RONNIE HOLLEY *v.* COMMISSIONER OF CORRECTION (AC 43186)

Bright, C. J., and Cradle and Harper, Js.*

Syllabus

The petitioner, who had been convicted, following a jury trial, of, inter alia, sexual assault in the first degree, sought a writ of habeas corpus. The petitioner had filed two prior state habeas corpus petitions, the second of which was denied in January, 2009, and the habeas court's decision was affirmed on appeal to this court. The Supreme Court denied the petitioner's request for certification to appeal that decision in January, 2011. The petitioner subsequently brought a federal habeas action, and the court denied the federal petition in December, 2014. The petitioner filed the habeas petition underlying this appeal in December, 2016, and the respondent, the Commissioner of Correction, filed a request for an order to show cause pursuant to statute (§ 52-470 (e)), asserting that the petition should be dismissed because it was not timely filed pursuant to § 52-470 (d) (1). At the good cause hearing, the petitioner asserted that his petition was timely under § 52-470 (d) because it was filed within two years of the final judgment on his federal habeas petition or, alternatively, that he had established good cause, under § 52-470 (e),

* This appeal was argued on November 9, 2020, before a panel of this court consisting of Judges Cradle, Alexander and Harper. On March 19, 2021, this court stayed the appeal pending the final disposition of *Kelsey* v. *Commissioner of Correction*, 202 Conn. App. 21, 244 A.3d 171 (2020), aff'd, 343 Conn. 424, 274 A.3d 85 (2022), and *Felder* v. *Commissioner of Correction*, 202 Conn. App. 503, 246 A.3d 63 (2021), aff'd, 348 Conn. 396, 306 A.3d 1061 (2024), by our Supreme Court.

On February 6, 2024, this court issued the following order: "As [*Kelsey*] and [*Felder*] have been decided by the Supreme Court, the stay that was entered on March 19, 2021, and continued on June 21, 2022, is hereby lifted. The parties are hereby ordered, sua sponte, to submit supplemental memoranda of no more than 2000 words, on or before February 28, 2024, addressing the impact of *Kelsey* v. *Commissioner* [*of Correction*], 343 Conn. 424, 274 A.3d 85 (2022), and *Felder* v. *Commissioner* [*of Correction*], 348 Conn. 396, 306 A.3d 1061 (2024), on this appeal. The supplemental memoranda should also indicate whether additional oral argument is requested." (Footnote omitted.) Both parties filed supplemental briefs in accordance with that order and waived additional oral argument.

On April 11, 2024, Chief Judge Bright replaced Judge Alexander on the panel, and he has read the briefs and appendices and listened to a recording of oral argument prior to participating in this decision.

to overcome the presumption of unreasonable delay for the filing of his untimely habeas petition because he was not aware of the limitation periods imposed by § 52-470 (d). The habeas court dismissed the petition as untimely under § 52-470 (d), concluding that the petitioner had failed to establish good cause for the delay. Thereafter, the habeas court denied the petitioner's petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the habeas court abused its discretion in denying his petition for certification to appeal as, pursuant to *Felder* v. *Commissioner of Correction* (348 Conn. 396), the petitioner's lack of knowledge, standing alone, was insufficient to establish good cause for a delay in filing his untimely petition, and the phrase "prior petition," as used in § 52-470 (d), unambiguously refers solely to state habeas petitions, and, therefore, any contrary interpretation by the petitioner was unreasonable; accordingly, this court could not conclude that the resolution of the petitioner's claims involved issues that were debatable among jurists of reason, that a court could resolve in a different manner, or that deserved encouragement to proceed further.

Argued November 9, 2020—officially released May 21, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment dismissing the petition; thereafter, the court, *Newson, J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Jennifer Bourn, chief of legal services, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Craig Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Ronnie Holley, appeals from the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely under

General Statutes § 52-470 (d) and (e).[1] On appeal, the petitioner claims that the habeas court improperly rejected his claim that his petition was timely under § 52-470 (d) because it was filed within two years of the final judgment on his prior federal habeas petition or, alternatively, that he had established good cause, under § 52-470 (e), to overcome the presumption of unreasonable delay for the filing of his untimely habeas petition in that he was unaware of the statutory time limit. We disagree and, accordingly, dismiss the appeal.

The following facts and procedural history, as set forth by the habeas court, are relevant to the petitioner's

[1] General Statutes § 52-470 provides in relevant part: "(a) The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require. . . .

"(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which

claims on appeal. "[T]he petitioner was convicted of sexual assault [in the] first degree and assault [in the] third degree by a jury after a trial held in the judicial district of New Haven. Following his convictions, the trial court sentenced him to a total effective term of fifteen years, execution suspended after ten years, followed by ten years of probation. The petitioner took a direct appeal from his convictions, which were affirmed. *State* v. *Holley*, 90 Conn. App. 350, 877 A.2d 872, cert. denied, 275 Conn. 929, 883 A.2d 1249 (2005). The petitioner has also filed two prior state habeas corpus petitions, the most recent one having been denied on January 12, 2009. *Holley* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-07-4001499-S (January 12, 2009). The decision of the habeas court was affirmed on appeal, and the petitioner's subsequent request for certification to [appeal to our] Supreme Court was denied. *Holley* v. *Commissioner of Correction*, 124 Conn. App. 907, 5 A.3d 584 (2010), cert. denied, 299 Conn. 924, 11 A.3d 151 (2011). [Our] Supreme Court released notification of its decision on January 4, 2011." Following that decision, in 2011, the petitioner brought a federal habeas action. On December 9, 2014, the court denied the federal petition. *Holley* v. *Chapdelaine*, United States District Court, Docket No. 3:11CV00576 (JAM) (D. Conn. December 9, 2014).

"The current petition for a writ of habeas corpus was received by the clerk on December 8, 2016. The respondent [Commissioner of Correction] filed a request for order to show cause on October 31, 2018, asserting that the petition should be dismissed because it was not filed within two years from when appellate review of the decision on the prior [state] petition became final on January [4], 2011, as provided for in

could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

. . . § 52-470 (d) (1). The court held an evidentiary hearing on the matter [on] February 22, 2019."

At the hearing, the petitioner was the sole witness. The petitioner asserted that "he was not aware of the limitation periods imposed by § 52-470 (d)." The petitioner also argued that " 'good cause' should be found in the fact that he commenced a federal habeas petition attacking the same conviction after the January 4, 2011 Supreme Court decision, and that federal case was not finally adjudicated until [December 9, 2014]."

In a memorandum of decision dated May 13, 2019, the court, *Newson, J.*, dismissed the habeas petition as untimely under § 52-470 (d), concluding that the petitioner failed to establish good cause for the delay. The court rejected the petitioner's first argument by stating: "[E]veryone is presumed to know the law, and . . . ignorance of the law excuses no one . . . . Thus, the [petitioner] is charged with knowledge of the law." (Internal quotation marks omitted.) The court rejected the petitioner's second argument by stating that "there is nothing in the language of § 52-470 (d) that could reasonably be read to contemplate a tolling of the limitation period while a petitioner is engaged in parallel challenges to the same conviction in a different forum. . . . Therefore, this basis is also insufficient to establish 'good cause' for this petition being filed . . . beyond the . . . deadline." (Citation omitted.) The court thereafter denied the petitioner's petition for certification to appeal. This appeal followed.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First,

[the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . To prove that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. . . .

"The conclusions reached by the [habeas] court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citations omitted; internal quotation marks omitted.) *Rice* v. *Commissioner of Correction*, 204 Conn. App. 513, 517–18, 251 A.3d 1009, cert. denied, 337 Conn. 906, 252 A.3d 365 (2021).

On appeal, the petitioner claims that the habeas court improperly determined that his petition was untimely under § 52-470 (d) on the ground that it was not filed

within the statutorily prescribed time limit of two years after the date of judgment on his prior habeas petition because it was filed within two years of final judgment on his prior federal habeas petition, which, he contends, is included within the meaning of "prior petition" under § 52-470 (d). Alternatively, he argues that he has demonstrated good cause for the untimely filing of his petition in that he was unaware of the statutory time limit.

Our resolution of the petitioner's claims is dictated by our Supreme Court's recent interpretation of § 52-470 (d), which provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of . . . [t]wo years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . [or] October 1, 2014 . . . ." In particular, the parties concede, and we agree, that our Supreme Court's decision in *Felder* v. *Commissioner of Correction*, 348 Conn. 396, 306 A.3d 1061 (2024), is dispositive of the petitioner's claims.

In *Felder*, our Supreme Court rejected the petitioner's claim that his petition was timely filed because he filed it within two years of the final judgment in his federal habeas petition, concluding that the phrase "prior petition," as used in § 52-470 (d), "unambiguously refers solely to state [habeas] petitions, and, therefore, any contrary interpretation by the petitioner would have been unreasonable." Id., 414. In *Felder*, the court also held that a petitioner's lack of knowledge, standing alone, is insufficient to establish good cause for a delay in filing an untimely petition. See id., 413. Citing *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022), the court held that the petitioner bears the

burden of demonstrating that something "outside the control of the petitioner had any bearing on his lack of knowledge . . . ." (Internal quotation marks omitted.) *Felder* v. *Commissioner of Correction*, supra, 348 Conn. 413. As in *Felder*, the petitioner in this case testified only that he had not been informed by his previous habeas counsel of the time limitations set forth in § 52-470 and he was not aware of them. The petitioner therefore cannot prevail on either of his claims on appeal.

We therefore cannot conclude that the resolution of the petitioner's claims involves issues that are debatable among jurists of reason, that a court could resolve in a different manner, or that are adequate to deserve encouragement to proceed further. Accordingly, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

KENNETH COCKERHAM *v.* ADAM WESTPHALEN ET AL. (AC 46231)

Alvord, Moll and Clark, Js.

Syllabus

Pursuant to statute (§ 52-552e (a)), "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due."

The defendant J appealed from the judgment of the trial court rendered for the plaintiff on three counts of his complaint that asserted claims of fraudulent transfer against J and her husband, the defendant W, pursuant to the Connecticut Uniform Fraudulent Transfer Act (CUFTA) (§ 52-552a et seq.). In September, 2004, on the advice of W, the plaintiff transferred funds from his 401 (k) account into an individual retirement account (IRA) comanaged by A Co., W's employer. W subsequently formed T Co., and he left his employment with A Co. in 2007. In 2008, on the advice of W, the plaintiff transferred the balance of his IRA into another entity, and the funds were subsequently transferred to a bank account owned by T Co. so that W, as the sole member of T Co., could fully manage and invest the funds for the plaintiff. As part of this transaction, T Co. issued an unsecured promissory note to the plaintiff in the amount of $185,000. The plaintiff invested additional funds into accounts held and managed by T Co. in 2009 and 2011, bringing the plaintiff's total principal investment to more than $227,000. Thereafter, W mismanaged the plaintiff's investments and was negligent in the handling of assets committed to him by the plaintiff by, inter alia, commingling the plaintiff's assets with those of other investors, taking no steps to secure the plaintiff's investment, paying numerous personal expenses with T Co.'s assets and transferring T Co.'s assets to his personal accounts without the knowledge of investors. Between 2008 and 2012, T Co. suffered significant losses, failed to provide the plaintiff with periodic reports concerning T Co.'s poor financial condition and failed to provide the plaintiff with any financial records reflecting the plaintiff's losses. On May 1, 2017, the promissory note from T Co. to the plaintiff matured. Although W represented to the plaintiff that his assets were secure, T Co. was unable to satisfy its obligation to the plaintiff because it lacked assets sufficient to satisfy the note. W subsequently dissolved T Co., giving no notice of the dissolution to the plaintiff or to any other creditors. The plaintiff commenced the present action in May, 2018, claiming, inter alia, that W and J fraudulently transferred to themselves various moneys and assets belonging to T Co. in violation of CUFTA, specifically § 52-552e. In July, 2018, the plaintiff applied for a prejudgment remedy against, inter alia, J and W, which was granted in January, 2019, as against W. While the litigation was ongoing, the Department of Banking commenced an investigation into W, and, although it was unclear from the record precisely when the department's investigation commenced, as of September, 2018, W had been made aware of the investigation and had retained counsel. Due to this investigation, W closed all his personal bank accounts. Between September, 2018, and July, 2019, W conveyed more than $233,000, representing amounts he had received for professional services he had rendered to various parties, to J through a series of deposits into an account owned solely by her. In July, 2020, the department issued orders that, inter alia, imposed a fine of $900,000 against W and required him to pay restitution to the

plaintiff in the amount of $367,000. At trial, J testified that she did not notice in November or December of 2018 that $100,000 had been deposited into her sole personal bank account over a period of two weeks and that she never looked at her bank statements. After the trial, the court, inter alia, rendered judgment against J on three counts of fraudulent transfer, concluding that W fraudulently transferred funds to J between 2018 and 2019 in violation of CUFTA and under the common law. The court found that, at the time of the transfers to J, W was unable to pay fines and restitution orders imposed by the department and had wound up T Co., leaving the plaintiff and others without any means of recovering their investments of principal; that J never provided any consideration for the infusion of funds into her account and used funds from that account to pay various personal and household expenses; that the transfer of funds by W into J's personal account was fraudulent and designed to place his personal assets beyond the reach of creditors and potential creditors, including the plaintiff; and that any claim that J was unaware of the purpose of the fraudulent transfer of funds lacked credibility, that J possessed fraudulent intent and that she willingly and actively participated in W's attempt to shield assets and place those assets beyond the reach of creditors, including the plaintiff. The court also attached J's assets in the amount of the funds fraudulently transferred to her by W. *Held*:

1. J could not prevail on her claim that the trial court erred in concluding that the transfers from W were made with an actual intent to defraud because its finding that both J and W participated in the transfer with the actual intent to hinder or defraud the plaintiff from collecting on a judgment was clearly erroneous:

a. The trial court properly rendered judgment for the plaintiff on his statutory fraudulent transfer claim pursuant to § 52-552e (a) (1) because its finding that the transfers were made with an actual intent to defraud was not clearly erroneous: because § 52-552e (a) (1) does not require a plaintiff to prove that a transferee shared in a transferor's fraudulent intent, the plaintiff was not required to prove that J shared in W's intent in order to prevail under § 52-552e (a) (1); moreover, the evidence presented at trial revealed that the transfers at issue satisfied many of the factors set forth in § 52-552e (b) that courts may consider in determining whether a transfer was made with actual intent to defraud, including that the transfers were made to an insider, that, before the transfers were made, W had been sued or threatened with suit by way of the present action and the investigation by the department, that W was insolvent or became insolvent shortly after the transfers were made or the obligation was incurred, given that W was unable to pay the fine and restitution imposed by the department, and that, at the time of the transfers, he was unable to pay the amount that the plaintiff had invested in T Co., that W retained possession or control of the property transferred after the transfers were made given that J used the transferred funds to

pay various personal and household expenses as well as W's personal expenses, that W did not receive reasonably equivalent value in exchange for the transfers to J given that the evidence adduced at trial showed that W received no value whatsoever in exchange for the transfers because he did not receive anything that he could use to satisfy or partially satisfy a creditor's claim, and that the transfers occurred shortly before and shortly after the court granted the prejudgment attachment against W's assets and before the department imposed the fine against W and ordered restitution to be paid to the plaintiff.

b. The trial court did not err in concluding that the transfers were actually fraudulent under the common law: the court found that any claim that J was unaware of the purpose of the fraudulent transfer of the funds lacked credibility, that she possessed fraudulent intent and that she willingly and actively participated in W's attempt to shield assets and place those assets beyond the reach of creditors, including the plaintiff, and, as the fact finder, the court was entitled to make this credibility determination as to J, and this court would not disturb those findings on appeal; moreover, the trial court, as the finder of fact, was entitled to infer from all of the circumstances surrounding the transfers that J shared in W's fraudulent intent.

2. J could not prevail on her claim that the trial court improperly determined that the transfers to her were constructively fraudulent under the common law and § 52-552e (a) (2): the court's finding that the transfers to J left W unable to meet his financial obligations was not clearly erroneous, as the record revealed that W admitted at trial that he was unable to pay the fine or restitution imposed on him by the department or the amount that the plaintiff originally invested in T Co. and, further, that he disclosed information regarding J's personal checking account to the department because of the pending investigation against him but that by the time he had done so there was only a small amount of funds remaining in the account; moreover, there was no support in the record for J's argument that she personally invested $750,000 into the T Co. fund, suggesting that the transfers at issue could have been made as a repayment of her investment into T Co., as W testified at trial that the transfers to J's bank account consisted solely of funds that he received for professional services unrelated to T Co. and that he transferred the funds because of the pending department investigation and, thus, based on W's own testimony, it was clear that the transfers at issue were wholly unrelated to J's alleged investment in T Co.; furthermore, although J argued that love and affection is valid consideration between a husband and wife, none of the cases cited by J in her appellate brief stands for the proposition that love and affection may constitute valid consideration for purposes of defeating a fraudulent transfer claim under the common law or CUFTA, and, on the contrary, various courts have long held that love and affection does not constitute adequate consideration for purposes of defeating a fraudulent conveyance claim, and, accordingly,

in the absence of any evidence in the record to support J's assertion that W received adequate consideration or reasonably equivalent value for the transfers, this court could not conclude that the trial court's finding that the transfers were made without consideration and not in exchange for a reasonable equivalent value was clearly erroneous.

Argued January 31—officially released May 21, 2024

Procedural History

Action to recover damages for, inter alia, fraudulent transfer, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee; judgment for the plaintiff, from which the defendant Jennifer Westphalen appealed to this court. *Affirmed.*

William W. Taylor, for the appellant (defendant Jennifer Westphalen).

Sabato P. Fiano, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant Jennifer Westphalen[1] appeals from the judgment of the trial court rendered against her and in favor of the plaintiff, Kenneth Cockerham, on counts nine, ten, and eleven of the plaintiff's complaint, asserting claims of fraudulent transfer against the defendant and her husband, Adam Westphalen (Westphalen), pursuant to the Connecticut Uniform Fraudulent Transfer Act (CUFTA), General Statutes § 52-552a et seq. On appeal, the defendant claims that the court erred in finding that Westphalen fraudulently transferred money to the defendant under the common

[1] The plaintiff, Kenneth Cockerham, brought the underlying action against Adam Westphalen; his wife, Jennifer Westphalen; and five entities: AssetMark, Inc., also known as AssetMark Investment Services; Vista Investment Advisors, LLC; Nereid II Fund, LLC; Mosaic Financial Strategies, LLC; and Triton Investment Partners, LLC. Prior to trial, the claims pleaded against all defendants except Adam Westphalen, Jennifer Westphalen, and Triton Investment Partners, LLC, were withdrawn. The only defendant participating in the present appeal is Jennifer Westphalen. Accordingly, all references to the defendant in this opinion are to Jennifer Westphalen only.

law[2] and pursuant to General Statutes § 52-552e. Specifically, the defendant argues that the court erred in finding that Westphalen possessed actual fraudulent intent, that the defendant shared in that intent, and that the transfers were made without consideration, leaving Westphalen unable to meet his financial obligations. We disagree with the arguments advanced by the defendant and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of this appeal. The plaintiff's wife, Stacey Cockerham, is the defendant's cousin. The plaintiff first met Westphalen in 1995, and in the years that followed, the couples developed a friendship. Westphalen holds a master's degree in business administration from Cornell University and a degree in legal taxation from the New York University School of Law. He has been a certified financial planner since 2003.

Between 1998 and 2007, Westphalen was employed by AssetMark Investment Services (AssetMark). During this time, he also held a 50 percent interest in Vista

[2] Although the operative complaint only asserted statutory fraudulent transfer claims, the court concluded that the plaintiff proved both actual and constructive fraud under the common law and General Statutes § 52-552e. On appeal, neither party has challenged the court's judgment that the defendant is liable for fraudulent transfers at common law on the basis that the plaintiff did not plead a common-law claim. Instead, both parties briefed the merits of the court's judgment that the defendant was liable for fraudulent transfers under the common law. Because neither party has raised any claim of error with respect to the court's judgment on the basis that the plaintiff did not plead a common-law fraudulent transfer claim, we will not disturb the court's judgment on that basis. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 164, 84 A.3d 840 (2014) ("our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived"); see also *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426 n.5, 143 A.3d 661 ("a court is not obligated to raise or consider plain error *if a party has failed to do so*" (emphasis in original)), cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016).

Investment Advisors, LLC (Vista). In September, 2004, on the advice of Westphalen, the plaintiff, who at the time was employed by AT&T and participated in his employer's 401 (k) plan, transferred $173,000 from his 401 (k) account into an individual retirement account (IRA) managed by AssetMark and Vista. AssetMark and Vista played a dual role in managing the IRA. Vista's role was to communicate with the plaintiff about his goals and objectives and then to provide AssetMark with that information. AssetMark's role was to take the information given to it by Vista and to manage the account through its investment platform.

While Westphalen was employed by AssetMark, he formed Triton Investment Partners, LLC (Triton). Westphalen was the sole member of Triton and had complete control, management, and authority over all matters relating to Triton. Westphalen was subject to no outside control or direction regarding Triton. Westphalen claimed that he formed Triton to serve as a vehicle through which he could manage the assets of family members and close friends.

Westphalen left AssetMark in 2007. In 2008, on the advice of Westphalen, the plaintiff transferred the balance of his IRA, in the amount of $187,048.86, into an entity called Pensco Trust. After the funds were transferred to Pensco Trust, they were subsequently transferred to a Chase account owned by Triton so that Westphalen, as the sole member of Triton, could fully manage and invest the funds for the plaintiff. As part of this transaction, Triton issued an unsecured promissory note to the plaintiff in the amount of $185,000. Westphalen did not personally guarantee that promissory note. In 2009, the plaintiff invested an additional $27,266.91 into accounts held and managed by Triton, followed by an additional investment in 2011 in the amount of $12,923.32, bringing the plaintiff's total principal investment to $227,239.09.

Westphalen, as the sole member of Triton, mismanaged the plaintiff's investments and "was negligent in the handling of assets committed to him by [the plaintiff]." For example, once the plaintiff's assets were controlled by Triton, Westphalen began to commingle the plaintiff's assets with those of other investors. Westphalen took no steps to secure the plaintiff's investment. Throughout the years, Westphalen paid numerous personal expenses with Triton assets and transferred Triton assets to his personal accounts without the knowledge of investors. Between 2008 and 2012, Triton suffered losses between $1.5 and $2 million. During this period, Triton did not provide the plaintiff with periodic reports concerning Triton's poor financial condition and failed to provide the plaintiff with any financial records reflecting the plaintiff's losses.

On May 1, 2017, the operative promissory note from Triton to the plaintiff matured. Although Westphalen represented to the plaintiff that his assets were secure, Triton was unable to satisfy its obligation to the plaintiff because it lacked assets sufficient to satisfy the note. Westphalen subsequently dissolved Triton, giving no notice of the dissolution to the plaintiff or to any other creditors.

The plaintiff commenced this action on May 17, 2018, claiming, inter alia, that Westphalen, acting both as an individual and as the sole member of Triton, had mismanaged, dissipated, and ultimately lost the retirement funds the plaintiff had entrusted to Westphalen and various limited liability and corporate entities. Relevant for present purposes, in counts nine, ten, and eleven of the complaint, the plaintiff claimed that Westphalen and the defendant fraudulently transferred to themselves various moneys and assets belonging to

"Westphalen Entities"[3] in violation of § 52-552e.[4] Specifically, count nine alleged a violation of § 52-552e (a) (1), count ten alleged a violation of § 52-552e (a) (2) (A), and count eleven alleged a violation of § 52-552e (a) (2) (B).

On July 26, 2018, the plaintiff applied for a prejudgment remedy against the defendant, Westphalen, Triton, and Mosaic Financial Strategies, LLC (Mosaic), pursuant to General Statutes § 52-278a et seq., in the amount of $500,000. A hearing on the application was held before the court, *T. Welch, J.*, on November 8, 2018. On January 7, 2019, the court granted the plaintiff's

[3] The complaint alleged that the "Westphalen Entities" included Vista, Triton, and two other entities, Mosaic Financial Strategies, LLC, and Nereid II Fund, LLC, and that Westphalen was a principal and/or interest holder in each of them.

[4] General Statutes § 52-552e provides: "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

"(b) In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred, (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

application for a prejudgment remedy against Westphalen and Triton. The court stated: "After a careful review of the evidence, briefs, the corresponding legal principles and taking into consideration the defendants' proposed defenses . . . the court finds that probable cause exists to support the plaintiff's claims against [Westphalen] and [Triton] as to count three (negligent misrepresentation) and count four (negligence) and against [Triton] as to count eight (breach of contract). The court does not find that the plaintiff has satisfied his burden of proof relative to [the defendant] or [Mosaic] as to any of the counts which were the subject of the prejudgment remedy hearing nor has the plaintiff satisfied his burden of proof relative to the first count (promissory estoppel). Accordingly, pursuant to General Statutes § 52-278d, the court grants a prejudgment attachment in favor of the plaintiff and against [Triton] and [Westphalen] only, in the amount of $450,000."

While this litigation was ongoing, the Department of Banking (department) commenced an investigation into Westphalen. Although it is unclear from the record precisely when the department's investigation commenced, as of September, 2018, Westphalen had been made aware of the investigation and had retained counsel. Due to this investigation, Westphalen closed all his personal bank accounts. Beginning in September, 2018, and continuing through July, 2019, Westphalen conveyed $233,069.28 to the defendant through a series of deposits into an account owned solely by the defendant. These transfers represented amounts that he had received for professional services that he had rendered to various parties. On July 27, 2020, the department issued orders that, inter alia, imposed a fine of $900,000 against Westphalen and required him to pay restitution to the plaintiff in the amount of $367,000.

The matter was subsequently tried to the court, *Hon. Dale W. Radcliffe*, judge trial referee, on January 12

and 13, 2022.[5] On June 22, 2022, the court rendered judgment against the defendant on counts nine, ten, and eleven of the complaint,[6] concluding that Westphalen fraudulently transferred funds to the defendant between 2018 and 2019 in violation of CUFTA and under the common law.[7] The court stated: "Westphalen testified that he deposited income into an account solely in the name of [the defendant] and closed existing accounts in his own name because of the proceedings before the [department]. At the time of the transfers, 2018 and 2019, [Westphalen] was unable to pay fines and restitution orders imposed by the [department] and had wound up [Triton], leaving the plaintiff and others

[5] This matter was tried twice. The first trial commenced on October 10, 2019, and concluded on January 8, 2020, before the court, *Hon. Edward F. Stodolink*, judge trial referee. On March 16, 2021, the defendant and Westphalen filed a motion for a mistrial predicated on the court's failure to render a timely decision pursuant to General Statutes § 51-183b, which requires that a trial court render a decision within 120 days after the completion of a civil trial. On April 22, 2021, the court, *Stevens, J.*, granted the motion for a mistrial, and a new trial was scheduled.

[6] The court also rendered judgment against Westphalen on counts four, five, seven, eight, and fifteen of the complaint and rendered judgment against Triton on count eight of the complaint.

[7] Although the plaintiff's complaint alleged fraudulent transfers from the Westphalen Entities to Westphalen and the defendant that occurred prior to the date the complaint was filed, the evidence presented at trial, and on which the trial court's judgment is based, is predicated on transfers occurring between Westphalen and the defendant in 2018 and 2019, after the complaint was filed. The defendant, however, did not object on that basis to any of the evidence presented in the trial court and has not challenged the court's judgment on that basis in this appeal. Because these causes of action, while unpleaded, were actually litigated at trial, without objection, we will not disturb the trial court's judgment on the basis of a pleading irregularity. See *Gleason* v. *Durden*, 211 Conn. App. 416, 431, 272 A.3d 1129 ("[I]n the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In that circumstance, provided the plaintiff has produced sufficient evidence to prove the elements of his unpleaded claim, the defendant will be deemed to have waived any defects in notice." (Internal quotation marks omitted.)), cert. denied, 343 Conn. 921, 275 A.3d 211 (2022).

without any means of recovering their investments of principal.

"[The defendant] never provided any consideration for the infusion of funds into her account and used funds from that account to pay various personal and household expenses. She also deposited her own income into the account.

"It is found that the transfer of funds by [Westphalen] into [the defendant's] personal account was fraudulent and designed to place his personal assets beyond the reach of creditors and potential creditors, including [the plaintiff].

"It is found that both actual and constructive fraud, both at common law and pursuant to applicable statutes, has been proven by clear and convincing evidence.

"It is found that any claim that [the defendant] was unaware of the purpose of the fraudulent transfer of funds lacks credibility. It is found by clear and convincing evidence that [the defendant] possessed fraudulent intent and willingly and actively participated in the attempt of [Westphalen] to shield assets and place those assets beyond the reach of creditors, including [the plaintiff].

"It is found that the amount of money transferred by [Westphalen] is $233,069.28.

"Judgment may therefore enter, as to counts nine, ten and eleven, as against both [Westphalen] and [the defendant]. It is further found that an attachment against the assets of [the defendant] should enter based upon the fraudulent transfers of money into her account, in the amount of $233,069.28." This appeal followed.

On appeal, the defendant claims that the court erred "in finding actual and constructive fraud at both common law and pursuant to [§ 52-552e]" because the evidence does not support the court's findings that Westphalen possessed actual fraudulent intent, that the defendant willingly and actively participated in the alleged fraud, or that the transfers were made without consideration, leaving Westphalen unable to meet his financial obligations. We are not persuaded.

We begin by setting forth the standard of review and legal principles relevant to this claim. "The determination of whether a fraudulent transfer took place is a question of fact and it is axiomatic that [t]he trial court's [factual] findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . We cannot retry the facts or pass on the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . The elements of fraudulent conveyance, including whether the defendants acted with fraudulent intent, must be proven by clear, precise and unequivocal evidence. . . . This standard, also referred to as the clear and convincing standard, is met if the evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . Put another way, the clear and convincing standard should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citation omitted; internal quotation marks omitted.) *Featherston* v. *Katchko & Son Construction Services, Inc.*, 201 Conn.

App. 774, 792, 244 A.3d 621 (2020), cert. denied, 336 Conn. 923, 246 A.3d 492 (2021).

In Connecticut, there exists both a common-law and statutory cause of action for fraudulent conveyance. "A party alleging a fraudulent transfer or conveyance under the common law bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations [(constructive fraud)] or (2) that the conveyance was made with a fraudulent intent in which the grantee participated [(actual fraud)]." (Internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 417, 211 A.3d 20 (2019).

Under § 52-552e, on the other hand, "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." With these principles in mind, we turn to the defendant's claims on appeal.

I

We first address the defendant's claim that the court erred in concluding that the transfers were made with an actual intent to defraud pursuant to § 52-552e (a) (1) and under the common law because its finding that both the defendant and Westphalen participated in the transfer with the actual intent to hinder or defraud

the plaintiff from collecting on a judgment was clearly erroneous. We are not persuaded.

A

With respect to the court's conclusion that the plaintiff was entitled to a judgment on his statutory fraudulent transfer claim, the defendant first argues that the court's finding that the transfers were made with an actual intent to defraud was clearly erroneous because "[t]here is absolutely no clear and convincing evidence of fraudulent intent on the part of [the defendant], and therefore actual fraud cannot be found." The plaintiff correctly points out, however, that § 52-552e (a) (1) does not require a plaintiff to prove that a transferee like the defendant shared in a transferor's fraudulent intent.

Section 52-552e (a) (1) provides: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation: (1) With actual intent to hinder, delay or defraud any creditor of the debtor . . . ." Unlike the common law, the statutory cause of action for a fraudulent transfer based on a transferor's actual intent to defraud a creditor does not require a plaintiff to prove that a transferee shared the transferor's fraudulent intent. In *Kosiorek* v. *Smigelski*, 138 Conn. App. 695, 54 A.3d 564 (2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013), this court explained that, "[p]rior to the adoption of [§ 52-552e], the plaintiff had to prove (1) that the transferor had intent to defraud the creditor and (2) that the transferee shared in the transferor's fraudulent intent. . . . The plain language in § 52-552e addresses the fraudulent intent of the debtor and makes no mention of the fraudulent intent of the transferee." (Emphasis omitted; internal quotation marks omitted.) Id., 726. Therefore, "[w]ith respect to [claims] under § 52-552e . . . *there*

is no requirement for a fraudulent intent with respect to the transferees." (Emphasis added.) Id., 727. Because a plaintiff is not required to prove that a transferee shared in a transferor's intent in order to prevail under § 52-552e (a) (1), the defendant's claim, that the court erred in holding her liable because its finding that she shared in Westphalen's fraudulent intent was clearly erroneous, fails as a matter of law.

Nevertheless, the defendant also claims that the court erred in holding her liable under § 52-552e (a) (1) because its finding that Westphalen made the transfers with the actual intent to hinder, delay, or defraud the plaintiff also was clearly erroneous. Specifically, the defendant argues that there was no evidence to support such a finding. We disagree.

"With respect to finding actual intent as set forth in § 52-552e (a) (1), [our Supreme Court has] stated that, because fraudulent intent is almost always . . . proven by circumstantial evidence, courts may consider numerous factors in determining whether a transfer was made with actual intent to defraud." (Internal quotation marks omitted.) *McKay* v. *Longman*, supra, 332 Conn. 422. These factors are set forth in § 52-552e (b), which provides: "In determining actual intent under subdivision (1) of subsection (a) of this section, consideration may be given, among other factors, to whether: (1) The transfer or obligation was to an insider, (2) the debtor retained possession or control of the property transferred after the transfer, (3) the transfer or obligation was disclosed or concealed, (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit, (5) the transfer was of substantially all the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred,

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred, (10) the transfer occurred shortly before or shortly after a substantial debt was incurred, and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor."

In support of its finding that Westphalen transferred funds to the defendant with actual intent to hinder, delay, or defraud his creditors, the court stated that "Westphalen testified that he deposited income into an account solely in the name of [the defendant], and closed existing accounts in his own name, because of the proceedings before the [department]." The court further found "that the transfer of funds by [Westphalen] into [the defendant's] personal account was fraudulent and designed to place his personal assets beyond the reach of creditors and potential creditors, including [the plaintiff]."

On the basis of our review of the record, we conclude that these findings were not clearly erroneous. At trial, evidence was presented that Westphalen conveyed $233,069.28 to the defendant through a series of deposits that occurred between September, 2018, and July, 2019. Westphalen testified that these transfers represented amounts that he had received for professional services that he had rendered to various parties, which he subsequently deposited into a bank account owned solely by the defendant.

The evidence presented at trial revealed that the transfers at issue in this case satisfy many of the § 52-552e (b) factors that "courts may consider . . . in determining whether a transfer was made with 'actual intent' to defraud." *McKay* v. *Longman*, supra, 332 Conn. 422. To begin, there is no dispute that the transfers were made "to an insider." General Statutes § 52-552e (b) (1). The transfers were made by Westphalen

to his wife, the defendant. Pursuant to General Statutes § 52-552b (7), " '[i]nsider' includes . . . a relative of the debtor" and, pursuant to § 52-552b (11), " '[r]elative' means . . . a spouse . . . ."

Next, the evidence showed that "before the transfer was made . . . the debtor had been sued or threatened with suit . . . ." General Statutes § 52-552e (b) (4). This action was commenced on May 17, 2018, and the transfers did not begin until September, 2018. Although it is unclear from the record exactly when the department commenced its investigation, Westphalen testified that, as of September, 2018, before any of the transfers had occurred, he had been made aware of the investigation and had retained counsel. Indeed, Westphalen specifically testified that he transferred the funds to the defendant and closed all his personal bank accounts on the advice of his attorney due to the pending department investigation.[8] Thus, Westphalen clearly had been sued or threatened with suit before the transfers were made.

The evidence also showed that "the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred . . . ." General

[8] The following exchange took place during the direct examination of Westphalen by the plaintiff's counsel:

"[The Plaintiff's Counsel]: Okay. And we've already seen from the evidence that, at this time, there were, in fact, other bank accounts that—that you were on either singly or jointly along with your wife at this time?

"[Westphalen]: No. They weren't open anymore.

"[The Plaintiff's Counsel]: [They] were not open. And—and why were—why were your accounts not open anymore?

"[Westphalen]: I just had closed them and then based on the [department] stuff, they said don't open any other—I was advised by an attorney not to open any other accounts.

"[The Plaintiff's Counsel]: But why did you go ahead and close the accounts with your name on them?

"[Westphalen]: I don't recall, at this point. I just—I closed them and was normally using business accounts and those had to be closed because I had a cease and desist so I had to put the money that I earned myself somewhere . . . ."

Statutes § 52-552e (b) (9). General Statutes § 52-552c, which defines insolvency, provides in relevant part: "(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. (b) A debtor who is generally not paying his debts as they become due is presumed to be insolvent. . . ." The court found that Westphalen was unable to pay the fine and restitution imposed by the department and that, "[a]t the time of the transfers, 2018 and 2019 . . . [he] had wound up [Triton], leaving the plaintiff and others without any means of recovering their investments of principal." At trial, Westphalen admitted that he was unable to pay the fine imposed on him by the department, the restitution he was ordered to pay the plaintiff by the department, or the amount that the plaintiff originally invested in Triton.[9] It is clear, therefore, that Westphalen either was insolvent at the time of the transfers or became insolvent shortly after the transfers occurred.

Next, the evidence clearly supports the conclusion that Westphalen "retained possession or control of the property transferred after the transfer . . . ." General Statutes § 52-552e (b) (2). The court found that the defendant used the transferred funds "to pay various

[9] The following exchange took place during the direct examination of Westphalen by the plaintiff's counsel:

"[The Plaintiff's Counsel]: And with respect to—with respect to your own personal solvency, do you have the financial wherewithal to pay the fines that have been imposed by the [department]?

"[Westphalen]: No.

"[The Plaintiff's Counsel]: As to your own financial wherewithal do you have sufficient solvency to pay the amount of restitution ordered by the [department] to [the plaintiff]?

"[Westphalen]: No.

"[The Plaintiff's Counsel]: Currently—and I understand we're debating. I'm not saying you're obligated. I'm just asking on a pure math basis. Do you have the solvency to pay back to [the plaintiff] the base amount of what he invested in Triton in the amount of $227,000?

"[Westphalen]: No."

personal and household expenses." Westphalen's personal expenses were paid primarily out of the transferred funds that were deposited into the defendant's account, and he testified that many household bills and other expenses also were paid from the transferred funds. Thus, there was uncontroverted evidence presented at trial to support a finding that Westphalen retained most of the benefits of the subject funds after he transferred them to the defendant. See *Cadle Co.* v. *White*, Docket No. 302-CV-00030 (TPS), 2006 WL 798900, *6 (D. Conn. March 21, 2006) (finding that debtor retained actual and constructive control over funds transferred to wife's bank account where his personal expenses, household bills, and home mortgage payments were paid using such funds).

Additionally, under § 52-552e (b) (8), evidence that a transferor did not receive reasonably equivalent value in exchange for a transfer may support a finding of fraudulent intent. For the reasons that we explain more fully in part II of this opinion, it is clear that Westphalen did not receive anything from the defendant that constitutes reasonably equivalent value in exchange for the transfers. The court found that "[the defendant] never provided any consideration for the infusion of funds into her account . . . ." Pursuant to § 52-552d (a), "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." The evidence adduced at trial showed that Westphalen received no value whatsoever in exchange for the transfers because he did not receive anything that he could use to satisfy or partially satisfy a creditor's claim. See *Cadle Co.* v. *White*, supra, 2006 WL 798900, *9 ("Courts in this district applying [CUFTA]

as well as courts interpreting the [Uniform Fraudulent Transfer Act (UFTA)] in other jurisdictions have held value to mean the type of consideration capable of satisfying or partially satisfying a creditor's claims. . . . 'Value is to be determined in light of the purpose of the [UFTA] to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition.' [Unif. Fraudulent Transfer Act (1984) § 3, comment 2, 7A U.L.A. (Pt. II) 302 (2017)]." (Citations omitted.))

Finally, it is clear that "the transfer occurred shortly before or shortly after a substantial debt was incurred . . . ." General Statutes § 52-552e (b) (10). The transfers happened periodically between September, 2018, and July, 2019. On January 7, 2019, the court granted a prejudgment attachment in the amount of $450,000 against the assets of Westphalen. Additionally, Westphalen testified that, on July 27, 2020, shortly after the transfers occurred, the department imposed a fine in the amount of $900,000 against him and ordered him to pay the plaintiff restitution in the amount of $367,000.[10] Thus, the transfers happened both shortly before and

[10] The following exchange took place during the direct examination of Westphalen by the plaintiff's counsel:

"[The Plaintiff's Counsel]: Mr. Westphalen, is it a fair statement that on or about July 27, 2020 . . . the [department] issued an order against you where it imposed a fine of $900,000 to be paid no later than forty-five days after the order was mailed?

"[Westphalen]: I never received proper notice of that.

"[The Plaintiff's Counsel]: Okay. Are you aware though that such an order has been—has been imposed by the [department] that you have been fined an amount of $900,000 that was to be paid no later than forty-five days after the date of the order? . . .

"[Westphalen]: I'm aware of it. Yes.

"[The Plaintiff's Counsel]: Okay. Mr. Westphalen, are you aware that the [department] has ordered you to make restitution to [the plaintiff] in the amount of $367,000 plus interest at 6 percent no later than forty-five days after its order that was rendered on July 27, 2020?

"[Westphalen]: I am since aware. Yes."

shortly after Westphalen had incurred substantial debts in the form of the department's fine and restitution order. He also was subject to the prejudgment attachment order.

In short, the evidence presented at trial supported findings implicating at least six of the eleven statutory factors that courts consider when determining whether a transfer was made with an actual intent to hinder, delay, or defraud creditors. Thus, on the basis of all of this evidence, we conclude that the court's finding that the transfers to the defendant were fraudulent pursuant to § 52-552e (a) (1) because Westphalen made them with an actual intent to defraud his creditors was not clearly erroneous.[11]

B

Next, the defendant claims that the court erred in concluding that the transfers were actually fraudulent under the common law because "[t]here is absolutely

[11] In her reply brief, the defendant argues that the court erred in finding that Westphalen possessed actual fraudulent intent, stating: "It should be noted that the transfers of funds from [Westphalen] to [the defendant] . . . were commenced . . . after this action was filed . . . . In other words, [the defendant] was already a defendant in the foregoing action when all alleged fraudulent transfers to shield assets were made. Common sense would tell anyone that if you wanted to dispose of and/or hide your assets, you would not transfer the assets to another named defendant in the litigation against you." We interpret the defendant's argument to be taking issue with the court's weighing of the evidence and the testimony that it chose to credit. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . [T]he trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *Sakon* v. *Glastonbury*, 111 Conn. App. 242, 252, 958 A.2d 801 (2008), cert. denied, 290 Conn. 916, 965 A.2d 554 (2009). The trial court weighed both parties' evidence and ultimately found that Westphalen did possess actual fraudulent intent regardless of the timing of the transfers. The court was free to discredit or find unpersuasive the defendant's evidence, and we decline the defendant's invitation to reweigh the evidence in her favor on appeal.

no clear and convincing evidence of fraudulent intent on the part of [the defendant], and therefore actual fraud cannot be found." The plaintiff counters that the record supports the court's finding that the defendant shared in Westphalen's fraudulent intent with respect to the transfers. We agree with the plaintiff.

As noted earlier in this opinion, although a transferee's intent is irrelevant for purposes of proving actual fraud pursuant to § 52-552e (a) (1); see *Kosiorek* v. *Smigelski*, supra, 138 Conn. App. 727; in order to prevail on a common-law claim for fraudulent transfer on the basis of actual fraud, a plaintiff must prove that the transferee shared in the transferor's fraudulent intent. See *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 598, 930 A.2d 768 (to prevail on common law fraudulent transfer claim based on actual fraud, "plaintiff ha[s] to prove (1) that the transferor had intent to defraud the creditor and (2) *that the transferee shared in the transferor's fraudulent intent*" (emphasis added; internal quotation marks omitted)), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007).

In concluding that the transfers at issue in this case were actually fraudulent under the common law, the court first found, as discussed in part I A of this opinion, that Westphalen transferred funds to the defendant with the actual intent to hinder, delay, or defraud the plaintiff. Next, the court found that the defendant, as the transferee, shared in Westphalen's fraudulent intent, stating "[i]t is found that any claim that [the defendant] was unaware of the purpose of the fraudulent transfer of the funds lacks credibility. It is found, by clear and convincing evidence, that [the defendant] possessed fraudulent intent and willingly and actively participated in the attempt of [Westphalen] to shield assets and place those assets beyond the reach of creditors, including [the plaintiff]."

At trial, the defendant testified that she did not notice in November or December of 2018 that $100,000 had been deposited into her bank account over a period of two weeks. She further testified that this was her sole personal bank account and that she "never looked at [her bank] statements ever." The court found that "any claim that [the defendant] was unaware of the purpose of the fraudulent transfer of the funds lacks credibility." As the fact finder, the court was entitled to make this credibility determination as to the defendant, and we will not disturb these findings on appeal. See *Featherston* v. *Katchko & Son Construction Services, Inc.*, supra, 201 Conn. App. 792 ("[w]e cannot retry the facts or pass on the credibility of the witnesses" (internal quotation marks omitted)). Moreover, the court, as the finder of fact, was entitled to infer from all of the circumstances surrounding the subject transfers that the defendant shared in Westphalen's fraudulent intent. See *Wieselman* v. *Hoeniger*, supra, 103 Conn. App. 600 ("[T]he determination of the question of fraudulent intent is clearly an issue of fact which must often be inferred from surrounding circumstances. . . . Such a fact is, then, not ordinarily proven by direct evidence, but rather, by inference from other facts proven—the indicia or badges of fraud." (Internal quotation marks omitted.)).

On the basis of our review of the record, we conclude that the court's findings that Westphalen made the transfers to the defendant with the actual intent to hinder, delay, or defraud the plaintiff and that the defendant shared in this fraudulent intent were not clearly erroneous.

II

Although our determination that the court did not err in finding the defendant liable under both the common-law and statutory causes of action because the

transfers were made with an actual intent to hinder, delay, or defraud the plaintiff is a sufficient basis on which to affirm the trial court's judgment; see *McKay* v. *Longman*, supra, 332 Conn. 417 (party need not prove both actual and constructive fraud to prevail on fraudulent transfer claim); we conclude that the defendant's challenge to the court's determination that the transfers were constructively fraudulent under the common law and pursuant to § 52-552e (a) (2) also fails.

In order to prove that a transfer was constructively fraudulent under the common law, a party must prove "that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations . . . ." Id. Similarly, under § 52-552e (a) (2), "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, if the creditor's claim arose before the transfer was made or the obligation was incurred and if the debtor made the transfer or incurred the obligation . . . (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." Pursuant to § 52-552d (a), "[v]alue is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person."

On appeal, the defendant first argues that "there was insufficient proof that [Westphalen] could not pay his fines and restitution as required by the [department]."

Specifically, the defendant contends that "[t]he plaintiff has not proven by clear and convincing evidence that [Westphalen] had left himself insolvent, as to an alleged debt owed to the plaintiff, at the time of the conveyance(s), and therefore the claim of fraudulent conveyance must fail." In support of that contention, the defendant maintains that "[t]here was no evidence at the time of trial to show what [Westphalen's] elaborate home in Easton, Connecticut, was appraised or valued for during the various dates of alleged fraudulent conveyance(s) of funds" and that Westphalen testified to various income streams that were not identified by the court as sources of income. We are not persuaded.

In support of its finding that the transfers rendered Westphalen unable to meet his financial obligations, the court found that Westphalen was unable to pay the fines and restitution orders imposed by the department and that, "[a]t the time of the transfers, 2018 and 2019 . . . [he] had wound up [Triton], leaving the plaintiff and others without any means of recovering their investments of principal." Our review of the record reveals that Westphalen admitted at trial that he was unable to pay the fine or restitution imposed on him by the department or the amount that the plaintiff originally invested in Triton.[12] He further testified that he disclosed information regarding the defendant's personal checking account, where he had been transferring his income, to the department because of the pending investigation against him, but by the time he had done so there was only $2696 remaining in the account.[13]

[12] See footnote 9 of this opinion.

[13] Westphalen testified as follows during cross-examination by the plaintiff's counsel:

"[The Plaintiff's Counsel]: Isn't it a fair statement, sir, that in the—in the approximate year before the submission of this financial affidavit [to the department], approximately $260,000 of your income had gone into this account . . . ?

"[Westphalen]: Well, yeah, we've agreed to that. Yes.

"[The Plaintiff's Counsel]: Okay. And so, but as of the date that you actually

As a result, the court's finding that the transfers left Westphalen unable to meet his financial obligations was not clearly erroneous.

The defendant next claims that there "clearly was evidence that monetary consideration was passed between [Westphalen] and [the defendant] in response to [Westphalen's] deposits in [the defendant's] account." In support of this claim, the defendant argues that the court "failed to make a finding of fact as to what [the defendant's] income was" and states that she invested "$750,000, by way of her personal inheritance, into the Triton fund," suggesting that the transfers at issue could have been made as a repayment of her investment into Triton. The defendant's arguments are wholly without merit.

In support of its determination that the transfers were made without adequate consideration, the court found that "[the defendant] never provided any consideration for the infusion of funds into her account and used funds from that account to pay various personal and household expenses. She also deposited her own income into the account." The defendant's argument on appeal that her alleged investment in Triton constituted adequate consideration for the transfers at issue finds no support in the record. Westphalen testified that the transfers to the defendant's bank account consisted solely of funds that he received for professional services unrelated to Triton and that he transferred the funds because of the pending department investigation. Thus, based on Westphalen's own testimony, it is clear that the transfers at issue were wholly unrelated to the defendant's alleged investment in Triton.

Last, the defendant argues that "it has long been held in Connecticut that between a husband and wife 'love

disclosed the account to the [department], the balance in there was only $2696, correct?

"[Westphalen]: Well, yeah, it's right there. Yes, correct."

and affection' is valid consideration," citing to *Middlebury* v. *Steinmann*, 189 Conn. 710, 716 n.3, 458 A.2d 393 (1983); *Varley* v. *Varley*, 170 Conn. 455, 460, 365 A.2d 1212 (1976); and *Candee* v. *Connecticut Savings Bank*, 81 Conn. 372, 378, 71 A. 551 (1908). At the outset, we note that none of the cases cited by the defendant stands for the proposition that love and affection may constitute valid consideration for purposes of defeating a fraudulent transfer claim under the common law. See *Middlebury* v. *Steinmann*, supra, 716 n.3 (finding inadequate consideration for transfer of property because "[l]ove and affection . . . does not provide legal consideration which would support enforcement of a promise"); *Varley* v. *Varley*, supra, 460 ("[c]onsideration of love and affection is not legal consideration which would support enforcement of a promise" (internal quotation marks omitted)); *Candee* v. *Connecticut Savings Bank*, supra, 378 ("[a] good consideration is that of blood or natural affection, and a gift made for such a consideration ought to prevail unless it be found to interfere with the rights of creditors and purchasers"). On the contrary, our Supreme Court has long held that love and affection does not constitute adequate consideration for purposes of defeating a fraudulent conveyance claim under the common law. See *Redfield* v. *Buck*, 35 Conn. 328, 337–38 (1868). In *Redfield*, the court held that an insolvent grantor's conveyance to his sister of all of his property, in consideration only of love and affection, was a constructively fraudulent transfer. Id. The court stated that a transfer was constructively fraudulent if it was "made by a grantor who was largely indebted and insolvent, and the property conveyed was all or nearly all he possessed, and the conveyances were wholly gratuitous and without other consideration than love and affection . . . ." Id.

The defendant's argument with respect to the statutory fraudulent transfer claim under § 52-552e (a) (2)

fares no better. To prevail on a fraudulent transfer claim on the basis of constructive fraud under § 52-552e (a) (2), a plaintiff must prove that a transfer was made "without receiving a reasonably equivalent value in exchange for the transfer or obligation . . . ." General Statutes § 52-552e (a) (2).

"[T]he drafters of the UFTA believed that value must be considered from the standpoint of the creditor"; *Cadle Co.* v. *White*, supra, 2006 WL 798900, *9; and the commentary to the UFTA specifically states that " '[v]alue' is to be determined in light of the purpose of the [UFTA] to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—e.g., love and affection." Unif. Fraudulent Transfer Act (1984) § 3, comment 2, supra, 7A U.L.A. (Pt. II) 302; see, e.g., *United States* v. *West*, 299 F. Supp. 661, 666 (D. Del. 1969) ("[s]ince 'the question of fair consideration as it pertains to an alleged fraudulent conveyance must be determined from the standpoint of creditors' . . . it is clear that no fair equivalent is exchanged when the conveyance is simply for natural love and affection" (citation omitted)).

Consistent with that commentary, federal courts in Connecticut and elsewhere have held that, in order for an exchange to be of reasonably equivalent value under CUFTA and other states' versions of the UFTA, it must be something with monetary value capable of satisfying a creditor's claims. See *In re Rose*, Docket No. 17-21333 (JJT), 2019 WL 1410633, *4 (Bankr. D. Conn. March 26, 2019) ("Only consideration of substantially equivalent value leaves the debtor in a financially similar position after the conveyance. A conveyance made for consideration of nominal or no monetary value leaves the debtor

in a much weakened financial position which hinders his creditors. This is precisely the scenario the [UFTA] attempts to prevent. Recognizing consideration of no monetary value as a defense to a fraudulent conveyance would emasculate the statute." (Internal quotation marks omitted.)); *Cadle Co.* v. *White*, supra, 2006 WL 798900, *9 ("[c]ourts in this district applying [CUFTA] as well as courts interpreting the UFTA in other jurisdictions have held value to mean the type of consideration capable of satisfying or partially satisfying a creditor's claims"); *Cadle Co.* v. *Jones*, Docket No. 3:00CV316 (WWE), 2004 WL 2049321, *6 (D. Conn. August 20, 2004) ("in considering whether fraudulent intent exists, the relevant inquiry is not simply whether the debtor received some type of consideration, but whether that consideration was in the form available for execution by creditors"); *In re Ogalin*, 303 B.R. 552, 559 (Bankr. D. Conn. 2004) ("the relevant inquiry is not simply whether [the debtor] received consideration, but whether that consideration was in a form available for execution by creditors, i.e. an assessment of the extent to which such creditors were deprived of the value of the diverted property"); *In re Kennedy*, 279 B.R. 455, 463 (Bankr. D. Conn. 2002) ("The only other form of value suggested by the [d]efendant was her provision of household and other marital services to the [d]ebtor. The [c]ourt rejects this suggestion . . . [and concludes that] such services were in the nature of those naturally and traditionally exchanged between spouses without consideration, and hence provided no basis of exchange value for purposes of fraudulent transfer analysis."); see also *In re McFarland*, 619 Fed. Appx. 962, 975 (11th Cir. 2015) ("[t]his [c]ourt has held that 'love and affection' are inadequate consideration to be reasonably equivalent value for a transfer"); *In re Marlar*, 267 F.3d 749, 755–56 (8th Cir. 2001) (affirming bankruptcy court conclusion that ten dollars plus love and affection did not

constitute reasonably equivalent value as matter of law); *Tavenner* v. *Smoot*, 257 F.3d 401, 408 (4th Cir. 2001) (when interpreting similar statute, 11 U.S.C. § 548, "courts have consistently held that a transfer motivated by love and affection does not constitute reasonably equivalent value"), cert. denied, 534 U.S. 1116, 122 S. Ct. 926, 151 L. Ed. 2d 890 (2002).

In the absence of any evidence in the record to support the defendant's assertion that Westphalen received adequate consideration or reasonably equivalent value for the transfers, we cannot conclude that the court's finding that the transfers were made without consideration and not in exchange for a reasonable equivalent value was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

CUONG KIM TRAN *v.* MARK ALLEN WOODWORTH, COADMINISTRATOR (ESTATE OF NANCY S. WOODWORTH), ET AL. (AC 46193)

Suarez, Seeley and Vertefeuille, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, personal injuries he sustained as a result of a head-on motor vehicle collision that resulted in the death of the defendants' decedent. The plaintiff alleged that the decedent's negligence in operating her motor vehicle caused her vehicle to cross over the double yellow lines into his lane of travel, causing the collision. The defendants filed requests for admissions, which requested that the plaintiff admit, inter alia, that he was distracted from the roadway immediately prior to the collision and that he was unaware of the existence of any evidence to contest that the collision occurred in the decedent's northbound lane of travel. As a result of the plaintiff's failure to respond to the requests, the requested admissions were deemed admitted by the plaintiff pursuant to the rule of practice (§ 13-23). The defendants thereafter filed a motion for summary judgment, claiming that they were entitled to judgment as a matter of law and that, on the

basis of the plaintiff's admissions, it was uncontested that he, in his distraction, had driven from his southbound lane of travel into the northbound lane and, thus, caused the collision. The defendants also submitted an affidavit from H, an engineer and accident reconstructionist, attesting that he had reviewed police photographs from the scene of the collision and that that information conclusively established that the plaintiff's vehicle had crossed from the southbound lane into the northbound lane and collided with the decedent's vehicle. The plaintiff filed an opposition to the defendants' motion for summary judgment, to which he appended a signed, written statement of W, the only eyewitness to the collision. W's statement was taken by a police officer who had responded to the scene of the accident. In his statement, W recalled, inter alia, that he had been driving behind the plaintiff in the northbound lane of travel and had witnessed the decedent's vehicle drift from the southbound lane and collide with the plaintiff's vehicle. The trial court granted the defendants' motion for summary judgment, reasoning that, because the plaintiff relied on an inconsistent statement from an eyewitness as to his direction of travel when the collision occurred and that the facts deemed admitted by the plaintiff demonstrated that the collision occurred in the decedent's lane of travel, no genuine issue of material fact existed concerning the location of the collision. The court determined that the plaintiff had failed to meet his burden in opposing summary judgment by submitting countervailing evidence to demonstrate the existence of a genuine issue of material fact. On the plaintiff's appeal to this court, *held* that the trial court improperly rendered summary judgment for the defendants: the evidence on which the defendants relied in support of their motion did not resolve the factual allegations of negligence contested in the pleadings, as the plaintiff's admissions that he was momentarily distracted just prior to the collision and was not aware of any evidence contesting that the collision occurred in the northbound lane did not resolve or address the factual issues or allegations raised in the complaint concerning the decedent's conduct prior to the collision, which could have been a significant factor in contributing to the collision and the extent of the plaintiff's injuries; moreover, H's affidavit also was insufficient to establish a genuine issue of any material fact as to the allegations of negligence, as it was not based on personal observations of the collision or knowledge about how it occurred and it did not address whether any of the decedent's conduct caused or contributed to the collision; furthermore, although the defendants did not meet their burden in demonstrating the absence of a genuine issue of material fact concerning the allegations of negligence in the complaint and the burden of proof never shifted to the plaintiff, even if this court were to conclude that the defendants met their initial burden, W's sworn statement was sufficient to establish the existence of a genuine issue of material fact concerning the cause of the collision to preclude summary judgment, as it served as direct evidence

concerning the circumstances surrounding the collision, and any inconsistencies in his statement concerned factual matters to be determined by a jury during a trial; accordingly, this court reversed the judgment of the trial court and remanded the case for further proceedings in accordance with its opinion.

Argued January 18—officially released May 21, 2024

Procedural History

Action to recover damages for, inter alia, personal injuries sustained as a result of the alleged negligence of the defendants' decedent, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Baio*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

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

Philip T. Newbury, *Jr.*, with whom, on the brief, was *William F. Corrigan*, for the appellees (defendants).

Opinion

SEELEY, J. The plaintiff, Cuong Kim Tran, appeals from the summary judgment rendered by the trial court in favor of the defendants, Mark Allen Woodworth and Jennifer Woodworth Sulc, coadministrators of the estate of the decedent, Nancy S. Woodworth. On appeal, the plaintiff claims that the trial court improperly granted the defendants' motion for summary judgment and determined that the defendants were entitled to judgment as a matter of law as to the plaintiff's complaint alleging negligence because (1) the documents on which the defendants relied in support of their motion did not demonstrate the absence of any genuine issue of material fact as to the allegations of negligence in the complaint and (2) the plaintiff submitted countervailing evidence demonstrating the existence of a genuine issue of material fact that precluded summary judgment. We agree with the plaintiff and, therefore, reverse

the summary judgment rendered in favor of the defendants and remand the case for further proceedings.

The following facts, as alleged in the complaint and viewed in the light most favorable to the plaintiff as the nonmoving party, or as otherwise undisputed in the record, and procedural history are relevant to our resolution of this appeal. On October 27, 2017, a motor vehicle accident occurred on Route 17 in the town of Glastonbury, at approximately 10:40 a.m. The plaintiff was operating a light blue 2005 Acura MDX sport utility vehicle (Acura) that was traveling in the southbound lane of Route 17. At the same time, the decedent was operating a red 2013 Buick Verano sedan (Buick) and was traveling in the northbound lane of Route 17. The plaintiff alleged that, "as [his] vehicle was proceeding southbound in his lane of travel, the decedent's vehicle, suddenly and without warning, left the northbound lane of travel and crossed over the double yellow lines into the plaintiff's lane of travel, causing a violent head-on collision."

Shortly after the accident, state police and fire personnel arrived at the scene. The decedent died as a result of the accident, and the plaintiff, who was rendered unconscious and allegedly suffered severe bodily injuries, is unable to recall any details concerning the collision. Following the accident, the defendants were appointed as coadministrators of the decedent's estate.

On October 28, 2019, the plaintiff commenced this action. In his complaint, the plaintiff alleged a single count of negligence, namely, that the decedent was negligent in operating her motor vehicle and that the decedent's negligence caused the head-on collision, resulting in the injuries and losses he sustained.[1] Specifically, the plaintiff alleged that the violent collision and

[1] The plaintiff alleged that he has incurred expenses for medical care, including costs for the ambulance, the hospital and physical rehabilitation care, X-rays, MRIs, CT scans, physician's fees, surgical fees, and medication, and that he may incur additional medical expenses in the future. Additionally,

the plaintiff's injuries and losses were caused by the carelessness and/or negligence of the decedent in one or more of the following ways: "In that she failed to drive on the right side of the road in violation of . . . General Statutes [§] 14-230 . . . she failed to maintain her lane by traveling over the double yellow line dividing the roadway in violation of . . . General Statutes [§] 14-237 . . . she was traveling unreasonably fast in violation of . . . General Statutes [§] 14-218a . . . she failed to keep her vehicle under proper and reasonable control . . . she failed to keep a proper and reasonable lookout for other motor vehicles on the roadway, specifically the motor vehicle operated by the plaintiff, which was approaching her motor vehicle . . . she failed to apply her brakes in time to avoid the collision, although by a proper and reasonable exercise of her faculties, she could and should have done so; and . . . she failed to turn her motor vehicle to the left or to the right so as to avoid a collision, although by a proper and reasonable exercise of her faculties she could and should have done so." On June 11, 2020, the defendants filed an answer to the complaint denying those allegations and asserted as a special defense that the plaintiff's injuries were caused by his own negligence. On the same day, the plaintiff replied to the defendants' answer and denied every allegation contained in the special defense.

On June 9, 2021, the defendants served the plaintiff with requests for admissions. In their request for admissions, filed pursuant to Practice Book § 13-22,[2] the

the plaintiff alleged that, as a direct and proximate result of the collision, his vehicle was destroyed, he suffered the loss of his property and the loss of use of his vehicle, and he has incurred storage fees and costs.

[2] Practice Book § 13-22 (a) provides in relevant part: "A party may serve in accordance with Sections 10-12 through 10-17 upon any other party a written request, which may be in electronic format, for the admission, for purposes of the pending action only, of the truth of any matters relevant to the subject matter of the pending action set forth in the request that relate to statements or opinions of fact or of the application of law to fact,

defendants requested that the plaintiff admit the truth to the following matters: "(1) At the time of the subject accident, the plaintiff . . . was driving south on Route 17 in Glastonbury . . . (2) Immediately prior to the subject accident the plaintiff . . . was momentarily distracted from the roadway when he saw something off the roadway . . . (3) The plaintiff . . . did not see the [decedent's] car immediately prior to the subject accident . . . (4) The plaintiff . . . did not immediately know what his car came in contact with in the accident . . . (5) The attached is a fair and accurate copy of the written statement the plaintiff . . . gave to the Connecticut State Police concerning the subject accident . . . (6) The plaintiff . . . is aware of no evidence to contest that the decedent . . . was operating her car northbound on Route 17 in Glastonbury . . . at the time of the accident . . . [and] (7) The plaintiff . . . is aware of no evidence to contest that the subject accident occurred in the northbound lane of travel on Route 17 in Glastonbury . . . ." The plaintiff never responded to the request for admissions.

Pursuant to Practice Book §13-23 (a), "[e]ach matter of which an admission is requested is admitted unless, within thirty days after the filing of the notice required by Section 13-22 (b), or within such shorter or longer time as the judicial authority may allow, the party to whom the request is directed files and serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ." "[A] failure to respond timely to a request for admissions means that the matters sought to be answered were conclusively admitted." (Internal quotations marks omitted.) *HM Construction & Painting, LLC* v. *32 Wilmot Place, LLC*, 222 Conn. App. 261, 269, 305 A.3d 302 (2023); *East Haven Builders Supply, Inc.* v. *Fanton*, 80 Conn. App.

including the existence, due execution and genuineness of any documents described in the request. . . ."

734, 744, 837 A.2d 866 (2004); see also Practice Book § 13-24. Accordingly, by operation of law, the requested admissions were deemed admitted by the plaintiff as a result of his failure to respond to them.[3]

On September 23, 2022, pursuant to Practice Book § 17-44, the defendants filed a motion for summary judgment as to the plaintiff's complaint, in which they claimed that no genuine issues of material fact existed and that they were entitled to judgment as a matter of law. Specifically, the defendants, relying on the plaintiff's admissions that he was distracted prior to the accident and that the accident occurred in the northbound lane, asserted in their memorandum of law in support of their motion for summary judgment that it was "uncontested that the plaintiff, in his distraction, suddenly and without warning crossed the double yellow lines and killed the . . . decedent." Thus, they argued that the plaintiff could not present any evidence to establish the allegations of negligence in the complaint. In support of the motion for summary judgment, the defendants attached their request for admissions and included an affidavit of William M. Howerton, an engineer and accident reconstructionist. In the affidavit,

[3] "It has long been held that '[f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . An admission in pleading dispenses with proof, and is equivalent to proof.' . . . *Provencher* v. *Enfield*, 284 Conn. 772, 792, 936 A.2d 625 (2007). 'A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it. . . . [The] admission in a plea or answer is binding on the party making it, and may be viewed as a conclusive or judicial admission. . . . It is axiomatic that the parties are bound by their pleadings.' . . . *Industrial Mold & Tool, Inc.* v. *Zaleski*, 146 Conn. App. 609, 614, 78 A.3d 218 (2013) . . . . Similarly, '[a] party's response to a request for admissions is binding as a judicial admission unless the judicial authority permits withdrawal or amendment. . . . [A] failure to respond timely to a request for admissions means that the matters sought to be answered were conclusively admitted.' " (Citation omitted.) *HM Construction & Painting, LLC* v. *32 Wilmot Place, LLC*, supra, 222 Conn. App. 268–69.

Howerton attested to the following: "As to the subject accident of October 17, 2017[4] on Route 17 in Glastonbury . . . I have reviewed the police photographs, and the location of the gouge marks, debris and liquid spray on the road, and the final resting places of the vehicles involved establish without a doubt that the southbound vehicle operated by [the plaintiff] crossed the double yellow lines and struck head-on the vehicle operated northbound by [the decedent], operating in the northbound lane." (Footnote added.)

On December 12, 2022, the parties appeared remotely before the court, *Baio, J.*, to present argument concerning the defendants' motion for summary judgment. The same day, prior to argument, the plaintiff filed a memorandum of law in opposition to the defendants' motion for summary judgment,[5] in which he argued that there was a genuine issue of material fact concerning the decedent's alleged negligence and that he could establish that the decedent was negligent in one of the ways alleged in his complaint. Moreover, in support of his opposition to the motion for summary judgment, the plaintiff submitted a copy of the signed written statement of the only eyewitness to the accident, Jason D. Watson.[6] In his written statement, Watson recounted

[4] We note that the affidavit incorrectly states the accident occurred on October 17, 2017, when it occurred on October 27, 2017.

[5] Although the objection was not timely filed pursuant to Practice Book § 17-45 (b), the defendants did not object to the court considering the objection, and the court provided the defendants with the opportunity to file a reply memorandum. The objection was, thus, allowed, and the defendants' counsel filed a reply memorandum.

[6] Watson's statement was taken by Trooper Andrew Crook, who had responded to the scene of the accident. Crook completed the written statement by signing that he had taken the oath of the eyewitness, Watson, on October 27, 2017, the same day the statement was provided. In that sworn statement, Watson provided Crook with his date of birth and his residential address and acknowledged that, by signing the written statement, he was making the statement without fear, threat or promise and that he had been advised that it is a crime to make any statements that are untrue and intended to mislead a public servant in the performance of his official function.

the details leading up to the crash and the aftermath and acknowledged that his written statement was true and made to the best of his knowledge and belief. Specifically, Watson recalled that he was travelling *northbound* on Route 17 approximately 100 feet behind a gray[7] Acura and that there was a red Buick coming from the opposite direction.[8] Watson further recalled that, prior to when the accident occurred, when the red Buick was approximately 125 to 150 feet away from his vehicle, he saw the red Buick drift into his lane of travel. According to Watson, the driver of the red Buick attempted to correct herself but it was too late, and the vehicles collided head-on. After the collision, Watson attempted to check on the well-being of both drivers.[9]

On December 20, 2022, the defendants filed a reply to the plaintiff's objection to the motion for summary judgment. In their reply, the defendants argued that the

[7] Although Watson described the Acura as being gray in color, the color of the Acura driven by the plaintiff was light blue.

[8] We note that there is an inconsistency in Watson's statement as to his direction of travel. Watson claims to have been traveling in a northbound direction behind the plaintiff's Acura. The plaintiff, however, was traveling in the southbound lane of Route 17 at the time of the accident.

[9] Watson also asserted the following in his statement: "After the vehicles collided the Acura ended up in the southbound lane and the Buick ended up in the northbound lane. At this time, I immediately pulled over to help. I approached the Acura and could see the male operator was trapped in the vehicle but was still alive and able to talk. The male operator was the only person in the Acura. I then ran over to the Buick. The Buick was being driven by a female who was unconscious and also trapped in the vehicle. The female was the only person in the Buick. I was not able to gain access to the Buick, so I returned to the Acura. The Acura . . . began to smoke so I feared that it was going to catch on fire. I spoke with the operator of the Acura and he stated that his back was hurting and he was having trouble breathing. I helped lay the operator of the Acura across the driver and passenger seats to make him more comfortable. The driver of the Acura was fading in and out of consciousness so I continued to talk to him. There was a female driver behind me who had also stopped and called for help as I was speaking with the operator of the Acura. Police and fire [personnel] arrived on scene shortly after she had called."

evidence submitted by the plaintiff did not establish the existence of a genuine issue of material fact.

Thereafter, on January 5, 2023, the court issued a memorandum of decision granting the defendants' motion for summary judgment. The court reasoned that the plaintiff's objection to the motion for summary judgment relied on an inconsistent statement from an eyewitness as to the direction he was traveling when the accident occurred and that the facts deemed admitted by the plaintiff—that the decedent was traveling in the northbound lane and the accident occurred in the northbound lane—supported a determination that no genuine issue of material fact existed concerning the location of the accident. Further, the court determined that the plaintiff failed to meet his burden in opposing summary judgment by submitting countervailing evidence to demonstrate the existence of a genuine issue of material fact. From the judgment rendered thereon, this appeal followed.

On appeal, the plaintiff claims that the court improperly granted the defendants' motion for summary judgment. Specifically, the plaintiff claims that (1) the evidence and affidavit on which the defendants relied in support of their motion for summary judgment did not demonstrate the absence of any genuine issue of material fact as to the allegations of negligence in the complaint and (2) the court improperly determined that the plaintiff failed to submit countervailing evidence demonstrating the existence of a genuine issue of material fact. We agree with both of the plaintiff's claims.

Before addressing those claims, we set forth our applicable standard of review and the principles that guide our analysis of an appeal from a decision granting a motion for summary judgment. "The standard of review of motions for summary judgment is well settled. Practice Book § 17-49 provides that summary judgment

shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Abendroth* v. *Moffo*, 156 Conn. App. 727, 730–31, 114 A.3d 1224, cert. denied, 317 Conn. 911, 116 A.3d 309 (2015). "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . A material fact . . . [is] a fact which will make a difference in the result of a case." (Internal quotation marks omitted.) *Forestier* v. *Bridgeport*, 223 Conn. App. 298, 308, 308 A.3d 102 (2024).

"It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute." (Internal quotation marks omitted.) *Hassiem* v. *O & G Industries, Inc.*, 197 Conn. App. 631, 636, 232 A.3d 1139, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020). "A party seeking summary judgment has the considerable burden of demonstrating the absence of any genuine issue of material fact because litigants ordinarily have a constitutional right to have issues of fact decided by a [jury] . . . ." (Internal quotation marks omitted.) *Mariano* v.

Hartland Building & Restoration Co., 168 Conn. App. 768, 781, 148 A.3d 229 (2016).

"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 [defendants] as a matter of law, our review is plenary . . . . " (Internal quotation marks omitted.) *Schimenti Construction Co., LLC* v. *Schimenti*, 217 Conn. App. 224, 234, 288 A.3d 1038 (2023). "In deciding a motion for summary judgment, [i]ssue finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) Id., 234–35.

We next turn to the well settled law of negligence. "[T]he essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Gonzalez* v. *O & G Industries, Inc.*, 341 Conn. 644, 680, 267 A.3d 766 (2021). In their motion for summary judgment, the defendants focused on the causation element. "To prevail on a negligence claim, a plaintiff must establish that the defendant's conduct legally caused the injuries." (Internal quotation marks omitted.) *Winn* v. *Posades*, 281 Conn. 50, 56, 913 A.2d 407 (2007). "[A] collision alone does not create a rebuttable presumption of negligence and causation." *Rawls* v. *Progressive Northern Ins. Co.*, 310 Conn. 768, 778, 83 A.3d 576 (2014). Our Supreme Court "has recognized that in a case involving an automobile accident, [a] plaintiff cannot merely prove that a collision occurred and then call upon the defendant operator to come

forward with evidence that the collision was not a proximate consequence of negligence on his part. Nor is it sufficient for a plaintiff to prove that a defendant operator might have been negligent in a manner which would, or might have been, a proximate cause of the collision. A plaintiff must remove the issues of negligence and proximate cause from the field of conjecture and speculation." (Internal quotation marks omitted.) *Winn* v. *Posades*, supra, 57. Generally, "[i]ssues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Internal quotation marks omitted.) *Fogarty* v. *Rashaw*, 193 Conn. 442, 446, 476 A.2d 582 (1984).

With these principles in mind, we turn to the plaintiff's first claim, which, in essence, asserts that the defendants did not meet their burden, as the parties moving for summary judgment, of establishing the absence of a genuine issue of material fact concerning the allegations of negligence in the complaint. In support of their motion for summary judgment, the defendants attached the request for admissions directed to the plaintiff and the affidavit from Howerton. The requested admissions, which were deemed admitted by the plaintiff, include the following: (1) the plaintiff was driving in a southbound direction at the time of the accident; (2) "[i]mmediately prior to the . . . accident the plaintiff . . . was momentarily distracted from the roadway when he saw something off the roadway"; (3) the plaintiff did not see the decedent's vehicle immediately prior to the collision; (4) the plaintiff "did not immediately know what his car came in contact with in the accident"; (5) the plaintiff gave a signed, written statement to the police following the accident; (6) the plaintiff was not aware of any evidence "to contest that the decedent . . . was operating her car northbound on Route 17 in Glastonbury . . . at the time of the accident"; and (7) the plaintiff was not aware of any

evidence "to contest that the subject accident occurred in the northbound lane . . . ." In light of these admissions, the defendants argued that there was no issue of material fact that the accident occurred in the northbound lane, the decedent's lane of travel. We do not agree that the plaintiff's admission that he was "aware of no evidence to contest that the subject accident occurred in the northbound lane" conclusively establishes that the accident occurred in the northbound lane. Additionally, even if the accident did occur in the northbound lane of Route 17, we disagree with the defendants' further assertion that the admissions necessarily establish that the plaintiff must have crossed over the double yellow line and been the sole cause of the collision.

Significantly, aside from establishing the direction of travel of the vehicles, that the plaintiff was momentarily distracted just prior to the collision, and that the plaintiff was not aware of any evidence contesting that the collision occurred in the northbound lane, the admissions do not resolve or address the factual issues and allegations raised in the complaint. The complaint alleges that the decedent was negligent in a number of ways, including by failing to drive on the right side of the road, failing to maintain her lane of travel, traveling unreasonably fast, and failing to keep her vehicle under proper and reasonable control, to keep a proper and reasonable lookout for other motor vehicles on the roadway, to apply her brakes in time to avoid the collision, and to turn her motor vehicle to the left or to the right so as to avoid a collision. The admissions, which do not address any conduct by the decedent prior to the collision, do not in any way resolve or dispel these allegations, any one of which could have been a significant factor in at least contributing to the collision and the extent of the plaintiff's claimed injuries.

We also conclude that Howerton's affidavit is similarly deficient in addressing the allegations of negligence in the complaint. First, notably, Howerton's attestations are not based on personal observations of the collision or knowledge about how it occurred, nor does it appear from his affidavit that he reviewed the police report concerning the accident. His affidavit is also silent regarding the decedent's conduct prior to the collision. We are not persuaded that Howerton, having reviewed only accident photographs and the final location of the vehicles, could determine who caused the accident, as opposed to where it took place. Because Howerton's affidavit addresses only the location of the accident as being in the northbound lane and not whether any actions of the decedent caused or contributed to the collision, his statement is not sufficient to establish the absence of a genuine issue of material fact as to the allegations of negligence in the complaint. That is, Howerton's conclusion in his affidavit that the plaintiff crossed the double yellow lines and struck the decedent's vehicle in the northbound lane head-on does not conclusively resolve the factual issues of whether the decedent failed to maintain her lane of travel just prior to the collision, whether she was traveling unreasonably fast, or whether she failed to keep her vehicle under proper and reasonable control, to keep a proper and reasonable lookout for other motor vehicles on the roadway, to apply her brakes in time to avoid the collision, and to turn her motor vehicle to the left or to the right so as to avoid a collision.

Our Supreme Court's decision in *Fogarty* v. *Rashaw*, supra, 193 Conn. 442, is directly on point with the present case. In *Fogarty*, the plaintiff brought an action for personal injuries he sustained in a two car collision. Id. The trial court rendered summary judgment in favor of the defendants, which our Supreme Court reversed on appeal. Id., 442–43. In doing so, the court stated that

the affidavits on which the defendants relied "contain[ed] no facts to refute the plaintiff's allegations that [the driver of the other vehicle] failed to keep his car under reasonable control, to maintain a proper lookout, and to apply his brakes or turn his vehicle in time to avoid the collision when he had an opportunity to do so." Id., 445. The court, thus, concluded that, "[s]ince these factual issues, contested in the pleadings and not even referred to in the defendants' affidavits, remained unresolved, the court was clearly in error in granting the motion for summary judgment." (Internal quotation marks omitted.) Id. As the court explained: "The affidavit before the court provided an insufficient basis for a summary judgment because it did not resolve 'the mixed question of fact and law' of whether the defendant met the requisite standard of care under the circumstances, particularly those relating to whether he had a reasonable opportunity to avoid the collision." Id., 446; see also *Plouffe* v. *New York, New Haven & Hartford Railroad Co.*, 160 Conn. 482, 488–91, 280 A.2d 359 (1971) (reversing summary judgment rendered in favor of defendants because affidavits submitted in support of motion for summary judgment did not contest truth of all material allegations in complaint that were denied by defendants); *Rockwell* v. *Quintner*, 96 Conn. App. 221, 222–23, 899 A.2d 738 (because affidavit did not dispose of all issues of material fact raised by complaint, trial court improperly granted defendant's motion for summary judgment), cert. denied, 280 Conn. 917, 908 A.2d 538 (2006).

Similarly, in the present case, the evidence on which the defendants relied in support of their motion for summary judgment did not resolve the factual allegations of negligence contested in the pleadings. For that reason, we conclude that the court improperly rendered summary judgment in favor of the defendants.

Because we conclude that the defendants did not meet their burden in demonstrating the absence of a genuine issue of material fact concerning the allegations of negligence in the complaint, the burden of proof never shifted to the plaintiff. See *Rockwell* v. *Quintner*, supra, 96 Conn. App. 233. Nevertheless, the plaintiff did submit the sworn, written statement of Watson, the sole eyewitness to the accident, in support of his objection to the motion for summary judgment. The court, having determined that the defendants met their initial burden, concluded that the plaintiff failed to submit any countervailing evidence to demonstrate the existence of a genuine issue of material fact, and the plaintiff challenges that determination on appeal. See *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 409, 848 A.2d 1165 (2004) (although defendants were not obligated to present documents in support of objection to motion for summary judgment when documents submitted by plaintiff in support of motion did not address crucial factual issue in case, trial court nonetheless was entitled to consider whether evidence supported claim). Even if we were to conclude that the defendants met their initial burden, Watson's sworn statement[10] was sufficient to establish

[10] We note that, pursuant to Practice Book § 17-45 (a), "[a] motion for summary judgment shall be supported by appropriate documents, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and other supporting documents."

Practice Book § 17-46 further provides in relevant part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

Thus, Practice Book § 17-46 "sets forth three requirements necessary to permit the consideration of material contained in affidavits submitted in a summary judgment proceeding. The material must: (1) be based on personal knowledge; (2) constitute facts that would be admissible at trial; and (3) affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. . . . Affidavits that fail to meet the criteria of . . . § 17-46 are defective and may not be considered to support the judgment." (Citation omitted; internal quotation marks omitted.) *Atlantic St. Heritage Associates, LLC* v. *Atlantic Realty Co.*, 216 Conn. App. 530, 550, 285 A.3d 1128 (2022). In their appellate brief, the defendants refer to Watson's statement

the existence of a genuine issue of material fact concerning the cause of the accident to preclude summary judgment in this case.

In his sworn statement, Watson stated that he "was traveling approximately 100 feet behind a gray Acura going northbound and there was a red Buick coming from the southbound direction. . . . When the red vehicle was approximately 125 to 150 feet away from me, it drifted into the northbound lane. The red vehicle tried to correct itself, but it was too late, and there was a head-on collision. After the vehicles collided, the Acura ended up in the southbound lane and the Buick ended up in the northbound lane." As we previously pointed out in this opinion, there is an inconsistency in Watson's statement in that he asserts that he was traveling behind the Acura in a northbound direction, but the complaint alleges that the plaintiff, the operator of the Acura, was traveling in a southbound direction, and that fact was judicially admitted by the plaintiff. See footnote 8 of this opinion. At oral argument before the trial court on the motion for summary judgment, the defendants' counsel argued that Watson must have been confused about which car he was following, whereas the plaintiff's counsel argued that Watson was mistaken about his direction of travel. Both parties continue to make those assertions on appeal before this court.

Watson was the sole eyewitness to the collision between the plaintiff's vehicle and that of the decedent. He provided the police with a sworn, written statement on the day of the accident shortly after it occurred. In

as an affidavit and have not argued that it should not be considered by this court. Because Watson made the statement on the basis of his personal observation of the accident and the statement was signed and sworn to by Watson; see footnote 6 of this opinion; the sworn statement is, in effect, an affidavit and meets the criteria of § 17-46.

his statement, he asserted that, just prior to the collision, the driver of the red Buick drifted into the oncoming lane, and that, although the driver tried to correct that maneuver, it was too late, and the Buick and the Acura collided. Watson also described in detail what happened following the collision. We conclude that his sworn statement constitutes sufficient countervailing evidence to demonstrate the existence of an issue of material fact concerning the cause of the collision. The sworn statement of Watson, the sole eyewitness to the accident, serves as direct evidence concerning the circumstances surrounding the accident, especially in light of the fact that the plaintiff has no memory of what occurred. See, e.g., *Rawls* v. *Progressive Northern Ins. Co.*, supra, 310 Conn. 786 n.12 ("eyewitness . . . testimony often serves as more compelling evidence"); *State* v. *Cooper*, 65 Conn. App. 551, 558, 783 A.2d 100 (victim's eyewitness testimony provided compelling direct evidence that defendant was perpetrator), cert. denied, 258 Conn. 940, 786 A.2d 427 (2001). Whether Watson was mistaken concerning the direction in which he was traveling or about which vehicle he was following concerns a factual matter to be determined by a jury during a trial. See generally *State* v. *Scott*, 191 Conn. App. 315, 328, 214 A.3d 871 (potential unreliability of eyewitness identification testimony concerned weight of evidence and not its admissibility, and it was question for jury), cert. denied, 333 Conn. 917, 216 A.3d 651 (2019). The circumstances of the present case require "a trial [on] the issues of fact in which the trier would be called on to determine the credibility of witnesses and the weight to be given to their testimony. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given to their testimony can be appraised." (Internal quotation marks omitted.) *Spencer* v. *Good Earth Restaurant Corp.*, 164 Conn. 194, 199, 319 A.2d 403 (1972);

see also *Doe* v. *West Hartford*, 328 Conn. 172, 197, 177 A.3d 1128 (2018) ("[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties").

As our Supreme Court has made clear, "[l]itigants have a constitutional right to have issues of fact decided by a jury. . . . Summary judgment procedure is especially ill-adapted to negligence cases, where, as here, the ultimate issue in contention involves a mixed question of fact and law, and requires the trier of fact to determine whether the standard of care was met in a specific situation. . . . [T]he conclusion of negligence is necessarily one of fact . . . ." (Citation omitted; internal quotation marks omitted.) *Michaud* v. *Gurney*, 168 Conn. 431, 434, 362 A.2d 857 (1975); see also *Busque* v. *Oakwood Farms Sports Center, Inc.*, 80 Conn. App. 603, 607, 836 A.2d 463 (2003), cert. denied, 267 Conn. 919, 841 A.2d 1190 (2004). The present case involves such a situation in which factual issues exist concerning the collision that preclude summary judgment. Even if the collision occurred in the decedent's lane, that does not eliminate all allegations of negligence in the complaint. For example, Watson asserted that the decedent "tried to correct [her]self, but it was too late," which relates to the plaintiff's allegation in the complaint that the decedent was negligent "[i]n that she failed to keep her vehicle under proper and reasonable control . . . ." As explained by our Supreme Court in *Rawls* v. *Progressive Northern Ins. Co.*, supra, 310 Conn. 779–80, "a plaintiff may show negligence and causation in a vehicle collision case by presenting evidence of the type of collision, the road conditions, the weather, other features of surrounding environment, *the actions of the drivers of any other vehicles involved*, and the extent to which the vehicles involved were damaged." (Emphasis added.) We conclude that Watson's statement creates a

genuine issue of material fact concerning the decedent's actions prior to the collision.

Therefore, the trial court improperly granted the defendants' motion for summary judgment.

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

In this opinion the other judges concurred.

NO. 2 FRASER PLACE CONDOMINIUM ASSOCIATION, INC. *v.* SHARON MATHIS ET AL. (AC 46406)

Alvord, Seeley and Westbrook, Js.

Syllabus

The plaintiff condominium unit owners' association sought to foreclose a statutory lien on a certain unit owned by the defendant S and occupied by the defendant M for unpaid monthly common expense assessments and late charges. The court rendered a judgment of strict foreclosure in 2013, and the law days passed without redemption. The plaintiff never took possession of the unit. The plaintiff had applied for orders of execution of ejectment, several of which were granted; however, the ejectment never took place. In 2023, S filed an application for a writ of audita querela, arguing that the latest in a series of ejectment orders should be enjoined because, after the judgment of strict foreclosure had been rendered but prior to the passing of the law days, she purportedly had reached an agreement with the plaintiff to pay off the judgment amount, had performed in accordance with that agreement and, thus, redeemed her ownership interest in the property. At the hearing on the application, M testified that she had made a partial payment to the plaintiff in an amount that was less than the full amount needed to redeem the property. The court excluded certain evidence that the defendants' counsel sought to introduce, including a letter written by an attorney for S Co., a mortgage servicer, regarding the status of a mortgage on the property, as well as a lis pendens noticing a subsequent foreclosure action against the defendants. The court denied the application for a writ of audita querela, concluding that the defendants failed to prove that the issuance of the writ was warranted because the evidence did not establish that the defendants had tendered the full amount

due to redeem the property prior to the passage of the law days and title vesting in the plaintiff. *Held*:

1. The trial court did not abuse its discretion in denying the defendants' application for a writ of audita querela: the defendants presented no evidence, either with the application or at the evidentiary hearing, from which the court reasonably could have found that the parties entered into a postjudgment agreement under which the defendants could have redeemed the property without tendering the full amount of the outstanding debt; moreover, although M testified that she had made a partial payment, she never testified that there was an agreement for the plaintiff to accept less than the full amount of the judgment rendered, and, M's testimony that she made a second payment that she understood as constituting payment in full, was unsupported by any evidence of that payment; furthermore, the trial court, in deciding whether to grant the equitable relief sought, was free to consider the fact that the defendants had never previously raised the argument that they had redeemed the property, despite numerous court filings over the course of one decade, during which time the defendants sought to evade ejectment, and the court, as the trier of fact, was free to reject M's unsupported testimony that there was an agreement to redeem the property.
2. This court declined to review the defendants' unpreserved claim that the trial court improperly failed to conclude that the granting of the application for a writ of audita querela was necessary to avoid an inequitable windfall to the plaintiff; the defendants never distinctly raised their windfall argument to the trial court, the court did not discuss that issue in its decision denying the application for a writ of audita querela, and the defendants' suggestions in their reply brief to this court that they "essentially" had presented a windfall argument or that the trial court should have gleaned from the closing argument of the defendants' counsel that they were advancing such a claim were unavailing.
3. The trial court properly declined to admit into evidence certain exhibits offered by the defendants' counsel at the hearing on the application for a writ of audita querela: although the defendants argue that the statements in the letter authored by S Co.'s attorney fell within the hearsay exception for a statement by a party opponent, the trial court correctly concluded that this evidence constituted inadmissible hearsay because the letter did not include statements of the plaintiff or any other party to the action but, rather, contained statements of an attorney for a nonparty mortgage servicer; moreover, the trial court properly declined to admit into evidence the lis pendens purporting to give notice of a subsequent foreclosure action against the defendants because that document was not properly certified and, therefore, was not self-authenticating, as the lis pendens did not contain, pursuant to the applicable statute (§ 7-23), a town seal demonstrating that it was a certified copy; furthermore, even if the lis pendens were improperly excluded from

evidence in error, the defendants failed to demonstrate that this exclusion was harmful because it was merely cumulative of other properly admitted evidence.

Argued January 30—officially released May 21, 2024

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, brought to the Superior Court in the judicial district of Hartford, where the defendants were defaulted; thereafter, the court, *Wahla, J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Baio, J.*, denied the defendants' application for a writ of audita querela, and the named defendant et al. appealed to this court. *Affirmed.*

Thomas P. Willcutts, for the appellants (named defendant et al.).

Houston Putnam Lowry, with whom were *Nicole K. Zatserkovniy*, and, on the brief, *Elizabeth M. Cristofaro*, for the appellee (plaintiff).

Opinion

WESTBROOK, J. More than ten years ago, the plaintiff, No. 2 Fraser Place Condominium Association, Inc., a unit owners' association of a common interest community, brought the underlying action to foreclose a statutory lien for unpaid monthly common expense assessments and late charges in accordance with General Statutes § 47-258[1] regarding a condominium unit

[1] General Statutes § 47-258 provides in relevant part: "(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. . . .

* * *

"(j) The association's lien may be foreclosed in like manner as a mortgage on real property. . . ."

(unit) owned by the defendant Sharon Mathis and occupied by her daughter, the defendant Shalonda Mathis.[2] The court rendered a judgment of strict foreclosure on September 23, 2013, and set law days to commence on November 18, 2013. The law days passed without redemption but, to date, the plaintiff has not taken possession of the unit.

The defendants now appeal from the judgment of the court denying an application for a writ of audita querela (application) filed by Sharon Mathis, in which she argues that the latest in a series of ejectment orders obtained by the plaintiff should be enjoined on the ground that, prior to the passing of the law days in 2013, she purportedly had reached an agreement with the plaintiff to pay off the judgment amount, performed in accordance with that agreement, and, thus, effectively redeemed her ownership interest such that title to her unit never passed to the plaintiff by operation of law following the passage of the law days. The defendants claim that the court improperly (1) concluded that the evidence presented in support of the application did not support a finding that the parties had reached and performed on any agreement to satisfy the debt and redeem the property, (2) failed to conclude that the granting of the application was necessary to avoid an inequitable windfall to the plaintiff, and (3) declined to admit into evidence certain exhibits offered by the

[2] The complaint also named Mortgage Electronic Registration Systems, Inc. (MERS), as an additional defendant by virtue of its interest in a mortgage on the property. MERS was defaulted for failure to appear and is not a participant in the present appeal. The plaintiff also named itself as a defendant, alleging that it may claim a subsequent priority interest in the property on the basis of additional assessments that arise during the pendency of this action. The defendant No. 2 Fraser Place Condominium Association, Inc., was also defaulted for failure to appear.

Accordingly, all references in this opinion to the defendants collectively are to Sharon Mathis and Shalonda Mathis only. We refer to the defendants individually by name when necessary.

defendants' counsel at the hearing on the application. We disagree and, accordingly, affirm the judgment of the trial court.[3]

The record reveals the following facts and procedural history. In July, 2012, the plaintiff commenced the underlying foreclosure action. Sharon Mathis was defaulted for failure to appear, and Shalonda Mathis was defaulted for failure to plead, and the court rendered a judgment of strict foreclosure in favor of the plaintiff on September 23, 2013. The court found that the amount of the debt owed as of the judgment date was $6874.85, and it set law days to commence on November 18, 2013.[4] No appeal was taken from the judgment of strict foreclosure.

On or about November 15, 2013, Shalonda Mathis made a payment of $5800 to the plaintiff, which was less than the full amount needed to redeem the property. See, e.g., *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 579 n.7, 55 S. Ct. 854, 79 L. Ed. 1593 (1935) (it is axiomatic that holder of equity of redemption can redeem from mortgagee or lien holder

[3] The plaintiff argues that any claim by the defendants that the parties had reached a settlement agreement pursuant to which the plaintiff would accept less than the full amount of the debt owed must be rejected because no such agreement was reached and, alternatively, because any such agreement was not in writing and, thus, would have violated the statute of frauds as set forth in General Statutes § 52-550. Section 52-550 (a) provides in relevant part: "No civil action may be maintained in the following cases unless the agreement, or a memorandum of the agreement, is made in writing and signed by the party, or the agent of the party, to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property . . . ." Because we affirm the trial court's determination that the plaintiff failed to establish that *any* postjudgment settlement agreement existed between the parties, we need not reach the statute of frauds issue.

[4] The court found that the fair market value of the property was $69,000, and awarded attorney's fees of $1890, a title search fee of $225, and an appraisal fee of $375. Accordingly, the debt and fees totaled $9364.85. At the time the judgment of strict foreclosure was rendered, the property was also encumbered by a $57,000 mortgage in favor of MERS.

only by paying outstanding debt in full); *Lomas & Nettleton Co.* v. *Di Francesco*, 116 Conn. 253, 258, 164 A. 495 (1933) (same). Although Shalonda Mathis made an inquiry as to the remaining amount needed to satisfy the judgment in full, she failed to make any further payments before the law days passed. Because the law days passed without any redemption of the property, all rights of redemption were extinguished and title to the unit vested absolutely in the plaintiff. See *Sovereign Bank* v. *Licata*, 178 Conn. App. 82, 97, 172 A.3d 1263 (2017) ("[if] a foreclosure decree has become absolute by the passing of the law days, the outstanding rights of redemption have been cut off and the title has become unconditional in the plaintiff, with a consequent and accompanying right to possession" (internal quotation marks omitted)).

The plaintiff applied for an order of execution of ejectment, which was granted and issued on March 27, 2014. The ejectment, however, did not take place. The plaintiff filed another application for execution of ejectment on April 7, 2017, which was granted and issued on April 21, 2017. Once again, the ejectment did not occur.[5] Several years later, on July 29, 2020, the plaintiff applied for a third execution of ejectment, which was granted and issued on January 19, 2021. The defendants were served with notice of the January 19, 2021 execution of ejectment, which indicated that they had until February 16, 2021, to quit possession. On February 8, 2021, Shalonda Mathis filed a motion to open the foreclosure judgment and a motion for a stay of the

[5] A party seeking to enforce an order of ejectment has only sixty days from the date it is issued to make service and due return to the court, otherwise the order expires and a new application for execution of ejectment must be filed with the court. See Form JD-CV-30, titled "Application and Execution for Ejectment Mortgage Foreclosure," available at https://jud.ct.gov/webforms/forms/cv030.pdf (last visited May 13, 2024) (directing officer to make service and due return to court within sixty days from date ejectment order issues).

ejectment asking for an "additional time of . . . [twenty] weeks before moving out." The court, *M. Taylor*, *J.*, denied the motion to open but granted the motion to stay the ejectment until May 3, 2021.[6]

The plaintiff filed another application for an order of execution of ejectment on May 25, 2021, which was granted and issued the same day. On June 16, 2021, Shalonda Mathis filed a motion seeking to stay the ejectment for ten or more additional weeks. The court, *Budzik*, *J.*, denied the motion and set a new ejectment date of July 13, 2021.

On July 15, 2021, the plaintiff filed a motion for sanctions seeking to preclude the defendants from filing further motions for stays of ejectment. On July 16, 2021, Shalonda Mathis filed her third motion for a stay of ejectment, seeking to stay the ejectment for an additional four weeks. The court, *M. Taylor*, *J.*, issued the following order: "The plaintiff may reclaim its proposed ejectment after thirty days from the court's order, issued on [July 19, 2021]. Should another stay be requested, the question of an agreement with the plaintiff may be raised only if both parties agree that the matter ought to be stayed. If there are other reasons for a stay presented, the court will hear them."

On January 25, 2022, Shalonda Mathis filed her fourth motion for a stay of execution, seeking an eight week extension. The plaintiff objected to the motion, which was taken on the papers on February 14, 2022. The court never ruled on that motion, and the ejectment date passed without action.

[6] At the hearing on the motion to open, counsel for the plaintiff provided the following explanation for why, despite numerous previous execution of ejectment orders, the defendants remained in possession of the unit: "My understanding is at each time . . . those executions were issued . . . the defendant sought additional time in which to move out of the premises and, so these executions were never acted upon."

On May 10, 2022, the plaintiff filed another application for an execution of ejectment. On August 2, 2022, having received no response from the court, the plaintiff filed a caseflow request seeking an adjudication. The clerk responded: "The clerk cannot act on this proposed execution of ejectment because a motion for stay and objection remain pending on the docket. There is no information in the court record indicating the duration of any agreed upon stay or if it has ended." On September 12, 2022, the court ordered the clerk to issue the execution of ejectment.

The execution of ejectment was issued on October 18, 2022. The ejectment date was set for November 9, 2022, at 7:30 a.m. On that day, Sharon Mathis filed a bankruptcy petition pursuant to chapter 13 of the United States Bankruptcy Code, which halted the ejectment. The bankruptcy action was dismissed on November 18, 2022, following which the plaintiff obtained a new ejectment date of December 14, 2022, at 7:30 a.m. Prior to that date, Sharon Mathis filed a second chapter 13 bankruptcy petition. The plaintiff obtained relief from the automatic stay provision on January 24, 2023, and, thereafter, Sharon Mathis filed a motion for voluntary dismissal of the bankruptcy action, and that action was also dismissed.

Because more than sixty days had passed since the issuance of the most recent order of execution of ejectment, the plaintiff immediately filed an application for a new order of execution of ejectment. The defendants filed their fifth motion for a stay of ejectment on January 25, 2023, indicating their intent to file an application for a writ of audita querela—the subject of the present appeal—which they filed on January 27, 2023. The plaintiff opposed the application, arguing that such a writ should be barred by the equitable doctrines of laches and/or res judicata.

On March 31, 2023, the court, *Baio, J.*, denied the defendants' application. The court concluded that the defendants failed to prove, on the basis of the evidence presented, that the issuance of the writ was warranted. The court explained that the evidence provided did not establish "that the defendant tendered the full amount due to redeem the property prior to the law day and title vesting with the plaintiff." The defendants thereafter filed the present appeal.

On June 28, 2023, the defendants filed a motion asking the court to articulate "whether or not it found that the evidence before it established the defendants' claim that an agreement was reached between the plaintiff and the defendants as to the defendants redeeming/satisfying the court's judgment of strict foreclosure . . . including whether the court found that the defendants performed on the agreement, as they claim."

The court issued a brief order in response to the motion for articulation on July 31, 2023, stating in relevant part: "The evidence presented failed to support the position of the defendants. Specifically, the evidence presented did not support a finding of *any* valid agreement between the parties, let alone one that would not require full repayment prior to the law day."[7] (Emphasis added.) Additional facts and procedural history will be set forth as necessary.

I

The defendants first claim that the court improperly denied the application for a writ of audita querela on the basis of its conclusion that the evidence presented in support of the application did not support a finding

[7] On August 1, 2023, the trial court denied the plaintiff's motion to terminate the appellate stay but conditioned the continuance of the stay on the defendants' making monthly payments of $250 to the plaintiff during the pendency of the appeal.

that the parties had reached a postjudgment agreement regarding the debt. We are not persuaded.

Our consideration of the defendants' claim is guided by the following principles of law and standard of review. "Audita querela is a remedy granted in favor of one against whom execution has issued on a judgment, the enforcement of which would be contrary to justice because of (1) matters arising subsequent to its rendition, (2) prior existing defenses that were not available to the judgment debtor in the original action, or (3) the judgment creditor's fraudulent conduct or circumstances over which the judgment debtor had no control." *Oakland Heights Mobile Park, Inc.* v. *Simon*, 40 Conn. App. 30, 32, 668 A.2d 737 (1995). "Because the writ impairs the finality of judgments, the common law precluded its use in cases in which the judgment debtor sought to rely on a defense such as payment or a release that he had the opportunity to raise before the entry of judgment against him. . . . The writ of audita querela provides relief from a judgment at law because of events occurring subsequently [that] should cause discharge of a judgment debtor." (Emphasis omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, 213 Conn. App. 635, 658–59, 278 A.3d 607, cert. denied, 345 Conn. 962, 285 A.3d 389 (2022).

"Audita querela is a specific equitable remedy that enables a court of equity to supervise its judgments and to control the issuance of executions. . . . It is in the nature of an equitable injunction addressed to a judgment." (Citation omitted.) *State* v. *Alegrand*, 130 Conn. App. 652, 668–69, 23 A.3d 1250 (2011). "Equitable relief is extraordinary and not available as a matter of right, but rather it is within the discretion of the court." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, supra, 213 Conn. App. 659. We will review a court's

equitable determinations, therefore, only for an abuse of discretion. See *Riley* v. *Travelers Home & Marine Ins. Co.*, 173 Conn. App. 422, 460–61, 163 A.3d 1246 (2017), aff'd, 333 Conn. 60, 214 A.3d 345 (2019); see also *Thompson* v. *Orcutt*, 70 Conn. App. 427, 431, 800 A.2d 530 ("[T]he exercise of . . . equitable authority . . . is subject only to limited review on appeal. . . . The only issue on appeal is whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.)), cert. denied, 261 Conn. 917, 806 A.2d 1058 (2002).

"Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *Riley* v. *Travelers Home & Marine Ins. Co.*, supra, 173 Conn. App. 461. "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . The salient inquiry is whether the court could have reasonably concluded as it did. . . . In determining whether there has been an abuse of discretion, much depends upon the circumstances of each case." (Internal quotation marks omitted.) *307 White Street Realty, LLC* v. *Beaver Brook Group, LLC*, 216 Conn. App. 750, 770, 286 A.3d 467 (2022).

In the present case, the basis for the writ was an alleged agreement pertaining to the redemption of the property entered into by the defendants with the plaintiff following the rendering of the judgment of strict foreclosure but before the passage of the law days. Whether a binding agreement or contract exists, either express or implied, is a factual determination to be made by the trier of fact, which, in this instance, was the trial court. See *Avon Meadow Condominium Assn., Inc.* v. *Bank of Boston Connecticut*, 50 Conn. App. 688,

695, 719 A.2d 66 ("existence of a contract is a question of fact to be determined by the trier on the basis of all the evidence" (internal quotation marks omitted)), cert. denied, 247 Conn. 946, 723 A.2d 320 (1998), and cert. denied, 247 Conn. 946, 723 A.2d 320 (1998). Even if we assume without expressly deciding that a writ of audita querela is a proper vehicle for the relief sought by the defendants in the present case, our review of the record and the hearing conducted by the trial court on the defendants' application reveals that the defendants presented no evidence, either with the application or at the evidentiary hearing, from which the court reasonably could have found that the parties entered into a postjudgment agreement under which the defendants could have redeemed the property without tendering the full amount of the outstanding debt as determined by the court in rendering the judgment of strict foreclosure.

Shalonda Mathis testified at the evidentiary hearing that she made a partial payment of $5800 on November 15, 2013, and provided a photocopy of a check evincing the same, above which was a signature of receipt by the plaintiff's counsel. She never expressly testified, however, that there was an agreement in place with the plaintiff to accept less than the full amount of the judgment rendered, nor was she even asked about the existence of any such agreement. She further testified that she made a second payment to the plaintiff that she understood as constituting payment "in full"; however, she provided no supporting evidence regarding this second payment, nor did she testify that this alleged additional payment was tendered before the running of the law days. Rather, she testified that she did not know when the second payment was made and that she had been unable to locate any receipt or canceled check evincing this second payment.

Although the defendants now argue that they effectively exercised the right of redemption prior to title

passing to the plaintiff, such that Sharon Mathis remains the title owner of the unit, it is significant that this argument never previously was advanced by the defendants prior to the filing of the underlying application, despite numerous court filings over the course of one decade seeking to evade ejectment. The trial court was free to consider this history in deciding whether to grant the equitable relief sought. Moreover, the trial court, as the trier of fact, was free to reject the unsupported testimony offered by Shalonda Mathis and to conclude, on the basis of the totality of the evidence in the record, that the defendants had failed to establish the existence of any postjudgment agreement regarding redemption of the property or that the property was redeemed. From our careful review of the record before us, we cannot conclude that the court abused its discretion in denying the defendants' application as unsupported by the evidence presented, and we reject the defendants' claim to the contrary.

II

The defendants next claim that the court improperly failed to recognize that the granting of the application was necessary to avoid an inequitable windfall to the plaintiff. The plaintiff argues that this claim was not made before or addressed by the trial court and, therefore, is unpreserved for appellate review. We agree with the plaintiff and decline to review this claim.

As expressly provided in our rules of appellate procedure, "[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial . . . ." Practice Book § 60-5. "A claim is *distinctly* raised if it is so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . A claim briefly suggested is not distinctly raised." (Citations omitted; emphasis added; internal quotation marks omitted.) *Swerdloff* v. *AEG Design/Build, Inc.*,

209 Conn. 185, 188, 550 A.2d 306 (1988). In other words, "[o]ur appellate courts, as a general practice, will not review claims made for the first time on appeal. We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 619, 99 A.3d 1079 (2014). "[O]nly in [the] *most exceptional circumstances* can and will [an appellate court] consider a claim, constitutional or otherwise, that has not been *raised and decided* in the trial court." (Emphasis added; internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014).

In the present case, as argued by the plaintiff, the defendants never *distinctly* raised their windfall argument to the trial court nor did the court discuss that issue in its decision. Although the defendants argue that the "plaintiff itself firmly invoked the trial court's duty to do equity to the parties in these proceedings" by affirming in its objection to the application that the writ of audita querela is an equitable remedy, which duty arguably would include avoiding any inequitable windfall, they point to nothing in the record demonstrating that the windfall issue was distinctly raised to the court. The defendants' suggestions in their reply brief that they "essentially" presented a windfall argument or that the court should have gleaned from the closing argument of the defendants' counsel at the hearing on the application that the defendants were advancing such a claim are unavailing. Accordingly, we decline to review this claim.[8]

[8] Certainly, a "substantial and undeserved windfall would not . . . [comport] with principles of equity." *Amresco New England II, L.P.* v. *Colossale*, 63 Conn. App. 49, 55, 774 A.2d 1083 (2001). Even if we were to conclude, however, that the defendants' windfall claim properly is before us for review, the evidentiary record and factual findings by the trial court provide an inadequate record on which to reasonably conclude that the plaintiff has

III

Finally, the defendants claim that the court improperly declined to admit into evidence two exhibits offered by the defendants. We disagree.[9]

The following additional facts are relevant to our discussion of the defendants' evidentiary claims. At the hearing on the application, after the defendants presented their witnesses, the defendants' counsel asked the court to admit into evidence as full exhibits several documents that were previously marked for identification only. The court declined to admit two of these exhibits on the basis of objections raised by the plaintiff's counsel.

First, the defendants' counsel offered what had been marked as exhibit A, which was a March 13, 2023 letter written by an attorney for Select Portfolio Servicing, Inc.,[10] to the defendants' counsel regarding the status

unfairly benefitted or received a financial windfall, particularly in the face of the defendants' continued possession and occupancy of the unit. See *Clelford* v. *Bristol*, 150 Conn. App. 229, 236, 90 A.3d 998 (2014) ("[if] presented with an inadequate record, we are precluded from reviewing the claim on appeal"). Although there is some evidence in the record that the defendants have made some monthly common expense payments to the plaintiff as well as some mortgage and property tax payments with respect to the foreclosed unit, nothing in the record compels the conclusion that such payments exceeded what would be reasonable use and occupancy payments or otherwise inured inequitable benefits on the plaintiff. Moreover, to the extent that the defendants' windfall claim includes an argument that a judgment of foreclosure by sale would have been more equitable under the circumstances of this case than a judgment of strict foreclosure, any such argument was abandoned by the defendants' failure to appeal from the judgment of foreclosure.

[9] At oral argument before this court, the defendants' counsel, during his rebuttal, seemed to suggest that the defendants were abandoning their evidentiary claims. Because this statement was somewhat ambiguous, however, we will review the claims as briefed.

[10] After the judgment of strict foreclosure was rendered, the mortgage was assigned to U.S. Bank National Association, not in its individual capacity but solely in its capacity as Indenture Trustee of CIM Trust 2021-NR2 (U.S. Bank). Select Portfolio Servicing, Inc., is the mortgage servicer for U.S. Bank.

of a mortgage on the subject unit. The plaintiff's counsel objected to its admission on both relevancy and hearsay grounds. The defendants' counsel appeared to argue to the court that exhibit A fell within the hearsay exception for a statement by a party opponent. See Conn. Code Evid. § 8-3 (1).[11] The plaintiff's counsel responded that the declarant was not a party to the action and, therefore, any statements in the letter were inadmissible hearsay. The court agreed that the statements in the letter were hearsay and sustained the objection of the plaintiff's counsel.

The defendants' counsel also sought to admit exhibit C, a copy of a lis pendens that purported to give notice of a 2020 foreclosure action that the plaintiff had filed against the defendants on the basis of unpaid common expenses and assessments. The defendants' counsel argued that "[t]he only reason you would . . . file a lis pendens on the land records referring to a foreclosure action is if the property was redeemed . . . ." The plaintiff's counsel objected to the admission of the lis pendens on authentication grounds, arguing that it was not a properly certified document and, thus, was not self-authenticating. The court agreed, stating: "So, while the lis pendens may well have relevance, unfortunately what is necessary to get it into evidence is not before the court today, so the objection is sustained."

[11] Section 8-3 (1) of the Connecticut Code of Evidence excepts from the hearsay rule "[a] statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship, (E) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, (F) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or (G) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question. . . ."

Our standard of review regarding challenges to a trial court's evidentiary rulings is well settled. "To the extent [that] a trial court's admission [or exclusion] of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Internal quotation marks omitted.) *Barclays Bank Delaware* v. *Bamford*, 213 Conn. App. 1, 18, 277 A.3d 151, cert. denied, 345 Conn. 905, 282 A.3d 982 (2022). In addition to the burden of demonstrating an erroneous evidentiary ruling, a party seeking reversal of a judgment must also demonstrate that the challenged ruling was harmful, meaning that it likely affected the outcome. See *Downing* v. *Dragone*, 216 Conn. App. 306, 343, 285 A.3d 59 (2022), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023).

With respect to exhibit A, the defendants argue that the court improperly excluded the letter as hearsay because the statements therein fall under the hearsay exception for statements by a party opponent. Although the defendants sought to offer the statements in the letter against the plaintiff, who is a party, the letter did not include statements of the plaintiff or any other party to the action but, rather, contained statements of an attorney for a nonparty mortgage servicer. Accordingly, the court correctly concluded that the letter, which the defendants offered for the truth of the matters asserted therein, constituted inadmissible hearsay, and it properly declined to admit it into evidence.

With respect to exhibit C, the lis pendens, the defendants argue that the court improperly excluded it from

evidence on the ground that it was not properly authenticated. Under the Code of Evidence, "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required if the offered evidence is self-authenticating in accordance with applicable law." Conn. Code Evid. § 9-1 (b). As noted in the commentary to the rule governing authentication of public records, "although certified copies of most public records are 'self-authenticating' . . . certification is not the exclusive means by which to authenticate a public record." (Citation omitted.) Conn. Code Evid. § 9-3, commentary. "It generally is recognized that a public record may be authenticated simply by showing that the record purports to be a public record and comes from the custody of the proper public office." Id. Copies of documents recorded on a town's land records generally are considered certified if they are affixed with the seal of the town by the town clerk or the town clerk's legally qualified assistant. General Statutes § 7-23.

Here, although the lis pendens contained a bar-coded label showing the volume and page number as well as the time and date that it was recorded on the Hartford land records, it did not contain a town seal demonstrating that it was a certified copy and was, thus, self-authenticating. Even if we assume for the sake of argument, however, that the court excluded the lis pendens from evidence in error, we are not persuaded that this exclusion was harmful because it was merely cumulative of other properly admitted evidence.[12] Thus, the

[12] The defendants argue that the lis pendens noticed a new foreclosure action, which could be viewed as an implicit admission by the plaintiff that the defendants previously had redeemed the property. The plaintiff's current president, Corey Fleming, however, testified at the hearing on the application that he had instructed the plaintiff's counsel to initiate a new foreclosure action after he became president in 2017, and that he later had been surprised to learn that the plaintiff already owned the defendants' unit. Accordingly, even if the lis pendens had been admitted, it would have been cumulative of Fleming's testimony. See *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 23–24, 60 A.3d 222 (2013) (in evaluating harmfulness of evidentiary error, reviewing court considers whether improperly admitted

defendants have failed to demonstrate that the court's failure to admit the lis pendens, even if error, was harmful.

The judgment is affirmed.

In this opinion the other judges concurred.

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or excluded evidence was "merely cumulative of other validly admitted testimony" (internal quotation marks omitted)). Moreover, the mere fact that the plaintiff initiated an additional foreclosure action does not mean that a court would have determined that the plaintiff was legally entitled to any additional relief, because the filing of the action would not have altered the undisputed fact that title to the property already passed to the plaintiff by operation of law when the defendants failed to pay off the total debt prior to the passage of the law days.