to agree that the court did not rely on those findings in reaching its ultimate conclusion, as he states in his reply brief that the court's decision "is clear: MSPD's unilateral agency designation conclusively established its right to the subject funds, regardless of whether . . . Valeri obtained the required 'use variance' as that term is used in the contract, and regardless of whether the two conditions were 'reasonably necessary.' " Consequently, because the court did not rely on the challenged findings in rendering judgment for MSPD, we conclude that any alleged error is harmless. See, e.g., *C. D.* v. *C. D.*, 218 Conn. App. 818, 828 n.6, 293 A.3d 86 (2023) ("[a]ssuming arguendo that [court's] finding is clearly erroneous, the error is harmless").

III

Valeri next claims that the court improperly concluded that he failed to satisfy paragraph 2b of the escrow agreement. Valeri argues that, "[r]ather than focusing on the key issue before it, i.e., whether the term 'use variance' as used in the escrow agreement

includes variances with reasonable conditions, the trial court relied almost exclusively on the agency designation which was not even part of the underlying contract. . . . When properly focused on the language of the escrow agreement itself, it becomes clear that the term 'use variance' necessarily includes reasonable conditions imposed by a zoning board." MSPD responds that the use variance Valeri obtained for 10 Downs Street "was not consistent with the parties' agreement in that it imposed unacceptable conditions upon MSPD outside the express terms of the contract, to which MSPD never agreed . . . or authorized." We agree with MSPD.

We begin our analysis with the applicable standard of review and relevant legal principles regarding contract interpretation. "When a party asserts a claim that challenges the trial court's construction of a contract, we must first ascertain whether the relevant language in the agreement is ambiguous. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact . . . . [When] there is definitive contract language, [however] the determination of what the parties intended by their contractual commitments is a question of law. . . . It is implicit in this rule that the determination as to whether contractual language is plain and unambiguous is itself a question of law subject to plenary review. . . .

"We accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . Where the language is unambiguous, we must give the contract effect according to its terms. . . . A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that

the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citations omitted; internal quotation marks omitted.) *C & H Shoreline, LLC* v. *Rubino*, 203 Conn. App. 351, 356–57, 248 A.3d 77 (2021).

When multiple "agreements . . . are connected by reference and subject matter, [they] are to be considered [together] in determining the real intent of the parties. . . . Where . . . the signatories execute a contract which refers to another instrument in such a manner as to establish that they intended to make the terms and conditions of that other instrument a part of their understanding, the two may be interpreted together as the agreement of the parties. . . . Contracts must be given a reasonable interpretation and the words used their common, natural, and ordinary meaning and usage . . . unless a technical or special meaning is clearly intended." (Citations omitted; internal quotation marks omitted.) *Meeker* v. *Mahon*, 167 Conn. App. 627, 634, 143 A.3d 1193 (2016).

In the present case, although neither party claims that the escrow agreement is ambiguous, they disagree as to the applicable standard of review. Valeri contends that our review of the court's decision is plenary because the court relied on the language of the parties' agreements only, whereas MSPD claims that "this issue presents primarily questions of fact about the parties'

intent and reasonableness, which are subject to the clearly erroneous standard [of review]." We conclude that Valeri's interpretation of the agreement is unreasonable and that the escrow agreement, when read together with the contract for sale, is unambiguous as to whether he satisfied paragraph 2b. Accordingly, because the parties' intent is "clear and certain from the language of the contract itself," our review is plenary.[4] *C & H Shoreline, LLC* v. *Rubino*, supra, 203 Conn. App. 357.

Paragraph 14 of the parties' contract for sale, titled "Additional Terms and/or seller concessions," as well as paragraph 34 of the rider to the contract, expressly reference the escrow agreement and related zoning contingencies.[5] Paragraph 2b of the escrow agreement requires that Valeri obtain "a [u]se [v]ariance for the property known as #10 Downs Street, Danbury, CT which variance permits the use of the property for two residential units, with the addition of a second floor to the existing building to accommodate the second residential unit." Paragraph 7 of the escrow agreement provides that "[MSPD] agrees to cooperate fully with [Valeri] in satisfying the zoning conditions set forth herein. In the event [Valeri] has not filed his application for variance for #10 Downs as of the conveyance of title, [MSPD] agrees that [Valeri] may file [the use variance] application for [MSPD] as the [a]gent of [MSPD]." Several days after the closing, MSPD, as the owner of 10

[4] Although the trial court did not state whether the agreement was unambiguous, we note that it concluded that Valeri's authority was limited by the language of the parties' agreements, and it did not rely on any extrinsic evidence as to the parties' intent in reaching that conclusion.

[5] As previously noted in this opinion, paragraph 14 of the contract for sale provides: "Escrow agreement to be finalized by attorneys: contingent upon [Valeri] delivering [two-family] status for #10 Downs . . . by 1/31/20." Paragraph 34 of the rider to contract provides: "Supplementing paragraph 14, the sum of $75,000 shall be held in escrow until the zoning and use contingencies are satisfied. [Valeri] and [MSPD] shall execute a mutually agreeable form of escrow agreement at closing."

Downs Street, executed a separate agency designation authorizing "Valeri to act as its agent to pursue a use variance from the [zoning board], which variance would allow the addition of a second story to the existing building and the use of the [two-story] building as a [two-family] residence, and to do all things reasonably necessary to achieve that purpose." No similar agency designation was executed for 12 Downs Street.

As Valeri emphasizes throughout his brief, he obtained a use variance that permits the use of the property for two residential units, with the addition of a second floor to the existing building to accommodate the second residential unit. He argues that "the term 'use variance' plainly includes within its definition a variance with reasonable conditions or stipulations" and that "not only were the [conditions] reasonable, they were *necessary* when interpreted in light of the situation of the parties and the circumstances connected with the transaction." (Emphasis in original.) Although we agree with Valeri that the term "use variance" reasonably could be interpreted to include reasonable conditions imposed by a zoning board on the use of 10 Downs Street, we are not persuaded that the agreement reasonably can be interpreted to allow him to encumber 12 Downs Street in pursuit of a use variance for 10 Downs Street.

At the outset we note that the contract for sale and the escrow agreement are connected by reference and subject matter and, therefore, must be read together in determining the intent of the parties. See *Meeker* v. *Mahon*, supra, 167 Conn. App. 634. Although Valeri claims on appeal that the parties' agency relationship was governed by the escrow agreement alone and that the court improperly relied on MSPD's agency designation, the only discernible difference between the agency designation in the escrow agreement and the later one executed by MSPD is that MSPD's later designation

authorized Valeri "to do all things reasonably necessary to" obtain the use variance, whereas the escrow agreement did not include that phrase. Significantly, neither the escrow agreement nor MSPD's agency designation grant Valeri authority as to 12 Downs Street. Thus, whether reading the escrow agreement alone or together with MSPD's agency designation, we agree with the trial court that Valeri's authorization to pursue the use variance was limited to 10 Downs Street.

Likewise, we agree with the court that the variance condition requiring an easement over 12 Downs Street would directly conflict with paragraph 16 of the contract for sale, which required that Valeri convey the properties without "private restrictive covenants or easements." The fact that paragraph 16 also provides that, "[i]n the event [Valeri] cannot deliver the [properties] to [MSPD] at [c]losing, free of violations as aforesaid, [MSPD] may . . . terminate this [c]ontract because of such violations," demonstrates the significance of the clear title requirement. Indeed, it has been observed that "an easement of any kind, is an [e]ncumbrance, because it is a load or weight on the land, *and must lessen its value*." (Emphasis added; internal quotation marks omitted.) *Storrs* v. *Pannone*, 113 Conn. 328, 332, 155 A. 234 (1931).

Valeri, however, argues that his alleged lack of authority to bind 12 Downs Street is irrelevant to the analysis because "the [v]ariance does not bind the owner of 12 Downs Street to anything. Rather, it merely grants 10 Downs Street a variance on the condition that it *obtain* an easement from 12 Downs Street; it does not order 12 Downs Street to grant one." (Emphasis in original.) Similarly, he contends that there is no conflict between the escrow agreement and the contract for sale because (1) "the properties *were* conveyed without private restrictive covenants or easements at the closing

on October 2, 2019," and (2) paragraph 16 of the contract for sale "is mere boilerplate language unrelated to the variance in particular. As a separately added and negotiated term, paragraph 2b of the escrow agreement prevails. See 2 Restatement (Second), Contracts § 203, p. 93 (1981) ('(c) specific terms and exact terms are given greater weight than general language; (d) separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated')." (Emphasis in original.) In his view, "[t]here is no limitation on what [he] could do to obtain the variance, and MSPD could not unilaterally impose such a limitation (without breach), nor unilaterally decide what was 'reasonably necessary' to obtain the variance." Valeri maintains that the conditions imposed by the zoning board were not only "reasonable, they [also] were *necessary* when interpreted in light of the situation of the parties and the circumstances connected with the transaction." (Emphasis in original.)

Valeri's arguments are premised on an unreasonable interpretation of the parties' agreement, in that it would lead to the absurd result that he could, *as MSPD's agent in regard to 10 Downs Street*, agree to one or more conditions that would devalue 12 Downs Street, such that the variance would be worthless to MSPD, simply to secure for himself the $75,000 held in escrow. It is well established that courts "will not construe a contract's language in such a way that it would lead to an absurd result." *Welch* v. *Stonybrook Gardens Cooperative, Inc.*, 158 Conn. App. 185, 198, 118 A.3d 675, cert. denied, 318 Conn. 905, 122 A.3d 634 (2015). In arguing that he was required only to "obtain" the variance and whether MSPD chose to use it is irrelevant to the analysis, Valeri ignores the clear and unambiguous language of the contracts viewed as a whole. The same is true as to his argument that he delivered 12 Downs Street unencumbered at the time of the closing as required

by the contract for sale. In other words, he reads each requirement in isolation and ignores the context of the transaction, in which MSPD purchased unencumbered properties from Valeri and, as part of that same transaction, agreed to pay Valeri $75,000 if he could obtain certain zoning approvals for those properties. Such a reading is contrary to well established principles of contract interpretation. See, e.g., *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 323, 186 A.3d 771 ("contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so" (internal quotation marks omitted)), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018); *Meeker* v. *Mahon*, supra, 167 Conn. App. 634 (when agreements are connected by reference and subject matter, court must consider them together in determining parties' intent); *Morrissey-Manter* v. *Saint Francis Hospital & Medical Center*, 166 Conn. App. 510, 521, 142 A.3d 363 ("[a] contractual promise cannot be created by plucking phrases out of context; there must be a meeting of the minds between the parties" (internal quotation marks omitted)), cert. denied, 323 Conn. 924, 149 A.3d 982 (2016).

Furthermore, Valeri's reliance on § 203 of the Restatement (Second) of Contracts in support of his argument that paragraph 16 of the contract for sale is boilerplate language that is superseded by the escrow agreement is misguided. To be sure, separately negotiated and more specific provisions will control over standardized and more general ones. See 2 Restatement (Second), supra, § 203 (c) and (d), p. 93. At the same time, however, subsection (a) of that provision provides that "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Id., § 203 (a), p. 93. Thus,

given that paragraph 16 of the contract for sale specifically requires that 12 Downs Street not be subject to easements, whereas the escrow agreement is silent on that issue, the only reasonable interpretation that gives effect to both provisions precludes a unilaterally imposed variance condition that requires an easement. See id., comment (a), p. 93 (noting that preferences for interpretation "apply only in choosing among *reasonable* interpretations" (emphasis added)).

Finally, Valeri relies on the fact that MSPD understood that the only access to the additional parking spaces behind 10 Downs Street was across 12 Downs Street to suggest that MSPD therefore knew that a permanent easement would be required for the use variance for 10 Downs Street. The problem with this reasoning is that "easement" is defined, in relevant part, as "[a]n interest in land *owned by another person* . . . ." (Emphasis added.) Black's Law Dictionary (11th Ed. 2019) p. 644. Therefore, because MSPD owned both properties, no easement would be required to allow such access. See, e.g., *Beneduci* v. *Valadares*, 73 Conn. App. 795, 808, 812 A.2d 41 (2002) ("[w]hen the plaintiff became the owner in fee of the servient estate, his easement was extinguished by merger"); 2 Restatement (Third), Property, Servitudes § 7.5, comment (a), p. 366 (2000) ("When the burdens and benefits are united in a single person, or group of persons, the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates."). Accordingly, the fact that there was no dispute about the location of the additional parking spaces does not have the probative force that Valeri suggests.

In sum, we conclude that the escrow agreement, when read together with the contract for sale, is unambiguous that the use variance Valeri obtained for 10 Downs Street, which was conditioned on the granting

of an easement over 12 Downs Street, could not satisfy paragraph 2b of the escrow agreement. Accordingly, the court properly awarded the escrow funds to MSPD.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KENNETH B.*
(AC 45975)

Clark, Seeley and DiPentima, Js.

Syllabus

Convicted, after a jury trial, of the crime of assault in the second degree, and, under a part B information, on a plea of guilty, of being a persistent serious felony offender, the defendant appealed to this court. The victim did not testify at the defendant's trial. Instead, the state introduced evidence of the victim's injuries through, inter alia, the testimony of S, the emergency room physician who treated the victim on the night of the incident. Over the objection of the defendant, two photographs of the victim were also admitted into evidence. These photographs were taken shortly after the assault occurred and depicted the victim with lacerations on her forehead and lips and with blood on her face and shirt. On the defendant's appeal, *held*:

1. There was sufficient evidence to sustain the defendant's conviction of assault in the second degree: the jury reasonably could have concluded that the victim suffered a serious physical injury on the basis of the evidence regarding her loss of consciousness during the incident, as this court previously has held that loss of consciousness may constitute a serious loss or impairment of the function of a bodily organ; moreover, contrary to the defendant's contention, the jury was entitled to rely on S's testimony regarding the victim's statement to him that she had experienced a brief loss of consciousness because the hearsay was admitted without objection; furthermore, the evidence was not insufficient merely because it was in conflict with or inconsistent with testimony that defense counsel elicited from S that certain medical records

[6] We note that Valeri did not challenge the amount of attorney's fees awarded to MSPD and claimed only that the award must be reversed along with the court's award of the escrow funds.

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

indicated that the victim had denied any loss of consciousness to the registered nurse who treated the victim on the night of the incident.

2. The trial court did not abuse its discretion in admitting into evidence the two photographs of the victim: contrary to the defendant's assertions, the photographs were relevant because they were probative of the two statutory (§ 53a-60 (a) (1)) elements of assault in the second degree, namely, that the defendant intended to cause the victim serious physical injury and that he caused the victim serious physical injury, as the defendant's intent could be inferred from the type of wounds inflicted, and the photographs depicted the size and location of the lacerations, in addition to the resulting blood loss, which were indicative of the severity of the victim's injuries; moreover, the trial court properly concluded that the photographs were not unduly prejudicial, despite their graphic nature, because they tended to prove a material fact in issue, and the trial court reasonably determined that their probative value outweighed their prejudicial impact.

Argued October 11, 2023—officially released January 9, 2024

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of assault in the second degree, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the first part of the information was tried to the jury before *Baldini*, *J.*; verdict of guilty; thereafter, the defendant was presented to the court, *Cordani*, *J.*, on a plea of guilty to the second part of the information; judgment in accordance with the verdict and plea, from which the defendant appealed to this court. *Affirmed.*

Tamar Birckhead, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *David Clifton*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Kenneth B., appeals from the judgment of conviction, rendered after a jury

trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (1). On appeal, the defendant claims that (1) there was insufficient evidence presented at trial to support his conviction of assault in the second degree, and (2) the trial court abused its discretion in admitting into evidence two photographs of the victim. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. On the night of November 21, 2020, the defendant was in the apartment of his sister, Emma S. (Emma). The victim, who is the defendant's adult daughter, was living with Emma during this time. At approximately 9:45 p.m., while Emma was in her bedroom, she heard the defendant and the victim arguing in the living room. Emma shouted for the victim to go into the bedroom, and when she did not, Emma heard the argument continue and get louder.

Emma went into the living room and observed the defendant standing over the victim, who was sitting on the floor. The defendant was hitting the victim and holding a small object in his left hand, which Emma believed to be a handgun.[1] Emma used a "grabber"[2] to strike the defendant to get him off the victim. When she told the defendant that she was going to call the police, he left the apartment. Emma subsequently called 911.

[1] At trial, Emma testified that she did not remember seeing anything in the defendant's hand and she did not remember telling the police that the defendant had a gun. A redacted copy of a written statement that Emma had provided to the police subsequently was admitted into evidence as a full exhibit, which contained Emma's report that the defendant had been holding what she believed to be a small handgun.

[2] At trial, Emma described the object that she identified as a "grabber" as a metal stick that she uses to pick up items and demonstrated to the prosecutor its approximate length by showing him the cane she had with her on the stand.

Officer Ryan Bailen of the New Britain Police Department arrived at the apartment to find the victim bleeding. Officer Bailen observed that there was blood on the coffee table, blood and locks of hair on the floor of the living room, and blood on the floor of the bathroom. A paramedic who subsequently arrived at the scene observed that the victim was "bloodied up" and "[d]istraught." The victim reported to the paramedic that she was in "severe" pain and that she was missing a tooth. The paramedic bandaged the victim's wounds and looked for the tooth.[3] The victim was then transported by ambulance to the Hospital of Central Connecticut in New Britain.

At the hospital, the victim was treated by Theodore Sherry, an emergency room physician. Dr. Sherry observed that the victim had a "fairly deep" four centimeter laceration on her forehead, had two lacerations on her lips and was missing a tooth. Dr. Sherry used approximately twelve sutures to close all of the lacerations and sutured the laceration on the victim's forehead in two separate layers. The victim reported to Dr. Sherry that she had experienced a brief loss of consciousness. Dr. Sherry ordered a computerized tomography scan as a result of the victim's head trauma, to assess if there was bleeding in the victim's brain or facial fractures; the results of the scan showed neither.

As a result of this incident, the defendant was arrested and charged, by way of a substitute information, with one count of assault in the second degree in violation of § 53a-60 (a) (1). After a trial, the jury found the defendant guilty as charged. The defendant then pleaded guilty to a part B information, which charged him as a persistent serious felony offender in violation

[3] At trial, the paramedic testified that she did not find the tooth at the apartment, but she believed someone located the tooth in the victim's bra when the victim subsequently was taken to the hospital.

of General Statutes § 53a-40 (c). The court subsequently sentenced the defendant to fifteen and one-half years of incarceration followed by four and one-half years of special parole. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to establish that he had caused serious physical injury to the victim, as required for a conviction of assault in the second degree. We conclude there was sufficient evidence to sustain the conviction.

"In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Luciano*, 204 Conn. App. 388, 396, 253 A.3d 1005, cert. denied, 337 Conn. 903, 252 A.3d 362 (2021). "As we previously have explained, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Fisher*, 342 Conn. 239, 249, 269 A.3d 104 (2022).

"To convict the defendant of assault in the second degree under § 53a-60 (a) (1), the state was required to

prove that (1) the defendant intended to cause serious physical injury to another person, and (2) acting with such intent, the defendant caused serious physical injury to that person." Id., 250. For purposes of that statute, "serious physical injury" means "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4).

At trial, the state presented evidence regarding the victim's injuries primarily through the testimony of Dr. Sherry. Dr. Sherry testified about the "surgical intervention" required to close the lacerations with approximately twelve sutures and explained that, as to the fairly deep laceration to the victim's forehead, he "had to suture the deeper layer first and then the superficial layer." As to the forehead laceration, Dr. Sherry testified that he "[t]ypically" would expect a scar to be formed, which would be "[t]he same length [as] the wound," but that he could not say whether the victim had a scar in the present case because he had not seen her since he performed the surgical procedure. Dr. Sherry explained the risks that would be present if the victim's injuries had gone untreated, specifically, that "any kind of external wound that's not treated has a risk of infection. . . . [T]he skin is an organ; the largest in the body, and it serves many functions, one of which is . . . a barrier against infection," and, as to "cosmetic effect . . . if it wasn't fixed, then there would be a larger scar." Dr. Sherry further testified as to his observation that the victim was missing a tooth and that he did not provide any treatment related to the tooth, as it would be appropriate for the victim to follow up with a dentist. In addition to Dr. Sherry's testimony, the state presented testimony from the paramedic about the victim's missing tooth and photographic evidence of the victim's lacerations.

Dr. Sherry also testified that the victim had reported a brief loss of consciousness. On cross-examination, defense counsel elicited testimony from Dr. Sherry that certain medical records indicated that the victim had denied any loss of consciousness to a registered nurse who treated her at the hospital. On redirect examination, Dr. Sherry testified that he was not present when the victim talked to the registered nurse, and he confirmed that the victim did report directly to him that she had lost consciousness.

The victim did not testify at trial. An inspector with the New Britain State's Attorney's Office testified regarding his efforts to serve a subpoena on the victim and his inability to locate her despite those efforts. After the state rested, defense counsel made an oral motion for a judgment of acquittal, which the court denied.

During the state's closing argument, the prosecutor argued that there were multiple theories under which the jury could find that the defendant had caused serious physical injury to the victim. Specifically, the prosecutor argued that the victim's forehead laceration and missing tooth constituted serious disfigurement, the laceration constituted a serious impairment of the victim's health, and the laceration and the victim's brief loss of consciousness constituted a serious impairment of the function of her bodily organs, i.e., her skin and her brain.

On appeal, the defendant argues that the evidence of the victim's loss of consciousness was insufficient to support a finding that the victim suffered a serious physical injury because the evidence constituted hearsay and there was conflicting evidence as to whether the victim had in fact suffered a loss of consciousness. The defendant also argues that there was no evidence

that the forehead laceration or missing tooth caused serious disfigurement to the victim.[4]

We conclude that there was sufficient evidence that the victim suffered a serious physical injury on the basis of the evidence regarding her loss of consciousness. Because the jury reasonably could have concluded that the victim suffered a serious physical injury on the basis of the evidence of her loss of consciousness, we do not address the defendant's remaining arguments as to the victim's forehead laceration and missing tooth.

This court previously has held that loss of consciousness may constitute a serious loss or impairment of the function of a bodily organ and, thus, a serious physical injury. See *State* v. *Morlo M.*, 206 Conn. App. 660, 673–74, 261 A.3d 68 (jury reasonably could find serious physical injury on basis of testimony that victim lost consciousness at some point during defendant's repeated beating of her), cert. denied, 339 Conn. 910, 261 A.3d 745 (2021); see also *State* v. *Miller*, 202 Conn. 463, 488–89, 522 A.2d 249 (1987) (severe facial lacerations and temporary loss of consciousness caused by strangling were " 'serious physical injur[ies]' " supporting conviction of assault in first degree); *State* v. *Rumore*, 28 Conn. App. 402, 413–15, 613 A.2d 1328 (temporary loss of consciousness and laceration requiring surgical stapling satisfied "serious physical injury" element of assault in first degree of elderly victim), cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992). In *Rumore*, this court explained that § 53a-3 (4) "does not require that the impairment of the organ be permanent. The jury could properly interpret the

[4] Specifically, the defendant argues that (1) there was no evidence that the forehead laceration left a scar, as the victim did not testify at trial and Dr. Sherry testified only as to the risk of a scar, and (2) "there was no evidence as to [the victim's] age, suggesting that [the missing tooth] could have been a baby tooth that would ultimately be replaced by an adult tooth or that it was a wisdom tooth that would have otherwise been extracted."

evidence to prove that the victim's brain was not functioning at a cognitive level when she was unconscious and thus was impaired." *State* v. *Rumore*, supra, 415.

The defendant contends that the evidence regarding the victim's loss of consciousness was insufficient because "there was no testimony aside from a hearsay statement attributed to [the victim] that she experienced a brief loss of consciousness," and there was no direct testimony from the victim herself and other corroborating witnesses about that loss of consciousness. It is well established, however, that "when hearsay is admitted without objection, it is a sufficient basis, if believed by the trier, for a finding of fact." *State* v. *Thompson*, 305 Conn. 412, 438 n.7, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013); see also *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 492 n.2, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007); *State* v. *Outlaw*, 70 Conn. App. 160, 168, 797 A.2d 579 (2002). Indeed, "[i]n viewing the evidence, [i]f [inadmissible] evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have. The fact that it was inadmissible does not prevent its use as proof so far as it has probative value. . . . [T]herefore . . . appellate review of the sufficiency of the evidence . . . properly includes hearsay evidence even if such evidence was admitted despite a purportedly valid objection."[5] (Internal quotation marks omitted.) *State* v. *Chemlen*, 165 Conn. App. 791, 817–18, 140 A.3d 347, cert. denied, 322 Conn. 908, 140 A.3d 977 (2016). Accordingly, the jury was entitled to rely on Dr. Sherry's testimony, to which the defendant did not object, regarding the victim's statement to him that she had experienced a brief loss of consciousness.

[5] To be clear, the defendant did not object to Dr. Sherry's testimony and does not claim on appeal that the testimony was inadmissible.

In addition, although the defendant elicited testimony from Dr. Sherry regarding the victim's inconsistent report to a registered nurse, as reflected in the medical records, we are mindful that "[*e*]*vidence is not insufficient . . . because it is conflicting or inconsistent.* . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Emphasis added; internal quotation marks omitted.) *State* v. *Michael T.*, 194 Conn. App. 598, 621, 222 A.3d 105 (2019), cert. denied, 335 Conn. 982, 242 A.3d 104 (2020). As explained previously, Dr. Sherry testified on redirect examination, consistent with his testimony during direct examination, that the victim reported directly to him that she lost consciousness. On the basis of Dr. Sherry's testimony, we conclude that there was sufficient evidence from which the jury reasonably could have found that the victim suffered a serious impairment of the function of a bodily organ and, thus, a serious physical injury.

II

The defendant next claims that the court abused its discretion in admitting into evidence two photographs of the victim. Specifically, the defendant claims that the photographs were (1) irrelevant and (2) unduly prejudicial. We disagree.

The following additional facts are relevant to this claim. At trial, the state sought to admit into evidence two photographs of the victim during its direct examination of Officer Bailen. The photographs depicted the victim with lacerations on her forehead and her lips and with blood on her face and her shirt. Defense counsel objected to the admission of both photographs on the basis that they were "[m]ore prejudicial than probative . . . ."

The court heard arguments from the parties outside the presence of the jury. The state argued: "[O]ne of

the elements that the state has to prove here is serious physical injury. I think those photos accurately depict the injuries on the night in question. Obviously, the jury's not going to have the victim here to testify about what those injuries did to her. There will be medical personnel to talk about the medical treatment that related to those injuries; however, the state does need to put forward proof beyond a reasonable doubt that the assault caused serious physical injury, and I would report that those two photos accurately depict that element."

Defense counsel argued that the photographs would "unduly arouse the jury's emotions and cause prejudice. As [the prosecutor] has said . . . he's going to call the medical [personnel] to testify to the conditions of the lacerations. And the pictures here have blood everywhere, Your Honor. They're not exactly explaining the injury in itself, Your Honor. Just because there's blood everywhere that can arouse the jury's emotions. I think that the harm is serious and inflammatory."

The court overruled defense counsel's objections and determined that the photographs were admissible. The court explained: "I find that [these photographs] would assist in establishing elements of this offense, including intent, causation and the issue of serious physical injury. . . . I am mindful that the appropriate test is relevancy, not necessity. Also, that a potentially inflammatory photograph, which I think that's the defense's argument in this particular case, that both photographs are inflammatory. Those photographs that may be characterized that way may be admitted if the court in its discretion determine[s] that the probative value of the photograph outweighs the prejudicial effect that it might have on this particular jury. These photographs, in this court's assessment, have a reasonable tendency to prove or disprove a material fact at issue. I do believe that the probative value does outweigh its prejudicial

effect with respect to both photographs. I've considered the case law, including *State* v. *Lane*, [206 Conn. App. 1, 258 A.3d 1283, cert. denied, 338 Conn. 913, 259 A.3d 654 (2021)], along with *State* v. *Kelly*, [256 Conn. 23, 770 A.2d 908 (2001)]. I therefore find that these photographs, both of their probative value does outweigh [their] prejudicial effect. And I also note . . . with regard to the number of photographs, there are two." After the jury returned to the courtroom, the court explained that the photographs were admitted as full exhibits. Officer Bailen testified that the photographs accurately depicted the victim's appearance on the night of November 21, 2020.

As a preliminary matter, we set forth the applicable standard of review. "Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law. . . . In addition, [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Lane*, supra, 206 Conn. App. 14.

On appeal, the defendant first claims that the photographs were irrelevant.[6] Section 4-1 of the Connecticut

[6] The state contends that the defendant did not raise a relevancy objection, and, therefore, he failed to preserve this claim for appellate review. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly . . . [by] articulat[ing] the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose . . . . [T]he determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with

Code of Evidence provides that " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." This court has noted that "[r]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, [as] long as it is not prejudicial . . . . In determining whether photographic evidence is admissible, the appropriate test is relevancy, not necessity." (Citation omitted; internal quotation marks omitted.) *State* v. *Lane*, supra, 206 Conn. App. 14–15.

At trial, the state bore the burden of proving beyond a reasonable doubt that the defendant intended to cause the victim serious physical injury and caused the victim

sufficient clarity to place the trial court on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Taylor G.*, 315 Conn. 734, 769–70, 110 A.3d 338 (2015). At trial, the defendant objected to the admission of the photographs on the basis that they were "[m]ore prejudicial than probative . . . ." He did not raise a separate relevancy objection, nor did he argue that the photographs had no probative value. See *State* v. *Best*, 337 Conn. 312, 317 n.1, 253 A.3d 458 (2020) (defendant functionally preserved relevancy claim where he argued that photographic evidence was devoid of any probative value). Nevertheless, the defendant subsequently argued that the photographs were "not exactly explaining the injury in itself," which is the same claim he makes on appeal. The state addressed the relevancy of the evidence in response to the defendant's objection, arguing that the photographs were probative of the victim's injuries, and, in the court's ruling, it specifically addressed the relevancy of the photographs, which "eliminate[s] any concerns that the trial court was not on notice of the argument." *State* v. *Streit*, 341 Conn. 170, 187 n.14, 266 A.3d 864 (2021). We therefore conclude that the defendant functionally preserved his relevancy claim. See *State* v. *Best*, supra, 317 n.1.

serious physical injury. See General Statutes § 53a-60 (a) (1). The two photographs at issue are probative as to both statutory elements. As to the first element, because "[i]ntent to cause . . . serious physical injury may be inferred from the . . . type of wound inflicted," the photographs have probative value to show intent. (Internal quotation marks omitted.) *State* v. *Lane*, supra, 206 Conn. App. 15; see also *State* v. *Best*, 337 Conn. 312, 320, 253 A.3d 458 (2020) ("[t]he extent and severity of injuries often are used as indirect proof of intent"); *State* v. *Osbourne*, 162 Conn. App. 364, 372, 131 A.3d 277 (2016) (photographs depicting victim's blood loss and bloody clothing were relevant to issue of "whether the defendant possessed the requisite intent of the crime charged"). As to the second element, the photographs depict the size and location of the lacerations on the victim's face, in addition to blood loss resulting from those lacerations, which were indicative of the severity of those injuries. *State* v. *Best*, supra, 318 (amount of blood loss suffered by victims immediately after shooting was indicative of severity of wounds and had tendency to prove that wounds were grievous enough to cause death of one victim and serious physical injury to other victim); *State* v. *Lane*, supra, 15 (photographs depicting black eye and surgical wounds were indicative of severity of injuries and had tendency to prove that injuries were sufficiently severe to constitute serious physical injury); *State* v. *Osbourne*, supra, 371–72 (photographs depicting blood loss and bloody clothing were relevant, among other reasons, to establish that victim suffered physical injury). Accordingly, we conclude that the court did not abuse its discretion in determining that the photographs were relevant.

We next address whether the trial court properly concluded that the photographs were not unduly prejudicial. Section 4-3 of the Connecticut Code of Evidence

provides that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

The defendant argues that the photographs are unduly prejudicial because they are "graphic" and gory, as they depict the victim "moments after the incident, covered in blood . . . ." He contends that the photographs served only "to disgust and inflame the jur[ors], deterring them from carefully considering whether the state had met its burden." As our Supreme Court noted in *Best*, however, even gruesome photographs can be admissible if they tend to prove or disprove a material fact. *State* v. *Best*, supra, 337 Conn. 323–24. "[P]hotographs [that] have a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry are not rendered inadmissible simply because they may be characterized as gruesome. . . . The question is not solely whether the evidence is gruesome, disturbing or otherwise inherently prejudicial but whether its prejudicial nature is undue or unfair, a question that requires the trial court to undertake the relativistic assessment of probative value versus prejudicial effect . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Lane*, supra, 206 Conn. App. 16.

Thus, contrary to the defendant's contention, the photographs at issue in the present case are not rendered inadmissible simply because they may be characterized as "graphic" or gory. The court reasonably determined that the probative value of the photographs, depicting injuries sustained by the victim, outweighed their prejudicial impact. See *State* v. *Best*, supra, 337 Conn. 316, 325 (concluding that trial court did not abuse its discretion in determining that, on balance, probative value of

photographs depicting bloody interior of car outweighed their prejudicial effect); *State* v. *Osbourne*, supra, 162 Conn. App. 375 ("although the photographs admitted into evidence depicted blood found at the scene and the victim's bloody clothing, the trial court's determination that they were more probative than prejudicial [did] not constitute an abuse of discretion"). Accordingly, we conclude that the court did not abuse its discretion in admitting into evidence the challenged photographs.

The judgment is affirmed.

In this opinion the other judges concurred.

ALFRED LASSEN *v.* CITY OF HARTFORD
(AC 45802)

Cradle, Clark and Vertefeuille, Js.

Syllabus

The plaintiff, whose prior employment as a police officer with the defendant city of Hartford had been terminated, sought to recover damages from the city for, inter alia, its failure to rehire him as a police officer because of his disability, narcolepsy. The city had posted a job listing seeking applications from nonresidents of Hartford for a police officer position. Applicants were required to apply online and to include with their applications a "CHIP" card signifying that they had successfully completed certain physical ability tests required of police officer candidates. The plaintiff, who was not a resident of Hartford, was among fifty-two applicants who did not submit a CHIP card with their applications and, thus, was determined by the city to be unqualified for the police officer position. In a two count complaint alleging violations of a provision (§ 46a-60) of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.), the plaintiff claimed that the city had discriminated against him on the basis of his disability and retaliated against him for having previously brought a lawsuit against the city in connection with the termination of his prior employment as a police officer. The city, which was aware at the time the plaintiff applied for the police officer position that he had been diagnosed with narcolepsy, moved for summary judgment, asserting that no genuine issue of material fact existed as to both counts of the plaintiff's complaint and that it was therefore entitled to

judgment as a matter of law. The court granted the city's motion, concluding that there was no genuine issue of material fact that the plaintiff had failed to establish a prima facie case of either disability discrimination or retaliation and that, even if he had established a prima facie case as to those claims, summary judgment was warranted on both counts because the city had articulated a legitimate, nondiscriminatory and nonretaliatory reason for its decision not to rehire the plaintiff, namely, his failure to submit the required CHIP card with his application, which he thereafter failed to establish was pretextual. On the plaintiff's appeal to this court, *held* that the trial court properly rendered summary judgment for the city: the undisputed evidence in the record established that the sole reason for the city's decision not to rehire the plaintiff was his failure to submit a CHIP card with his job application and, although the plaintiff claimed that a genuine issue of material fact existed as to whether the city's reason was pretextual because the job application did not identify a CHIP card as a document that needed to be submitted with the job application, whereas the job posting listed the CHIP card as a document required to be submitted with the job application, it would have been purely speculative for this court to infer from that inconsistency that the city was motivated to discriminate or retaliate against the plaintiff when that circumstance would have had the same effect on all applicants; moreover, the plaintiff did not provide any evidence to contradict the city's evidence that the city had conducted a screening process after which applicants, including the plaintiff, who had failed to submit CHIP cards with their applications were eliminated from consideration and not hired, nor did the plaintiff provide evidence of any connection between the city's determination that he was unqualified for the police officer position and his medical diagnosis or with his having previously filed suit against the city in connection with its termination of his prior employment as a police officer; furthermore, the plaintiff's disagreement with the city's requirement that he submit a CHIP card with his application was immaterial and did not render the city's reason for not rehiring him pretextual, there having been no genuine issue of material fact that all applicants were required to submit a CHIP card, regardless of whether they were certified police officers.

Argued October 2, 2023—officially released January 9, 2024

Procedural History

Action to recover damages for, inter alia, alleged disability discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan*, *J.*, granted the defendant's motion for summary judgment and rendered judgment

thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Alexandria L. Voccio, with whom, on the brief, were *David S. Monastersky* and *Channez M. Rogers*, for the appellee (defendant).

Opinion

VERTEFEUILLE, J. The plaintiff, Alfred Lassen, appeals from the summary judgment rendered by the trial court in favor of the defendant, the city of Hartford, on his two count complaint, alleging disability discrimination and retaliation in violation of General Statutes § 46a-60 of the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq., in connection with the defendant's failure to rehire him as a police officer. On appeal, the plaintiff claims that the court erred in rendering summary judgment in favor of the defendant because it improperly concluded that no genuine issue of material fact existed as to whether (1) the plaintiff had failed to make out a prima facie case of disability discrimination and retaliation, and (2) the defendant's proffered legitimate, nondiscriminatory reason for not rehiring[1] him was pretextual. For the reasons that follow, we disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. The defendant published a job posting for the position of Hartford police officer for persons who were not residents of Hartford. The plaintiff was not a resident of Hartford at the time he filed his application.

[1] The plaintiff previously had been employed with the defendant as a police officer from December, 2009, to March, 2016. He responded to a June, 2018, job posting by the defendant for a police officer position for persons who were not residents of Hartford, but he was not hired for the position.

The job posting required all applicants to submit their applications online through the PoliceApp web portal. The plaintiff applied for the position online as required. At the time he applied for the position, the plaintiff had been diagnosed with narcolepsy, and the defendant was aware of this diagnosis. A lawsuit was already pending in which he made multiple claims against the defendant, including disability discrimination, failure to provide a reasonable accommodation, and retaliation for having requested a reasonable accommodation in connection with the defendant's termination of his previous employment as a Hartford police officer.

The defendant engaged in a screening process of all the applications it received for the Hartford police officer position wherein an initial review and a second review were conducted by administrative clerks from the defendant's Human Resources Department. During this screening process, applicants who did not submit with their applications a valid Complete Health & Injury Prevention physical ability assessment (CHIP card)[2] were eliminated from consideration for the position. As a result of this screening process, fifty-two applicants, including the plaintiff, were neither considered nor hired for the position because they had failed to submit the required CHIP card with their applications.

The plaintiff brought suit and filed a two count complaint alleging that the defendant, in violation of § 46a-60, failed to rehire him as a police officer because of his narcolepsy diagnosis (disability discrimination) and because he previously had filed a lawsuit against the

[2] CHIP (Complete Health & Injury Prevention) administers the Police Physical Ability Assessment, also known as Physical Fitness Tests, and, upon successful completion, candidates receive a CHIP card, which is valid for a six month period and is accepted by participating departments. The defendant utilizes CHIP to administer police physical agility tests for applicants.

defendant (retaliation).[3] The defendant thereafter filed a motion for summary judgment, arguing that no genuine issue of material fact existed and that it was entitled to judgment as a matter of law on both claims of the plaintiff's complaint. The plaintiff filed an opposition to the defendant's motion for summary judgment. The court granted the defendant's motion for summary judgment on the ground that there existed no genuine issues of material fact that the plaintiff had failed to establish a prima facie case of either disability discrimination or retaliation. The court additionally determined that, even if it had assumed arguendo that the plaintiff had established a prima facie case of disability discrimination and retaliation, summary judgment was warranted as to both counts of the complaint because the defendant had offered a legitimate, nondiscriminatory reason for its decision not to rehire the plaintiff, specifically, that the plaintiff had failed to submit the required CHIP card with his application and that no genuine issue of material fact existed as to whether the plaintiff had failed to establish that the defendant's proffered reason was pretextual. This appeal followed.

We begin by setting forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion

[3] According to General Statutes § 46a-60 (b), it is a discriminatory practice "(1) For an employer . . . to refuse to hire or employ . . . any individual . . . because of the individual's . . . physical disability [or] (4) [f]or any . . . employer . . . to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012). The standard of review of a trial court's decision granting a motion for summary judgment is plenary. Id., 116.

The standard applicable to the plaintiff's claim of disability discrimination, which is based on disparate treatment, and retaliation is the *McDonnell Douglas-Burdine*[4] model of analysis. See *Taing* v. *CAMRAC, LLC*, 189 Conn. App. 23, 27–28, 206 A.3d 194 (2019) (discussing applicability of *McDonnell Douglas-Burdine* model to disparate treatment discrimination claims); *Luth* v. *OEM Controls, Inc.*, judicial district of Ansonia-Milford, Docket No. CV-17-6025657-S (December 6, 2019) (reprinted at 203 Conn. App. 680, 252 A.3d 413) (discussing applicability of *McDonnell Douglas-Burdine* model to retaliation claims under act), aff'd, 203 Conn. App. 673, 252 A.3d 406 (2021). Under this framework, the plaintiff first must establish a prima facie case,[5] then the burden of production shifts to the

[4] See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[5] To establish a prima facie case of discrimination, an employee plaintiff must show that "(1) [he] is a member of a protected class; (2) [he] was qualified for the position; (3) [he] suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015).

To establish a prima facie case of retaliation, a plaintiff must show "(1) that he participated in a protected activity; (2) that the defendant knew of

defendant to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision. *Tomick* v. *United Parcel Service, Inc.*, 157 Conn. App. 312, 327, 115 A.3d 1143 (2015), aff'd, 324 Conn. 470, 153 A.3d 615 (2016). Once the defendant offers a legitimate, nondiscriminatory reason, then the plaintiff has the burden to prove by a preponderance of the evidence that the proffered reason is pretextual. Id.

In the present case, the plaintiff challenges the propriety of the court's determinations that no genuine issues of material fact existed with respect to his failure to make out a prima facie case of disability discrimination and retaliation and that the defendant's employment decision was based on a nonpretextual, legitimate, nondiscriminatory reason. We conclude that, even if we were to assume without deciding, that the plaintiff had established a prima facie case of disability discrimination and retaliation, the court correctly concluded that there was no genuine issue of material fact that the defendant's proffered legitimate nondiscriminatory and nonretaliatory reason for failing to rehire the plaintiff was not pretextual.[6]

the protected activity; (3) an adverse employment action against him; and (4) a causal connection between the protected activity and the adverse employment action." *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 536, 976 A.2d 784 (2009).

[6] "Because [s]ummary judgment is appropriate where no genuine issue of material fact exists, and the defendant is entitled to judgment as a matter of law, with respect to any one element that the plaintiff is required to prove in order to prevail at trial . . . an appellate court need not address every basis articulated by a trial court in rendering summary judgment." (Citations omitted; internal quotation marks omitted.) *Alvarez* v. *Middletown*, 192 Conn. App. 606, 611 n.2, 218 A.3d 124, cert. denied, 333 Conn. 936, 218 A.3d 594 (2019). Accordingly, because we agree with the trial court that the plaintiff has not demonstrated the existence of a genuine issue of material fact as to whether the defendant's justification for its failure to rehire him was merely a pretext for discrimination and/or retaliation, we need not address the question of whether a genuine issue of material fact exists regarding the plaintiff's establishment of a prima facie case of discrimination and/or retaliation. See id.

The reason stated by the defendant in its memorandum of law appended to its motion for summary judgment for not rehiring the plaintiff was that he did not pass the defendant's initial screening process because he failed to submit the required CHIP card with his application. In moving for summary judgment, the defendant submitted uncontroverted documentary evidence to substantiate that it had engaged in a screening process wherein all applicants who failed to submit a CHIP card with their application were denied consideration for the position. Specifically, in an affidavit attached to the defendant's motion for summary judgment, Debra C. Carabillo, the Deputy Director of Human Resources and Labor Relations with the defendant, averred that an initial screening process of applicants who had responded to the defendant's publication of a job posting for a police officer position for persons who were not residents of Hartford was conducted by a human resources administrative clerk, an employee of the defendant, to determine whether each applicant had submitted all of the required documentation as set forth in the job posting to establish that the applicant met the age, citizenship, education, driver's license, and physical ability testing (CHIP card) qualifications. If an applicant did not submit any of the required documentation, then the applicant was designated as "unqualified," and, if an applicant submitted all of the required documentation, then the applicant was designated as "qualified." She further stated that Brenda Perez, an administrative clerk with the defendant, reviewed the applications for a second time to confirm the designations for applicants as either qualified or unqualified based on whether they had submitted with their job application all of the required documentation. Carabillo also stated that no other factors were taken into consideration during this screening of applications and that the plaintiff "was deemed to not meet the minimum

requirements for the position solely due to his failure to provide a copy of a valid CHIP card, proving that he has passed the CHIP Physical Ability Assessment required for all applicants under the job posting . . . .'' Also attached to the defendant's motion for summary judgment was an internal document of the defendant listing the names of all fifty-two applicants who did not submit a CHIP card with their application and their resultant designation as unqualified for the position. We conclude that the defendant satisfied its summary judgment burden of articulating a legitimate, nondiscriminatory reason for not rehiring the plaintiff. See *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 74, 111 A.3d 453 (2015) (to rebut presumption created by prima facie case, employer must articulate legitimate nondiscriminatory reason, and ''[t]his burden is one of production, not persuasion; it can involve no credibility assessment'' (internal quotation marks omitted)).

Because the defendant articulated a nondiscriminatory and nonretaliatory reason for its employment decision, the burden shifted to the plaintiff to establish a genuine issue of material fact with respect to whether the defendant's stated reason was a pretext for discrimination and/or retaliation. See *Tomick* v. *United Parcel Service, Inc.*, supra, 157 Conn. App. 327.

''[T]o defeat summary judgment . . . the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors. . . . A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer

did not act for the asserted non-discriminatory reasons." (Citation omitted; internal quotation marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 522–23, 233 A.3d 1170 (2020).

The plaintiff does not dispute that he did not submit a CHIP card with his application. Rather, he argues that the court erred in determining that he had failed to offer any evidence creating a genuine issue of material fact as to whether the defendant's proffered reason for not rehiring him was a pretext for discriminatory and/or retaliatory intent. Specifically, he contends that the "[t]he job application did not identify the CHIP card as a document that needed to be submitted. The job application asked the applicant to identify if he was presently a Connecticut certified police officer," and that "[h]is job application stated he was employed by the defendant as a police officer from December 14, 2009, through March 4, 2016." He further argues that a "presently certified Connecticut police officer already possesses the qualification to immediately begin working as a police officer. Therefore, the CHIP card was irrelevant. The defendant cited to the fact that every applicant for the job who failed to submit a CHIP card did not pass the initial screening of applications. Tellingly, the defendant failed to disclose whether any of the other rejected applicants were certified police officers."

The two reasons presented by the plaintiff to support his contention that there is a genuine issue of material fact as to whether the defendant's reason for its employment decision not to rehire him was pretextual—specifically, that the job application did not identify a CHIP card as a required document and that for presently certified Connecticut police officers a CHIP card was irrelevant—are not persuasive. His first reason highlights the fact that the job application, which the defendant attached to its motion for summary judgment, did

not identify a CHIP card as a document that needed to be submitted online with the job application.[7] We note that the job application is inconsistent in this respect with the job posting, which clearly lists a CHIP card as a document required to be submitted with the job application.[8] This apparent inconsistency in the application process may have resulted in some applicants, such as the plaintiff, not submitting a CHIP card with their job application due to a belief that such documentation was not required and, as a result, being eliminated from consideration for the position and not hired. Although the plaintiff may have highlighted inconsistencies in the job application process and a possible failure on the part of the defendant to communicate effectively to applicants what it considered the minimum job requirements to be, it is purely speculative for us to infer from this circumstance, which would have the same effect on all applicants, a motivation on the part of the defendant to discriminate and/or retaliate against the plain-

[7] The job application, under a section titled "required documents for submission," states, "PLEASE NOTE: YOU MUST HAVE ALL REQUIRED DOCUMENTS IN BY APRIL 1, 2019. IF REQUIRED DOCUMENTS ARE NOT SUBMITTED, YOU WILL NOT BE ABLE TO PROCEED TO THE WRITTEN EXAMINATION! By selecting 'YES,' I understand the above and that I must have all required documents submitted by April 1, 2019 or I will not be able to proceed to the Written Examination." The application then states that "A COPY OF YOUR HIGH SCHOOL DIPLOMA, GED CERTIFICATE OR TRANSCRIPT MUST BE SUBMITTED WITH THE APPLICATION," provides a space for such document to be submitted electronically and then states: "A valid driver's license is required. A COPY OF THE LICENSE MUST BE SUBMITTED WITH THE APPLICATION" and provides a space to submit such documentation electronically. The application does not include a prompt to attach a CHIP card and does not identify a valid CHIP card as a document that needed to be uploaded with the application.

[8] The job posting is titled "Police Officer (Non-Hartford Residents)." The job posting states that the position was "[o]pen to all Hartford residents who meet the following qualifications," and proceeds to list items, including the submission of a CHIP card. Although the job posting contains an internal discrepancy as to the residency requirement of applicants, it is uncontested that the plaintiff, who was not a resident of Hartford, was able to apply for the position.

tiff.[9] See *Agosto* v. *Premier Maintenance, Inc.*, 185 Conn. App. 559, 569–70, 197 A.3d 938 (2018) ("[a]lthough the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . 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 plaintiff has provided no evidence contradicting the evidence submitted by the defendant that the sole reason that it did not rehire the plaintiff was that it had conducted a screening process whereby all applicants, including the plaintiff, who failed to submit CHIP cards with their applications were eliminated from consideration for the position and not hired. The plaintiff attached to his opposition to summary judgment his affidavit in which he stated that the job application did not identify a CHIP card as a document that was required to be submitted online with the application and that he was unaware that a CHIP card was required because he was a certified Connecticut police officer, which meant that he was able to work immediately as a police officer. He did not provide evidence of any connection whatsoever between the defendant's decision to eliminate from consideration applicants who did not submit a CHIP card with their application and his medical diagnosis or his having filed suit against the defendant. See *Luth* v. *OEM Controls, Inc.*, supra, 203 Conn. App. 689 ("[e]ven on a motion for summary judgment, the plaintiff must present some factual basis to support [his] claims and cannot rely solely on naked

[9] There need only exist no genuine issue of material fact that the defendant's decision not to rehire the plaintiff was not motivated by a discriminatory and/or retaliatory intent. See *Craine* v. *Trinity College*, 259 Conn. 625, 643 n.12, 791 A.2d 518 (2002) (noting unusual circumstance wherein defendant's stated reason for employment decision constituted both breach of contract and nondiscriminatory reason for employment decision).

claims or arguments unsupported by any actual evidence or at least some evidence from which reasonable, supportive inferences may be made").

The plaintiff's second reason, in which he expresses disagreement with the relevance of the defendant's hiring standards and deems the submission of a CHIP card to be redundant, is not material. See, e.g., *Watkins* v. *East Haven*, Docket No. CV-04-4001818-S, 2008 WL 344711, *3 (Conn. Super. January 24, 2008) ("[w]hile the plaintiff has a right to wonder why such a position would require a [twelfth] grade education, it is not for this court to rewrite the job description based on the plaintiff's conception of the job and its requirements"). Whether currently certified police officers should have to comply with the CHIP card requirement does not raise an inference of discriminatory or retaliatory intent because the defendant had the CHIP card requirement for all applicants.

Significantly, no genuine issue of material fact exists that the defendant applied the same CHIP card standard to *all* applicants and thereby removed from consideration in total fifty-two applicants who, like the plaintiff, did not submit a CHIP card with their applications. The undisputed evidence in the record establishes that the sole reason for the defendant's decision not to rehire the plaintiff was his failure to submit a CHIP card with his job application. For the foregoing reasons, we conclude that the trial court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.