IN RE DENZEL W. ET AL.*
(AC 46612)

Suarez, Westbrook and Harper, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor

* 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to

children. The court concluded that the mother had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time considering the ages and needs of the children, she could assume a responsible position in their lives. The mother began a relationship with the father of the children, T, in 2009, and reported that domestic violence had occurred throughout the relationship and included both mental and physical abuse. The children had been exposed to their parents' intimate partner violence, including a stabbing incident in which T stabbed the mother in the face, neck and chest. Following the stabbing, T was arrested, and a full no contact protective order was put in place with the mother as the protected party. Although the protective order continued to be in effect, the mother and T still had contact with each other, including over the phone while T was incarcerated and while in the mother's motor vehicle, which, following a traffic stop, resulted in the arrest of both the mother and T. The mother was also observed by family members with T in the community. The mother denied that she had had any contact with T since his release from prison. Following the removal of the children from the mother's care, the mother was provided with weekly visits. During the visits, the mother struggled with the use of electronics and the children's behavioral needs, including allowing one child to play a violent video game on her cell phone. The Department of Children and Families referred the mother to a variety of services, and, although she initially struggled with attendance, the mother did make some progress and appeared engaged in the sessions she attended. There were continued concerns, however, regarding the mother's missed sessions, her inconsistency, and her difficulty in managing her work schedule and the children's appointments. A licensed clinical psychologist, P, conducted certain evaluations and explained that, although the mother had a general understanding of child development and expectations for independence, she had limitations regarding her ability to understand the children's emotional and psychological needs, as demonstrated by her allowing one child to play the violent video game that depicted violence and blood from the use of a knife. P opined that the mother failed to recognize the instability in her romantic relationship that led to the instability in the home for her children and that this lack of insight would be detrimental to the children being in her care. P further opined that the mother minimized how the intimate personal violence minimized her strength as a parent, she failed to understand how T's actions could place her children at risk, and she continued to struggle to understand how their cycle of violence over the years of their relationship created a chaotic and hostile environment that was unsafe for her children. The court concluded, by clear and convincing evidence, that the termination

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identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

of the mother's parental rights was in the children's best interests and rendered judgments terminating her parental rights and appointing the petitioner, the Commissioner of Children and Families, as the children's statutory parent for the purpose of securing their adoption as expeditiously as possible. *Held*:

1. The respondent mother could not prevail on her claim that the trial court improperly shifted the burden of proof on the issue of personal rehabilitation to her: although the mother referenced as evidence one statement in the court's memorandum of decision, namely, that she "has not demonstrated that she is able to provide her children with a safe, secure, and permanent home free from intimate personal violence at the present time nor in the foreseeable future," this court concluded, upon reviewing the memorandum of decision as a whole, that the trial court did not shift the burden of proving personal rehabilitation to the mother and was aware of and applied the proper burden of proof that required the petitioner to prove, by clear and convincing evidence, that the mother had failed to achieve a sufficient degree of personal rehabilitation, as the court expressly stated that it had considered carefully, inter alia, the criteria set forth in the General Statutes and the applicable case law in granting the petitions to terminate parental rights on the basis of the clear and convincing evidence; moreover, the petitioner offered testimony from department social workers, a psychologist, and police officers regarding the instances of intimate personal violence, the mother's efforts to continue and conceal her relationship with T, even after he had stabbed her, her inability to maintain control and meet the emotional needs of the children during visits, and her failure to comply with requests to not bring her cell phone and allow her child to play inappropriate video games during visits, and, on the basis of the evidence presented by the petitioner, the court concluded that she had met her burden with respect to the issue of failure to rehabilitate; furthermore, the isolated use of the imprecise language that formed the basis for the mother's claim reflected the court's rejection of the mother's evidence of personal rehabilitation only after it had determined that the petitioner had met her burden.
2. The respondent mother could not prevail on her claim that the trial court improperly determined that she had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time and considering the ages and needs of the children, she could assume a responsible position in the children's lives: there was sufficient evidence existing in the record to support the court's determination that the mother failed to rehabilitate as her continuing efforts to maintain her relationship with T despite the significant history of intimate partner violence, coupled with her efforts to conceal this relationship from the department, her providers, and the police, supported the court's conclusion that she had failed to address these issues, which placed the children at risk of trauma, and that she would continue

to do so in the future; moreover, contrary to the mother's argument, the evidence reflected that the domestic violence issues had existed consistently throughout the relationship, and that the mother had continued to prioritize and maintain her relationship with T despite its negative effects on the children and the existence of a protective order.

Argued November 16, 2023—officially released May 9, 2024**

Procedural History

Petitions to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Burgdorff, J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

Nisa Khan, assistant attorney general, with whom, were *Abhishek Mukund*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

HARPER, J. The respondent mother, Stephanie B., appeals from the judgments of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor children, Denzel W. and Ariel W.[1] On appeal, the respondent claims that the court improperly (1) shifted the burden of proof on the issue of

** May 9, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of the respondent father, Timothy W., with respect to Denzel and Ariel. In addition to finding that he had failed to rehabilitate, the court also determined that the petitioner had proved abandonment as an additional ground to terminate Timothy's parental rights as to the two children. Because Timothy is not participating in this appeal, we refer in this opinion to Stephanie as the respondent.

personal rehabilitation to her and (2) determined that she failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time and considering the ages and needs of the children, she could assume a responsible position in the children's lives. See General Statutes § 17a-112 (j) (3) (B). We affirm the judgments of the trial court.[2]

The following facts and procedural history are relevant to our consideration of the respondent's appeal. The Department of Children and Families (department) became involved with the family at issue, which is comprised of the respondent, the father Timothy W., and their four children, in 2012.[3] This involvement includes fourteen referrals to the department's Careline[4] regarding physical neglect of the children, an inability to meet the basic needs of the children for supervision, the children's exposure to intimate partner violence between the respondent and Timothy, and their exposure to substance abuse by Timothy.[5]

On November 2, 2019, an incident of domestic violence occurred between the respondent and Timothy,

[2] The attorney for the minor children has filed a statement adopting the appellate brief of the petitioner. See Practice Book § 79a-6 (c).

[3] In addition to Denzel and Ariel, the respondent and Timothy also have two other children together, both of whom previously were adjudicated neglected.

[4] "Careline is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect." (Internal quotation marks omitted.) *In re Anthony S.*, 218 Conn. App. 127, 136 n.9, 290 A.3d 901 (2023).

[5] In its memorandum of decision, the trial court noted that, on November 6, 2019, ex parte orders of temporary custody were filed with respect to the parties' other two children, and the orders were sustained on November 19, 2019. On July 8, 2021, the court approved the permanency plans for a transfer of guardianship as to the parties' other two children, and, approximately one month later, it granted the motion to transfer guardianship to their maternal grandmother under six months of protective supervision, which later was allowed to expire on February 19, 2022. These two children are not the subject of this appeal.

forming the basis for the department's most recent involvement with the family. "[The respondent] reported that she has been stabbed by [Timothy] during an argument while the children were present inside the home. She sustained stab wounds to the face, neck, and chest area. While the knife was imbedded in her chest, [the respondent] checked on the children and she followed [Timothy] outside at which time [Timothy] pulled the knife out of her. [The respondent] called the police to report the assault and then called the paternal grandmother to come and care for the children. The children reported hearing [the respondent and Timothy] arguing but did not witness the assault. In her signed statement to the police, [the respondent] reported that [Timothy] had a knife and was threatening her, and that he intentionally stabbed her with the knife. [The department] was contacted by the police . . . [and the children were removed] from the home. [Timothy] was arrested . . . and a full no contact protective order was put in place with [the respondent] as the protected party. The protective order remains in place and does not have an expiration date."

The petitioner filed neglect petitions as to all four children on November 6, 2019, alleging that they were denied proper care and attention and were permitted to live under conditions, circumstances and/or associations injurious to their well-being. On that same date, the petitioner also filed ex parte orders of temporary custody. Ten days later, the court, *Sanchez-Figueroa, J.*, issued ex parte orders vesting temporary custody of the children in the petitioner and ordered specific steps for both the respondent and Timothy.[6] Following

[6] The respondent's specific steps included the following: "[K]eep all appointments set by or with [the department]; cooperate with [the department's] home visits, announced or unannounced, and visits by the children's court-appointed attorney and/or guardian ad litem; let [the department], your attorney, and the attorney for the children know where you and the children are at all times; take part in counseling and make progress toward the identified treatment goals as to individual and family with the specific

a hearing, the court sustained the orders of temporary custody on November 19, 2019.

Petitions to terminate the parental rights of the respondent and Timothy as to Denzel and Ariel were filed on September 9, 2021.[7] As to the respondent, the

goals creating and maintaining safe, stable, and nurturing home environment free from domestic violence/criminal activity; address trauma history and understand the impact on present functioning; understand the impact of domestic violence on children; understand the danger that individuals present to children and how to protect children from future abuse; identify your own specific risk factors and develop a personalized plan for preventing abuse in the future; do not get involved with the criminal justice system and understand the current protective orders value and purpose; cooperate with service providers recommended for parenting/individual/family counseling, in-home support services and/or substance abuse assessment/treatment: New Horizons, IPV Fair; accept in-home support services referred by [the department] and cooperate with them; cooperate with service providers recommended for parenting/individual/family counseling, cooperate with court-ordered evaluations or testing; sign releases allowing [the department] to communicate with service providers to check on your attendance, cooperation and progress towards identified goals, and for use in future proceedings in this court. Sign the release within 30 days; sign releases allowing your children's attorney and guardian ad litem to review your children's medical, psychological, psychiatric and/or educational records; get and/or maintain housing and a legal income; immediately let [the department] know about any change in the makeup of the household to make sure the change does not hurt the health and safety of the children; get and/or cooperate with restraining/protective order and/or other appropriate safety plan approved by [the department] to avoid more domestic violence incidents; attend and complete an appropriate domestic violence program; not get involved with the criminal justice system. Cooperate with the Office of Adult Probation or parole officer and follow your conditions of probation or parole; take care of the children's physical, educational, medical, or emotional needs, including keeping the children's appointments with their medical, psychological, psychiatric, or educational providers; cooperate with the children's therapy; make all necessary childcare arrangements to make sure the children are properly supervised and cared for by the appropriate caretakers; keep the children in the State of Connecticut while the case is going on unless you get permission from the [department] or the court to take them out of state. You must get permission first. Visit the children as often as [the department] permits; tell [the department] the names and addresses of the grandparents of the children."

[7] "Proceedings to terminate parental rights are governed by § 17a-112. . . . The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision

petitions alleged that, pursuant to § 17a-112 (j) (3) (B) (i), the two children previously had been adjudicated neglected and the respondent had failed to achieve such degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, given the ages and needs of these two children, the respondent could assume a responsible position in their lives.

A termination of parental rights trial was held on February 21, 23 and 27, 2023. The court, *Burgdorff, J.*, heard testimony from seven witnesses, including two department social workers, the respondent's therapist, three members of law enforcement, and a court-appointed psychologist. On April 19, 2023, the court issued a comprehensive memorandum of decision in which it terminated the parental rights of the respondent and Timothy as to Denzel and Ariel. After setting forth the procedural history and making the relevant jurisdictional findings, the court initially observed that it "has carefully considered the petitions, the criteria set forth in the relevant Connecticut General Statutes, the applicable case law as well as all of the evidence and testimony presented, the demeanor of [the respondent and Timothy], the demeanor and credibility of the witnesses, the credibility of [the respondent's and Timothy's] testimony, and the evaluation of their testimony with all other testimony and documentary evidence according to the standards required by law. The court was able to clearly listen to and observe all of the witnesses and determine the validity, cohesion, and the credibility of their testimony. The court thoroughly reviewed the documentary

(3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 806–807, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

evidence. On the basis of the clear and convincing evidence presented and for the reasons stated below, the court finds in favor of the petitions and hereby terminates the parental rights of the respondent . . . and . . . Timothy as to their children, Ariel and Denzel, for the reasons stated in detail [herein]."

Relevant to the adjudicatory phase of the termination proceeding,[8] the court concluded, by clear and convincing evidence, that the petitioner proved that the department had used reasonable efforts to locate the respondent and to reunify her with Denzel and Ariel prior to the filing of the petitions to terminate her parental rights.[9] It further determined that she had failed to achieve the degree of personal rehabilitation that would encourage the belief that, within a reasonable time considering the ages and needs of Denzel and Ariel, she could assume a responsible position in their lives. Specifically, the court stated: "While [the respondent] attended and engaged in her services, she has clearly failed to sufficiently benefit from the services and attain sufficient rehabilitation especially with regard to her long-standing domestic violence issues and ongoing voluntary

[8] "Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase." (Internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 476 n.5, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024); see also *In re Tresin J.*, 334 Conn. 314, 322–23, 222 A.3d 83 (2019).

[9] "Section 17-112 (j) (1) provides in relevant part that the Superior Court may grant a petition [for termination of parental rights] if it finds by clear and convincing evidence that . . . the [department] had made reasonable efforts to locate the parent and to reunify the child with the parent . . . *unless* the court finds . . . that the parent is unable or unwilling to benefit from reunification efforts . . . . In construing that statutory language, our Supreme Court has explained that [b]ecause the two clauses are separated by the word unless, this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. . . . [E]ither showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Autumn O.*, 218 Conn. App. 424, 432, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023).

relationship with [Timothy] which includes violations of the protective order. In addition, both [the respondent and Timothy] are clearly unwilling and unable to benefit from these reasonable efforts due to their failure to address their longstanding intimate partner violence issues which have placed Denzel and Ariel at risk. Significantly, they have not achieved sufficient insight as to their poor parenting skills and how their significant history of personal violence has negatively impacted the children. They have clearly put their own needs, and their clear intention to maintain a relationship with each other, over the safety, needs, and well-being of Denzel and Ariel."

In support of its conclusions, the court made the following relevant factual findings. The respondent's relationship with Timothy began in 2009, and they are the biological parents of four children. The respondent reported that domestic violence has occurred throughout the relationship and included both mental and physical abuse. She further acknowledged that the children have been exposed to intimate partner violence and that it likely has contributed to their behavioral issues; nonetheless, she stated that she and Timothy were "good parents."

Approximately eighteen months after the November 2, 2019 stabbing incident, the respondent "filed an amended police report regarding the domestic assault incident wherein she changed her statement and stated that she had the knife in her possession prior to the assault. She also stated that she did not believe that [Timothy] intended to stab her or hurt her." Furthermore, the department learned that the respondent and Timothy were in contact with each other, in violation of the protective order. Timothy was arrested in October, 2020, for violating the protective order as a result of his contact with the respondent. "[The department] confirmed that [Timothy] called [the respondent] from his

place of incarceration and they engaged in subterfuge to conceal their identities from prison staff. Telephone records from the prison confirmed that [the respondent] and [Timothy] were in contact with each other. They discussed the pending [department] case in addition to the domestic violence incident that led to [Timothy's] arrest in November, 2019, as well [as] plans on how [the respondent] was to bail out [Timothy]. They also discussed their ongoing commitment to one another. [The respondent] has consistently and repeatedly denied to [the department] that she has been in contact with [Timothy]."

Furthermore, both the respondent and Timothy were arrested on May 25, 2021, following a traffic stop in Hartford. Timothy was operating the respondent's motor vehicle, and she was a passenger. "[The respondent] denied her identity to the police at least several times during the stop and identified herself with her sister's name. [The respondent] was arrested for interfering and resisting as a result of this incident and a protective order was issued against [Timothy] with [the respondent] as the protected party. She falsely reported to the criminal court that she was not present in the vehicle which led to the charges being dropped. [The respondent] continued to lie about her presence in the car to [the department] and her service providers, as well as about her ongoing contact with [Timothy]. It was not until March, 2023, during her sworn testimony at the trial of this matter that [the respondent] admitted that she was in the car with [Timothy] on May 25, 2021. In addition, [the respondent] repeatedly denied having any contact with him or having a relationship with him since that time nor having any contact with him at his place of incarceration during 2019 to 2020, and most recently in July, 2022, when she was observed by family members with him in the community."

Pursuant to the court-ordered specific steps to facilitate the respondent's reunification with Denzel and Ariel, the department referred the respondent to a variety of services. During the period from 2018 to 2020, she struggled with attendance, but did make some progress and appeared engaged in the sessions she attended. Despite her reports to her provider to the contrary, she "was continuing to remain in contact with [Timothy] during his incarceration in violation of the full no contact protective order. She also continued to minimize the impact [that] the violence [in] their relationship with each other had on the children. In addition, [the respondent] has consistently told [the department] she wanted [Timothy] to be part of the children's lives."

From December, 2019, to July, 2020, the respondent participated in and successfully completed a domestic violence program. At the conclusion of the program, the provider determined that the respondent's ongoing risk was low to moderate but cautioned that her risk could increase to high if she engaged in contact with Timothy "prior to completion of her treatment recommendations and if she failed to demonstrate safe nonabusive behaviors for at least six months." The court observed: "[I]n violation of her specific steps, [the respondent] continued to remain in contact with [Timothy] while he was incarcerated and while attending the program." The respondent also participated in individual therapy starting in 2020. The department "was not able to determine if her treatment properly addressed [her conduct with respect to the May 25, 2021 Hartford arrest], or her ongoing voluntary contact with [Timothy]" because the releases the respondent signed were limited in nature. The respondent began another domestic violence program in January, 2023, shortly before the termination of parental rights trial.

Following the removal of the children in 2019, the respondent was offered weekly in person and remote

visitation via video chats. Because of issues that arose during these sessions, the department provided the respondent with suggestions on how to engage the children during the visits. "[Specifically, the respondent] relied on the use of electronics, including her cell phone, which negatively affected the children's behavioral needs and ability to maintain the children's behavior which often disrupted the visits. A notable concern was [the respondent] permitting Denzel to play a violent game on her phone . . . which depicted violence and blood from the use of a knife. The game is rated for children [thirteen] years of age and older. In addition, [the respondent] brought a 'fake' knife to a visit for Denzel. [The respondent] did not understand [the department's] concern in light of [Timothy's] knife attack on [the respondent] in 2019. [The respondent] minimized the content of the game and reported that Denzel had played the game since the age of three at their home. In addition, [the respondent] attempted to record the visits and interrogate the children at times regarding the foster parents which caused the children to feel conflicted and stressed. [The department] instructed [the respondent] not to bring her phone to the visits; however, she was observed using the phone on at least several occasions thereafter. Another concern was [the respondent] using her phone to allow her and the children to converse with [Timothy] via FaceTime on the phone during the visits." The behaviors of Denzel and Ariel regressed before and after their supervised visits with the respondent, including acting out at school and having tantrums.

In August, 2020, the respondent continued to struggle with her use of electronics and the children's behavioral needs during the visits. She would still bring her phone to the visits despite being instructed not to, and she would deny having done so. During the supervised visits

from September, 2020, to December, 2021, the respondent "appeared overwhelmed and unorganized . . . . She often struggled to assess the children's emotional needs and continued to struggle to recognize the impact of the trauma and removal on the children. She also struggled to incorporate the information she was provided during the sessions." Concerns remained regarding the respondent's missed sessions, inconsistency, and her difficulty in managing her work schedule and the children's appointments.

Ines M. Schroeder, a licensed clinical psychologist, conducted a court-ordered evaluation of the respondent, clinical interviews of the foster parents, developmental screenings of Denzel and Ariel, interactional evaluations between the respondent and the children, and interactional evaluations between the children and the foster parents. Schroeder contacted the respondent's service providers and reviewed the records provided by the court. In her evaluation, Schroeder noted that the respondent "was hampered by her inability to manage and process information well and react appropriately." Schroeder explained that the respondent "felt that she did not get the support she needed from [the department] and that they 'failed to help her' and expressed that '[t]hey are trying to break a family that wants to be a family. We have a great bond. It does not make sense to [terminate the parental relationship].' [Schroeder] opined that this was concerning as this was an indication that [the respondent] was including [Timothy] in the 'family.' She further noted that [the respondent] had maintained a very long relationship with [Timothy] despite her claim that he was manipulative and hurtful, and that she was used to the cycle of abuse in her relationships and that cycle was repeated for her as an adult. She further opined that [the respondent] . . . 'does not believe that there are relationships without the violence [and] emotional harm embedded.

. . . Sadly, [the respondent] failed [to] keep [the children] in a safe, consistent, stable environment due to the many changes where she lived, the intermittent violence in her relationship with their father, and inconsistency in care. . . . Even with services provided to [the respondent] about domestic violence and the impact to [the] children . . . she still indicated she was unsure how it affected them and felt that the behavioral issues were the only concern.' "

Next, the court stated that Schroeder had explained that, although the respondent had a general understanding of child development and expectations for independence, "she had limitations regarding her ability to understand their emotional and psychological needs as demonstrated by her allowing Denzel to play a violent video game which depicts intimate personal violence. She noted that this suggests [a] lack of insight on [the respondent's] part and that [t]his would be detrimental to the children to be in her care if she has a limited ability to grasp the psychological impact of the trauma to the children and ways to parent them effectively while providing emotional support. Significantly, [Schroeder] found that [the respondent] expressed that her children were treated well and [were] never in harm's way. She felt she kept them safe and minimized the incident when [Timothy] stabbed her with a knife despite her descriptions [suggesting] she was covered in blood and spoke to the children (with a knife sticking out of her) and left them inside alone. She also noted that [the respondent] denied [that] the incident in November, 2019, was an intentional act to her but accidental in nature and that the potential for [Timothy] to receive [twelve] years [of incarceration] due to the charges seemed excessive. In addition, [the respondent] reported that she and [Timothy] were strong parents and that [Timothy] was a good parent because he was willing to watch the children when she went to work.

[Schroeder] opined that [the respondent] failed to recognize the instability in her romantic relationship that led to the instability in the home for her children and this lack of insight would be detrimental to the children [being] in her care. [Schroeder] further opined that [the respondent] minimizes how the intimate personal violence minimized her strength as a parent and fails to understand how [Timothy's] actions can place her children at risk; she continues to struggle to understand how their cycle of violence over the years of their relationship created a chaotic and hostile environment that was unsafe for her children. She remains defensive in her posture and unable to successfully incorporate new information offered across programs. Notably, with regard to [the respondent's] relationship with [Timothy], [Schroeder] noted that [the respondent] denied any contact with [Timothy] since his release from prison and denied she was present . . . when they were arrested in [the respondent's] car in May, 2021." (Internal quotation marks omitted.)

The court found, by clear and convincing evidence, that the department had used reasonable efforts to locate the respondent and that it had made reasonable and ongoing efforts to reunify her with Denzel and Ariel prior to the filing of the petitions. See General Statutes § 17a-112 (j) (1). Next, it concluded that neither parent had adequately or timely taken advantage of these services.[10]

[10] Specifically, the court explained: "While [the respondent] attended and engaged in her services, she has clearly failed to sufficiently benefit from the services and attain sufficient rehabilitation especially with regard to her long-standing domestic violence issues and ongoing voluntary relationship with [Timothy], which includes violations of the protective order. In addition, both [the respondent and Timothy] are clearly unwilling and unable to benefit from these reasonable efforts due to their failure to address their long-standing intimate partner violence issues which have placed Denzel and Ariel at risk. Significantly, they have not achieved sufficient insight as to their poor parenting skills and how their significant history of personal violence has negatively impacted the children. They have clearly put their own needs, and their clear intention to maintain a relationship with each other, over the safety, needs and well-being of Denzel and Ariel.

The court then turned to the question of the failure to rehabilitate. See General Statutes § 17a-112 (j) (3) (B). It found that the petitioner had proved, by clear and convincing evidence, that Denzel and Ariel had been adjudicated neglected on November 17, 2020, and committed to the care of the petitioner. It further found that the "clear and convincing evidence also clearly shows that [the respondent] has failed to make sufficient progress in her services and continues to be unable to sufficiently and timely benefit from these services to enable her to reunify with her children." This conclusion was based on the physical neglect of the children, the respondent's inability to meet the children's basic needs for supervision, the exposure of the children to intimate partner violence, and the respondent's mental health issues.

"As also discussed in detail [previously], [the respondent] was offered a multitude of services which included case management, family team meetings, counseling, exploration and assessment of family resources, parenting services, individual therapy, intimate personal violence program, supervised visitation, administrative case reviews, bus passes and transportation, foster care services, [c]onsidered [r]emoval [f]amily [t]eam [m]eetings and referrals for children's therapy and education services. While she has attended most of her supervised visits with the children, she struggled with maintaining their behavior and allowed the children to converse with [Timothy] on [the respondent's] cell phone even after being instructed not to bring her phone to the visits. This behavior during the visits clearly demonstrated her failure to sufficiently engage in or benefit from her services with regard to her intimate personal violence and parenting issues in a timely manner to the extent that her children can safely return to her care. . . . In addition, [the respondent] has consistently put her relationship with [Timothy] ahead of her children's needs. She has demonstrated a clear lack of insight as to the risk her ongoing and voluntary relationship with [Timothy] has on the children as well as to herself during the pendency of this matter. As such, she clearly has not demonstrated sufficient rehabilitation to the extent that she can safely care for . . . Denzel and Ariel within a reasonable period of time. . . .

"The court finds by clear and convincing evidence that [the department] made reasonable efforts to locate [the respondent] . . . and to reunify [her with Denzel and Ariel], and, further that [she is] unable or unwilling to benefit from the reunification efforts. The court further finds that services offered to [the respondent] . . . were appropriate, reasonable, and timely offered to assist them with reunification with Denzel and Ariel." (Citation omitted.)

"The clear and convincing evidence also clearly shows that . . . [the respondent] has not demonstrated that she is able to provide her children with a safe, secure, and permanent home free from intimate personal violence at the present time nor into the foreseeable future. [The respondent] has also clearly demonstrated that she is unable and unwilling to benefit from reunification efforts as she has failed to sufficiently address her longstanding intimate partner violence issues which have placed the children at risk and caused them trauma. [The respondent] has consistently put her relationship with [Timothy] over and above the needs and well-being of Denzel and Ariel. It is clear to the court that she will continue to do so into the future. She was not forthcoming with her service providers as to her ongoing contact with [Timothy], including advising them of the [traffic stop] incident on May 25, 2021. The court is deeply troubled by [the respondent's] significant lack of insight as evidenced by her desire to maintain a relationship with [Timothy] and to keep him part of the 'family unit' which is further demonstrated by her ongoing willing violation of the court-ordered protective orders between them. Thus, she has clearly failed to benefit from the services in which she has engaged and will be unable to do so in the foreseeable future." Ultimately, the court determined that the respondent was no closer to being able to safely parent these two children than she was at the time of their removal in November, 2019, and that the children "simply cannot wait for [the respondent] to rehabilitate."

In the dispositional phase of the proceedings, the court made findings as to each of the seven factors set forth in § 17a-112 (k). It concluded, by clear and convincing evidence, that the termination of the respondent's parental rights was in the children's best interests. Accordingly, the court rendered judgments terminating her parental rights and appointing the petitioner as the children's

statutory parent for the purpose of securing their adoption as expeditiously as possible. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent first claims that the court improperly shifted the burden of proof on the issue of personal rehabilitation to her. Specifically, she argues that the court placed the burden of proof on her as evidenced by the statement in its memorandum of decision that she "has not demonstrated that she is able to provide her children with a safe, secure, and permanent home free from intimate partner violence at the present time nor in the foreseeable future." The petitioner counters that, "[w]hen taken as a whole, the trial court's decision demonstrates that the court required the [petitioner] to prove that [the respondent] failed to rehabilitate." We agree with the petitioner that the court did not shift the burden of proof on the issue of personal rehabilitation to the respondent.

At the outset, we identify the applicable standard of review. "The question of whether a trial court has held a party to a less exacting standard of proof than the law requires is a legal one. . . . Accordingly, our review is plenary. . . . Similarly, plenary review applies to a question of misallocation of a burden of proof. See . . . *Zabaneh* v. *Dan Beard Associates, LLC*, 105 Conn. App. 134, 140, 937 A.2d 706 (applying plenary review to plaintiff's claim that the [trial] court improperly required that it, rather than the defendant, bear the burden of proof regarding the existence of permission), cert. denied, 286 Conn. 916, 945 A.2d 979 (2008); *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 596–97, 930 A.2d 768 (applying plenary review to claim that although the court applied the clear and convincing standard of proof required to establish a fraudulent transfer, it did so to the wrong party), cert. denied, 284 Conn. 930, 934 A.2d

245 (2007). . . . Furthermore, if it is not otherwise clear from the record that an improper standard was applied, the appellant's claim will fail on the basis of inadequate support in the record." (Citations omitted; internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 452–53, 51 A.3d 334 (2012).

Additionally, "we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . Furthermore, [w]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) Id., 453; see also *Natasha B.* v. *Dept. of Children and Families*, 189 Conn. App. 398, 407, 207 A.3d 1101 (2019).

It is well established that the petitioner bore the burden of proving, by clear and convincing evidence, that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable amount of time, considering the ages and needs of Denzel and Ariel, she could assume a responsible position in their lives. See *In re Samantha C.*, 268 Conn. 614, 628–29, 847 A.2d 883 (2004); *In re Xavier H.*, 201 Conn. App. 81, 88, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705, and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020). Simply stated, "[t]he burden of proof is always on the state when it seeks to remove children from the home." (Internal quotation marks omitted.) *In re J.R.*, 161 Conn. App. 563, 570, 127 A.3d 1155 (2015).

The following details, as set forth in the court's memorandum of decision, inform our resolution of the respondent's claim. At the outset, the trial court specifically stated that it had, inter alia, "carefully considered" the criteria set forth in the General Statutes and the applicable case law. This controlling authority placed the burden of proof on the petitioner. At the start of

its discussion of the adjudicatory phase, the court expressly stated that "*the petitioner . . . is required to prove any one of the grounds alleged in the termination of parental rights petitions by clear and convincing evidence*." (Emphasis added.) In support of this statement, the court cited to controlling case law and a rule of practice indicating that the burden of proving, by clear and convincing evidence, a statutory ground to terminate parental rights rested with the petitioner.[11] These citations provide support for the conclusion that the trial court was aware of and applied the proper burden in this matter. See, e.g., *In re J.R.*, supra, 161 Conn. App. 570. The court then repeated the petitioner's burden of proof and specifically noted that it was obligated to strictly comply with the statutory criteria for the termination of parental rights.

The court also observed that the petitioner was required to prove by clear and convincing evidence that the department had used reasonable efforts to locate the respondent and that it made reasonable and ongoing efforts with respect to reunification prior to filing the termination petitions. This further evidenced the court's awareness of the proper allocation of the burden of proof and demonstrated that it applied the correct standard in the present case.

As to the issue of the failure to rehabilitate, the court found that the evidence "clearly and convincingly proves

[11] Specifically, the court cited to *In re Jacob M.*, 204 Conn. App. 763, 777, 255 A.3d 918 (in adjudicatory phase, trial court determines whether one of statutory grounds for termination of parental rights exists by clear and convincing evidence), cert. denied, 337 Conn. 909, 253 A.3d 43, and cert. denied, 337 Conn. 909, 253 A.3d 44 (2021), *In re Melody L.*, 290 Conn. 131, 148–49, 962 A.2d 81 (2009) (in order to terminate parental rights, petitioner required to prove, inter alia, by clear and convincing evidence that one of seven grounds for termination set forth in § 17a-112 (j) (3) exists), overruled on other grounds by *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014), and Practice Book § 35a-3 (when coterminous petitions are filed, judicial authority must determine whether statutory grounds exist to terminate parental rights by clear and convincing evidence).

. . . [that, as] of the conclusion of the trial of this matter,[12] [neither the respondent nor Timothy has] achieved the requisite degree of personal rehabilitation that would encourage the belief that within a reasonable period of time, considering Denzel's and Ariel's ages and needs, [the respondent and Timothy] could assume a responsible position in the children's lives, as required by . . . § 17a-112 [(j)] (3) (B)." (Footnote added.) It then stated: "[*The respondent*] *has not demonstrated that she is able to provide her children with a safe, secure, and permanent home free from intimate personal violence at the present time nor into the foreseeable future*." (Emphasis added.) Ultimately, the court concluded that the petitioner "has met [her] burden of proof as to this ground by clear and convincing evidence, that [the department] made reasonable efforts to locate and reunify [the respondent and Timothy] with Denzel and Ariel, and that [the respondent and Timothy] have been unable to benefit from reunification efforts."

On appeal, the respondent contends that the court's statement that she had failed to demonstrate her ability to provide her children with a safe, secure, and permanent home free from intimate personal violence at the present time or in the foreseeable future, indicates that the court improperly shifted the burden of proof from the petitioner to her. Specifically, she contends that the "directness of the trial court's language" coupled with other sections of the memorandum of decision establish the improper burden shifting and warrant a reversal of the court's judgment. We are not persuaded.

The respondent, as the appellant in this matter, bears the burden of establishing that the court applied an

[12] In its memorandum of decision, the trial court observed that it "may properly rely upon events occurring after the date of the petition when considering whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." See, e.g., *In re Damian G.*, 178 Conn. App. 220, 238–39, 174 A.3d 232 (2017), cert. denied, 328 Conn. 902, 177 A.3d 563 (2018).

incorrect legal standard, and we will not engage in speculation or presume such error. *In re Paulo T.*, 213 Conn. App. 858, 876, 279 A.3d 766 (2022), aff'd, 347 Conn. 311, 297 A.3d 194 (2023). Our appellate courts have recognized that a court's misstatement regarding the correct legal standard does not require a reversal and new proceeding in every instance. Id. Furthermore, we iterate that "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding. . . . [W]e read an ambiguous trial court record so as to support, rather than contradict, its judgment." (Citation omitted; internal quotation marks omitted.) *In re Jason R.*, supra, 306 Conn. 453.

In reviewing the memorandum of decision as a whole, we conclude that the court applied the proper burden of proof and required the petitioner to prove, by clear and convincing evidence, that the respondent had failed to achieve a sufficient degree of personal rehabilitation.[13] The court expressly stated that it had considered carefully, inter alia, the criteria set forth in the General Statutes, and the applicable case law in granting the petitions to terminate parental rights on the basis of clear and convincing evidence. The court repeatedly referred to the petitioner's burden of establishing the requirements for termination by clear and convincing evidence, as well as the applicable case law detailing the controlling precedent. For example, the memorandum of decision states: "The court is next called upon to determine whether [the petitioner] has met [her] burden of proving the allegations presented in the pending termination of parental rights petitions . . . . Pursuant to § 17a-112 et seq., during the adjudicatory phase

[13] We note that, at the outset of the trial, the court orally advised the respondent and Timothy: "Because the [petitioner] filed the termination of parental rights petitions and is asking the court to permanently sever your legal relationship with your children, it is up to the [petitioner] to prove [her] case at this termination of parental rights trial by clear and convincing evidence."

of a [termination of parental rights] proceeding, the petitioner . . . is required to prove any one of the grounds alleged in the termination of parental rights petitions by clear and convincing evidence." To this end, the court also observed that the department made reasonable efforts to reunite the respondent and the children and that, although she attended and engaged in such services, "she has clearly failed to sufficiently benefit from the services and attain sufficient rehabilitation especially with regard to her long-standing domestic violence issues and ongoing voluntary relationship with [Timothy], which includes violations of the protective order. . . . Significantly, they have not achieved sufficient insight as to their poor parenting skills and how their significant history of personal violence has negatively impacted the children. They have clearly put their own needs, and their clear intentions to maintain a relationship with each other, over the safety, needs and well-being of Denzel and Ariel."

Further, the petitioner offered testimony from department social workers, a psychologist, and police officers regarding the instances of intimate personal violence, the respondent's efforts to continue and conceal her relationship with Timothy, even after he had stabbed her, her inability to maintain control and meet the emotional needs of the children during visits, and her failure to comply with requests to not bring her cell phone and allow Denzel to play inappropriate video games during visits. On the basis of the evidence presented by the petitioner, the court concluded that she had met her burden with respect to the issue of the respondent's failure to rehabilitate. See *In re Jason R.*, supra, 306 Conn. 453–55.

Reading the court's decision as a whole, we conclude that it did not shift the burden of proving personal rehabilitation to the respondent. See *In re Fayth C.*, 220 Conn. App. 315, 325, 297 A.3d 601 (court's analysis

of party's failure to achieve sufficient personal rehabilitation, combined with citations to correct legal standard, evinces use of correct legal standard), cert. denied, 347 Conn. 907, 298 A.3d 275 (2023). After our careful review of the record, we are satisfied that, despite the court's isolated use of the imprecise language that forms the basis for the respondent's claim, the court applied the proper standard. The challenged language reflects the trial court's rejection of the respondent's evidence of personal rehabilitation after it had determined that the petitioner had met her burden with respect to this issue. See *In re Jason R.*, supra, 306 Conn. 455. The respondent's claim, therefore, fails.

II

The respondent next claims that the court improperly determined that she failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable period of time, considering the ages and needs of the children, she could assume a responsible position in the children's lives. Specifically, she argues that the last evidence of violence between her and Timothy occurred in 2019, and the department "had no hard evidence of contact between [Timothy and the respondent] after 2021" and, therefore, the evidence was insufficient to conclude that she had failed to achieve personal rehabilitation at the time of the trial in February, 2023. We are not persuaded by the respondent's sufficiency claim.

We begin our analysis by setting forth the relevant legal principles and our standard of review. With respect to the former, "[p]ersonal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to [her] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether

[she] has gained the ability to care for the particular needs of the child at issue. . . . An inquiry regarding personal rehabilitation requires us to obtain a historical perspective of the respondent's child-caring and parenting abilities. . . . Although the standard is not full rehabilitation, the parent must show more than any rehabilitation. . . . Successful completion of the petitioner's expressly articulated expectations is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. . . . [E]ven if a parent has made successful strides in [her] ability to manage [her] life and may have achieved a level of stability within [her] limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, [she] could assume a responsible position in the life of [her] children." (Citations omitted; internal quotation marks omitted.) *In re Fayth C.*, supra, 220 Conn. App. 319; see also *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015); *In re Serenity W.*, 220 Conn. App. 380, 396–97, 298 A.3d 276, cert. denied, 348 Conn. 902, 300 A.3d 1166 (2023).

Next, we set forth the applicable standard of review. "As clarified by our Supreme Court in *In re Shane M.*, [supra, 318 Conn. 587–88], the standard of review of a trial court's determination that a parent has failed to achieve sufficient rehabilitation is as follows: We have historically reviewed for clear error both the trial court's subordinate factual findings and its determination that a parent has failed to rehabilitate. . . . While we remain convinced that clear error review is appropriate for the trial court's subordinate factual findings, we now recognize that the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of

the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in . . . § 17a-112 (j) (3) (B). Accordingly, we now believe that the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Lil'Patrick T.*, 216 Conn. App. 240, 245–46, 284 A.3d 999, cert. denied, 345 Conn. 962, 285 A.3d 387 (2022); see also *In re Kyreese L.*, 220 Conn. App. 705, 720, 299 A.3d 296 (although reviewing courts apply evidentiary sufficiency standard of review to trial court's ultimate determination on question of whether parent has failed to rehabilitate sufficiently, clear error review applies to court's subordinate factual findings), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023); *In re Kylie P.*, 218 Conn. App. 85, 108, 291 A.3d 158 (same), cert. denied, 346 Conn. 926, 295 A.3d 419 (2023).[14]

[14] As we noted in *In re Kyreese L.*, supra, 220 Conn. App. 720 n.8, "[p]rior to *In re Shane M.*, supra, 318 Conn. 569, courts had applied the clear error standard of review both to a trial court's determination that a parent failed to rehabilitate and to that court's subordinate factual findings." In her appellate brief, the respondent argues that, "[f]or a variety of reasons, the respondent asserts that the standard of review as established by our Supreme Court in *In re Shane M.*, should be replaced by the former clear error standard. . . . The respondent is aware, however, that this court is not capable of overturning Supreme Court precedent. This challenge is raised for the purpose of review upon the grant of a petition for certification should it be necessary. The respondent presents her argument to this court under the sufficiency standard articulated by our Supreme Court." (Citation omitted.) It is axiomatic that this court, as an intermediate body, is bound by the precedent from our Supreme Court and is unable to modify it. *In re Kyreese L.*, supra, 720 n.8; see also *In re Niya B.*, 223 Conn. App. 471, 490 n.19, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024); *In re Lil'Patrick T.*, supra, 216 Conn. App. 246 n.4.

Furthermore, "[i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the [judgment of the trial court] . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 362–63, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

In the present case, the court found that the department's involvement with this family commenced in 2012 and included fourteen referrals regarding physical neglect of the children, an inability to meet their basic needs for supervision, and exposure to intimate partner violence and mental health issues. As previously noted, the department's "most recent involvement with this family began in November, 2019, with the primary concerns of ongoing intimate partner violence . . . and the children's continuous exposure to the violence, resulting in their physical and emotional neglect, in addition to the children's exposure to [Timothy's] ongoing substance abuse issues while in a caretaking role for the children." The respondent reported that domestic violence issues occurred throughout her relationship with Timothy, which began in 2009. "She also reported that the police were called frequently to their home and multiple protective orders were issued by the court with [the respondent] as the protected person." Despite this history, however, the respondent described herself and Timothy as "good parents."

We emphasize that Denzel and Ariel were present in the home at the time of the November, 2019 stabbing of the respondent by Timothy, which resulted in wounds to the respondent's face, neck, and chest area. Although the children did not witness the physical attack, the respondent checked on the children while the knife was imbedded in her chest. At that time, the respondent reported that Timothy, in possession of a knife, intentionally had stabbed her. Timothy was arrested and a full no contact order was issued. In March, 2021, however, the respondent filed an amended police report in which she changed her statement, claiming that she had the knife prior to the assault, and Timothy had not intended to stab or hurt her.

Additional violations of the protective order followed. The respondent and Timothy communicated by telephone during his incarceration, and their discussions involved the pending department case, the November, 2019 stabbing, the respondent's plans to "bail out" Timothy, and "their ongoing commitment to each other." Despite phone records of these communications, the respondent "has consistently and repeatedly denied to [the department] that she has been in contact with [Timothy]." On May 25, 2021, the police stopped a motor vehicle driven by Timothy with the respondent in the passenger seat. The respondent attempted to deceive the police officers as to her identity, and repeated this falsehood to the criminal court, the department, and her service providers. Family members observed the respondent with Timothy in July, 2022, in violation of the protective order. Despite her participation in various programs and individual therapy,[15] the evidence supports the court's conclusions that

[15] We emphasize that "it is well settled that [a] determination with respect to rehabilitation is not solely dependent on a parent's technical compliance with specific steps but rather on the broader issue of whether the factors that led to the initial commitment have been corrected." (Internal quotation marks omitted.) *In re Blake P.*, 222 Conn. App. 693, 708, 306 A.3d 1130 (2023).

she continued her relationship with Timothy, despite the negative effects on the children and in violation of the specific steps, and that she consistently has indicated to the department that "she wanted [him] to be part of the children's lives." She also has made multiple attempts to conceal this relationship.

Furthermore, the court found that the respondent relied on electronic devices, including her cell phone, during visits with the children, which negatively impacted their behavior. She also brought a "fake" knife to a visit, and allowed Denzel, to play a violent video game depicting blood from the use of a knife. Despite directions to not bring the phone to her in person visits with the children, the respondent did so on several occasions and used it to FaceTime with Timothy, again violating the protective order.

Schroeder, who conducted the evaluations, expressed concern that the respondent was including Timothy as a member of the family based on her beliefs that the department had failed to provide support and help her, and that it was attempting to break up the family. "She further noted that [the respondent] had maintained a very long relationship with [Timothy] despite her claim that he was manipulative and hurtful, and that she was used to the cycle of abuse in her relationships . . . ." Schroeder further opined that the respondent remained "unsure" as to how this violence affected the children. Schroeder also noted that the respondent minimized the November, 2019 stabbing, despite the fact that she was "covered in blood and spoke to the children (with a knife sticking out of her) . . . ." The respondent denied that the assault was intentional and questioned the necessity for Timothy to receive a period of incarceration of twelve years. Schroeder indicated that the respondent's failure to recognize the instability of her relationship with Timothy would be detrimental to Denzel and Ariel. Finally, the November, 2022 addendum

to the termination of parental rights social study stated that "family members have seen [the respondent and Timothy] both out together in the community, most recently as [July, 2022]."

On the basis of this evidence, the court found, by clear and convincing evidence, that the petitioner proved that the respondent had not achieved the requisite degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, considering the ages and needs of Denzel and Ariel, she could assume a responsible position in their lives. The court focused on the intimate partner violence issue, as well as the issue of the respondent placing her relationship with Timothy over the needs and well-being of Denzel and Ariel, and concluded that she will continue do to so in the future. It also noted her ongoing lack of recognition of the negative aspects of her relationship with Timothy.

We conclude that sufficient evidence existed in the record to support the court's determination of failure to rehabilitate. The respondent's continuing efforts to maintain her relationship with Timothy despite the significant history of intimate partner violence, coupled with her efforts to conceal this relationship from the department, her providers, and the police, support the court's conclusion that she has failed to address these issues that placed the children at risk of trauma, and that she will continue to do so in the future. A failure to acknowledge and address the underlying personal issue that formed the basis for the department's concerns indicates a failure to achieve a sufficient degree of rehabilitation. See *In re Angelina S.*, 223 Conn. App. 52, 67, 306 A.3d 1185 (2023), cert. denied, 348 Conn. 950, 308 A.3d 549 (2024); see also *In re A'vion A.*, 217 Conn. App. 330, 352, 288 A.3d 231 (2023).

We are not persuaded by the respondent's argument that the court's conclusion was improper because the

last evidence of intimate partner violence occurred in 2019, the last evidence of contact between the respondent and Timothy was in 2021, and the psychological report was based on the conditions as they existed in December, 2021. The evidence reflects that the domestic violence issues have existed consistently throughout this relationship, which began in 2009, and that the respondent has continued to prioritize and maintain her relationship with Timothy, despite its negative effects on Denzel and Ariel. Further, the evidence reflects that she actively has attempted to conceal the relationship from the department and others. Finally, we note that the record contains evidence, which the court was free to credit, that the respondent and Timothy were seen together in the community in July, 2022. This evidence and the reasonable inferences drawn therefrom support the court's conclusion that the respondent has failed to rehabilitate. See *In re Nevaeh G.-M.*, 217 Conn. App. 854, 878–80, 290 A.3d 867 (evidence that respondent was incapable of, or chose to ignore safety plans and protective orders, repeatedly mislead department and others about her continued relationship with individual who had committed acts of intimate partner violence, and despite awareness of potential physical and psychological harm to children that might result from their presence during incident of intimate partner violence, respondent repeatedly failed to take reasonable steps to minimize risk of exposure to additional acts of intimate partner violence, supported conclusion that respondent had failed to rehabilitate), cert. denied, 346 Conn. 925, 295 A.3d 418 (2023); see also *In re Blake P.*, 222 Conn. App. 693, 709–710, 306 A.3d 1130 (2023) (despite ending relationship, respondent's failure to understand or gain insight as to how intimate partner violence issues impacted her role as mother and, notwithstanding her participation in certain programs, coupled with pattern of intimate partner violence relationships, supported

court's conclusion that petitioner had demonstrated by clear and convincing evidence respondent could not exercise judgment necessary to keep child safe and healthy).

For these reasons, we conclude that the respondent cannot prevail on her claim that the court's determination that she failed to rehabilitate was not supported by the evidence.

The judgments are affirmed.

In this opinion the other judges concurred.

MODZELEWSKI'S TOWING & STORAGE, INC., ET AL. *v.* COMMISSIONER OF MOTOR VEHICLES ET AL.
(AC 45605)

Moll, Cradle and Westbrook, Js.

Syllabus

The plaintiff licensed motor vehicle dealers and repairers, T Co. and R Co., appealed to this court from the judgment of the trial court dismissing their administrative appeal from the final decision of the defendant Commissioner of Motor Vehicles, who determined that the plaintiffs had overcharged the owner of a damaged tractor trailer for certain nonconsensual towing and recovery services. The plaintiffs had been summoned by the state police to provide towing and recovery services after the tractor trailer, which was insured by the defendant S Co., was damaged in an accident on Interstate 84. The plaintiffs used special equipment to clear the tractor trailer from the highway and tow it to the plaintiffs' storage facility where it remained for twenty-eight days. The plaintiffs subsequently charged the owner of the tractor trailer for the towing and recovery services, which S Co. paid. S Co. thereafter filed a complaint with the Department of Motor Vehicles, claiming that the plaintiffs' charges were unreasonable and excessive in light of industry standards and the department's regulations (§ 14-63-34 et seq.) governing charges for nonconsensual towing and recovery services. After a hearing, a department hearing officer, relying on §§ 14-63-36b and 14-63-36c of the regulations, issued a decision, concluding that the plaintiffs had overcharged for their services, and ordering them to pay restitution to S Co. and a civil fine to the department. The hearing officer reasoned

that the plaintiffs had established their own rate schedule based on the equipment they had used and charged for equipment using their rate schedule rather than the department's approved hourly rate for labor schedule. The hearing officer also declined the plaintiffs' request to dismiss S Co.'s complaint as to R Co., which was based on the plaintiffs' claim that R Co. was a separate entity that did not participate in the towing and recovery services involving the tractor trailer. On appeal, the trial court issued an initial decision agreeing with the hearing officer's interpretation of the applicable regulations but remanded the matter for further findings as to several issues, including whether the plaintiffs had posted an appropriate sign in their workplace setting forth their labor charges, whether they had submitted invoices consistent with the labor charges and, if so, which ones could be considered labor and which of the labor charges also included an equipment charge. The hearing officer thereafter issued a supplemental decision addressing those issues, and the trial court rendered judgment dismissing the plaintiffs' appeal. *Held*:

1. This court found unavailing the plaintiffs' claim that the trial court improperly concluded that, because the charges they levied were not based on an hourly rate, they were violative of the applicable regulations: although the plaintiffs contended that the regulations did not require that rates for exceptional services be based solely on labor but may include a charge for the special equipment used to perform those exceptional services, the plaintiffs' use of a ratio of factors, such as depreciation, insurance, maintenance and the cost of equipment, to determine their rates for equipment usage was violative of the regulations, which did not provide for the inclusion of those factors in setting an hourly rate for exceptional services but, rather, permitted only an hourly charge for exceptional services that was based on labor; moreover, because the plaintiffs did not maintain a breakdown as to which portion of their charges was based on labor and which portion was based on the cost of equipment, there was no evidentiary basis on which their charges could be found to constitute regulatory compliant labor charges.
2. The plaintiffs could not prevail on their claim that the trial court improperly concluded that the rate schedule they posted in their workplace did not comply with the applicable regulation (§ 14-65j-3): the rate schedule did not comply with § 14-65j-3 in form, as some of the listed items indicated a per hour price, others indicated a minimum number of hours and others stated a dollar amount, and, because the words labor, storage or diagnosis did not appear on the schedule, the hourly labor rate for those items could not be ascertained; moreover, the schedule did not comply with § 14-65j-3 in substance, as the only reasonable conclusion regarding items that listed a piece of equipment and an hourly rate or a dollar amount without specifying whether that amount was a labor, storage or diagnosis charge was that those charges were simply equipment charges.

3. There was substantial evidence in the record to support the imposition of a civil fine against the plaintiffs, as they improperly billed S Co. for equipment charges, for which there was no support in the regulations, failed to maintain accurate records to justify or explain those charges, billed S Co. for items not listed on the plaintiffs' own rate schedule and charged an administrative fee, which was not permitted under the regulations; moreover, this court disagreed with the plaintiffs' claim that, because they had raised a bona fide issue as to the interpretation of the regulations, which have not been subject to judicial review, the fine could not have been based on the commissioner's assertion that the plaintiffs' charges were excessive, as the regulations plainly do not permit towing companies to levy equipment charges, and, although § 14-63-36c of the regulations entitles towing companies to an additional charge for labor, it does not mention equipment costs; furthermore, the plaintiffs' contention that the commissioner's reasoning underlying imposition of the fine was based on an incorrect assertion that prior determinations by our Supreme Court that fees based on equipment charges were impermissible was unavailing, as there was no indication in the record that the hearing officer had relied on those cases, our Supreme Court has not addressed the issue pertaining to equipment charges for nonconsensual tows, and the hearing officer's decision regarding the fine clearly was linked to his conclusion that the plaintiffs had charged fees in excess of those permitted.
4. Contrary to the plaintiffs' claim, the trial court did not err in concluding that the hearing officer properly declined to dismiss S Co.'s complaint as to R Co.: substantial evidence in the record supported the hearing officer's finding that R Co. was involved in the tow at issue, including the plaintiffs' invoice to S Co., the check paid to and presumably cashed by the plaintiffs, and the fact that those documents seemed to use the corporate names of the entities interchangeably or names that were not formally affiliated with either entity; moreover, there was no documentary evidence to support the plaintiffs' assertion that none of the wreckers used at the accident scene was registered to R Co., the plaintiffs having acknowledged that their invoice to S Co. failed to identify which wreckers were used at the accident scene, as required by statute (§ 14-66b); furthermore, there was no merit to the plaintiffs' assertion that the commissioner had all but conceded R Co.'s lack of involvement because R Co. was not named in any documentation in the record, as the documents cited by the hearing officer, which also did not name T Co., did not mean that T Co. was not involved in the tow.

Argued January 11—officially released May 14, 2024

Procedural History

Appeal from the decision of the named defendant ordering the plaintiffs to pay to the defendant Sentry

Select Insurance Company restitution for alleged overcharges for towing and recovery services, and to pay a civil penalty to the Department of Motor Vehicles, brought to the Superior Court in the judicial district of New Britain, where the action was withdrawn as to the defendant Sentry Select Insurance Company; thereafter, the case was tried to the court, *Hon. Henry S. Cohn*, judge trial referee; subsequently, the court remanded the case to the named defendant for further findings; thereafter, the named defendant's hearing officer issued a supplemental decision; subsequently, the court denied the plaintiffs' motion to remand the case to the named defendant for further proceedings and rendered judgment dismissing the appeal; thereafter, the court issued a clarification of its decisions, and the plaintiffs appealed to this court. *Affirmed.*

Jesse A. Langer, with whom, on the brief, was *Jeffrey D. Bausch*, for the appellants (plaintiffs).

Drew S. Graham, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (named defendant).

Opinion

CRADLE, J. The plaintiffs, Modzelewski's Towing & Storage, Inc., and Modzelewski's Towing & Recovery, Inc., appeal from the judgment of the trial court dismissing their appeal from the final decision of the named defendant, the Commissioner of Motor Vehicles (commissioner), concluding that the plaintiffs had violated the regulations established by the commissioner governing permissible fees for the nonconsensual towing[1]

[1] General Statutes § 14-66 (h) defines a nonconsensual tow as the "towing or transporting of a motor vehicle in accordance with the provisions of section 14-145 or *for which arrangements are made by order of a law enforcement officer* or traffic authority, as defined in section 14-297." (Emphasis added.) We note that, at the time of the underlying incident on December 4, 2014, subsection (h) of § 14-66 was codified as subsection (g) of § 14-66. Subsection (g) subsequently was redesignated as subsection (h) of § 14-66. See Public Acts, Spec. Sess., June, 2015, No. 15-5, § 163. Because

and storage of motor vehicles and ordering the plaintiffs to make restitution to the defendant Sentry Select Insurance Company (Sentry),[2] and to pay a civil penalty to the Department of Motor Vehicles (department). On appeal to this court, the plaintiffs claim that the trial court improperly concluded that (1) the fees charged for the tow at issue were in conflict with § 14-63-36b (4) and (5), and § 14-63-36c (c) of the Regulations of Connecticut State Agencies; (2) their posted rate schedule did not comply with § 14-63-36b (4) and (5), and § 14-63-36c (c) of the regulations; (3) the department properly imposed a civil penalty of $4000 against them; and (4) substantial evidence supported the inclusion of Modzelewski's Towing & Recovery, Inc., as a respondent in the underlying administrative proceedings.[3] We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiffs' claims. The plaintiffs are licensed motor vehicle dealers and repairers. On December 4, 2014, the plaintiffs were summoned by the Connecticut State Police to perform recovery and towing services involving a tractor trailer in connection with an accident that had occurred on Interstate 84 in Danbury. The tractor trailer, which was severely damaged and had become wedged beneath the metal guardrail, was owned by David Tuttle doing business as Big

that redesignation and subsequent amendments to the statute; see Public Acts 2022, Public Acts 2022, No. 22-141, § 1; Public Acts 2022, No. 22-44, § 12; have no bearing on the merits of the plaintiffs' appeal, we refer to the current revision of § 14-66 in this opinion. See also Regs., Conn. State Agencies § 14-63-34 (b).

[2] Although Sentry was named as a defendant in the plaintiffs' administrative appeal to the Superior Court, the appeal was withdrawn as to Sentry on October 20, 2023.

[3] We note that the plaintiffs' brief to this court is not a model of clarity in that the arguments contained in the body of the brief do not necessarily correspond to the plaintiffs' stated claims. We therefore have reframed the plaintiffs' claims "to more accurately reflect the arguments set forth in the body of the [plaintiffs'] brief." *Doe* v. *Quinnipiac University*, 218 Conn. App. 170, 173 n.4, 291 A.3d 153 (2023).

Daddy Trucking of Waymart, Pennsylvania (Big Daddy), and was insured by Sentry. Upon receiving the call from the state police, the plaintiffs dispatched to the scene a 1075 rotator truck, an Occupational Safety and Health Administration (OSHA) rigging supervisor, a scene supervisor and a major response truck that contained equipment to handle debris and leaks. The plaintiffs used the 1075 rotator truck, which had been set up on an OSHA certified platform, to disentangle the tractor trailer from the metal guardrail. Within approximately one hour, the plaintiffs cleared the tractor trailer and debris from the highway and towed the tractor trailer to a nearby parking lot to further secure the vehicle for towing to the plaintiffs' storage facility. The tractor trailer remained at the storage facility for twenty-eight days.[4] The plaintiffs invoiced Tuttle for towing, recovery

[4] The plaintiffs alleged that, "[a]s a result of the severe damage, [Modzelewski's Towing & Storage, Inc.] was forced to call in support equipment . . . [which] included [a] man lift, which was necessary to detach the air dam that was at a height of fourteen feet, which exceeded the legal clearance height . . . [a] heavy duty flatbed, which was necessary to transport the [forty] foot man lift . . . [a] lowbed trailer with tractor unit, which was necessary to transport the severely damaged tractor portion of the Big Daddy unit . . . [and an] extra tractor, which was necessary to transport the trailer portion of the Big Daddy unit." The plaintiffs alleged that it "harnessed two certified operators to the man lift basket and proceeded to rig foundry hooks to each corner of the damaged air dam and tractor roof . . . used spill kits to contain the release of fuel leakage from the tractor . . . [and] used the 1075 rotator to lift the air dam from the tractor roof and placed it on the ground next to the damaged tractor." According to the plaintiffs, "[d]uring that process, [Modzelewski's Towing & Storage, Inc.] noticed a puncture in the fuel tank and utilized a diesel pump off system to evacuate the fluids into a certified containment drum." The plaintiffs "used the 1075 rotator to lift the tractor onto the lowbed trailer, which was positioned underneath the raised tractor, and secured the tractor thereto. [Modzelewski's Towing & Storage, Inc.] placed the detached air dam in the Big Daddy trailer, which was coupled to [Modzelewski's Towing & Storage, Inc.'s] extra tractor." The plaintiffs "installed a 4000 watt lighting system to provide a safe and illuminated work space [and] . . . utilized communications equipment throughout the continued recovery to ensure safety and efficient coordination." The plaintiffs explained that Modzelewski's Towing & Storage, Inc., "secured the Big Daddy tractor at the storage facility and left it on the lowbed trailer overnight. . . . The next day, December 5, 2014, [Modzel-

and storage services in the amount of $29,339. Sentry paid the invoice in total, under duress, to secure the release of the tractor trailer and filed an administrative complaint with the department, contesting the reasonableness of the fees charged by the plaintiffs on the grounds that they were "unreasonable, excessive and not keeping within industry standards or the Connecticut standards for nonconsensual towing or transportation, further codified in §§ 14-63-34 to 14-63-37b of the Regulations of Connecticut State Agencies."

On August 28, 2020, after a hearing, the department's hearing officer issued his decision with respect to Sentry's complaint. The hearing officer first indicated that, because Modzelewski's Towing & Storage, Inc., and Modzelewski's Towing & Recovery, Inc., are both owned and operated by James E. Modzelewski, his decision would reference the two entities as a single entity for purposes of the administrative appeal. The hearing officer explained that the plaintiffs had asked that the case be dismissed as to Modzelewski's Towing & Recovery, Inc., because it was not involved in the tow at issue. The hearing officer denied that request on the ground that the invoices submitted to Sentry "were entitled Modzelewski's Recovery, Inc." As to Sentry's challenge to the reasonableness of the invoiced fees, the hearing officer explained that, "[r]ather than using and charging the approved rates, the [plaintiffs] established, posted and used [their] own rate schedule based on [the] equipment [used]. The [plaintiffs] charged for equipment using [their] schedule, as opposed to using the approved hourly rate for labor schedule." On that basis, the hearing officer concluded that the plaintiffs had overcharged

ewski's Towing & Storage, Inc.] utilized the 1075 rotator and certified riggers to remove the damaged tractor from the lowbed trailer and secure it at the storage facility. This process took approximately 2.5 to three hours." Although Sentry challenged below the reasonableness and necessity of some of the measures taken by the plaintiffs, neither the hearing officer nor the court reached those arguments, and they are not at issue in this appeal.

Sentry and ordered the plaintiffs to repay Sentry $24,687.22 as restitution and, also, imposed a civil penalty of $4000 against the plaintiffs. The plaintiffs appealed to the Superior Court.

On July 1, 2021, after a hearing, the court, *Hon. Henry S. Cohn*, judge trial referee, issued a decision agreeing with the hearing officer's interpretation of the applicable regulations, concluding that § 14-63-36c (c) of the regulations states that "the towing company is entitled to an additional charge for its 'labor' and does not mention equipment costs." The court found "problematic," however, the hearing officer's determination that, "[r]ather than using and charging the approved rates, the [plaintiffs] established, posted and used [their] own rate schedule based on [the] equipment [used]. The [plaintiffs] charged for equipment using [their] schedule, as opposed to using the approved hourly rate for labor schedule." Specifically, the court found it unclear whether the hearing officer meant that the plaintiffs were required to bill in accordance with the commissioner's approved rates even though § 14-63-36c (c) permits the towing company to use their own labor rate for exceptional services. The court also noted that the hearing officer failed to address whether the plaintiffs had posted a labor schedule in accordance with the regulations. Additionally, the court found problematic the hearing officer's statement that the plaintiffs charged only for equipment, not labor. The court explained: "The existing record is ambiguous on this point. The invoices state that the plaintiffs 'used'[5] certain equipment to remedy the situation at the scene and sets forth a charge. . . . There is nothing in the record or in the final decision to explain whether each charge was for their labor or the equipment itself or both. [Modzelewski's] testimony at the department's hearing of January 10, 2020,

[5] The court noted that "[t]he word 'use' has been defined as the 'act of using something' in Webster's Third International Dictionary."

is ambiguous. While he sets forth how he calculated the equipment charge, and did not include labor, he then states that he did bill on the basis of labor." (Footnote altered.) Finally, the court held that, "even if the plaintiffs may claim that some or all of their charges are due to a properly posted labor schedule, the hearing officer may reject any or all of the billed charges as not reasonable or necessary. This is not discussed in the final decision." Accordingly, the court remanded the matter to the department to address three issues: (1) whether the plaintiffs had posted an appropriate sign in their workplace setting forth labor charges; (2) whether the plaintiffs had submitted invoices consistent with the labor charges, and, if so, which ones may be considered labor, and which of the labor charges also included an equipment charge; and, (3) assuming that there are labor charges, whether those charges are reasonable and necessary. The court noted that, "[i]n its discretion, the department may need to conduct a further hearing."

On November 18, 2021, the hearing officer issued a written decision in response to the court's remand. Preliminarily, the hearing officer declined to "[reopen the] case for a limited remand hearing" because the parties had been afforded "ample opportunity" to introduce evidence "without restriction." The hearing officer then responded to the court's directions on remand. In addressing the court's inquiry about whether the plaintiffs had posted an appropriate sign in their workplace setting forth their labor charges, the hearing officer explained: "The plaintiffs did not post an appropriate sign or signs in [their] workplace setting forth [their] allowed labor charges. The rate schedule posted [by the plaintiffs], beyond what in part appear to be hourly labor charges in five categories (Certified Driver, Certified Man Power, Clean-Up Supervisor, Extra Man, Rigging Supervisor), is not a schedule of hourly charges for labor. Consistent with the hearing decision, labor

charges are permitted labor charges for nonconsensual tows as allowed by statute and regulation. According to the testimony of [Modzelewski], these fees were posted in his office and included fees for what he considered exceptional services. [Modzelewski testified that, in] arriving at these rates, 'the exceptional services and the specialized recovery equipment is not used every day. So, we take a ratio of what the equipment costs, the depreciation, the insurance, the maintenance, obviously the cost of the equipment, and we put that together and we come up with a rate for that piece of equipment.' . . . Upon later questioning by [the plaintiffs' counsel], he admitted that the fees did not include charges for individual labor, but the charges or fees did include the vehicle and the operator. . . . In response to [a] question [from the commissioner's counsel], 'do you have a numerical breakdown for each, how much did you charge for the operator or how much you charged for the equipment? . . . do you have a breakdown for each?' . . . his response was, 'I don't.' . . . In this case, where the plaintiffs did not charge, itemize separately, and keep an accurate record of such additional services, expressed in the form of an hourly labor rate, it was disallowed by the [commissioner]. Whether or not a charge is viewed as an exceptional service is not material. It still needs to be calculated on the basis of an hourly labor rate." (Citations omitted.)

The hearing officer then addressed the issue of whether the plaintiffs had submitted invoices "in keeping with the labor charges," which of the charges may be considered labor charges, and whether some of the labor charges also include an equipment charge. The hearing officer explained: "Evidence in the hearing record . . . is the invoice in this case. This invoice is not a record for services related to the tow itemized in accordance with the hourly charge for labor other than, again, where it was found to be expressed as an hourly

labor charge as opposed to an equipment charge. When the plaintiffs' invoice listed a charge that was found to be consistent with an hourly labor charge, such as the scene supervisor, it was an allowed charge. When the plaintiffs' invoice listed a charge that was found to be an equipment charge and not an hourly labor charge, such as the 75 ton rotator, it was disallowed. When the plaintiffs' invoice listed a charge that was neither an hourly labor charge nor an equipment charge, such as the 10 percent administration billing fee, it was disallowed. Whether some of the equipment charges also included labor charges cannot be determined, and the plaintiffs failed to provide evidence on that issue. The core issue remains [that] charges must be at hourly labor rates. As to the question of whether some of the labor charges also include an equipment charge, my analysis of the evidence was [that] some of the equipment charges may also include labor charges, but evidence was lacking to confirm this, as hourly labor rates were not recorded." (Citation omitted.)

And, finally, the hearing officer addressed the court's third issue, namely, assuming that there are charges for labor, whether those charges are reasonable and necessary. The hearing officer found: "Where the evidence demonstrated an hourly labor charge that was found to be reasonable and necessary, it was approved. Other than what was provided on the invoice . . . it was admitted that there was no record kept of hourly labor charges." (Citation omitted.) The hearing officer found the total allowed charges to be $4651.78, and listed each of the claimed charges set forth on the plaintiffs' invoice and indicated whether it was allowed, and in what amount, or disallowed as an equipment charge and whether the rate was listed in the plaintiffs' rate schedule.[6] The hearing officer explained: "The

[6] Specifically, the hearing officer addressed each of the charges levied against Sentry as follows:

"Total charges found to be allowed were $4651.78. As to the invoice listed charges . . .

plaintiffs in this case viewed many of the charges as exceptional services, [as] enumerated in testimony by

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"*Scene Supervisor, listed as $250.00 x 4, total charge $1,000 + tax = $1063.50 allowed as a charge calculated at an allowable hourly labor rate;

"*75 Ton Rotator First Hour, listed as $1750.00 x 1, and 75 Ton Rotator listed as $ 750.00 x 3, total charge $ 4000.00 + tax = $4254.00 disallowed as not found to be calculated at an approved hourly labor rate; nonetheless allowed $325.00 x 4, total allowed charge $1300.00 + tax = $1382.55, based on [the commissioner's] approved rates . . .

"*OSHA Rigging Supervisor, listed at $250.00 x 4, total charge $1000.00, disallowed as evidence was wreckers for towing vehicles are exempt from OSHA riggers. . . . No evidence to the contrary was produced at the hearing . . .

"*Major Response Incident Truck, listed as $750.00 x 4, total charge $3000.00 + 6.35% = $3190.50, disallowed as found not to be calculated at an approved hourly labor rate;

"*Heavy Duty Flatbed, listed at $325.00 x 4, total charge $1300.00 + tax = $1382.55, disallowed as found to be an equipment charge, and [the commissioner's] rates and charges applicable are charges based on distance and vehicle weight;

"*45 Ft Man Lift, listed at $450.00 x 4, total charge $1800.00+ tax = $1914.30, disallowed as found not calculated at an approved hourly labor rate, and not listed in [plaintiffs'] rate schedule;

"*Communications Systems, listed as $175.00 x 4, total charge $700.00 + tax = $744.45, disallowed as found to be an equipment charge, and not listed in [plaintiffs'] rate schedule;

"*Light Tower, listed as $175.00 x 4, total charge $700.00 + tax = $744.45, disallowed as found to be an equipment charge;

"*Low Bed Trailer, listed as $325.00 x 4, total charge $1300.00 + tax = $1382.55, disallowed as found to be an equipment charge;

"*Tractor Unit, listed as $325.00 x 4, total charge $1300.00 + tax = $1382.55, disallowed as found to be an equipment charge, and there was no evidence it was an hourly labor rate;

"*Diesel Pump Off, listed as $800.00, total charge $800.00 + tax = $850.80, disallowed as found to be an equipment charge, with no evidence it was an hourly labor rate charge;

"*Spill Kit, listed as $55.00 x 5, total charge $275.00 + tax = $292.46, disallowed as found to be an equipment charge;

"*Fuel Surcharge, listed as $50.00 x 6, total charge $300.00 + tax = $319.05, disallowed with exception of $4.00 + tax = $4.25, consistent with the decision in DMV case No. CCC-2011-1587, dated May 28, 2013, also involving [these plaintiffs] . . .

"*Truck Cover, listed as $110.00, total charge $110.00 + tax = $116.98, disallowed as found to be an equipment charge;

"*10% Administration Billing Fee, listed as $2258.50, total charge $22589.50 + tax = $2401.898, disallowed as not a permissible charge;

"*Storage, listed as $44.00 x 28 = $54.00 x 28, total charge $1232.00 + $1512.00, + tax, corrected without objection to reflect $716.47 overcharge." (Citations omitted.)

[Modzelewski]. . . . However, assuming *arguendo* this position, such charges would still be restricted to hourly charges for labor as allowed by the commissioner, not charges of the plaintiffs' own making for equipment. It was not necessary to reach a determination if a service was exceptional or not if the service was not recorded and invoiced as required using an hourly rate. . . . The plaintiffs cannot avoid the dictates of statute and regulation by constructing [their] own fee schedule, claiming most services are exceptional, then posting a fee schedule that is not [an] hourly charge for labor but, rather, in most instances an obvious equipment schedule, with some undetermined part for 'operators.' " (Citation omitted.)

On December 14, 2021, the plaintiffs filed with the court a motion to remand the case to the hearing officer for additional evidence, arguing that "[t]he remand decision [of the hearing officer] did not address any of the issues the court ordered briefed as set forth in the [court's remand] order" and that "[t]he remand decision does not adequately address the ambiguity highlighted in the court['s] remand [order]." The plaintiffs sought a remand for "an abbreviated proceeding limited to how [they] formulated [their] fee schedule . . . ." The court denied the plaintiffs' motion. The court explained that it had remanded the matter to the hearing officer for further findings as to whether the plaintiffs had followed the applicable regulations regarding "the setting of rates and the posting of a sign at [their] office." The court reasoned that "[t]he original record as supplemented by the further decision of the [department] hearing officer is sufficient for the determination of the issues raised by the plaintiffs. There is no need for an additional remand. A remand does not offer the parties an opportunity to relitigate the case ab initio." (Internal quotation marks omitted.)

After considering the parties' supplemental briefs and additional oral argument, the court issued a memorandum of decision on April 11, 2022, dismissing the plaintiffs' appeal from the decision of the hearing officer. The court agreed with the hearing officer's determination that charges for exceptional services must be based on labor only and that the "pro rata cost of equipment may not be a factor." The court concluded that there was substantial evidence presented to support the hearing officer's findings that the plaintiffs had failed to post a sign that complied with the regulations in that the sign posted by the plaintiffs included fees that "included not just those [charges] for labor" but also charges that "reflected the cost of the [plaintiffs'] machinery." The court further concluded that there was substantial evidence to support the hearing officer's determinations as to which of the plaintiffs' charges to Sentry were permissible and which were not; that the fine levied against the plaintiffs was appropriate pursuant to General Statutes § 14-64; and that both plaintiffs were involved in this matter.

The plaintiffs thereafter filed a motion to reargue or for reconsideration of the court's ruling, requesting clarification on whether the department can determine if a "rate" is reasonable and necessary as opposed to whether the "service" is reasonable and necessary to effectuate the tow. In response to that motion, the court clarified its two previous decisions as follows: "Assuming that the towing company fully meets the requirements of § 14-63-36c (c) [of the regulations], the towing company may establish its own rates for [exceptional] services and is not bound by the rate issued by the [commissioner] under § 14-63-36 (a) and (b). The [department] may review compliance by the towing company with [its] regulations regarding the need for services and the reasonableness of the rate set by the towing company." This appeal followed.

We begin by setting forth the standard of review and legal principles that govern our resolution of the plaintiffs' claims. "[J]udicial review of the commissioner's action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency, in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . .

"The substantial evidence rule governs judicial review of administrative fact-finding under the UAPA. [See] General Statutes § 4-183 (j) (5) and (6). An administrative finding is supported by substantial evidence if the record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . . It is fundamental that a plaintiff has the burden of proving that the commissioner, on the facts before [the commissioner], acted contrary to law and in abuse of [the commissioner's] discretion . . . .

"Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a

correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion." (Citations omitted; internal quotation marks omitted.) *Lucky 13 Industries, LLC* v. *Commissioner of Motor Vehicles*, 210 Conn. App. 558, 563–65, 270 A.3d 188, cert. denied, 343 Conn. 905, 272 A.3d 1127 (2022).

I

The plaintiffs first claim that the court improperly concluded that the charges they levied in connection with the tow at issue in this case violated §§ 14-63-36b (4) and 14-63-36c (c) of the regulations in that they were not based on an hourly labor rate. The plaintiffs argue that the regulations do not require that rates for "exceptional services" be based solely on labor, but that they also properly may include a charge for the special equipment used to perform those exceptional services. We are not persuaded.[7]

The plaintiffs' claim requires us to interpret the department's administrative regulations. "Administrative regulations have the full force and effect of statutory law and are interpreted using the same process as

[7] The plaintiffs also claim that the court erred in construing the regulations "such that the commissioner . . . can determine if the rate for an 'additional service' falling under § 14-63-36c (c) [of the regulations] is reasonable and necessary as opposed to whether the service is reasonable and necessary . . . ." Neither the hearing officer nor the trial court reached this claim because they both found that the rates charged by the plaintiffs failed to comply with the regulations. We likewise do not reach this claim. We note, however, that the portion of § 14-63-36c (c) of the regulations that provides the commissioner with the authority to "require the wrecking service to

statutory construction . . . . Accordingly, in conducting this analysis, we are guided by the well established principle that [i]ssues of statutory construction raise questions of law, over which we [also] exercise plenary review. . . .

"When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, [the court] seek[s] 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 [the court] 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . .

"Ordinarily, the construction and interpretation of a [regulation] is a question of law for the courts where the administrative decision is not entitled to special deference, particularly where . . . the [regulation] has not previously been subjected to judicial scrutiny or time-tested agency interpretations." (Citation omitted; internal quotation marks omitted.) *Costas* v. *Commissioner of Revenue Services*, 213 Conn. App. 719, 729–30, 280 A.3d 108, cert. denied, 345 Conn. 911, 283 A.3d 507 (2022). Because the present case presents a question of law and does not involve the department's time-tested interpretation of its regulations, the standard

justify such additional fees" seems to undermine the plaintiffs' argument in this regard.

of review is de novo. See *Connecticut Motor Cars* v. *Commissioner of Motor Vehicles*, 300 Conn. 617, 622, 15 A.3d 1063 (2011).

Pursuant to General Statutes § 14-66 (a) (2), which provides in relevant part that "[t]he commissioner shall establish and publish a schedule of uniform rates and charges for the nonconsensual towing and transporting . . . and for the storage of motor vehicles," the commissioner has promulgated §§ 14-63-34 through 14-63-37b of the Regulations of Connecticut State Agencies. These regulations set forth, inter alia, the permissible charges that licensed wreckers may levy in relation to nonconsensual towing.[8] Section 14-63-36c (c) of the regulations provides in relevant part: "A licensed wrecker service may charge additional fees for exceptional services, and for services not included in the tow charge or hourly rate, which are reasonable and necessary for the nonconsensual towing or transporting of a motor vehicle. Any such additional fees shall be itemized in accordance with the hourly charge for labor posted by the licensed towing service, as required by the provisions of section 14-65j-3 of the Regulations of Connecticut State Agencies. Such additional fees shall be itemized separately, and the towing service shall maintain accurate records

[8] Section 14-63-36a of the Regulations of Connecticut State Agencies provides: "The commissioner shall publish a list of uniform rates and charges for the nonconsensual towing and transporting of motor vehicles, and for storage of motor vehicles, which he has determined to be just and reasonable. The commissioner may consider factors such as rates set by other jurisdictions, towing services provided by contract with automobile clubs and associations, operating costs of the towing and recovery industry in Connecticut, single source contracts resulting from competitive bids on behalf of municipalities and business entities, and rates published in standard service manuals. Such list of rates and charges shall be distributed to each licensed wrecker service, and to other interested parties, upon request. Such rates and charges shall be the maximum rates and charges that the commissioner shall permit for the nonconsensual towing and transporting of motor vehicles, and for storage of motor vehicles, in accordance with subsection (a) of section 14-66 of the general statutes and sections 14-63-36b and 14-63-36c."

which explain such additional services. The commissioner may require the wrecking service to justify such additional fees. A copy of each towing bill or invoice containing the information required pursuant to section 14-66b of the general statutes shall be given to the customer upon payment of the bill." Section 14-63-36b (4) of the regulations defines "exceptional services" as "the use of special equipment such as cutting torches, air compressors and other equipment not generally required for nonconsensual towing or transporting services, at the scene of an accident." Section 14-63-36b (5) of the regulations defines "hourly rate" as "the maximum hourly rate determined by the commissioner that may be charged for the nonconsensual towing or transporting and recovery of a motor vehicle with a G.V.W.R. of ten thousand (10,000) pounds or more. Such rate shall not include exceptional services provided by one or more licensed wrecker services."

The commissioner concedes that, pursuant to § 14-63-36b (5) of the regulations, he is not authorized to set hourly labor rates for towing companies seeking additional fees for exceptional services under § 14-63-36c (c) of the regulations but maintains that those fees must be based on hourly labor rates. The plaintiffs argue that, because the regulations allow licensed towing companies to charge "additional fees for exceptional services" and "exceptional services" is defined as "the use of special equipment," their inclusion of the cost of procuring, maintaining, repairing and insuring the special equipment used for the tow at issue was appropriate. Although it reasonably may be argued that the term "use" in the phrase, "the use of special equipment," may be ambiguous in that it is susceptible to more than one reasonable interpretation when that phrase is read in isolation, that ambiguity is resolved when the phrase is read in conjunction with the portion of § 14-63-36c (c) that specifically requires "additional fees for excep-

tional services" to be "itemized in accordance with the hourly charge for *labor* . . . ." (Emphasis added.) There is no support, however, in the regulations for a towing service to include an equipment charge in its rates for exceptional services.

As to the plaintiffs' charges in this case, the plaintiffs argue that the rate they charged as to each piece of special equipment was "the amount for the operator to operate the specific 'special equipment' pursuant to § 14-63-36c (c) [of the regulations] and as set forth in § 14-63-36b (4) [of the regulations]. Ultimately, this approach to setting [the plaintiffs'] rate schedule is congruent with the definition of 'exceptional service' . . . . The rate is for the operator using the specific 'special equipment.' " (Emphasis omitted.) The plaintiffs contend that Modzelewski simply "did not articulate more clearly that it was a labor rate based on the type of equipment used. It is eminently reasonable (and necessary) to set a rate for a particular 'exceptional service' based on the 'special equipment' being operated." This argument is belied by Modzelewski's testimony that the rates that are listed on the plaintiffs' posted rate schedule and that they charged Sentry, were based on "a ratio of what the equipment costs, the depreciation, the insurance, the maintenance, obviously the cost of the equipment, and we put that together and we come up with a rate for that piece of equipment."[9] As stated, the regulations clearly and unambiguously do not provide for the inclusion of these factors in setting the hourly rate for exceptional services. They only permit

[9] The plaintiffs also have not indicated with any degree of specificity the manner in which they calculated the equipment portion of each charge. Modzelewski's inability to articulate the labor versus equipment portion of each of his charges is puzzling in light of his testimony that he used a "ratio" of various costs associated with the equipment to arrive at his rates. Presumably, he would simply add a labor fee to that number to arrive at the total charge.

an hourly charge for exceptional services that is specifically based on labor. Although Modzelewski eventually testified that the charges were for the special equipment and the operator of the special equipment, he indicated that he did not maintain a breakdown as to which portion of the charges was based on labor and which was based on the cost of equipment. Because Modzelewski failed to explain which portion of his charges allegedly constituted a labor charge versus an impermissible equipment charge, there was no evidentiary basis on which his charges could have been found to constitute regulatory compliant labor charges.[10] Accordingly, the plaintiffs' claim that the court improperly concluded that the charges they levied in connection with the tow at issue violated the applicable regulations is unavailing.[11]

II

The plaintiffs also claim that the court improperly concluded that their posted rate schedule did not comply with the applicable regulations. We disagree.

As set forth herein, § 14-63-36c (c) of the regulations requires that additional fees for exceptional services be itemized in accordance with the hourly charge for

[10] Moreover, the hearing officer correctly found that the plaintiffs charged Sentry for items that are not permitted by the regulations, such as an administrative fee and a fuel surcharge. The plaintiffs also charged Sentry for items that were not listed on their posted rate schedule, such as communications systems, which were not approved by the hearing officer. See footnote 5 of this opinion.

[11] To the extent the plaintiffs also argue that the hearing officer applied the regulations inconsistently, unreasonably and arbitrarily, we disagree. Our review of the record reveals that the hearing officer carefully examined each of the charges listed on the plaintiffs' invoice to Sentry and compared them with the plaintiffs' posted rate schedule and Modzelewski's testimony. There was evidence to support certain charges and a lack of evidence to support other charges. Because there was substantial evidence in the record to support the hearing officer's findings, we cannot conclude that his application of the regulations was inconsistent, unreasonable or arbitrary.

labor posted by the towing service as required by § 14-65j-3 of the regulations.[12] Section 14-65j-3 requires that every licensed towing service must post a sign that shall "not be less than 17 inches by 24 inches and be displayed in each area of the premises where work orders are placed by customers" that sets forth its charges for labor, storage and diagnosis. It further sets forth the manner in which the posted rate schedule must be laid out and which fonts should be used.[13]

An examination of the plaintiffs' posted rate schedule reveals that it did not comply with § 14-65j-3 of the regulations in form or substance. As to form, the plaintiffs' posted rate schedule, titled "Rate Schedule," consists of two columns that contain fifty-seven line items, most of which are for certain pieces of presumably "special equipment."[14] Regs., Conn. State Agencies § 14-63-36b (4). Some of those items indicate a "per hour"

[12] Section 14-65j-3 of the Regulations of Connecticut State Agencies titled, "Charges and conditions sign," provides in relevant part: "(a) This sign shall not be less than 17 inches by 24 inches and be displayed in each area of the premises where work orders are placed by customers. The sign shall state:

"(1) The hourly charge for labor;

"(2) The conditions, if any, under which the shop may impose charges for storage, and the amount of any such charges; and

"(3) The charge, if any, for a diagnosis.

"(b) Each sign shall have the following headings 'LABOR CHARGES,' 'STORAGE CHARGES,' 'DIAGNOSIS CHARGE' and '$'. All headings shall be 120 point bold face type, caps, sans-serif such as helvetica bold, standard bold compressed or similar.

"(c) Other information on such sign shall be at least 48 point medium face type, caps, sans-serif such as helvetica medium, avant garde demi or similar. . . ."

Subsection (d) of § 14-65j-3 then sets forth the proper order and form of the sign.

[13] The department created a form for use by licensed towing services that contains areas where the towing services must fill in their "hourly charge for labor" for tows when exceptional services are provided. (Emphasis in original.)

[14] We also note that the plaintiffs' posted schedule of fees includes "Admin Fee 10%." This fee is not based on an hourly rate of labor or the use of special equipment and, therefore, violates the regulations. The plaintiffs

price. For instance, the rate schedule lists "20 ton MD Wrecker $200/hr." Several of those line items indicate a certain minimum number of hours, such as "1075 Rotator Fee $750 4Hr Min." Other items simply state a dollar amount. For example, "Chain Saw $125" and "Spill kit $55." There are other line items that simply list a service and an associated dollar amount, such as "Flat Tire Change $175." Because the words labor, storage or diagnosis do not appear anywhere on the plaintiffs' posted rate schedule, the plaintiffs' hourly labor rates for those items cannot be ascertained.

As to substance, to the extent some of the line items on the plaintiffs' posted rate schedule list a piece of equipment and then an hourly rate, perhaps those are the items to which Modzelewski referred when he testified that the rate listed included the operator and the equipment. Insofar as those rates include an equipment charge, they violate § 14-63-36c (c) of the regulations. As to the line items that simply list a piece of equipment and a dollar rate without specifying whether it is a labor charge, storage charge or diagnosis charge, the only reasonable conclusion is that those items are simply equipment charges, which, as held herein, violate § 14-63-36c (c). We therefore agree with the court's conclusion that the plaintiffs' posted rate schedule did not comply with the applicable regulations.

III

The plaintiffs also claim that the court erred in concluding that the hearing officer properly imposed a civil fine of $4000 against them. We are not persuaded.

Section 14-64 provides in relevant part: "The commissioner may . . . impose a civil penalty of not more than one thousand dollars for each violation on any

charged Sentry this fee and it was disallowed. The plaintiffs have not pursued the validity of this fee on appeal.

licensee or both, when, after notice and hearing, the commissioner finds that the licensee (1) has violated any provision of any statute or regulation of any state or any federal statute or regulation pertaining to its business as a licensee or has failed to comply with the terms of a final decision and order of any state department or federal agency concerning any such provision . . . ."

The hearing officer found, inter alia, that, "[r]ather than using and charging approved rates, the [plaintiffs] established, posted and used [their] own rate schedule based on equipment" and concluded that the plaintiffs had "charged fees in excess of the maximum rates and charges permissible under . . . Connecticut Statutes and Regulations" and, accordingly, ordered restitution and a civil fine of $4000 pursuant to § 14-64.

In his brief to the trial court, the commissioner argued, inter alia, that the plaintiffs' appeal should be dismissed because the issue of whether a towing company could levy equipment charges under § 14-63-36c (c) of the regulations had already been rejected by our Supreme Court in two other cases,[15] one of which involved the plaintiffs. The commissioner asked the court to affirm the hearing officer's order imposing the fine on the plaintiffs for "violating state laws and regulations governing nonconsensual towing by charging excessive fees for towing and recovery services provided."

The court disagreed with the commissioner that the issue had been decided by our Supreme Court but

[15] The cases referred to by the commissioner were *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor Vehicles*, 322 Conn. 20, 139 A.3d 594 (2016), and *Raymond's Auto Repair, LLC* v. *Commissioner of Motor Vehicles*, 322 Conn. 43, 45, 139 A.3d 609 (2016). Those cases involved the issue of whether the department's regulations were preempted by federal law, not whether equipment charges properly may be included in charges for exceptional services.

agreed with the hearing officer that "[c]learly . . . § 14-63-36c (c) [of the regulations] states that the towing company is entitled to an additional charge for its 'labor' and does not mention equipment costs." On remand from the court, the hearing officer explained, inter alia, that "[t]he plaintiffs cannot avoid the dictates of statute and regulation by constructing [their] own fee schedule, claiming most services are exceptional, then posting a fee schedule that is not an hourly charge for labor but, rather, in most instances an obvious equipment schedule with some undetermined part for 'operators.' " In its decision following the remand, the court found that the fine was appropriate.

On appeal, the plaintiffs argue that "[t]he [commissioner's] stated reasoning for the [fine] . . . demonstrates that it was improperly imposed." The plaintiffs contend that the reasoning underlying the imposition of the fine was improper because it was based on the incorrect assertion that our Supreme Court had already determined that fees based on equipment charges were impermissible. They also argue that the fine could not properly have been based on the commissioner's assertion that their charges were excessive because they "raised a bona fide issue as to the interpretation of §§ 14-63-36b and 14-63-36c (c) [of the regulations], which had not yet been reviewed by the courts, and the department's application of those regulations to the subject tow." They contend that "the department's basis for a civil penalty is incorrect and, thus, the penalty meted out is unwarranted and appears to be aimed at the plaintiffs for exercising their statutory rights." The plaintiffs' arguments merit little discussion.

First, there is no indication in the record that the hearing officer relied on either of the cases cited by the commissioner in imposing the fine on the plaintiffs. Rather, the hearing officer's decision in this regard clearly was linked to his conclusion that the plaintiffs

charged fees in excess of those permitted. Second, the court also explicitly disagreed with the commissioner's argument that the issue had been decided in the cases cited by the commissioner but agreed that the fees charged by the plaintiffs were improper and that the fine therefore was justified.

The language of the applicable regulations plainly does not permit towing companies to levy equipment charges. We therefore disagree with the plaintiffs' characterization of their interpretation of the applicable regulations as "bona fide." As the plaintiffs acknowledge, the issue pertaining to equipment charges for nonconsensual tows has not been addressed by our courts. We disagree with the plaintiffs' assertion that they were "exercising their statutory rights," an argument for which they have provided no support. The plaintiffs charged Sentry equipment charges, for which there is no regulatory support. They failed to maintain accurate records to justify, or even explain, those charges. Furthermore, they charged Sentry for items not listed on their own rate schedule,[16] and they charged Sentry an administrative fee, which is not even arguably permitted under the regulations. We therefore conclude that there was substantial evidence in the record to support the imposition of the fine.

IV

Finally, the plaintiffs claim that the court erred in concluding that the hearing officer properly denied their request to have Sentry's complaint against Modzelewski's Towing & Recovery, Inc., dismissed.

In their prehearing brief, the plaintiffs argued that "[Modzelewski's Towing & Recovery, Inc.] was not

[16] For instance, the plaintiffs charged Sentry for four hours associated with a "major incident response truck" at a rate of $750 per hour. The rate listed on the plaintiffs' posted rate schedule is $550 per hour with a four hour minimum.

involved in the tows underlying the present matter. [Modzelewski's Towing & Recovery, Inc.] is a separate entity with a separate place of business. . . . [Modzelewski's Towing & Recovery, Inc.] has a separate repairer license and its own fleet of wreckers. . . . The state police] called [Modzelewski's Towing & Storage, Inc.] to the accident scene. . . . Accordingly, [Modzelewski's Towing & Recovery, Inc.] should be removed as a respondent in this matter."[17] (Citations omitted.)

At the hearing, Modzelewski testified before the hearing officer that Modzelewski's Towing & Recovery, Inc., has its own equipment and its own fleet of wreckers, none of which was used in the tow at issue. Modzelewski's Towing & Recovery, Inc., did not respond to the accident, and Big Daddy's tractor trailer was not stored at Modzelewski's Towing & Recovery, Inc.'s facility in Newtown. As to why the invoice sent to Sentry bore the name "Modzelewski's Recovery, Inc.," Modzelewski testified before the hearing officer: "The computer program that we use to write our recovery bills, when we enter it, it pops up recovery, and recovery bill it pops up recovery, not a tow." He explained that it was an "administrative issue" that arises when "we click in recovery and that's when the name pops up . . . ." He acknowledged that "Modzelewski's Recovery, Inc.," "pops up" on the computer even if the tow is from his other company.

The hearing officer declined to dismiss Sentry's complaint as to Modzelewski's Towing & Recovery, Inc. The hearing officer explained: "[The plaintiffs ask] that the case as against [Modzelewski's Towing & Recovery, Inc.] be dismissed, claiming it was not involved in the tow. However, the invoices from the [plaintiffs] were entitled Modzelewski's Recovery, Inc. The payment check issued by [Sentry] was to Modzelewski Tow &

[17] The commissioner did not file a prehearing brief.

Storage, Inc., not Modzelewski's Towing & Storage, Inc. There is also the lack of documentary evidence in compliance with General Statutes § 14-66b on this issue. Therefore, in spite of [Modzelewski's] affidavit, [Modzelewski's Towing & Storage, Inc.] and [Modzelewski's Towing & Recovery, Inc.], and their respective bonds, will remain a part of this decision, and both bonds will be subject to invocation until such time as restitution has been made by either the [plaintiffs] or a bond payment has been made by Western Surety Company . . . " The court concluded that there was sufficient evidence in the record to support the hearing officer's determination that both Modzelewski's Towing & Storage, Inc., and Modzelewski's Towing & Recovery, Inc., were involved in this matter.

The plaintiffs claim on appeal that the hearing officer's "inclusion [in these proceedings] of [Modzelewski's Towing & Recovery, Inc.] is not supported by substantial evidence on the whole of the record." The plaintiffs argue that Modzelewski's Towing & Recovery, Inc., is a separate licensee, with a separate fleet of wreckers and is located in a separate municipality. The plaintiffs also argue that "[t]he photographs [of the accident scene], particularly one of a heavy duty wrecker showing a Danbury decal, connect [Modzelewski's Towing & Storage, Inc.]—as opposed to [Modzelewski's Towing & Recovery, Inc.]—to the tow [at issue]."

First, we note that the hearing officer found that there was no evidence submitted by the plaintiffs that they complied with § 14-66. As noted herein, § 14-63-36c (c) of the regulations requires in relevant part that "[a] copy of each towing bill or invoice containing the information required pursuant to section 14-66b of the general statutes shall be given to the customer upon payment of the bill." Section 14-66b provides in relevant part: "Each owner of a wrecker registered pursuant to subsection (c) of section 14-66 shall keep and maintain a record

stating the following information: (1) The registration number of each motor vehicle towed or transported and the registration number of each wrecker used to tow or transport such motor vehicle . . . ." Modzelewski acknowledged that the invoice given to Sentry did not comply with § 14-66b in that it did not indicate which wreckers were used at the scene of the accident at issue. Accordingly, there was no documentary evidence to support Modzelewski's testimony that none of the wreckers used for the tow at issue was registered to Modzelewski's Towing & Recovery, Inc.

Moreover, even if we assume the truth of the plaintiffs' factual assertions, they are not dispositive of the issue of whether there was substantial evidence in the record to support the hearing officer's finding that Modzelewski's Towing & Recovery, Inc., was involved in the tow at issue. As noted, in declining to dismiss Modzelewski's Towing & Recovery, Inc., from the administrative proceedings, the hearing officer relied on the invoice given to Sentry and the check paid to and presumably cashed by the plaintiffs, and the fact that those documents seem to use the corporate names of the entities interchangeably or to use names that are not formally affiliated with either entity.

We disagree with the plaintiffs' assertion that the commissioner "all but conceded this when [he] stated that there is 'no documentation on the record that names [Modzelewski's Towing & Recovery, Inc.] as a participant in this matter.' " This argument misses the mark. The documents cited by the hearing officer also do not name Modzelewski's Towing & Storage, Inc. That fact obviously does not mean that Modzelewski's Towing & Storage, Inc., was not involved in the tow at issue. On the basis of the documentation relied on by the hearing officer and the lack of documentary evidence to support the plaintiffs' contention that Modzelewski's Towing & Recovery, Inc., was not involved in the tow

at issue, there was substantial evidence from which it reasonably can be inferred that both of the plaintiffs were involved in the tow at issue.

The judgment is affirmed.

In this opinion the other judges concurred.

SADIQ MARAFI *v.* HIND EL ACHCHABI ET AL. (AC 45745)

Elgo, Suarez and Eveleigh, Js.

Syllabus

The defendant appealed to this court from the summary judgment rendered by the trial court in favor of the plaintiff on his claims of fraudulent misrepresentation, statutory theft and unjust enrichment. After meeting in 2001, the parties became involved in a romantic relationship. Despite this ongoing relationship, the defendant married A in 2007. Later in 2007, when the plaintiff gave birth to a child, S, she told the plaintiff, who was present for the birth, that he was S's biological father. She then filed for divorce from A. In 2009, the defendant had a DNA test done that conclusively established that A was S's biological father, but she did not share this result with the plaintiff. After the defendant's marriage to A was dissolved, she married the plaintiff in 2013. The defendant then began a romantic relationship with B in 2014. She gave birth to another child, N, in 2015 and again represented to the plaintiff, who was present for the birth, that he was the biological father. In 2016, B submitted to DNA testing, which confirmed that N was his biological daughter. Between 2007 and 2015, the plaintiff transferred more than $187 million to the defendant pursuant to the belief that S and N were his children. Following the dissolution of his marriage to the defendant, the plaintiff commenced the present action, alleging, inter alia, fraudulent misrepresentation, statutory theft, and unjust enrichment. The defendant did not file an answer to the complaint but later admitted in an interrogatory that she knew that A and B were the biological fathers of her children from the time she was first aware of her pregnancies. Thereafter, the plaintiff filed a motion for summary judgment; the defendant did not file an objection or appear at the hearing on the motion. The court rendered judgment for the plaintiff and awarded him damages of more than $500 million, and the defendant appealed to this court. *Held*:

1. The trial court properly determined that no genuine issue of material fact existed with respect to the plaintiff's claims of fraudulent misrepresentation, statutory theft, and unjust enrichment:

a. The trial court properly rendered summary judgment on the count of the plaintiff's complaint alleging fraudulent misrepresentation: it was undisputed that the defendant had falsely represented to the plaintiff that he was the father of both S and N and that the defendant at all times knew that those representations were untrue, and the court was entitled to rely on the plaintiff's assertions that he would not have made financial transfers to the defendant if he had not believed his paternity of the children; moreover, the plaintiff's reliance on the defendant's representations that S and N were his children was reasonable and justifiable under the facts of this case, as he was present for the births of both children, he established a trust for their benefit at the defendant's behest, and he spent almost a decade acting as their father under the misapprehension that they were his children; accordingly, the plaintiff established a prima facie case of fraudulent misrepresentation, and the defendant did not respond in any manner to the motion for summary judgment.

b. The trial court properly rendered summary judgment on the count of the plaintiff's complaint alleging statutory theft by false pretenses; this court concluded, for the same reasons and evidentiary basis set forth with respect to the claim of fraudulent misrepresentation, that the trial court properly determined that the plaintiff established a prima facie case of statutory theft, and the defendant did not respond.

c. The trial court properly rendered summary judgment on the count of the plaintiff's complaint alleging unjust enrichment; this court concluded, in light of the evidentiary basis submitted by the plaintiff in support of his motion for summary judgment, that the trial court properly determined that the plaintiff established a prima facie case of unjust enrichment, and the defendant failed to set forth specific facts or evidentiary support to demonstrate that there was a genuine issue for trial.

2. The defendant could not prevail on her claim that the trial court's failure to conclude, sua sponte, that the plaintiff's claims of fraudulent misrepresentation, statutory theft and unjust enrichment were barred by the statute (§ 52-572f) prohibiting any action brought upon any cause arising from "criminal conversation," constituted plain error: when the plaintiff's motion for summary judgment was before the trial court, it was not obvious or indisputable that § 52-572f operated in the particular context of this case, as the plaintiff's operative complaint did not include a criminal conversation count or include the word adultery, but instead was rooted in the defendant's knowingly false representations to the plaintiff that he was the biological father of S and N, and the defendant provided no authority for the proposition that actions for fraudulent misrepresentation, statutory theft or unjust enrichment contravene § 52-572f; moreover, the trial court was entitled to rely on the defendant's affirmative representations in her previously filed motion to transfer the case to the complex litigation docket that this was a fraud case, a pleading that made no mention of adultery or criminal conversation,

and which, together with her silence in the face of a motion for summary judgment, further undermined her claim that the court should have sua sponte invoked § 52-572f to bar the plaintiff's claims.

Argued January 25—officially released May 14, 2024

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged fraudulent misrepresentation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Complex Litigation Docket, where the court, *Ozalis, J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the named defendant appealed to this court. *Affirmed.*

John R. Weikart, with whom were *James P. Sexton*, and, on the brief, *Megan L. Wade*, for the appellant (named defendant).

Jonathan M. Freiman, with whom was *Emmett F. Gilles*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant Hind El Achchabi[1] appeals from the summary judgment rendered by the trial court in favor of the plaintiff, Sadiq Marafi. On appeal, the defendant claims that the court (1) improperly determined that no genuine issue of material fact existed with respect to the plaintiff's actions for fraudulent misrepresentation, statutory theft, and unjust enrichment, and (2) committed plain error in granting the plaintiff's motion for summary judgment because those actions were predicated on adultery in contravention

[1] Rysaffe Administrators Sarl, in its capacity as trustee of the Achchabi Family Trust; Portchester Limited; Portchester Holdings, LLC; and Ryo, LLC, also were named as defendants in this action. On August 9, 2018, Ryo, LLC, was defaulted for failure to appear pursuant to Practice Book § 17-20. Rysaffe Administrators Sarl, Portchester Limited, and Portchester Holdings, LLC, appeared before the trial court but have not participated in this appeal. We therefore refer to Hind El Achchabi as the defendant in this opinion.

of General Statutes § 52-572f. We affirm the judgment of the trial court.

Mindful of the procedural posture of this case, we set forth the following facts as gleaned from the pleadings of the parties and the affidavits and other proof submitted by the plaintiff, viewed in the light most favorable to the defendant.[2] See, e.g., *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009). The plaintiff is a Kuwaiti citizen who has served as Kuwait's Ambassador to Austria and as its Permanent Representative to the United Nations International Organizations in Vienna since September, 2013. The defendant is a citizen of Morocco who maintained residences in Morocco, Austria, and Greenwich, Connecticut.

The parties met in 2001 and subsequently began a romantic relationship. Despite that ongoing relationship, the defendant married Ahmad Al Saad in 2007. The defendant at that time represented to the plaintiff that Al Saad was homosexual, that her relationship with Al Saad was not sexual in nature, and that they married only for family and social reasons for Al Saad's benefit.

When the defendant became pregnant, she told the plaintiff that he was the biological father. Later in 2007, the defendant gave birth to a son, S, at a hospital in New York.[3] The plaintiff was with the defendant at the time of S's birth; Al Saad was neither present for the birth nor in the United States. After being released from the hospital, the plaintiff and the defendant spent time together with S at the Four Seasons Hotel in New York. During that time, the defendant filed for divorce from

[2] The defendant in this case did not answer the plaintiff's complaint and did not file any responsive pleading to the plaintiff's motion for summary judgment.

[3] On March 1, 2019, the parties filed a joint motion for a protective order to keep certain information confidential, including information concerning the minor children at issue in this case. By order dated March 29, 2019, the court granted that motion.

Al Saad and the parties discussed purchasing a vacation home for their new family.

At the behest of the defendant, the plaintiff thereafter transferred approximately $6.3 million to her to settle the Achchabi Family Trust (trust) for the benefit of their current and future children, which funds were used to purchase real property known as 31 North Porchuck Road in Greenwich (Greenwich home) in 2009, as well as the subsequent purchase of adjacent property known as 34 North Porchuck Road. Those properties later were conveyed for no consideration to Portchester Holdings, LLC, and were its only assets.[4]

In September, 2009, the defendant covertly had a DNA test performed on S, which conclusively established that Al Saad was the child's father. The defendant informed the plaintiff of that test but falsely stated that its results had confirmed his parentage. In the years that followed, the defendant consistently referred to the plaintiff as S's father in both private and public settings. On one occasion in which the plaintiff expressed a concern as to whether S was his child due to her prior marriage to Al Saad, the defendant angrily admonished him for raising such an issue.

The parties married in Kuwait in 2013. Between 2007 and 2015, the plaintiff transferred more than $187 million to the defendant while under the misapprehension that S was, in fact, his child.

Unbeknownst to the plaintiff, the defendant began a romantic relationship with Mohsine Karim-Bennani in 2014. The defendant became pregnant and again represented to the plaintiff that he was the biological father,

[4] Portchester Holdings, LLC, is a Connecticut limited liability company. The sole member of Portchester Holdings, LLC, is Portchester Limited, a Cayman Islands entity. The sole shareholder and director of Portchester Limited is Rysaffe Administrators Sarl, a Swiss entity that at all relevant times served as trustee of the trust.

though she knew that was false. As the defendant admitted in her June 6, 2019 response to the plaintiff's interrogatories, she "knew the paternity of each of her biological children *from the time she was first aware that she was pregnant* with each of her biological children." (Emphasis added.)

The defendant gave birth to a daughter, N, at a hospital in New York in 2015. The plaintiff was present at the time of N's birth; Karim-Bennani was not there.[5] Following their release from the hospital, the plaintiff, the defendant, S, and N spent a month together at the Greenwich home and the defendant repeatedly told the plaintiff that he was N's father. The plaintiff believed her and considered N to be his daughter. The plaintiff held a party in Vienna, Austria to celebrate N's birth, which was attended by dignitaries from the Austrian government and the international diplomatic community.

In late 2015, the parties' relationship soured when the plaintiff received reports from personal staff that the defendant was having an affair with Karim-Bennani. Although the defendant initially denied that allegation, in January, 2016, she left the family home in Austria, never to return. The defendant later admitted to the affair with Karim-Bennani and informed the plaintiff that she wanted a divorce.

In April, 2016, the plaintiff filed a complaint in Morocco against the defendant and Karim-Bennani. During the ensuing investigation, Karim-Bennani claimed that N was his biological daughter and submitted to DNA testing, which confirmed his parentage. Following

[5] In support of his motion for summary judgment, the plaintiff submitted a copy of an announcement prepared by the obstetrician who was present for N's birth, which states: "This is an announcement that [the plaintiff] and [the defendant] delivered a baby girl on [redacted] 2015. The baby's weight is 4 [pounds], 4 [ounces]. She was delivered by Dr. Farris Fahmy at Mount Sinai Roosevelt Hospital."

a trial, a Moroccan court found the defendant guilty of intentional fabrication of a document comprising false information, illegally obtaining an administrative document by presenting false information, intentional use of a forgery, and adultery.[6]

That same year, Al Saad filed a paternity lawsuit against the defendant in Morocco. After receiving DNA test results confirming that he was the biological father of S, Al Saad sent a copy of the results to the plaintiff in December, 2016. When the plaintiff confronted the defendant with those DNA test results, the defendant finally admitted that S was not his son—nine years after the child's birth. The parties divorced in 2017.

The plaintiff commenced the present action in May, 2018. The defendant filed an appearance on July 12, 2018, and a request to revise on October 15, 2018, which the court denied. On October 19, 2018, the defendant filed an application to transfer the action to the complex litigation docket, in which she averred that "[t]his is a fraud case seeking $100 million in damages, trebled to $300 million." The court granted that motion on November 8, 2018. The defendant thereafter filed a series of requests to revise and multiple objections to the plaintiff's interrogatories and requests for production.

On June 14, 2019, the plaintiff filed the operative complaint, his second amended complaint, which contained five counts. Counts one through four were directed solely at the defendant and alleged fraudulent misrepresentation, statutory theft, intentional infliction of emotional distress, and negligent infliction of emotional distress. In count five, the plaintiff alleged unjust enrichment against the defendant and other entities. See footnote 1 of this opinion. At no time did the defendant file an

[6] A copy of the November 3, 2016 decision of the Moroccan court was submitted as an exhibit to the plaintiff's motion for summary judgment in the present case.

answer to any of the complaints filed by the plaintiff, including the operative one.

On July 16, 2019, the law firm representing the defendant filed a motion to withdraw its appearance for cause, which the court granted on August 16, 2019.[7] At that time, the defendant's participation in this case before the Superior Court ceased.[8]

On December 13, 2019—more than eighteen months after the action commenced—the plaintiff filed a motion for summary judgment on counts one, two and five of the operative complaint. That motion was accompanied by a memorandum of law and fifty exhibits, which included affidavits from the plaintiff and Attorney Richard Luedeman, bank records documenting millions of dollars in payments to the defendant by the plaintiff, invoices for large expenditures made by the defendant including a yacht, multiple aircraft, and approximately $3.5 million in jewelry, copies of text messages and WhatsApp[9] chats between the parties, and numerous photographs of the plaintiff with the defendant, S, and N. The defendant did not file an objection to the plaintiff's motion for summary judgment.[10]

[7] In its order, the court found that the law firm had "demonstrated good cause by establishing that [the defendant] has failed to pay substantial sums due and owing on the firm's invoices for legal services in connection with this matter, some outstanding for more than [one] year. . . . Given the significant amount of money due and owing, the court finds that it would be unreasonable to require [the law firm] to continue to finance this litigation."

[8] On August 16, 2019, the trial court sua sponte ordered a sixty day stay of "all proceedings" in the case "to give the defendant reasonable time to obtain new counsel and to protect her interests in the meantime." Those sixty days passed without the defendant filing an appearance or communicating in any way with the court.

[9] "WhatsApp is a messaging service that uses an [I]nternet connection, instead of a cellular network connection, to send text messages and photographs between cell phones." *Klein* v. *Facebook, Inc.*, 580 F. Supp. 3d 743, 810 (N.D. Cal. 2022).

[10] On January 27, 2020, Rysaffe Administrators Sarl, Portchester Limited, and Portchester Holdings, LLC, filed what they termed a "response" to the plaintiff's motion for summary judgment, in which they maintained that they did not participate in the fraud that allegedly resulted in the transfer of

The court held a hearing on the motion for summary judgment on February 27, 2020. When the defendant did not appear, the court ordered the plaintiff to serve the motion on the defendant by supplemental service. On June 4, 2020, the plaintiff filed a certification of supplemental service, indicating that service was made on the defendant's attorneys in Switzerland and France, on the defendant's sister in Japan, and on an additional address for the defendant in Rabat, Morocco.

Oral argument on the motion for summary judgment commenced on September 25, 2020. At that time, the court remarked that the plaintiff "certainly makes a persuasive argument for summary judgment on the liability for the claims of [statutory] theft, unjust enrichment and [fraudulent] misrepresentation. So I don't need . . . further argument on that. . . . What is unclear to me is the amount of [money that] was transferred" from the plaintiff to the defendant. Following a colloquy with the plaintiff's counsel, the court invited the plaintiff to submit a supplemental filing in support of the motion for summary judgment. In response, the plaintiff filed a supplemental brief on October 30, 2020, in which he averred that he had made wire transfers and cash remittances to the defendant totaling $187,888,949.28 from 2007 to 2014. That brief was accompanied by the sworn affidavit of Attorney Laura Ann K. Froning. Over the course of 367 paragraphs, that affidavit painstakingly detailed in chronological order numerous transfers from the plaintiff's account with the National Bank of Kuwait to (1) the defendant's account with the Banque Marocaine du Commerce Extérieur in Morocco and (2) the defendant's account with the National Bank of Kuwait in various currencies, including Swiss francs, United States dollars, euros, and

substantial sums to the defendant and that they "take no position with respect to the fraud, theft, and unjust enrichment allegedly committed by [the defendant]."

Kuwaiti dinar. Appended to that affidavit were thirty-nine exhibits, all of which were bank records documenting the transfers referenced in Froning's affidavit.

On November 2, 2020, the court granted the plaintiff's motion for summary judgment. In its memorandum of decision, the court found that no genuine issue of material fact existed with respect to the defendant's liability on counts one, two, and five of the operative complaint.[11] The court thereafter entered an order awarding the plaintiff $192,111,387.20 on the fraudulent misrepresentation count, trebled damages pursuant to General Statutes § 52-564 on the statutory theft count that totaled $576,335,551.60, and $6,250,000 on the unjust enrichment count with respect to the defendant.[12] The court rendered judgment accordingly, and this appeal followed.

As a preliminary matter, we note the well established standard that governs our review of the trial court's decision to grant a motion for summary judgment. "The facts at issue are those alleged in the pleadings." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 164, 204 A.3d 717 (2019). "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the

[11] The plaintiff subsequently withdrew counts three and four of his complaint, which alleged intentional and negligent infliction of emotional distress.

[12] The court also rendered summary judgment against Rysaffe Administrators Sarl, Portchester Limited, and Portchester Holdings, LLC, on the unjust enrichment count and ordered them to "disgorge the assets of the trust to the plaintiff no later than thirty days after this court's decision . . . ." It is undisputed that those entities complied with that order, as evidenced by the notice of compliance filed with the court on December 11, 2020.

light most favorable to the nonmoving party. . . . [T]he moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . Once the moving party has met its burden . . . the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

I

On appeal, the defendant claims that the court improperly determined that no genuine issue of material fact existed with respect to the plaintiff's actions for fraudulent misrepresentation, statutory theft, and unjust enrichment. We disagree.

A

We begin with the first count of the operative complaint, which alleged fraudulent misrepresentation on the part of the defendant. Fraudulent misrepresentation "is an intentional tort"; *Kramer* v. *Petisi*, 285 Conn. 674, 684, 940 A.2d 800 (2008); that "has four elements: (1) a false representation was made by the defendant as a statement of fact; (2) the statement was known to be untrue by the defendant; (3) the statement was made with the intent to induce reliance; and (4) the other party relied on the statement to its detriment."[13] *Companions & Homemakers, Inc.* v. *A&B Homecare Solutions, LLC*, 348 Conn. 132, 144, 302 A.3d 283 (2023).

[13] In this appeal, the parties disagree as to whether the fourth element requires proof that a plaintiff's reliance was reasonable. See *Companions & Homemakers, Inc.* v. *A&B Homecare Solutions, LLC*, 348 Conn. 132, 144 n.4, 302 A.3d 283 (2023) ("[a]lthough there are circumstances in which the plaintiff's reliance must be reasonable for the false representation to be actionable, we do not address this issue"); *Stuart* v. *Freiberg*, 316 Conn. 809, 829 n.15, 116 A.3d 1195 (2015) (noting that reasonable reliance is essential element of *negligent* misrepresentation); *Goldstein* v. *Unilever*, Superior

It is undisputed that the defendant falsely represented to the plaintiff that he was the father of both S and N. The defendant at all times knew that those representations were untrue. As the defendant admitted in her response to the plaintiff's interrogatories, she "knew the paternity of each of her biological children *from the time she was first aware that she was pregnant* with each of her biological children." (Emphasis added.) The first two elements of fraudulent misrepresentation, therefore, are plainly established.

The plaintiff filed various materials in support of the motion for summary judgment, including his December 10, 2019 affidavit. As this court has observed, "when a nonmoving party fails to respond to a motion for summary judgment by setting forth specific facts showing that there is a genuine issue for trial, the court is entitled to rely upon the facts alleged in the affidavit of the moving party." *Carrasquillo* v. *Carlson*, 90 Conn. App. 705, 711, 880 A.2d 904 (2005); see also *Bartha* v. *Waterbury House Wrecking Co.*, 190 Conn. 8, 11–12, 459 A.2d 115 (1983) (court is entitled to rely on facts stated in movant's affidavit when nonmovant does not respond). In the present case, the defendant never responded to the plaintiff's motion for summary judgment. Accordingly, the court was entitled to rely on the facts set forth in the plaintiff's December 10, 2019 affidavit.

In that affidavit, the plaintiff stated that he believed that S was his son and that N was his daughter due to the defendant's representations that he was their biological father. He indicated that he was with the defendant at the times that she gave birth to both S

Court, judicial district of Fairfield, Docket No. CV-397881-S (May 3, 2004) (37 Conn. L. Rptr. 158, 164 n.9) (emphasizing that "[t]he Restatement formulation of the law of fraud, which has never been adopted by a Connecticut appellate court, does require that reliance on a fraudulent misrepresentation be 'justifiable' "). For purposes of the present analysis, we assume without deciding that proof of reasonable reliance is required.

and N and that, over the years that followed, he relied on the defendant's repeated assurances and representations regarding his parentage. On the one occasion in 2013 in which he expressed a concern as to whether S was his child due to her prior marriage to Al Saad, the plaintiff stated that the defendant angrily admonished him "for even having asked the question."

In text messages with the defendant, copies of which were submitted in support of the motion for summary judgment, the plaintiff referred to S as his "beloved" child who he nicknamed "President" and referred to N as his "Princess." Other materials submitted by the plaintiff, such as the written communications to S's boarding school and the invitations sent to international dignitaries to attend a celebration to welcome his "newborn baby girl" in 2015, demonstrate that the plaintiff held S and N out to the world as his children. The plaintiff also submitted several photographs in support of his motion for summary judgment, many of which feature him smiling with his arms around S and N.

The plaintiff further averred in his affidavit that he had transferred "tens of millions of dollars" to the defendant "because I believed that [the defendant] had been honest with me and that S was my son and N my daughter. Had I not believed that, I would not have made those transfers. My financial relationship with [the defendant] was entirely predicated upon the family relationships that she fraudulently claimed." In addition, the plaintiff produced a panoply of financial records that, along with the affidavits of Froning and Luedeman, documented in detail more than $187 million in transfers from the plaintiff to the defendant between 2007 and 2014.

In light of those materials, we conclude that the court properly determined that the plaintiff established a prima facie case of fraudulent misrepresentation. The facts set forth therein indicate both that the defendant's

knowingly false representations to the plaintiff regarding his parentage of S and N were made with the intent to induce reliance and that the plaintiff relied on those representations to his detriment. We further conclude that the plaintiff's reliance was reasonable and justifiable under the facts and circumstances of this case, in which he was present for the births of both children, established a trust for their benefit at the defendant's behest, and thereafter spent almost one decade acting as a father under the misapprehension that S, and later N, were his children.[14]

Because the plaintiff established a prima facie case of fraudulent misrepresentation, it was incumbent on the defendant to "substantiate [her] adverse claim by showing that there is a genuine issue of material fact *together with the evidence disclosing the existence of*

[14] In her principal appellate brief, the defendant suggests that the fourth element of a fraudulent misrepresentation claim requires proof that the detriment sustained by a plaintiff was caused "only" and exclusively by reliance on the defendant's false statement. She has provided no legal authority for that proposition, nor are we aware of any. Under Connecticut law, a plaintiff asserting a claim for fraudulent misrepresentation bears the burden of demonstrating that he relied on a defendant's knowingly false statement and that he "suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Sturm* v. *Harb Development, LLC*, 298 Conn. 124, 142, 2 A.3d 859 (2010). Moreover, the Restatement (Third) of Torts rejects the proposition urged by the defendant. As it explains: "A successful claim for fraud requires proof that the plaintiff relied on the defendant's misrepresentation. The element of reliance overlaps with (and may be considered a form of) the usual requirement in tort that a defendant's wrong be a factual or 'but for' cause of the harm that the plaintiff suffered. The plaintiff may have been influenced by several sources, or by multiple statements—some true, some false—made by the same party. Liability is nevertheless intact if the defendant's fraud made a necessary contribution to the plaintiff's loss, typically by inducing the plaintiff to enter a damaging transaction. *If the plaintiff was subject to multiple influences, each of which would have been sufficient to cause the resulting loss, the defendant whose fraud was among those influences may be held liable even though it may appear that the fraud was not a 'but for' cause of the harm.*" (Emphasis added.) 1 Restatement (Third), Torts, Liability for Economic Harm § 11, comment (a), p. 95 (2020).

such an issue." (Emphasis in original; internal quotation marks omitted.) *Rainbow Housing Corp.* v. *Cromwell*, 340 Conn. 501, 522, 264 A.3d 532 (2021); see also *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 320–21, 77 A.3d 726 (2013) ("the rule that the party opposing summary judgment must provide evidentiary support for its opposition applies only when the moving party has first made out a prima facie case for summary judgment"); *Farrell* v. *Farrell*, 182 Conn. 34, 38, 438 A.2d 415 (1980) ("[w]hen a motion for summary judgment . . . is filed and supported by affidavits and other documents, [the nonmoving] party . . . must set forth specific facts showing that there is a genuine issue for trial, and if he does not so respond, summary judgment shall be entered against him" (footnote omitted)). That she failed to do. Because the plaintiff established a prima facie case of fraudulent misrepresentation and the defendant did not respond in any manner to the motion for summary judgment, the court properly rendered summary judgment on count one of the complaint.

B

We turn next to the second count of the complaint, which alleged statutory theft by false pretenses in violation of § 52-564. "[S]tatutory theft under . . . § 52-564 is synonymous with larceny [as defined in] General Statutes § 53a-119 [and] includes various fraudulent methods of taking property from its owner, including when a person obtains property by false pretenses." (Citation omitted; internal quotation marks omitted.) *Scholz* v. *Epstein*, 341 Conn. 1, 18–19, 266 A.3d 127 (2021). A conviction for larceny by false pretenses requires proof "(1) that a false representation or statement of a past or existing fact was made by the accused; (2) that in making the representation he knew of its falsity; (3) that the accused intended to defraud or deceive; (4) that the party to whom the representation

was made was in fact induced thereby to act to her injury; and (5) that the false representation or statement was the effective cause of the accused receiving something of value without compensation." *State* v. *Farrah*, 161 Conn. 43, 47, 282 A.2d 879 (1971). Both parties acknowledge that the elements of a false pretenses claim largely mirror those constituting a claim of fraudulent misrepresentation.

For the same reasons and evidentiary basis outlined in part I A of this opinion, we conclude that the court properly determined that the plaintiff established a prima facie case of statutory theft by false pretenses, to which the defendant did not respond. Summary judgment, therefore, was properly granted on the second count of the operative complaint.

C

The third and final cause of action at issue is unjust enrichment. "[R]ecovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." (Internal quotation marks omitted.) *Gagne* v. *Vaccaro*, 255 Conn. 390, 408, 766 A.2d 416 (2001). As our Supreme Court has explained, "[u]njust enrichment is, consistent with the principles of equity, a broad and flexible remedy . . . . Plaintiffs seeking recovery . . . must prove (1) that the defendants were benefited, (2) that the defendants unjustly did not pay the plaintiffs for the benefits, and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) *Geriatrics, Inc.* v. *McGee*, 332 Conn. 1, 24–25, 208 A.3d 1197 (2019).

In light of the evidentiary basis submitted by the plaintiff in support of the motion for summary judgment, as discussed in part I A of this opinion, we conclude that the plaintiff established a prima facie case

of unjust enrichment. With no response from the defendant setting forth specific facts or evidentiary support to demonstrate that there was a genuine issue for trial; see *Romprey* v. *Safeco Ins. Co. of America*, supra, 310 Conn. 320–21; *Farrell* v. *Farrell*, supra, 182 Conn. 38; the court properly granted summary judgment on count five of the complaint.

II

The defendant also contends that the court improperly rendered judgment in favor of the plaintiff as a matter of law on the fraudulent misrepresentation, statutory theft, and unjust enrichment counts of his complaint. She claims that those counts all were predicated on her adultery and, thus, are barred by § 52-572f.

The defendant concedes that she did not raise that claim at any time before the trial court and now seeks to prevail pursuant to the plain error doctrine. She maintains that the court committed plain error by rendering summary judgment "on legislatively abolished claims arising from the defendant's alleged adultery." We do not agree.

"[T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . [P]lain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 813–14, 155 A.3d 209 (2017). "An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and]

also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record. Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 812.

On appeal, the defendant claims that the trial court should have sua sponte concluded that the plaintiff's actions for fraudulent misrepresentation, statutory theft, and unjust enrichment were barred by § 52-572f, and that its failure to do so constitutes plain error. Section 52-572f provides: "No action may be brought upon any cause arising from criminal conversation." Historically, criminal conversation was a common-law action synonymous with adultery. See, e.g., *Tinker* v. *Colwell*, 193 U.S. 473, 481, 24 S. Ct. 505, 48 L. Ed. 754 (1904) (quoting William Blackstone for proposition that criminal conversation is cause of action for "[a]dultery . . . with a man's wife" (internal quotation marks omitted)); *Marri* v. *Stamford Street Railroad Co.*, 84 Conn. 9, 14, 78 A. 582 (1911) (same); *Oppenheim* v. *Kridel*,

236 N.Y. 156, 166, 140 N.E. 227 (1923) (explaining that "adultery is the sole basis" of action for criminal conversation); *State ex rel. Golden* v. *Kaufman*, 236 W. Va. 635, 645, 760 S.E.2d 883 (2014) ("criminal conversation is, quite simply, adultery; they are one and the same"); cf. 14 Sen. Proc., Pt. 4, 1971 Sess., p. 1516, remarks of Senator J. Edward Caldwell ("[§ 52-572f] merely abolishes an ancient action on the books"). The plain intent of the legislature in enacting § 52-572f was to prohibit civil actions in this state for adultery.

The operative complaint in the present case does not include a criminal conversation count, nor does it include the word adultery. The three counts at issue in this appeal—fraudulent misrepresentation, statutory theft, and unjust enrichment—all are rooted in the defendant's knowingly false representations to the plaintiff that he was the biological father of S and N. The defendant nevertheless insists that those causes of action contravene the proscription of § 52-572f and argues that the trial court, in not enforcing that proscription, committed an error that was obvious and not debatable.

We cannot agree with that proposition. The defendant has provided no authority in which a Connecticut court has held that actions for fraudulent misrepresentation, statutory theft, or unjust enrichment contravene § 52-572f. Moreover, the defendant mistakenly suggests that this is a question of first impression in this state. She overlooks the fact that, in *DiMichele* v. *Perrella*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6004536-S (February 23, 2011) (51 Conn. L. Rptr. 750), rev'd on other grounds, 158 Conn. App. 726, 120 A.3d 551, cert. denied, 319 Conn. 927, 125 A.3d 203 (2015), the Superior Court was presented with a strikingly similar claim to that now raised by the defendant. Like the present case, *DiMichele* involved a plaintiff from whom the true paternity of two children he

believed to be his own was concealed "for nearly a decade." Id., 750. That plaintiff subsequently brought an action against the defendant biological father of the children alleging, inter alia, fraud. In moving to strike that count, the defendant argued that § 52-572f precluded that action. Id., 757. The court rejected that contention and concluded that the plaintiff's action for fraud was "not barred by the legislature's abolition of the doctrine of criminal conversation as embodied in [§] 52-572f." Id., 759; accord *Dufault* v. *Mastrocola*, Superior Court, judicial district of Hartford-New Britain, Docket No. CV-94-0543343-S (March 1, 1996) (denying motion to strike predicated on § 52-572f regarding common-law causes of action including negligence, intentional infliction of emotional distress, breach of fiduciary duty, and breach of contract arising from defendant's sexual relations with plaintiff's wife).

The Superior Court's conclusions in *DiMichele* and *Dufault* comport with the reasoning of our Supreme Court in *Piccininni* v. *Hajus*, 180 Conn. 369, 429 A.2d 886 (1980). The plaintiff in that case brought an action for fraudulent misrepresentation, alleging that the defendant had fraudulently represented to him "that she would marry him and that they would occupy, as their home, the house owned by the defendant [and that] the plaintiff was induced to spend approximately $40,000 in renovating, improving and furnishing [her] house." Id., 370. In response, the defendant filed a motion to strike that count, claiming that it was barred by General Statutes § 52-572b;[15] the trial court agreed and granted that motion. Id.

On appeal, the Supreme Court disagreed with that determination. It first explained that "Heart Balm *statutes* should be applied no further than to bar actions

[15] General Statutes § 52-572b provides: "No action may be brought upon any cause arising from alienation of affections or from breach of a promise to marry."

for damages suffered from loss of marriage, humiliation, and other direct consequences of the breach, *and should not affect the rights and duties determinable by common law principles*." (Emphasis added.) Id., 372. The court then applied that precept to the facts of the case, stating: "The plaintiff here is not asking for damages because of a broken heart or a mortified spirit. He is asking for the return of things which he bestowed in reliance upon the defendant's fraudulent representations. [Section 52-572b] does not preclude an action for restitution of specific property or money transferred in reliance on various false and fraudulent representation, apart from any promise to marry, as to their intended use. . . . [T]he gravamen of the [plaintiff's claim] is that [he] was induced to transfer property to the defendant in reliance upon her fraudulent representations that she intended to marry him and that the property transferred would be used for their mutual benefit and enjoyment. The plaintiff does not here assert that the defendant wronged him in failing to marry him; rather, he is asserting that the defendant wronged him in fraudulently inducing him to transfer property to her. The plaintiff's complaint is based on what the defendant did, and not on what she refused to do." (Citation omitted.) Id., 373–74. For that reason, the court concluded that the motion to strike was improperly granted. Id., 374.

The defendant claims that *Piccininni* has little relevance to the present case, as it involved only § 52-572b. We disagree. Early in its decision in *Piccininni*, our Supreme Court made clear that all references therein to § 52-572b would be to "the Act"; id., 370; and the court employed that particular diction whenever it discussed § 52-572b specifically. See id., 373. At the same time, the court also referred to "Heart Balm Acts" and "Heart Balm statutes" in its discussion of general principles gleaned from other jurisdictions; see id., 371–72; and it

cited to cases that note that criminal conversation is among the heart balm statutes.[16] See id., 372, citing *In re Marriage of Heinzman*, 40 Colo. App. 262, 265, 579 P.2d 638 (1978), aff'd, 198 Colo. 36, 596 P.2d 61 (1979), and *Gill* v. *Shively*, 320 So. 2d 415, 417 (Fla. App. 1975). In our view, *Piccininni* is highly relevant to any discussion of heart balm statutes such as §§ 52-572b and 52-572f, as multiple Superior Court judges have held. See, e.g., *Caldarella* v. *Steigbigel*, Superior Court, judicial district of New Haven, Docket No. CV-13-6035423-S (August 14, 2013); *DiMichele* v. *Perrella*, supra, Superior Court, Docket No. CV-10-6004536-S; *Dufault* v. *Mastrocola*, supra, Superior Court, Docket No. CV-94-0543343-S. That authority strongly suggests, contrary to the contention of the defendant, that actions for fraudulent misrepresentation, statutory theft, and unjust enrichment are not barred by § 52-572f in cases in which a plaintiff seeks restitution for moneys transferred in reliance on the defendant's fraudulent representations, as alleged in the operative complaint here, rather than damages stemming from "a broken heart or a mortified spirit."[17] *Piccininni* v. *Hajus*, supra, 180 Conn. 373.

[16] As numerous jurisdictions have observed, criminal conversation is considered a heart balm action. See, e.g., *Tran* v. *Nguyen*, 97 Cal. App. 5th 523, 533, 315 Cal. Rptr. 3d 607 (2023); *Diaz* v. *Eli Lilly & Co.*, 364 Mass. 153, 160, 302 N.E.2d 555 (1973); *G.A.W., III* v. *D.M.W.*, 596 N.W.2d 284, 289 (Minn. App. 1999); *Saunders* v. *Alford*, 607 So. 2d 1214, 1215 (Miss. 1992); *Segal* v. *Lynch*, 413 N.J. Super. 171, 182, 993 A.2d 1229 (App. Div.), cert. denied, 203 N.J. 96, 999 A.2d 464 (2010); *Laidlaw* v. *Converge Midatlantic*, 66 Pa. D. & C. 5th 358 (2017); *Campbell* v. *Robinson*, 398 S.C. 12, 18, 726 S.E.2d 221 (2012); *Felsenthal* v. *McMillan*, 493 S.W.2d 729, 730 (Tex. 1973); *Koestler* v. *Pollard*, 162 Wis. 2d 797, 802, 471 N.W.2d 7 (1991); cf. *Brown* v. *Strum*, 350 F. Supp. 2d 346, 348–49 (D. Conn. 2004) (criminal conversation is common-law heart balm action under Connecticut and New York law); W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 124, p. 929 (discussing actions for alienation of affection, seduction, and criminal conversation and noting that compensation for such actions "has derisively been called 'heart balm' "). In her principal appellate brief, the defendant acknowledges that "other jurisdictions . . . have abolished criminal conversation and other 'heart balm' actions . . . ."

[17] In our view, the lesson of *Piccininni* is that a plaintiff may state a legally viable claim for fraudulent misrepresentation and recover restitution,

In addition, it is well established that the courts of this state are entitled to rely on representations made by the parties before it. See *State* v. *Pires*, 310 Conn. 222, 238, 77 A.3d 87 (2013) ("the trial court may rely on factual and legal representations by counsel to the court, which are then attributable to and binding on the attorney's client"). On October 19, 2018, the defendant filed an application to transfer the present action to the complex litigation docket, in which she averred that "[t]his is a fraud case seeking $100 million in damages, trebled to $300 million. [The plaintiff] alleges that [the defendant] made false representations to him regarding the paternity of her son and one of her daughters . . . and that, in reliance on those allegedly false statements, he made transfers to her totaling at least $100 million over the course of a decade." In that pleading, the defendant made no mention of adultery, criminal conversation or the like. Rather, she represented to the court that this was "a fraud case" that concerned false representations made to the plaintiff regarding his paternity of her children. Under Connecticut law, we presume that the trial court was aware of the contents of that pleading. See, e.g., *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 4–6, 513 A.2d 1218 (1986) (appellate court presumes that trial court considered pleadings in file before it); *A. Secondino & Son*,

even in factual scenarios that appear to implicate heart balm statutes such as §§ 52-572b and 52-572f. Other jurisdictions have reached such a result. See, e.g., *G.A.W., III* v. *D.M.W.*, 596 N.W.2d 284, 289 (Minn. App. 1999) (plaintiff's claims for fraud based on misrepresented paternity were not barred by legislature's abolition of criminal conversation); *Hodge* v. *Craig*, 382 S.W.3d 325, 342 (Tenn. 2012) (concluding that "public policy does not prevent the former spouse of a child's mother from pursuing a common-law damage claim based on her misrepresentations regarding the identity of the child's biological father"); cf. *Tran* v. *Nguyen*, 97 Cal. App. 5th 523, 525–26, 315 Cal. Rptr. 3d 607 (2023) (concluding that plaintiff's attempt to recover extortion payments made to defendant to prevent disclosure of parentage over his "child birthed by another woman during his marriage" did not violate heart balm statute prohibiting actions for criminal conversation).

Inc. v. *LoRicco*, 19 Conn. App. 8, 13, 561 A.2d 142 (1989) ("we will presume that the trial court was aware of the contents of the [case] file"). The defendant's affirmative representation that this is a fraud case premised on her false representations regarding the plaintiff's paternity—and her subsequent silence in the face of a motion for summary judgment—further undermines her claim that the court should have sua sponte invoked § 52-572f to bar the plaintiff's claims.

To be clear, the issue before us is not whether § 52-572f operates to bar actions for fraudulent misrepresentation, statutory theft, and unjust enrichment. The issue is whether the defendant has sustained her burden of establishing that, when the plaintiff's motion for summary judgment was before the trial court, it was obvious and indisputable that § 52-572f so operates in the particular context of this case. In this regard, we are mindful that "[p]lain error is a doctrine that should be invoked sparingly." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 596, 134 A.3d 560 (2016). The defendant's burden under the first prong of that doctrine is to demonstrate the existence of an error that is "obvious in the sense of not debatable. . . . [T]his inquiry entails a relatively high standard, under which it is not enough for the defendant simply to demonstrate that [her] position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Coccomo*, 302 Conn. 664, 685, 31 A.3d 1012 (2011). Our Supreme Court has succinctly described the first prong as requiring proof of "an error so obvious on its face that it is undebatable." *State* v. *McClain*, supra, 324 Conn. 820 n.13. On the record before us, we conclude that the defendant has not met that burden.

The judgment is affirmed.

In this decision the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* SHERI A. SPEER ET AL. (AC 46046)

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

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant S, who filed an answer and ten special defenses. Approximately two years later, S filed a request for leave to amend her answer and special defenses to include a five count counterclaim, seeking damages for, inter alia, alleged property damage and trespass. In the counterclaim, S claimed that the plaintiff's agents had, inter alia, broken a door to the property, taken certain construction materials from it, and replaced the locks, which S alleged interfered with her ability to rent and repair the property. The plaintiff objected to S's request, arguing that her allegations were unfounded, that the counterclaim was not made on the basis of new information, and that S failed to show good cause to allow the amendment at that stage of the proceedings. The trial court sustained the plaintiff's objection. S filed a second request for leave to amend her answer, which included a counterclaim asserting the same five counts, but added that the plaintiff's agents had more recently trespassed on her property. The trial court again sustained the plaintiff's objection to the request, which contained the same grounds as the first objection. The plaintiff thereafter withdrew the foreclosure action. S appealed to this court, claiming that the trial court abused its discretion in sustaining the plaintiff's objections because her proposed amendments were timely and would not have prejudiced the plaintiff. *Held*:

1. The plaintiff could not prevail on its claim that this appeal should be dismissed as moot because, having withdrawn its action before any counterclaim had been filed against it, no practical relief could be afforded to S on the basis of any such unfiled claim: this court concluded that the appeal was not moot because it could provide practical relief to S if it decided her claim on the merits, despite the plaintiff having withdrawn its foreclosure action, namely, that, if this court were to determine that S should have been permitted to file her proposed counterclaim, it could remand this case to the trial court with direction to restore the case to the docket and conduct further proceedings with respect to S's proposed counterclaim; moreover, although S's proposed counterclaims were not yet filed when the action was withdrawn because the court had effectively denied her requests for leave to amend her answer to assert the proposed counterclaims when it sustained the plaintiff's objections, the plaintiff's withdrawal would not have impaired

her right to proceed with the proposed counterclaims had she otherwise been permitted to file them.

2. S could not prevail on her claim that the trial court abused its discretion in sustaining the plaintiff's objections to her requests for leave to amend her answer to assert a counterclaim: the trial court record provided a sound basis for the court's conclusion that permitting S's amendments would have caused an unreasonable delay, as the foreclosure action had already been pending for approximately two years, and, during that time, S had filed several unmeritorious motions in addition to two interlocutory appeals that had been dismissed, and the court could have considered S's request to amend her answer to be an additional dilatory tactic; moreover, S's proposed counterclaims were not based on information that she recently had obtained or learned after filing her answer, thereby potentially making it unreasonable for her to wait for almost two years after she was served before seeking leave of court to assert the counterclaims, and, although S alleged that agents of the plaintiff had recently trespassed onto the property, she also alleged that there were at least fifty forceable entries onto the property during the term of her mortgage, and S did not claim that she only recently learned of the alleged misconduct underlying her proposed counterclaims at the time she filed her request for leave to amend her answer, and, thus, the court could have considered that S's requests were not made seasonably.

Argued February 1—officially released May 14, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Calmar*, *J.*, sustained the plaintiff's objections to the named defendant's two requests for leave to amend her answer to assert a counterclaim; thereafter, the plaintiff withdrew the action, and the named defendant appealed to this court. *Affirmed.*

Sheri A. Speer, self-represented, the appellant (named defendant).

Victoria L. Forcella, for the appellee (plaintiff).

Opinion

SHELDON, J. Following the unconditional withdrawal of this foreclosure action by the plaintiff,[1] Deutsche Bank National Trust Company, as trustee for HSI Asset Securitization Corporation Trust 2006-OPT4, Mortgage Pass-Through Certificates, Series 2006-OPT4, the defendant Sheri A. Speer[2] appeals from the trial court's decisions sustaining the plaintiff's objections to the defendant's two prior requests for leave to amend her answer to assert a counterclaim. On appeal, the defendant claims that the court abused its discretion in sustaining the plaintiff's objections because her proposed amendments were timely and would not have prejudiced the plaintiff. We disagree with the defendant's claims of error and, accordingly, affirm the trial court's decisions sustaining the plaintiff's objections to the requests for leave to amend.

The following procedural history is relevant to this appeal. On March 20, 2019, the plaintiff served the defendant with a summons and complaint, seeking to foreclose a mortgage on a parcel of real property owned by the defendant located at 107 Oakridge Street in Norwich (property). In its complaint, the plaintiff alleged that the defendant had executed and delivered to Option One Mortgage Corporation, its predecessor in interest, a note in the amount of $159,800, of which the plaintiff

[1] "Under [the] law, the effect of a withdrawal, so far as the pendency of the action is concerned, is strictly analogous to that presented after the rendition of a final judgment . . . ." (Internal quotation marks omitted.) *Doe* v. *Bemer*, 215 Conn. App. 504, 513–14, 283 A.3d 1074 (2022); see also, e.g., *Waterbury Twin, LLC* v. *Renal Treatment Centers-Northeast, Inc.*, 292 Conn. 459, 471 n.16, 974 A.2d 626 (2009).

[2] The Second Injury Fund also was named as a defendant in the present action, as the plaintiff alleged that it may claim an interest in the property by virtue of a real estate lien in the amount of $24,327.15 related to a workers' compensation matter. Because the Second Injury Fund is not participating in this appeal, all references in this opinion to the defendant are to Sheri A. Speer.

became the holder, secured by a mortgage on the property. The plaintiff further alleged that the note and mortgage were in default due to the defendant's nonpayment of monthly installments due thereunder since June 1, 2018. On March 20, 2020, the self-represented defendant filed an answer to the plaintiff's complaint and asserted ten special defenses.

On January 25, 2021, the defendant filed a request for leave to amend her answer and special defenses to include a five count counterclaim, to which she attached a copy of her proposed amended pleading. The proposed five count counterclaim sought damages for (1) property damage, (2) trespass, (3) fraud, (4) conversion and civil theft, and (5) a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The alleged factual basis for the defendant's counterclaim was that agents of the plaintiff had forcibly entered the property on at least fifty occasions, most recently on December 23, 2020. The defendant alleged that the plaintiff's agents had, among other things, broken a door to the property, taken certain construction materials from it, and replaced its locks, all of which interfered with her ability to rent and repair the property.

The plaintiff filed an objection to the defendant's request for leave to amend, arguing that the defendant's allegations were unfounded and that the defendant had failed to show good cause to allow an amendment at that stage of the proceedings, approximately two years after the action had been commenced, where the counterclaim was not made on the basis of new information. The court issued an order on February 22, 2021, sustaining the plaintiff's objection, thereby denying the defendant's request to amend. The defendant subsequently filed a motion for reconsideration, which the court denied.

On June 9, 2021, the defendant filed a second request for leave to amend her answer. The proposed amended answer attached to that request included a counterclaim setting forth the same five counts as the defendant's first proposed counterclaim, with only one additional factual allegation: that the plaintiff's agents had again trespassed on the property on or about May 26, 2021. The plaintiff filed an objection to the defendant's second request for leave to amend, arguing that that request was nearly identical to her first such request and, thus, that it should be denied for the same reasons as the first request. By order dated June 28, 2021, the court sustained the plaintiff's objection to the defendant's second request for leave to amend, thereby denying that request. The plaintiff subsequently withdrew the foreclosure action. This appeal followed.

After filing the present appeal, the defendant filed a motion for articulation requesting an explanation from the trial court for its denial of both of her requests for leave to amend, which the court denied.[3] The defendant subsequently filed with this court a motion for review of the denial of her motion for articulation. This court granted the defendant's motion for review but denied the relief requested therein.

I

Before we address the merits of the defendant's claim on appeal, we must address the plaintiff's claim that we should dismiss this appeal as moot. Specifically, the plaintiff, relying on *Sovereign Bank* v. *Harrison*, 184 Conn. App. 436, 194 A.3d 1284 (2018), claims that, because it withdrew the underlying foreclosure action before any counterclaim had been filed against it, no

[3] The defendant also filed a "notice of demand for decision," which the court denied. The court explained: "A memorandum of decision is not required for the orders requested as these orders are not covered by Practice Book § 64-1 (a)."

practical relief can now be afforded to the defendant on the basis of any such unfiled claim. "Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties." (Internal quotation marks omitted.) *GMAT Legal Title Trust 2014-1* v. *Catale*, 213 Conn. App. 674, 694, 278 A.3d 1057, cert. denied, 345 Conn. 905, 282 A.3d 980 (2022). "[M]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve before we may reach the merits of an appeal. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Citation omitted; internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 12, 287 A.3d 557 (2023).

In the present case, we conclude that the appeal is not moot because, although the plaintiff withdrew its foreclosure action, this court could provide practical relief to the defendant if it decided her claim on the merits. Specifically, if this court determined that the defendant should have been permitted to file her proposed counterclaim, it could remand this case to the trial court with direction to restore the case to the docket and conduct further proceedings with respect to the defendant's proposed counterclaim. "Although the plaintiff's right . . . to withdraw [*its*] *action* before a hearing on the merits . . . is absolute and unconditional . . . such withdrawal in no way impairs the right of the defendant to prosecute a previously filed counterclaim." (Citation omitted; emphasis in original; internal

quotation marks omitted.) *Sovereign Bank* v. *Harrison*, supra, 184 Conn. App. 442–43; see also Practice Book § 10-55 ("[t]he withdrawal of an action after a counterclaim, whether for legal or equitable relief, has been filed therein shall not impair the right of the defendant to prosecute such counterclaim as fully as if said action had not been withdrawn, provided that the defendant shall, if required by the judicial authority, give bond to pay costs as in civil actions").

The plaintiff's reliance on *Sovereign Bank* v. *Harrison*, supra, 184 Conn. App. 436, to support its position is misplaced. In *Sovereign Bank*, the issue was whether the trial court erred in interpreting the defendant's special defense as a counterclaim and, therefore, lacked the authority to restore that claim to the docket following the plaintiff's voluntary withdrawal of its action. Id., 438. This court's resolution of that issue turned on the differences between special defenses and counterclaims. Id., 444–46. Ultimately, this court determined that the defendant's special defense "[could not] reasonably be construed as stating an independent cause of action, and, therefore, the trial court erred in construing it as a counterclaim. Because there was no pending counterclaim as of the date of the withdrawal, the court lacked the authority to restore the case to the docket." Id., 447. In contrast to *Sovereign Bank*, it is undisputed that the defendant in the present case sought to amend her answer to assert a counterclaim, as opposed to a special defense.[4] Although the defendant's proposed counterclaims were not yet filed or pending when this action was withdrawn—because the court had effectively denied her requests for leave to amend her answer to assert the proposed counterclaims when it sustained the plaintiff's objections to her requests for leave to

[4] On appeal, the defendant is not seeking relief to pursue the separate special defenses that she had asserted in relation to the foreclosure action that has been withdrawn.

amend—the fact remains that the plaintiff's withdrawal would not have impaired her right to proceed with those proposed counterclaims had she otherwise been permitted to file them. See id. Accordingly, we proceed to the merits of the defendant's appeal.

II

The defendant claims that the court abused its discretion in sustaining the plaintiff's objections to her requests for leave to amend her answer because each claim in her proposed counterclaim was timely asserted and no such claim would have prejudiced the plaintiff. We disagree.

Pursuant to General Statutes § 52-130, "a party, as a matter of right, may make substantive amendments to any pleading. That right is subject only to the court's discretion to award costs or to limit an amendment if doing so is necessary to prevent undue delay of a trial." (Emphasis omitted.) *Ocwen Loan Servicing, LLC* v. *Mordecai*, 209 Conn. App. 483, 498, 268 A.3d 704 (2021). Similarly, "Practice Book § 10-60 (a) provides that a party may amend his or her pleadings in three ways: by order of the judicial authority, by written consent of the adverse party, or by filing a request for leave to file such amendment, with the amendment appended. If no party files an objection, the amendment is deemed to have been filed by consent, but if an objection is filed, the matter is placed upon the next short calendar for consideration of the court. Practice Book § 10-60 (a) (3). 'The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial.' Practice Book § 10-60 [c]." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 184, 73 A.3d 742 (2013).

"The granting or denial of a motion to amend the pleadings is a matter within the trial court's discretion.

. . . In the interest of justice courts are liberal in permitting amendments; unless there is a sound reason, refusal to allow an amendment is an abuse of discretion. . . . The trial court is in the best position to assess the burden which an amendment would impose on the opposing party in light of the facts of the particular case. The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial. . . . In exercising its discretion with reference to a motion for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment or to his adversary by granting the motion, with the resultant delay. . . . The law of this state favors courts allowing amendments in the absence of some sound basis for not doing so . . . particularly if the record fails to disclose some significant injustice or prejudice to the nonmoving party." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Ocwen Loan Servicing, LLC* v. *Mordecai*, supra, 209 Conn. App. 498–99.

"While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion.

. . . It is the [defendant's] burden in this case to demonstrate that the trial court clearly abused its discretion." (Internal quotation marks omitted.) *Perugini* v. *Giuliano*, 148 Conn. App. 861, 871–72, 89 A.3d 358 (2014).

In the present case, the record afforded the court a sound basis for sustaining the plaintiff's objections to the defendant's requests for leave to amend her answer to assert a counterclaim.[5] See *Ocwen Loan Servicing, LLC* v. *Mordecai*, supra, 209 Conn. App. 500–501 (where trial court failed to provide any explanation for its decision, reviewing court examined record to determine whether it reflected sound reason for denial of defendants' request to amend their special defenses). Specifically, the court reasonably could have concluded, as the plaintiff repeatedly argued, that permitting the defendant's amendments would have caused an unreasonable delay. See *Perugini* v. *Giuliano*, supra, 148 Conn. App. 872. By the time the defendant filed her requests for leave to amend, the foreclosure action already had been pending for approximately two years. During that time, the defendant had filed several unmeritorious motions, in addition to two interlocutory appeals that were dismissed, and the court could have considered the defendant's requests to amend her

[5] We note that, in the plaintiff's objections to the defendant's requests for leave to amend her answer, the plaintiff also referenced the general legal principle requiring that a counterclaim arises out of the same transaction as the complaint. The plaintiff did not, however, address the application of that principle in the particular context of foreclosure actions, where our case law has established that, for a defendant's counterclaims in such an action to be valid, they must relate to the making, validity, or enforcement of the note or mortgage. See, e.g., *Wells Fargo Bank, N.A.* v. *Melahn*, 198 Conn. App. 151, 169 n.12, 232 A.3d 1201, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020); see also *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 667, 212 A.3d 226 (2019). Because the plaintiff did not base its objections to the defendant's proposed counterclaims on any alleged violation of that rule, we have no occasion to consider whether the counterclaims at issue here sufficiently related to the making, validity, or enforcement of the note or mortgage to make them legally valid.

answer as an additional dilatory tactic. See *Ocwen Loan Servicing, LLC* v. *Mordecai*, supra, 501 (considering whether defendants had engaged in dilatory behavior before filing request for leave to amend special defenses by, among other things, filing improper interlocutory appeals or excessive and unproductive motions).

Moreover, this was not an instance where either of the defendant's proposed counterclaims was based on information that she recently had obtained or learned after filing her answer, thereby potentially making it reasonable for her to wait for almost two years after she was served before seeking leave of court to assert the counterclaim. See id., 500 (concluding that it was reasonable for defendants to wait to amend special defenses on basis of information that could be obtained during discovery related to those defenses). To the contrary, although the defendant alleged that the plaintiff's "most recent" trespasses onto her property had occurred on December 23, 2020, and May 26, 2021, she also alleged that there had been at least fifty forcible entries onto the property during the term of her mortgage. The plaintiff did not claim that she only recently learned of the alleged misconduct underlying her proposed counterclaims at the time she filed her requests for leave to amend her answer.[6] Thus, the court could have considered that the defendant's requests had not been "made seasonably." (Internal quotation marks omitted.) *Perugini* v. *Giuliano*, supra, 148 Conn. App. 872. On that basis, we cannot conclude that the court abused its discretion in sustaining the plaintiff's objections to the defendant's requests for leave to amend her answer to assert a counterclaim.

[6] Indeed, the defendant's original answer filed in March, 2020, indicates that she already had knowledge of the alleged misconduct underlying her proposed counterclaims at that time. Specifically, in her second special defense, the defendant alleged that "[t]he plaintiff has, during the pendency of this action, caused one or more of its agents to set foot on the property, which constituted an act of criminal trespass."

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL CONEY *v.* COMMISSIONER OF CORRECTION (AC 41747)

Alvord, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted, following a jury trial, of the crimes of murder and criminal possession of a pistol or revolver, filed a fourth petition for a writ of habeas corpus. The habeas court, upon the request of the respondent, the Commissioner of Correction, issued an order to show cause why the petition should not be dismissed as untimely given that it had been filed beyond the time limit for successive petitions set forth in the applicable statute (§ 52-470 (d)). The court held an evidentiary hearing, during which the petitioner testified that he had filed a timely third habeas petition but withdrew it prior to trial on the advice of his prior habeas counsel. The petitioner further testified that counsel did not discuss § 52-470 (d) and that, if the petitioner had known that withdrawing his third petition and refiling would result in an untimely petition, he would not have done so. The habeas court dismissed the fourth habeas petition as untimely, concluding that the petitioner had failed to demonstrate good cause for the delay in filing the petition. Thereafter, the petitioner, on the granting of certification, appealed to this court, which affirmed the judgment of the habeas court. The petitioner, on the granting of certification, appealed to the Supreme Court, which granted the petition for certification, vacated the judgment of this court, and remanded the case to this court for further consideration in light of *Rose* v. *Commissioner of Correction* (348 Conn. 333). *Held* that, after further consideration of the issue raised in this appeal, the proper remedy was to remand the matter to the habeas court for a new hearing and good cause determination under § 52-470 (d) and (e), consistent with the principles set forth in *Rose*, *Rapp* v. *Commissioner of Correction* (224 Conn. App. 336), and *Hankerson* v. *Commissioner of Correction* (223 Conn. App. 562).

Argued April 8—officially released May 14, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza, J.*, rendered judgment dismissing

the petition; thereafter, the petitioner, on the granting of certification, appealed to this court, *Alvord*, *Elgo* and *Albis*, *Js.*, which affirmed the judgment of the habeas court; subsequently, on the granting of certification, the petitioner appealed to the Supreme Court, which granted the petition to appeal, vacated the judgment of this court and remanded the case to this court for further proceedings. *Reversed*; *further proceedings*.

Judie Marshall, assigned counsel, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. This appeal returns to this court on remand from our Supreme Court with direction to further consider the claim raised by the petitioner, Paul Coney, that the habeas court erred in dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e) because he failed to demonstrate good cause to overcome the statutory presumption of an unreasonable delay. See *Coney* v. *Commissioner of Correction*, 348 Conn. 946, 308 A.3d 35 (2024). We reverse the judgment of the habeas court and remand the matter for a new hearing and good cause determination.

Following a jury trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a) and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 1999) § 53a-217c (a). The trial court sentenced the petitioner to a total term of incarceration of sixty years. Our Supreme Court affirmed the judgment of conviction. See *State* v. *Coney*, 266 Conn. 787, 822, 835 A.2d 977 (2003).

On February 20, 2004, the petitioner filed his first petition for a writ of habeas corpus in which he challenged the validity of his conviction. After the habeas court denied the petition, this court dismissed the petitioner's appeal. See *Coney* v. *Commissioner of Correction*, 117 Conn. App. 860, 867, 982 A.2d 220 (2009), cert. denied, 294 Conn. 924, 985 A.2d 1061 (2010). On March 18, 2010, the petitioner filed his second petition for a writ of habeas corpus in which he challenged the validity of his conviction. The petitioner withdrew that petition prior to trial. On June 1, 2012, the petitioner filed his third petition for a writ of habeas corpus in which he challenged the validity of his conviction. The petitioner withdrew that petition prior to trial.

On January 20, 2015, the petitioner filed his fourth petition for a writ of habeas corpus in which he challenged the validity of his criminal conviction. The disposition of the petitioner's fourth petition is the subject of this appeal. At the request of the respondent, the Commissioner of Correction, the court, *Sferrazza, J.*, pursuant to § 52-470 (e), ordered the petitioner to show cause as to why the petition should not be dismissed as untimely in that it was filed beyond the time limit for successive petitions in § 52-470 (d). At the show cause hearing, the petitioner testified that he withdrew his third petition prior to trial on the advice of his prior habeas counsel. The petitioner further testified that prior counsel did not discuss § 52-470 (d) and that, if he had known that withdrawing the third petition and refiling would result in an untimely petition, he would not have withdrawn the third petition. Following the petitioner's testimony, the petitioner's counsel argued that prior habeas counsel's representation was ineffective and that it amounted to good cause to permit the petition to proceed under § 52-470 (e).

The court determined that the fourth petition was presumptively untimely under § 52-470 (d). Consistent

with the petitioner's testimony at the good cause hearing, the court found that "[t]he trial [on the third petition] was scheduled to begin on January 12, 2015. Unfortunately, a highly desirable witness, in the view of the petitioner and his habeas counsel . . . went missing shortly before trial.

"[The petitioner's prior habeas counsel] discussed this development with the petitioner and advised him that the best course would be to withdraw the [third petition] before trial and refile the claims in a new habeas [petition] to gain more time to locate the witness for use at a future trial. The petitioner accepted this advice and withdrew the third [petition] on January 6, 2015, around one week before the first day of trial. The sole purpose of that withdrawal was to avoid trial in the hope that, if a new habeas case was initiated, the witness could be found and his testimony presented at some later date. . . .

"Neither [the petitioner's prior habeas counsel] nor the petitioner considered the effect the passage of § 52-470 (d) . . . had on the filing of a new habeas [petition] . . . that is, the petitioner could not file a new habeas [petition], directed at his criminal conviction, without invoking the presumption of undue delay, which, if unrebutted, mandated dismissal." Ultimately, the court determined that the petitioner had failed to establish good cause for the delay in filing the fourth petition. The court rejected the petitioner's theory that prior habeas counsel's "poor legal advice" was "a basis for rebutting the presumption of undue delay . . . ."

The habeas court granted the petitioner's petition for certification to appeal to this court. Following oral argument, this court ordered, sua sponte, that the appeal be stayed pending the release of *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022). Following *Kelsey*'s release, the parties were

ordered to file supplemental briefs addressing *Kelsey*'s impact on the appeal. Thereafter, this court affirmed the judgment of the habeas court after concluding "that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing his fourth petition for a writ of habeas corpus." *Coney* v. *Commissioner of Correction*, 215 Conn. App. 99, 112, 281 A.3d 461 (2022).

The petitioner filed a petition for certification to appeal this court's decision to our Supreme Court. Our Supreme Court ruled on the petition as follows: "The petition is granted, the judgment of the Appellate Court is vacated, and the case is remanded to that court for further consideration in light of *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023)." *Coney* v. *Commissioner of Correction*, supra, 348 Conn. 947.

This court sua sponte ordered the parties to submit supplemental memoranda "addressing the impact of *Rose* . . . on [the present] appeal." After the parties complied with this order, the parties were heard at oral argument. Having further considered the issue raised in this appeal, we conclude that the proper remedy is to remand the matter to the habeas court for a new hearing and good cause determination under § 52-470 (d) and (e), consistent with the principles set forth in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333; *Rapp* v. *Commissioner of Correction*, 224 Conn. App. 336, 311 A.3d 249 (2024); and *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 308 A.3d 1113 (2024).

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* LINDSEY S. BRETOUX ET AL. (AC 46506)

Bright, C. J., and Suarez and Harper, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. The defendant asserted the special defenses of, inter alia, unclean hands and estoppel. He alleged that, commencing one month after he stopped making required payments on the note and continuing for a period of more than three and one-half years, the defendant submitted to C Co., the plaintiff's loan servicer, twenty-five applications to modify the terms of the underlying note and mortgage. Despite C Co.'s continuing encouragement to submit these applications, they all were denied for various reasons, including technical defects. The defendant alleged that the repeated denials caused him to incur additional debt due to the accrual of interest, fees, and other costs associated with his default. The trial court granted the plaintiff's motion for summary judgment as to the liability of the defendant, determining, inter alia, that, although the defendant's estoppel defense was legally sufficient, it did not dispel the defendant's liability for defaulting on the mortgage but, rather, only indicated that the amount of the interest, fees, and other costs had increased due to the plaintiff's alleged conduct. With respect to the defendant's unclean hands defense, the trial court found that the defendant failed to provide evidence beyond his own affidavit that proved that the plaintiff had engaged in wilful misconduct. Thereafter, the plaintiff filed a motion for a judgment of strict foreclosure and submitted an affidavit of debt that included the interest and fees that had accumulated on the note while the defendant was attempting to secure a loan modification. In response, the defendant filed a motion for a judgment of foreclosure by sale, which included an objection to the amount of the debt described in the affidavit, on the basis that the plaintiff wrongfully had increased the amount of the debt through its own misconduct. The trial court overruled the defendant's objection and rendered a judgment of foreclosure by sale. On the defendant's appeal to this court, *held*:

1. The trial court properly rejected the defendant's unclean hands defense in rendering summary judgment as to liability for the plaintiff because the defendant did not meet his burden of providing an evidentiary basis to establish the existence of a genuine issue of material fact: the only evidence the defendant submitted in support of his opposition to the plaintiff's motion for summary judgment was his affidavit, which asserted only bare allegations relevant to his unclean hands defense and did not provide a basis from which to infer that C Co., as the

plaintiff's agent, had engaged in wilful misconduct with the purpose of prejudicing the defendant's rights; moreover, there were no documents in the record demonstrating the plaintiff's allegedly improper handling of the defendant's loan modification applications, as the defendant did not submit the applications or any evidence of any communications between the defendant and C Co. regarding the applications, evidence of the specific nature of the technical difficulties identified in the applications, evidence as to the effect of the technical deficiencies on C Co.'s review of the applications, or evidence indicating whether the applications were subjected to any corrective actions following their denial; accordingly, the defendant's defense was based on mere speculation, in which this court would not engage.

2. The trial court improperly relied solely on the plaintiff's affidavit of debt to determine the amount of the debt, and, accordingly, this court reversed the judgment of foreclosure by sale and remanded the case for an evidentiary hearing on the amount of the debt: by objecting to the amount of the debt and specifically objecting as to why the amount of the debt was incorrect on the basis of his estoppel based special defense, the defendant sufficiently interposed a defense as to the amount of the debt, which prevented the plaintiff from relying on the affidavit of debt to prove the amount of the debt pursuant to the applicable rule of practice (§ 23-18 (a)); moreover, contrary to the plaintiff's claims, the defendant was not required to present evidence to preserve his objection to the plaintiff's affidavit of debt or to request an evidentiary hearing for the plaintiff to present its evidence in support of its motion for judgment because the defendant's objection to the amount of the debt precluded the application of Practice Book § 23-18 (a), and it was the plaintiff's burden to prove the amount of the debt.

Argued January 31—officially released May 14, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant Newtown Savings Bank et al. was defaulted for failure to appear; thereafter, the defendant Fiore Bria was defaulted for failure to plead; subsequently, the court, *Cirello*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Cirello*, *J.*, rendered judgment of foreclosure by sale, from which the named defendant appealed to this court. *Reversed in part*; *further proceedings*.

Melissa Kay, certified legal intern, with whom were *Jeffrey Gentes*, and, on the brief, *Tyler Walls*, certified legal intern, for the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. In this foreclosure action, the defendant Lindsey S. Bretoux[1] appeals from the trial court's judgment of foreclosure by sale in favor of the plaintiff, Deutsche Bank National Trust Company, as indenture trustee for New Century Home Equity Loan Trust 2005-2. On appeal, the defendant claims that the court improperly (1) rendered summary judgment as to liability in favor of the plaintiff because the defendant failed to establish a genuine issue of material fact as to his special defense of unclean hands and (2) failed to consider the defendant's estoppel defense when determining the amount of debt. We are not persuaded by the defendant's first claim, but we agree with his second claim. Accordingly, we reverse in part the judgment of the trial court.

The following facts, viewed in the light most favorable to the defendant, and procedural history are relevant to our analysis. On February 28, 2005, the defendant and Rosemary Ann Oquendo (Oquendo), formerly known as Rosemary Bretoux, his then wife, executed a mortgage in favor of New Century Mortgage Corporation (New Century) on property located at 40 Martha Place in Bridgeport, as security for a promissory note in the amount of $283,050. The defendant and Oquendo later divorced, and, pursuant to an October 6, 2016

[1] The complaint also named the following parties as additional defendants: the city of Bridgeport, Newtown Savings Bank, and Fiore Bria. The city of Bridgeport and Newtown Savings Bank were defaulted for failure to appear, and Fiore Bria was defaulted for failure to plead. Because those additional defendants have not participated in this appeal, we refer to Lindsey S. Bretoux as the defendant in this opinion.

dissolution of marriage decree, Oquendo was required to maintain the mortgage on the home and either sell the home or refinance the mortgage by November 1, 2026, to remove the defendant from the note and mortgage and to divide the existing equity in the home evenly with the defendant. In October, 2017, after the defendant learned that Oquendo had failed to make the required monthly payments under the note, he made three payments to bring the note current and continued to make the monthly payments for several months thereafter. After April, 2018, however, the defendant made no further payments. Thus, the defendant has been in default on the note and mortgage since May, 2018.

Beginning in June, 2018, the defendant began filing a series of applications to modify the terms of the note and mortgage. He filed those applications with Carrington Mortgage Services, LLC (Carrington), which serviced the loan for both New Century and the plaintiff, to which New Century assigned the note and mortgage in April, 2019. Oquendo conveyed her interest in the premises to the defendant by virtue of a quit claim deed that was recorded in the Bridgeport land records on December 14, 2018.[2] By the time that the plaintiff commenced the underlying foreclosure action against the defendant in October, 2019, the defendant already had filed seven unsuccessful applications for a loan modification with Carrington. In his November 14, 2019 answer, the defendant, who was self-represented at the time, admitted the essential allegations of the complaint, including that the note and mortgage had been in default since May 1, 2018, and that the plaintiff was the party entitled to collect the unpaid debt and enforce

[2] Oquendo was not named as a party in the underlying foreclosure action and consequently has not participated in the underlying action or in this appeal.

the mortgage. In the section of the answer entitled "Special Defenses," the defendant wrote: "I am working with the bank for a loan modification." In April, 2021, the defendant, through counsel, filed an amended answer and special defenses in which he averred that he lacked knowledge or information to form a belief as to the truth of the same allegations he previously had admitted and alleged, as special defenses, that (1) he was working with the plaintiff for a loan modification and (2) the note was modified by a 2010 loan modification.

On September 28, 2021, the plaintiff filed a motion for summary judgment as to liability, accompanied by a supporting memorandum of law.[3] On April 6, 2022, the defendant filed a memorandum in opposition to the plaintiff's motion for summary judgment. On that same day, the defendant also filed a second amended answer and special defenses, in which he asserted the special defenses of, inter alia, estoppel and unclean hands.[4] Specifically, the defendant alleged that, between June, 2018, and March, 2022, he applied to the plaintiff's loan servicer, Carrington, for a loan modification twenty-five times and that each application was denied for various reasons, including technical defects. The defendant further alleged that, following each denial, Carrington encouraged him to reapply and represented that the loan would be modified. The defendant alleged that the repeated denials of his loan modification applications over the course of nearly four years caused him to incur additional debt due to the accrual of interest, fees, and other costs associated with his default.

Consistent with these new special defenses, the defendant argued in his opposition to the plaintiff's

[3] The plaintiff previously had moved for summary judgment in October, 2020, but the plaintiff withdrew that motion when it filed its September 28, 2021 motion.

[4] Due to the plaintiff's failure to object to the defendant's request within fifteen days, the amended answer and special defenses were deemed to have been filed by consent. See Practice Book § 10-60 (a) (3).

motion for summary judgment that the plaintiff should be estopped from foreclosing on the property because Carrington repeatedly encouraged the defendant to file loan modification applications and then consistently denied those applications, often "for technical reasons such as paperwork not being in order." The defendant argued that the plaintiff's actions in connection with the modification process had "materially added to [the defendant's] debt, including, but not limited to, added . . . interest, attorney's fees, costs, etc., and substantially prevented [the defendant] from curing the default."

On June 23, 2022, the plaintiff filed a supplemental memorandum in support of its motion for summary judgment alleging, among other things, that the defendant's estoppel and unclean hands defenses failed to raise a genuine issue of material fact and were legally insufficient. On August 8, 2022, the defendant filed a supplemental objection to the plaintiff's motion for summary judgment, reiterating his argument that, because the plaintiff's misconduct during the modification process had caused him to incur costs that impeded his ability to cure any default under the note and mortgage, the plaintiff should be precluded from foreclosing on the property.

On October 21, 2022, after a hearing, the trial court issued a memorandum of decision granting the plaintiff's motion for summary judgment. After determining that there was no genuine issue of material fact as to the plaintiff's prima facie case that the defendant had defaulted under the note and mortgage and that the plaintiff was entitled to enforce those obligations, the court concluded, inter alia, that, although the defendant's estoppel defense was legally sufficient, it did "not dispel of the defendant's liability for defaulting on the mortgage but, rather, only indicates that the amount of interest, fees, and other costs ha[d] increased due to the plaintiff's alleged conduct." As to the defendant's

unclean hands defense, the court concluded that the defendant "failed to prove that the plaintiff ha[d] engaged in wilful misconduct. Specifically, the defendant ha[d] failed to provide evidence beyond his own affidavit, which evinces the plaintiff's continuous and meritless rejection of his mortgage modification application."[5] Accordingly, the court rendered summary judgment as to liability for the plaintiff.

Thereafter, on February 22, 2023, the plaintiff filed a motion for a judgment of strict foreclosure. On April 19, 2023, the plaintiff submitted an affidavit of debt that identified the interest and fees that had accumulated since May 1, 2018, including during the more than three and one-half years when the defendant was attempting to secure a loan modification from the plaintiff.[6] On April 21, 2023, the defendant filed a motion for a judgment of foreclosure by sale, which also included his objection to the plaintiff's motion for judgment of strict foreclosure. The defendant objected to the amount of debt described in the plaintiff's affidavit on the basis that the plaintiff wrongfully increased the amount of the debt through its own misconduct. The defendant specifically challenged only a portion of that debt amount, namely, $30,968.59, which included $30,663.59 in interest and $305 for a property inspection fee. On April 24, 2023, the court overruled the defendant's objection. The court's order stated that "the argument that the defendant was damaged as a result of the twenty-five applications for loan modification is not persuasive and has been addressed by the court in its memorandum granting the plaintiff's motion for summary judgment.

[5] The court also concluded that the defendant's other special defenses were legally insufficient, which conclusion the defendant has not challenged on appeal.

[6] The plaintiff's affidavit of debt reflected that the plaintiff had charged $30,663.59 in interest at a rate of 4.875 percent from April 1, 2018, to April 2, 2023.

Regarding the request that the judgment be for foreclosure by sale, the court will use the defendant's appraisal so the judgment will be [foreclosure by] sale." On the same date, the court rendered a judgment of foreclosure by sale and ordered the sale to take place on August 5, 2023. On the basis of the affidavit of debt and the appraisal filed by the plaintiff on April 19, 2023, the court found the amount of the debt was $401,570.56 as of April 2, 2023, and that the fair market value of the property was $475,000. This appeal followed.

We first set forth the applicable standard of review and relevant legal principles. "Although the party seeking summary judgment has the burden of showing the nonexistence of any material fact . . . a party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue. . . . A material fact is one that makes a difference in the outcome of a case. . . .

"Summary judgment shall be granted 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. . . . The trial court must view the evidence in the light most favorable to the nonmoving party. . . .

"[T]o establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure . . . have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"[T]he party raising a special defense has the burden of proving the facts alleged therein. . . . If the plaintiff in a foreclosure action has shown that it is entitled to foreclose, then the burden is on the defendant to produce evidence supporting its special defenses in order to create a genuine issue of material fact . . . . Legally sufficient special defenses alone do not meet the defendant's burden. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . Further . . . [t]he applicable rule regarding the material facts to be considered on a motion for summary judgment is that the facts at issue are those alleged in the pleadings. . . . [B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Mangiafico*, 198 Conn. App. 722, 726–27, 234 A.3d 1115 (2020).

"On appeal, [w]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Because the trial court rendered judgment for the [plaintiff] as a matter of law, our review is plenary and we must decide whether [the trial court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *U.S. Bank, N.A.* v. *Foote*, 151 Conn. App. 620, 630–31, 94 A.3d 1267, cert. denied, 314 Conn. 930, 101 A.3d 952 (2014).

I

The defendant first claims that the court improperly rendered summary judgment against him as to liability

on the foreclosure complaint because genuine issues of material fact exist with respect to his special defense of unclean hands.[7] More specifically, the defendant claims that the court erred in its analysis of the evidence needed to support a defense in the face of a motion for summary judgment. The defendant argues that, although the court correctly concluded that he sufficiently alleged the defense of unclean hands, it erroneously concluded that "he did not adequately support his claim because he 'failed to provide evidence beyond his own affidavit . . . .' " The defendant further argues that his affidavit listing twenty-five dates on which his applications for a loan modification were denied is sufficient evidence on its own to show the " 'continuous and meritless' " rejections of his loan modification applications, thereby creating a genuine issue of material fact as to whether the plaintiff engaged in intentionally wrongful conduct during the loan modification process that substantially prevented the defendant from curing the default. We are not persuaded.

Because an action to foreclose a mortgage is an equitable proceeding, the doctrine of unclean hands is a viable special defense. "It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . The doctrine of unclean hands

[7] The defendant does not challenge the court's conclusion that the plaintiff met its burden of establishing its prima facie case in this foreclosure action. The court determined there was no genuine issue of material fact that the defendant has been in default of the mortgage note since May 1, 2018, that the plaintiff has been entitled to collect the debt associated with the mortgage note since July 18, 2019, and that the plaintiff has exercised its right to call due the balance of the note.

expresses the principle that where a plaintiff seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue. . . . Unless the plaintiff's conduct is of such a character as to be condemned and pronounced wrongful by honest and fair-minded people, the doctrine of unclean hands does not apply. . . . The party seeking to invoke the clean hands doctrine to bar equitable relief must show that his opponent engaged in wilful misconduct with regard to the matter in litigation. . . . The trial court enjoys broad discretion in determining whether the promotion of public policy and the preservation of the courts' integrity dictate that the clean hands doctrine be invoked. . . . Wilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional." (Citations omitted; internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 747, 196 A.3d 328 (2018).

In *Eichten*, this court addressed the scope of the doctrine of unclean hands and its application in the foreclosure context. See id., 746–50. In that case, the defendant raised several special defenses to the plaintiff's foreclosure complaint, including that "the plaintiff [was] guilty of unclean hands because, although she qualifie[d] for a [federal Home Affordable Modification Program (HAMP)] loan modification upon completion of her trial period payments, the plaintiff did not offer her a loan modification, but instead, placed her in a forbearance program without her consent . . . ." Id., 734. In opposition to the plaintiff's motion for summary judgment as to liability, the defendant submitted a detailed affidavit in which she outlined the plaintiff's

course of conduct in considering her loan modification application and asserted that, despite qualifying for the loan modification under all applicable HAMP guidelines and successfully completing a trial period plan (TPP), the plaintiff deprived her of the modification. Id., 739–40. Along with that affidavit, the defendant submitted additional documentation supporting her defense, including a supplemental directive issued by the United States Department of the Treasury that provided guidance to loan servicers making HAMP eligibility determinations. Id., 748. That directive outlined a two step process for HAMP modifications and indicated that, with successful completion of a TPP, borrowers would be offered a permanent loan modification. Id., 748–49. She also submitted the plaintiff's internal records documenting that she had met HAMP criteria for a modification, yet the plaintiff failed to offer her a permanent modification and ultimately deemed her ineligible for a modification, despite its prior acknowledgement of her eligibility and approval. Id., 740–41. The trial court rendered summary judgment for the plaintiff, concluding "that none of the defendant's special defenses raised a genuine issue of material fact that might defeat the plaintiff's cause of action." Id., 743.

On appeal, this court concluded that there was a genuine issue of material fact as to the defendant's unclean hands defense and, therefore, reversed the judgment of the trial court. Id., 746. We reasoned that "[t]he plaintiff's failure to establish that it adhered to the Treasury Department's directives, which appear to encourage that final determinations on whether to offer the borrower a loan modification be made before the end of the TPP, and the plaintiff's failure to provide an explanation as to its apparent internal approval of the loan modification in March, 2011, which was not communicated to the defendant, create a genuine issue of material fact as to whether the defendant [could] prevail

on her special defense of unclean hands. When viewing the evidence in the light most favorable to the defendant, the unexplained length of time it took the plaintiff to deny the defendant an offer of a permanent modification, almost twenty months . . . raises the question of whether the plaintiff treated the defendant in a fair, equitable and honest manner knowing that prolonged delay would place the defendant in an untenable financial situation, such that she could not possibly extricate herself to prevent foreclosure." Id., 749–50.

Although the defendant relies on *Eichten* and argues that the same analysis applies in the present case, such reliance is misplaced because the record here is markedly different. The defendant in *Eichten* provided sufficient evidence illustrating the plaintiff's review process and all determinations regarding her eligibility for a permanent loan modification, which evidence substantiated the assertions in her affidavit that she qualified for the permanent loan modification and that the plaintiff wrongfully had failed to offer her a permanent loan modification under the HAMP guidelines. Id., 739–41, 748–49. In the present case, however, the only evidence that the defendant submitted in support of his opposition to the plaintiff's motion for summary judgment was his affidavit. Relevant to his unclean hands defense, the defendant averred that, between June 4, 2018, and March 24, 2022, he submitted twenty-five applications to modify the mortgage, Carrington encouraged him to file those applications, Carrington told him that he would get his mortgage modified, his applications were often denied for technical reasons such as paperwork not being in order, and, after each denial, Carrington would encourage him to resubmit his application. Those bare allegations in his affidavit do not provide a basis to infer that Carrington, as the plaintiff's agent, engaged in wilful misconduct with the purpose of prejudicing the defendant's rights. Although the defendant stated in

his affidavit that the plaintiff has "engaged in wrongful conduct with respect to my mortgage modification applications and as a result [has] materially added to my debt including but not limited to added to interest, attorney's fees, costs, etc., and substantially prevented me from curing the default," he provided no evidence to substantiate that conclusory allegation. The defendant's unsupported allegations are insufficient to raise a genuine issue of material fact. See *Hoskins* v. *Titan Value Equities Group, Inc.*, 252 Conn. 789, 793–94, 749 A.2d 1144 (2000) ("[a] conclusory assertion . . . does not constitute evidence sufficient to establish the existence of a disputed material fact for purposes of a motion for summary judgment").

Notably, there are no documents in the record demonstrating the plaintiff's allegedly improper handling of the defendant's loan modification applications. In particular, there is no evidence of any communications between the defendant and Carrington regarding his applications, no evidence as to the specific nature of the technical deficiencies identified in the defendant's applications, no evidence as to the effect of the technical deficiencies on Carrington's review of the loan modification applications, and no evidence indicating whether the loan modification applications were subjected to any corrective actions following their initial denial, such as rectification of technical deficiencies or reconsideration based on corrected information. In fact, the defendant attached none of the loan modification applications to his affidavit. Thus, unlike the defendant in *Eichten*, who submitted an abundance of documentary evidence that substantiated the assertions in her affidavit; see *U.S. Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 739–41; the defendant here failed to submit any supporting evidence to permit a reasonable inference of wrongdoing to establish a genuine

issue of material fact regarding his unclean hands defense.

The present case is more analogous to *Homebridge Financial Services, Inc.* v. *Jakubiec*, 223 Conn. App. 517, 309 A.3d 1223 (2024). In *Jakubiec*, the plaintiff sought to foreclose a mortgage on real property owned by Thomas M. Jakubiec (decedent), who died two days after he had been served with process commencing the action. Id., 521–22. The trial court granted the plaintiff's motion to cite in as a defendant, among others, Robyn Jakubiec (Robyn), the decedent's widow. Id., 522. The plaintiff moved for summary judgment as to liability, contending that "[s]aid note and mortgage are now in default by virtue of nonpayment of the monthly installments of principal and interest due on July 1, 2013, and each and every month thereafter, and the plaintiff has exercised its option to declare the entire balance of said note due and payable." (Internal quotation marks omitted.) Id., 523. Robyn objected to the plaintiff's motion for summary judgment and filed an answer and special defenses, including, inter alia, unclean hands. Id. She alleged that "[t]he plaintiff misrepresented to the court that it was unable to verify, contact or locate anyone residing in the property subject to this action when in fact [Robyn] had actively contact[ed] the plaintiff and its agents to alert them to the circumstances of [the decedent's] passing and her occupancy of the property" and that "[t]he purpose of the plaintiff's misrepresentations were to blindside and ambush [her] with a judgment of foreclosure prior to her even having notice of any pleading or filing made with the court." (Internal quotation marks omitted.) Id., 537–38 n.18. Robyn further asserted that "the record is replete with numerous actions taken by the plaintiff requiring that it be denied foreclosure. Among these included submitting a false affidavit as to the lack of knowledge as to the defendant's residence and whereabout[s]. These

acts have included a refusal of trial payments, confusion of amounts due, repeated notices directed to the [decedent], checks written out to the [decedent], and material failure to comply with [the Emergency Mortgage Assistance Program, General Statutes §§ 8-265cc through 8-265kk].'' (Internal quotation marks omitted.) Id., 528. The trial court rendered summary judgment as to liability for the plaintiff, concluding that Robyn failed to present evidence to support her special defense of unclean hands. Id., 523–24.

On appeal, this court affirmed the judgment of the trial court, reasoning that, ''[a]lthough [Robyn] contends that [the mortgagee] 'lied' about its lack of knowledge of her whereabouts when the foreclosure action was commenced, she has not presented any evidence demonstrating that this was anything more than a mistake. Furthermore, [Robyn] failed to present evidence of the plaintiff's wilful misconduct that rose to the level of unclean hands with respect to, inter alia, the return of [her] partial payments during the modification trial period in 2019, issuing checks and correspondence to the decedent after his death, and the purportedly improper refusal to process modification paperwork.'' Id., 540. Accordingly, this court held that the trial court properly rendered summary judgment as to the defendant's unclean hands defense. Id., 542.

In the present case, as in *Jakubiec*, the defendant, on the basis of actions taken by the plaintiff with which he disagreed, argues that a fact finder could reasonably infer that the plaintiff engaged in those actions for the improper purpose of hindering his ability to rectify the default under the note and mortgage, and, as a result, substantially increased his debt. See *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 675, 212 A.3d 226 (2019) (explaining that ''[a]llegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused

the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement of the note and mortgage" (citation omitted; internal quotation marks omitted)). The problem for the defendant is that he has submitted no evidence whatsoever that the rejection of his loan modification applications was improper. The only evidence he has submitted is a chronology of rejected applications and encouragement from Carrington that he reapply to correct any errors. Without some evidence that Carrington engaged in such conduct as a subterfuge to harm the defendant, the defendant's unclean hands defense is based on mere speculation, in which we will not engage. See *Perez* v. *Metropolitan District Commission*, 186 Conn. App. 466, 476, 200 A.3d 202 (2018) ("Although 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. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.)).

Simply put, because the defendant did not meet his burden of providing an evidentiary basis to establish the existence of a genuine issue of material fact, the court properly rejected the defendant's unclean hands defense in rendering summary judgment as to liability for the plaintiff.

II

The defendant next claims that the court improperly failed to consider his estoppel defense when determining the amount of the debt. Specifically, he claims that

the court improperly accepted the plaintiff's affidavit of debt without an evidentiary hearing as to the amount of mortgage debt, despite his specific objection to the amount of the debt based on his sufficiently interposed estoppel defense. The plaintiff contends that the defendant's failures to present any evidence in support of his objection and to request an evidentiary hearing are fatal to his claim that the court erroneously accepted the plaintiff's affidavit of debt. We agree with the defendant.

We first set forth the applicable standard of review and relevant legal principles regarding the admissibility of affidavits of debt pursuant to Practice Book § 23-18 (a). "[T]he proper characterization of the trial court's ruling is clarified by examining the nature of an affidavit of debt and the function of . . . § 23-18 (a) in foreclosures. Without question, an affidavit of debt is hearsay evidence because it is an out-of-court statement, by an absent witness, that is offered to prove the truth of the amount of the debt averred in the affidavit. . . . [T]he purpose of § 23-18 (a) is to serve as an exception to the general prohibition of hearsay evidence when appropriate circumstances arise, namely, that the amount of the debt is not in dispute. . . . Therefore, the [defendant's] claim that the [trial court] erred in determining that § 23-18 (a) [applies] is most properly characterized as challenging the trial court's determination that an exception to the general prohibition of hearsay applies to the affidavit of debt.

"A trial court's decision to admit evidence, *if premised on a correct view of the law* . . . calls for the abuse of discretion standard of review. . . . In other words, only after a trial court has made the *legal determination* that a particular statement . . . is subject to a hearsay exception, is it [then] vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission

is being sought. . . . Therefore, a trial court's legal determination of whether Practice Book § 23-18 (a) applies is a question of law over which our review is plenary. . . .

"Practice Book § 23-18 (a) provides that, in any foreclosure action, where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto.

"Thus, to preclude the admission of an affidavit of debt pursuant to Practice Book § 23-18 (a) to establish the amount of mortgage debt, a defense to the mortgage debt must concern the *amount* of the debt. . . . [A] defense challenging the amount of the debt must be actively made to prevent the application of § 23-18 (a). . . . A defense is insufficient if it focuses on matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of liability, or [matters] that attack the credibility of the affiant or defects in the execution of the affidavit itself. . . . Additionally, a defense to the amount of the debt must be based on some articulated legal reason or fact. . . . A defendant not only must object to the amount of the debt but must specifically object as to why the amount of the debt is incorrect: for example, whether late charges should have been waived or money had been advanced for taxes." (Citations omitted; emphasis in original; internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 163–65, 296 A.3d 157 (2023).

In the present case, the defendant filed an objection to the amount of the debt and challenged the $30,968.59

claimed by the plaintiff for interest and fees accrued between April 1, 2018, and April 2, 2023. In his objection, the defendant argued that his special defenses "show[ed] that the plaintiff by and through [Carrington] instructed the defendant to file twenty-five mortgage modification applications . . . then wrongfully denied his twenty-five applications. Throughout this period, while the defendant relied on the plaintiff's assurances, the plaintiff wrongfully increased the debt amount through interest, attorney's fees, and other costs. . . . It would be inequitable for the plaintiff to recover a debt total that was increased due to its own misconduct. Therefore, the defendant respectfully requests that the interest and property inspection fees, an amount of $30,968.59, be excluded from this court's finding of debt, and that this court refuse to award attorney's fees that accrued because of the plaintiff's wrongful conduct." (Citations omitted.) Thus, the defendant "not only . . . object[ed] to the amount of the debt but [also] . . . specifically object[ed] as to why the amount of the debt is incorrect" on the basis of his estoppel based defenses. *JPMorgan Chase Bank, National Assn.* v. *Malick*, supra, 347 Conn. 165. Consequently, the defendant "sufficiently interposed a defense as to the amount of the debt," which prevented the plaintiff from relying on the affidavit of debt to prove the amount of the debt pursuant to Practice Book § 23-18 (a). Id., 176.

Although the plaintiff contends that the defendant failed to provide evidence in support of his objection, our Supreme Court recently rejected that same contention in *JPMorgan Chase Bank, National Assn.* v. *Malick*, supra, 347 Conn. 177, noting that, "[a]lthough the defendant did not provide official records from the town tax collector to support his calculation of the amount of property tax he owed, we have never required, and the language of Practice Book § 23-18 (a) does not require, a defendant to provide any evidence." The court

explained "that, in a foreclosure action, it is the plaintiff's burden to establish the amount of the debt. . . . [Section] 23-18 (a) provides plaintiffs with an efficient method of meeting their burden to establish the amount of the debt if no defense is interposed. Although it is the defendant's burden to sufficiently interpose a defense to the claimed amount of the debt, once a defense is interposed, the burden remains on the plaintiff to prove the amount of the debt. At no point does the burden shift to the defendant to prove that the plaintiff's affidavit is incorrect. In other words, once the defendant has sufficiently interposed a defense as to the amount of the debt, the plaintiff is required to satisfy its burden under the Connecticut Code of Evidence, without the benefit of § 23-18 (a). The purpose of this procedure is to allow a defendant to cross-examine the witnesses presented on the issue of the amount of the debt, as well as to allow a defendant an opportunity to present his or her own evidence." (Citation omitted.) Id., 176.

The defendant followed this precise procedure in the present case and, contrary to the plaintiff's argument, was not required to present evidence to preserve his objection to the plaintiff's affidavit of debt. For the same reason, we are not persuaded by the plaintiff's alternative argument that the defendant had to request an evidentiary hearing in order to preserve his objection to the court's reliance on the affidavit of debt. In other words, because the defendant's objection to the amount of the debt precludes the application of Practice Book § 23-18 (a) and because it was the plaintiff's burden to prove the amount of the debt, the defendant was not required to request an evidentiary hearing for the plaintiff to present its evidence in support of its motion for judgment. See id., 178 ("At all times, it was the plaintiff's burden to prove the amount of the debt. The defendant sufficiently objected to the amount of [the debt], and

it was not his burden to provide further evidence to prove his objection." (Internal quotation marks omitted.)).

Accordingly, the defendant in the present case sufficiently objected to the amount of interest and fees, and he was not required to provide evidence to support his objection for the purpose of interposing a defense to the amount of the debt in accordance with Practice Book § 23-18 (a). Consequently, we conclude that the court improperly relied solely on the plaintiff's affidavit of debt to determine the amount of the debt.[8]

The judgment is reversed with respect to the order of foreclosure by sale and the case is remanded for an evidentiary hearing on the amount of the debt; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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[8] We note that, in its memorandum of decision on the motion for summary judgment, the court deemed the defendant's estoppel defense "legally sufficient" but stated that the estoppel defense "does not dispel of the defendant's liability for defaulting on the mortgage but, rather, only indicates that the amount of interest, fees, and other costs has increased due to the plaintiff's alleged conduct." Thus, although the court recognized the legal viability of the defendant's estoppel defense with respect to the debt when it rendered summary judgment as to liability for the plaintiff, it later failed to consider the specific objection based on that defense when it overruled the defendant's objection to the amount of the debt as set forth in the plaintiff's affidavit of debt and, instead, relied on the affidavit when it determined the amount of the debt. Given that the court recognized the legitimate dispute as to the amount of the debt at the summary judgment stage, it should have required the plaintiff to present evidence at a hearing to establish the amount of the debt when the defendant raised that issue again in response to the plaintiff's affidavit of debt.