TORRINGTON TAX COLLECTOR, LLC *v.* HOLLY RILEY (AC 46294)

Cradle, Seeley and Westbrook, Js.

Syllabus

The plaintiff, an entity that collected taxes for the city of Torrington, appealed to this court from the judgment of the trial court granting the defendant's claim for an exemption from execution. In 2020, the plaintiff served a bank execution to secure funds from the defendant's bank account to collect on personal property taxes assessed against a business with which the defendant formerly had been involved. Although the defendant had previously provided the plaintiff with her address in California, the plaintiff did not send a tax bill or a personal written demand to the defendant at that address, as required pursuant to statute (§ 12-155 (a)). In 2021, the trial court granted the defendant's claim for an exemption from execution, concluding that the plaintiff had failed to comply with the § 12-155 (a) requirement to send notice of the tax debt to the defendant's last known address and that the bank execution was not properly issued because the plaintiff had failed to provide notice of the underlying tax bill to the defendant. The plaintiff appealed from that judgment to this court but later withdrew the appeal, abandoning any claim of error with respect to that decision. In 2022, the plaintiff mailed a personal demand to the defendant's California address and issued a new execution against her bank account to recover the same personal property taxes that it had attempted to recover with the 2020 execution. The plaintiff did not send a tax bill to the defendant's California address in connection with the new execution. Thereafter, the defendant initiated the current exemption proceedings, arguing that the 2022 execution was precluded by the trial court's 2021 order granting her prior claim for an exemption from execution. The trial court granted the defendant's 2022 claim for an exemption from execution. *Held*:

1. The trial court properly concluded that the plaintiff was precluded from collecting on the tax pursuant to the doctrine of collateral estoppel: the issue of whether the plaintiff could execute on the defendant's funds without first sending a tax bill to her California address was actually and necessarily decided in the prior exemption proceeding, even though it was not strictly essential to the final judgment of that action, because the issue was raised in the pleadings, the trial court heard testimony regarding the issue, the court specifically found that the tax bill had not been sent and relied in part on that finding in granting the defendant's exemption from execution, and the court treated the issue as essential and gave it thorough consideration; moreover, the issue was identical to the issue before the trial court in the present action, as the plaintiff

failed to send the defendant a tax bill at her California address before issuing the 2022 execution.

2. The trial court did not improperly fail to hold an evidentiary hearing on the defendant's exemption claim: the court held a hearing in which each party was given an opportunity to argue their position, and that hearing was sufficient to satisfy the requirements of the applicable statute ((Supp. 2022) § 52-367b).

Argued February 8—officially released June 18, 2024

Procedural History

Application seeking a claim of exemption from a financial institution execution to satisfy outstanding personal property taxes, brought to the Superior Court in the judicial district of Litchfield, where the court, *Lynch, J.*, granted the defendant's claim for an exemption from execution, and the plaintiff appealed to this court. *Affirmed.*

Matthew L. Studer, for the appellant (plaintiff).

Clifford S. Thier, for the appellee (defendant).

Opinion

WESTBROOK, J. The plaintiff, Torrington Tax Collector, LLC, appeals from the judgment of the trial court granting the defendant, Holly Riley,[1] an exemption from a bank execution on an account held by the defendant. See General Statutes (Supp. 2022) § 52-367b.[2] On appeal,

[1] Following the commencement of this action, Holly Riley legally changed her name to Holly Alcorn.

[2] General Statutes (Supp. 2022) § 52-367b provides in relevant part: "(a) Execution may be granted pursuant to this section against any debts due from any financial institution to a judgment debtor who is a natural person, except to the extent such debts are protected from execution . . . .

* * *

"(e) To prevent the financial institution from paying the serving officer, as provided in subsection (h) of this section, the judgment debtor shall give notice of a claim of exemption by delivering to the financial institution, by mail or other means, the exemption claim form or other written notice that an exemption is being claimed . . . .

"(f) (1) Upon receipt of an exemption claim form . . . the clerk of the court shall enter the appearance of the judgment debtor . . . with the address set forth in the exemption claim form . . . . The clerk shall forthwith send file-stamped copies of the exemption claim form . . . to the

the plaintiff claims that the court improperly (1) determined that the plaintiff's opposition to the claim of exemption was barred by the doctrine of res judicata and/or collateral estoppel, and (2) failed to hold an evidentiary hearing before granting the defendant's claim for exemption from execution. We disagree and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiff is attempting to collect personal property taxes assessed against the defendant by the city of Torrington (city). In 2002, the defendant and Raymond Robertson filed a trade name certificate with the city's town clerk indicating that they were doing business together as Robertson Precision (business), with a business address of 177 South Main Street, #18, Torrington. The defendant left the business in 2007, and, in 2011, she moved to California. By 2013, Robertson had transferred or sold the assets of the business, and the business was no longer in operation.

The city assessed personal property taxes against the business for the grand lists of 2008 through 2016. Neither the defendant nor Robertson paid the assessed taxes; nor did they challenge the assessment of the taxes. In 2011 and 2016, the plaintiff served bank executions on the defendant's accounts, securing funds and applying them to the personal property taxes the city alleged were owed relative to the business.[3] In both 2011 and 2016, the defendant informed the plaintiff that

judgment creditor and judgment debtor with a notice stating that the disputed funds are being held for forty-five days from the date the exemption claim form . . . was received by the financial institution or until a court order is entered regarding the disposition of the funds, whichever occurs earlier, and the clerk shall promptly schedule the matter for a hearing. . . ."

Hereinafter, unless otherwise indicated, all references to § 52-367b are to the version of that statute in the 2022 supplement to the General Statutes.

[3] The secured funds, however, were insufficient to cover the taxes assessed, and therefore, tax was still owed relative to the business at the time of the 2020 and 2022 executions.

she had never received notice of a tax bill or the execution. The 2011 and 2016 executions are not at issue in this appeal. The defendant provided the plaintiff with her new California address and informed the plaintiff that she was no longer involved in the business.

In 2020, the plaintiff again served a bank execution (2020 execution) to secure funds from the defendant's account pursuant to a levy under General Statutes § 12-155[4] to collect on the remaining personal property taxes assessed against the business for the grand lists of 2008 through 2016. The plaintiff did not send a personal written demand to the defendant at her last known address, namely, her California address. The defendant thereafter filed a claim for an exemption from execution, arguing that, despite previously having given the plaintiff her California address, she never received a personal demand as required by § 12-155 (a). Additionally, she argued that she never received a tax bill at her current address.

The court, *Shaban*, *J.*, held a hearing on the defendant's claim for an exemption from execution, as required by § 52-367b. At the hearing, the plaintiff argued that the scope of the proceeding was limited

[4] General Statutes § 12-155 provides in relevant part: "(a) If any person fails to pay any tax . . . within thirty days after the due date, the collector or the collector's duly appointed agent shall make personal demand of such person therefor or leave written demand at such person's usual place of abode or deposit in some post office a written demand for such tax . . . postage prepaid, addressed to such person at such person's last-known place of residence . . . . If such person is a corporation, limited partnership or other legal entity, such written demand may be sent to any person upon whom process may be served to initiate a civil action against such corporation, limited partnership or entity.

"(b) After demand has been made in the manner provided in subsection (a) of this section, the collector for the municipality, alone or jointly with the collector of any other municipality owed taxes by such person, may (1) levy for any unpaid tax . . . on any goods and chattels of such person and post and sell goods and chattels in the manner provided in case of executions . . . ."

and that the court could not consider whether the tax bill was received, but that, regardless, the plaintiff followed the proper procedure in sending the tax bill to the business address on file, rather than to the defendant's California address. The defendant countered that the exemption should be granted because she had informed the plaintiff of her California address in 2011 but had never received a tax bill at that address. The defendant presented the testimony of the plaintiff's agent, Launa M. Goslee, and testified herself at the hearing.

Following the hearing, the court, *Shaban*, *J.*, issued an order (2021 order) granting the defendant an exemption on the grounds that the plaintiff had not complied with the personal demand requirement of § 12-155 (a) and that the defendant had never received a tax bill. Specifically, the court concluded: "[T]he [plaintiff] failed to comply with the statutory requirement to send notice of the tax debt to [the defendant's] usual place of abode and/or her last known address. The [plaintiff] had been given that information personally by [the defendant] years before the tax bill, the tax warrant and the bank execution were issued. In that [the defendant] *did not properly receive the tax bill, she lost any ability to challenge the assessment or the billing itself* before a tax bill or warrant was issued. Having not properly provided notice of the *underlying tax bill* to [the defendant], the bank execution upon which it was based, as well as the tax warrant that was issued, also were not properly issued." (Emphasis added.) The court granted the defendant's claim for an exemption from execution and ordered that the funds subject to execution be returned to the defendant's bank account.

The plaintiff filed an appeal with this court challenging Judge Shaban's order. It also filed a motion for articulation with the trial court, which the court denied. In that prior appeal, the plaintiff argued that it was not clear whether the court had granted the exemption on

the ground that the *tax bill* was not sent to the defendant's California address. The plaintiff argued that the sole issue before the court "was whether the funds claimed by the plaintiff were exempt from execution . . . . The trial court, however, exceeded the limited scope of review in bank execution cases. As drafted, there is some ambiguity as to whether the trial court's holding implicates the collectability or validity of the underlying personal property taxes as opposed to simply determining the exempt or nonexempt status of the claimed funds. The court appears to hold that the defendant was denied the opportunity to challenge the assessment of the personal property taxes due to the fact that she never received a tax bill, thus rendering the present, and arguably any future, tax warrant and bank execution invalid. If, in fact, this is the trial court's position then it runs contrary to established law and confuses the timeline and procedure for challenging the assessment of municipal taxes." (Citation omitted.) The plaintiff, however, later withdrew the appeal, thereby abandoning any claim of error with respect to Judge Shaban's decision. See *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 240, 232 A.3d 1279 (2020) (plaintiff failed to timely appeal and expressly waived right to appeal and "could not circumvent this failure by attempting to seek the same relief he could have claimed had he properly and timely appealed").

Rather than pursue its appellate remedy, the plaintiff instead mailed a personal demand to the defendant's California address and, thereafter, issued a new execution (2022 execution) against the defendant's bank account. The plaintiff did not send a tax bill to the defendant's California address. The defendant initiated the current exemption proceedings, arguing that the 2022 execution was precluded by the 2021 order. In a letter to her bank, which was attached to her claim form, the defendant argued that she "won the court

case on the last lien in December of 2021 and the funds were returned to our account.[5] [The plaintiff] chose to cancel [the] appeal [and] therefore should not have been legally allowed to again place a lien on my account without any notification to me and following the appeal process. [The plaintiff] forfeited [its] right to do this again." (Footnote added.)

The trial court, *Lynch*, *J.*, ordered the parties to brief the issue "as to why Judge Shaban's [2021] order is not res judicata on whether the plaintiff can execute on the defendant's funds without sending a new tax bill to the [defendant].

* * *

"It appears to the court that Judge Shaban's ruling . . . is res judicata as to whether this court should again grant the defendant's motion for exemption." (Citation omitted.) The plaintiff, in its responsive brief, presented a similar argument to the one it had made on direct appeal from the 2021 order. The plaintiff argued that res judicata does not bar the present action because Judge Shaban's order finding that the tax bill had not been sent and the court's grant of the exemption based on this finding "exceeded the scope of the court's review and is nonbinding. . . . [C]onsideration of the assessment of the taxes and/or the ability of the defendant to challenge the assessment was improper.

* * *

"In the court's 2021 [order], Judge Shaban stated [in dictum], '[i]n that the defendant did not properly receive the tax bill, she lost any ability to challenge the assessment or the billing itself before a tax bill or warrant was issued.' . . . The court's statement confuses the issue as well as the timeline associated with challenging

[5] The execution secured funds from a bank account shared by the defendant and her husband.

the assessment of a municipal tax. Moreover, and most importantly, the statement is incorrect as a matter of law." (Citations omitted.) The defendant in her brief countered that the present execution was barred by res judicata and/or collateral estoppel because the parties already litigated, and the 2021 order conclusively provided, that the plaintiff may not execute on the defendant's assets without notice of the tax bill. She argued that the court in the prior action took up the issue of whether the tax bill was sent and granted the exemption from execution in part because it concluded that the plaintiff had never sent a tax bill to the defendant's California address and, thus, deprived her of the ability to challenge the assessment.

After a hearing on the defendant's exemption claim, the court agreed with the defendant that res judicata and/or collateral estoppel barred the present execution because the court in the prior action had granted the exemption from execution in part due to its conclusion that the plaintiff had not sent the tax bill. The court held that "Judge Shaban's order regarding the city's failure to send the underlying tax bill to [the defendant] was not dictum but rather was an essential part of the court's decision. There is no other reasonable way to read Judge Shaban's order. Indeed, this court finds that the city's attempt to execute on the same tax debt is a collateral attack on Judge Shaban's previous decision and [is] barred by the doctrine of res judicata/collateral estoppel." The court reasoned that "[t]he only way the court could deny [the defendant's] exemption in this case would be to ignore the part of Judge Shaban's order [quoted in the preceding paragraph] . . . . The [plaintiff] asks this court to do just that and ignore that part of Judge Shaban's ruling, arguing that it was wrong. It is not for one Superior Court to rule upon the propriety of another Superior Court judge's opinion. To the extent the [plaintiff] believed Judge Shaban's ruling was

wrong, the [plaintiff] should have pursued its appeal rather than withdraw it. Ignoring the court's ruling in the previous case, issuing another bank execution and asking this court to reject Judge Shaban's analysis is not permitted under the doctrines of res judicata and collateral estoppel." (Citation omitted.) The court therefore granted the defendant's claim for an exemption from execution. This appeal followed.

The plaintiff claims on appeal that the court improperly (1) concluded that the plaintiff's most recent attempt to collect on the remainder of the outstanding tax was barred by the doctrines of res judicata and/or collateral estoppel, and (2) failed to hold an evidentiary hearing on the defendant's exemption claim pursuant to § 52-367b. The defendant counters that the 2021 order should be given preclusive effect under the doctrine of collateral estoppel. She argues that the issue of whether the plaintiff may execute on her funds without first sending her a *tax bill* already had been litigated and decided in the prior action and that the present action is therefore barred. The defendant additionally argues that an evidentiary hearing was not required and that, regardless, the plaintiff's evidentiary hearing claim was waived because it was raised for the first time on appeal. For the following reasons, we reject the plaintiff's claims.

I

We first address whether the present claim is barred by the doctrine of res judicata and/or collateral estoppel. We agree with the defendant that the issue of whether the plaintiff may execute on the defendant's funds without first sending her a tax bill was decided in the 2021 order, which directly implicates the doctrine of collateral estoppel.[6] Although the plaintiff argues that

[6] In light of our conclusion that the plaintiff is precluded under the doctrine of collateral estoppel from relitigating the issue of whether the plaintiff may execute on the defendant's funds without first sending her a tax bill in the present action, we do not consider whether the plaintiff's claims are barred

collateral estoppel does not bar the present action because whether the tax bill was received was not a proper consideration when evaluating a claimed exemption from execution,[7] that is inconsequential in the present action because, "[u]nder the doctrines of res judicata and collateral estoppel, a later court cannot alter the results of a prior final judgment *even if that judgment is wrong* . . . ."[8] (Emphasis added; internal quotation marks omitted.) *Bruno* v. *Geller*, 136 Conn. App. 707, 727, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012). Having decided to abandon its challenge to the soundness of the 2021 order by way of the direct appeal, the plaintiff is not permitted to challenge the prior order as erroneous in the present action if the requirements for the application of collateral estoppel have been met. We accordingly consider only whether the prior court's conclusion that the plaintiff could not execute on the defendant's funds without sending her

under the doctrine of res judicata. See *Weiss* v. *Weiss*, 297 Conn. 446, 472 n.20, 998 A.2d 766 (2010).

[7] "Both the plain language of § 52-367b and our case law . . . make clear that the only cognizable exemptions are those provided for by that statute. Section 52-367b (a) plainly and unambiguously states that the judgment debtor is only permitted to assert exemptions set forth by statute or 'any other laws or regulations of this state or of the United States which exempt such debts from execution.' . . . General Statutes (Supp. 2022) § 52-367b (a)." (Emphasis omitted.) *Clark* v. *Quantitative Strategies Group, LLC*, 224 Conn. App. 224, 233, 311 A.3d 732 (2024).

[8] Even if "the judgment in the first action was manifestly erroneous . . . [it would] not render it invalid or ineffective. Though erroneous, it continue[s] in force [unless] set aside by writ of error or appeal, or other proper proceedings, and the Superior Court in deciding the second action ha[s] no power to decide that the first judgment was erroneous. . . . Unless, and until, it is corrected, modified, reversed, annulled, vacated, or set aside on appeal or in some other timely and appropriate proceeding, a final judgment on the merits which has been rendered by a court having jurisdiction of the parties and the subject matter, and which is not void, is conclusive as to matters put in issue and actually determined in the suit, when they come into controversy again in subsequent litigation between the same parties or their privies, even though it is irregular or erroneous." (Citation omitted; internal quotation marks omitted.) *Bruno* v. *Geller*, 136 Conn. App. 707, 726–27, 46 A.3d 974, cert. denied, 306 Conn. 905, 52 A.3d 732 (2012).

a tax bill bars the relitigation of that issue in the present action under the doctrine of collateral estoppel, given that the plaintiff has again sought to execute on the defendant's funds without sending a tax bill to her California address.

A brief review of the processes of tax assessment and tax collection will aid our discussion. Pursuant to General Statutes § 12-71, "goods, chattels and effects or any interest therein . . . belonging to any person who is a resident in this state, shall be listed for purposes of property tax in the town where such person resides, subject to the provisions of sections 12-41, 12-43 and 12-59." Every person required by law to file personal property taxes must file an annual declaration of their tangible personal property pursuant to General Statutes § 12-41 on or before the first day of November each year. General Statutes § 12-41 (f). After the declarations are filed,[9] the assessors or board of assessors release the grand list for their respective town.[10] General Statutes § 12-55 (a).

[9] If a person required to file a declaration fails to do so, the assessor or a majority of the board of assessors will notify the person in writing within sixty days of the expiration of the time to file such declaration to "appear before them to be examined under oath as to such person's property liable to taxation and for the purpose of verifying a declaration made out by them under the provisions of section 12-41. Any person who wilfully neglects or refuses to appear before the assessors and make oath as to such person's taxable property within ten days after having been so notified or who, having appeared, refuses to answer shall be fined not more than one thousand dollars. The assessors shall promptly notify the proper prosecuting officers of any violation of any provision of this section. . . ." General Statutes § 12-54.

[10] General Statutes § 12-55 (a) provides in relevant part: "On or before the thirty-first day of January of each year, except as otherwise specifically provided by law, the assessors or board of assessors shall publish the grand list for their respective towns. Each grand list shall contain the assessed values of all property in the town, reflecting the statutory exemption or exemptions to which each property or property owner is entitled, and including, where applicable, any assessment penalty added in accordance with section 12-41 or 12-57a for the assessment year commencing on the October first immediately preceding. The assessor or board of assessors shall lodge the grand list for public inspection, in the office of the assessor on or before

The town then "shall make out and sign rate bills containing the proportion which each individual is to pay according to the assessment list; and any judge of the Superior Court or any justice of the peace, on their application or that of their successors in office, shall issue a warrant for the collection of any sums due on such rate bills. Each collector shall mail or hand to each individual from whom taxes are due a bill for the amount of taxes for which such individual is liable." General Statutes § 12-130 (a).

A personal property tax assessment may then be challenged in several ways. "It is well settled that, if the owner of the [property] at the [time] of the [assessment] in question . . . want[s] to challenge the [assessment], [he or she is] required to follow the appropriate statutory procedures, either by (1) timely appealing from the [assessment] to the city's board of assessment appeals pursuant to General Statutes §§ 12-111 and 12-112, and from there by timely appealing to the trial court pursuant to General Statutes § 12-117a, or (2) timely bringing a direct action pursuant to . . . [General Statutes] § 12-119."[11] (Internal quotation marks omitted.) *Cornelius* v. *Arnold*, 168 Conn. App. 703, 710, 147 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1245 (2017). Under § 12-117a, a person claiming to be aggrieved by an action relating to the assessment of taxes has two months from the date of the mailing of the notice of such action to file an appeal from the board of tax review or the board of assessment appeals. General Statutes § 12-117a (a) (1). Under § 12-119, an application for relief

said thirty-first day of January, or on or before the day otherwise specifically provided by law for the completion of such grand list. . . ."

[11] We note that, although §§ 12-117a and 12-119 reference only real property taxes, rather than personal property taxes, these statutory procedures have been applied to challenge both real and personal property taxes. See *Cooley Chevrolet Co.* v. *West Haven*, 146 Conn. 165, 166, 148 A.2d 327 (1959); *Wiele* v. *Board of Assessment Appeals*, 119 Conn. App. 544, 546–47, 988 A.2d 889 (2010).

to the Superior Court "may be made within one year from the date as of which the property was last evaluated for purposes of taxation . . . ." General Statutes § 12-119.

We now turn to the process of tax collection. If any person fails to pay a duly assessed tax, the tax collector, pursuant to § 12-155 (a), must send a personal demand to the tax debtor's usual place of abode within thirty days of the due date.[12] After making a personal demand pursuant to § 12-155 (a), a tax collector may levy for the unpaid taxes with interest, penalties and charges of the municipality upon the goods, chattels, or real estate of the taxpayer, demand payment from any bank indebted to the taxpayer or garnish the wages due from the taxpayer's employer for the amount owed the municipality. See General Statutes § 12-162 (b) (1).

To collect on a tax debt, the tax collector may file an execution on the tax debtor's financial institution. To do so, the tax collector must make an application requesting the execution to the clerk of the court. General Statutes (Supp. 2022) § 52-367b (b). If such application is properly filed in accordance with § 52-367b, the clerk shall issue the execution with directions for the officer serving the execution to make demand upon the financial institution. General Statutes (Supp. 2022) § 52-367b (b). To prevent the financial institution from paying pursuant to the execution, the debtor must provide notice of a claim of exemption to the financial institution. General Statutes (Supp. 2022) § 52-367b (e). Upon receipt of the exemption form, the clerk of the court must enter the appearance of the debtor and send copies of the exemption claim to the creditor and the debtor with a notice stating that the funds are to be held for

[12] See footnote 4 of this opinion.

forty-five days or until a court order regarding the disposition of the funds.[13] General Statutes (Supp. 2022) § 52-367b (f) (1). The clerk must thereafter schedule a hearing on the exemption matter. General Statutes (Supp. 2022) § 52-367b (f) (1).

We next set forth our standard of review and other relevant legal principles. "[C]ollateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"Additionally, [a]pplication of the doctrine of collateral estoppel is neither statutorily nor constitutionally mandated. The doctrine, rather, is *a judicially created rule of reason that is enforced on public policy grounds*. . . . Accordingly, as we have observed in regard to the doctrine of res judicata, the decision whether to apply the doctrine of collateral estoppel in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely . . . (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (Citation omitted; emphasis added; internal quotation marks omitted.) *Wilmington Trust, National Assn.* v. *N'Guessan*, 214 Conn. App. 229, 237, 279 A.3d 310 (2022). Whether a plaintiff's claim is "barred by the [doctrine] of collateral estoppel . . . presents a question of law, over which our review is

[13] See footnote 2 of this opinion.

plenary." *Solon* v. *Slater*, 345 Conn. 794, 809, 287 A.3d 574 (2023).

Turning to the present case, we address whether the first requirement of collateral estoppel, namely, that the issue be " 'actually litigated' " in the prior action, is satisfied. *Lyon* v. *Jones*, 291 Conn. 384, 406, 968 A.2d 416 (2009). Whether the plaintiff properly could execute on the defendant's funds without sending her a tax bill was an issue distinctly raised and litigated in the prior exemption proceeding and submitted to the court for determination. For the purposes of applying the doctrine of collateral estoppel, "[a]n issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." (Internal quotation marks omitted.) Id., citing 1 Restatement (Second), Judgments § 27, comment (d), p. 255 (1982).

The plaintiff argues that whether the tax bill was received was not actually litigated in the prior action because that question was not a proper consideration in an exemption from execution action. See *Clark* v. *Quantitative Strategies Group, LLC*, 224 Conn. App. 224, 233, 311 A.3d 732 (2024). This argument rests on the assumption that an issue cannot be actually litigated for the purposes of collateral estoppel if it is not properly a matter before the court. Although our law, which echoes the Restatement (Second) of Judgments, states that an issue is actually litigated only if it is "properly raised"; 1 Restatement (Second), supra, § 27, comment (d), p. 255; we conclude, guided by our review of the Restatement and its application by our courts and the courts of other states, that an issue need only be raised in the proper pleadings, actually argued before the court and in fact determined in order to be considered properly raised and, accordingly, actually litigated for the purposes of collateral estoppel.

In the present case, the tax bill issue was properly raised in the prior exemption action because it was raised in the pleadings. See *Doyle* v. *Universal Underwriters Ins. Co.*, 179 Conn. App. 9, 17, 20, 178 A.3d 445 (2017) (concluding that "issue of the plaintiff's damages was plainly raised in the pleadings" and, therefore, issue was properly raised for purposes of collateral estoppel). Specifically, in the letter attached to the defendant's exemption form, the defendant raised as a basis for her claim of exemption that she had never received the tax bill and had no notice of the execution until the funds were seized from her accounts.[14] The court heard testimony from both the defendant and Goslee regarding what documents were sent and received, including that the plaintiff sent the tax bill to the business address on file and not to the defendant's California address. The court, on the basis of the evidence adduced at the hearing, made the following factual findings in its memorandum of decision: "[The plaintiff] failed to comply with the statutory requirement to send notice of the tax debt to [the defendant's] usual place of abode and/or her last known address. The city had been given that information personally by [the defendant] years before the tax bill, the tax warrant and the bank execution were issued. In that [the defendant] did not properly receive the tax bill, she lost any ability to challenge the assessment or the billing itself before a tax bill or warrant was issued. Having not properly provided notice of the underlying tax bill to [the defendant], the bank execution upon which it was based, as well as the tax warrant

[14] The letter stated in relevant part: "We've never received a single bill from them, nor is this my company as I left it in 2007.

* * *

"[W]ithout warning [or] forethought to communicate, as the tax department and assessor's office had my phone number and address . . . [t]hey took $33,352.06 from our bank account. . . . [The plaintiff] mailed the documents to a home on Franklin [S]treet in Torrington, not to our address in California which [it] had [and] which denies me due process to settle this matter personally."

that was issued, also were not properly issued." The court therefore specifically found that the tax bill was not sent and relied in part on this finding in granting the defendant's exemption from execution. We therefore conclude that whether the plaintiff may execute on the defendant's funds without first sending a tax bill to her California address was actually litigated.

Moreover, the determination that the tax bill was not received was necessarily determined in the prior case. "An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. Findings on nonessential issues usually have the characteristics of dicta." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 344, 15 A.3d 601 (2011); see also *Lyon* v. *Jones*, supra, 291 Conn. 406 (citing to F. James & G. Hazard, Civil Procedure (3d Ed. 1985) § 11.19, p. 624, for principle that "[a]n issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered" (emphasis omitted; internal quotation marks omitted)). Although the plaintiff argues that the court's determination regarding the tax bill was not essential to the prior court's judgment and, accordingly, was dicta, we disagree.

"If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs

the interest in avoiding the burden of relitigation." 1 Restatement (Second), supra, § 27, comment (h), p. 258. Dictum "includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not [dictum however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.) *Kelly Services, Inc.* v. *Senior Network, Inc.*, 338 Conn. 794, 803, 259 A.3d 1172 (2021).

Connecticut courts have not extensively discussed when an issue is necessarily determined for the purposes of collateral estoppel. We nevertheless find the discussion of the necessarily determined requirement by the Massachusetts Supreme Court in *Home Owners Federal Savings & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.*, 354 Mass. 448, 455, 238 N.E.2d 55 (1968), modifying the rule of *Cambria* v. *Jeffery*, 307 Mass. 49, 50, 29 N.E.2d 555 (1940), persuasive. Although, for the foregoing reasons, we adopt the *Home Owners Federal Savings & Loan Assn.* rule, rather than the more limited rule stated in *Cambria*, it is important to first discuss the *Cambria* case.

In the first action at issue in *Cambria*, the plaintiff, Ernest Jeffery, sought relief for personal injury caused by the negligence of the servant of the defendant, John E. Cambria, following a car accident. *Cambria* v. *Jeffery*, supra, 307 Mass. 49. The court in the first action, however, concluded that Jeffery was contributorily negligent. Id. Because, at the time, contributory negligence was a complete bar to recovery in a negligence action, this finding made obsolete the consideration of the negligence of Cambria's servant. See id., 50. The court nevertheless went on to explicitly find that Cambria's

servant was negligent as well. Id., 49. Cambria then brought an action alleging that Jeffery's negligence caused damage to his car. Id., 50. The Supreme Court concluded that "[a] fact merely found in a case becomes adjudicated only when it is shown to have been a basis of the relief, denial of relief, or other ultimate right established by the judgment." Id. Because the finding of negligence with respect to Cambria's servant was unnecessary to conclude that contributory negligence barred the prior negligence action, the Supreme Court concluded that the issue of negligence with respect to Cambria's servant was not binding in the subsequent action. Id.

The Massachusetts Supreme Court, however, later recognized a narrow exception to the rule it had stated in *Cambria*. In *Home Owners Federal Savings & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.*, supra, 354 Mass. 455, the court "expand[ed] the applicability of the doctrine [of collateral estoppel] to encompass certain findings not strictly essential to the final judgment in the prior action. . . . Such findings may be relied upon [for purposes of collateral estoppel] if it is clear that the issues underlying them were treated as essential to the prior case by the court and the party to be bound. Stated another way, it is necessary that such findings be the product of full litigation and careful decision. . . . This limited expansion of the class of findings within the ambit of the doctrine of collateral estoppel does no violence to the policies underlying the rule of the *Cambria* case . . . . See [F. James & G. Hazard, Civil Procedure (2d Ed. 1965) § 11.25, p. 583]. We deem this limited extension of the rule warranted in view of the strong and oft-stated public policy of limiting each litigant to one opportunity to try his case on the merits." (Citations omitted.)

In the present case, the plaintiff argues that, because the issue of receipt of the underlying tax bill was not

a proper consideration in an exemption action, it was unnecessary to the conclusion in the prior action and, therefore, not necessarily decided. We are persuaded, however, that the aforementioned rule adopted by the Supreme Court of Massachusetts is consistent with how Connecticut courts have generally applied collateral estoppel.

Collateral estoppel is intended to limit a litigant to only one opportunity to argue his case on the merits. "[T]he decision whether to apply the doctrine of collateral estoppel in any particular case should be made based upon a consideration of the doctrine's underlying policies, namely, the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, supra, 300 Conn. 344.

Guided by these public policies, and our Supreme Court's recognition that when a court "intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . such action constitutes an act of the court [that] it will thereafter recognize as a binding decision"; (internal quotation marks omitted) *Kelly Services, Inc.* v. *Senior Network, Inc.*, supra, 338 Conn. 803; we find persuasive and adopt the rule of *Home Owners Federal Savings & Loan Assn.* v. *Northwestern Fire & Marine Ins. Co.*, supra, 354 Mass. 455. In the interest of bringing litigation to a close, preventing repetitive litigation, and preventing inconsistent judgments, we conclude that

an issue that, although not strictly essential to the final judgment of the prior action, will nevertheless be treated as necessarily determined for collateral estoppel purposes if it is clear that the issue in question was treated as essential in the prior action by both the court and the party to be bound by collateral estoppel. For this limited rule to apply, it is necessary that the finding on the issue be fully litigated and be the product of a careful decision by the prior court in order to protect the competing interest of the bound party's vindication of a just claim. If these considerations are satisfied, we are persuaded that, to prevent the frustration of the policies underlying the doctrine of collateral estoppel, an issue, although not strictly necessary to the prior judgment, will nevertheless be considered necessarily determined for the application of collateral estoppel.

In the present case, the prior court's discussion of whether the tax bill was received was not merely passing commentary. Rather, it was presented to the court by the defendant as a basis for granting her an exemption, it was discussed in the hearing before the court, and the court intentionally addressed it in its 2021 order. See *Kelly Services, Inc.* v. *Senior Network, Inc.*, supra, 338 Conn. 803. The plaintiff had an opportunity to litigate before the court, and did litigate, whether the tax bill properly was noticed and received by the defendant. The court discussed in its order whether the tax bill was sent by the plaintiff and to what address it was sent, and ultimately came to the conclusion that the defendant's request for an exemption from execution should be granted in part due to the fact that the defendant never received the tax bill at her California address. The court concluded that the tax bill was not received and expressly relied on this conclusion in granting the defendant's exemption from execution.[15]

[15] The court reasoned that, "[i]n that [the defendant] did not properly receive the tax bill, she lost any ability to challenge the assessment or the billing itself before a tax bill or warrant was issued."

Although this issue may not have been strictly necessary to the prior court's judgment because there was an additional ground on which Judge Shaban sustained the defendant's exemption claim, we nevertheless conclude that, because the issue of whether the tax bill was received was treated as essential by the court, and because this issue was fully litigated and given thorough consideration, the court's determination that the plaintiff could not execute on the defendant's funds without sending her a tax bill was necessarily determined in the 2021 order.

We accordingly conclude that the issue of whether the plaintiff could execute on the defendant's bank account without first sending a tax bill was actually and necessarily decided in the prior action and is identical to the issue before the court in the present action. Because the 2021 order decided that the plaintiff may not execute on the defendant's funds without first sending her a tax bill and, thereby, affording her the right to challenge the tax assessment, and the plaintiff failed to send the defendant a tax bill at her California address before the present execution, the court in the present action properly concluded that the plaintiff is precluded from collecting on the tax.

II

The plaintiff next argues that the court improperly failed to hold an evidentiary hearing on the exemption claim pursuant to § 52-367b prior to granting the defendant's claim for an exemption. The defendant counters that an evidentiary hearing is not required to determine whether to grant an exemption on the grounds of res judicata and/or collateral estoppel and that the plaintiff has waived this argument because the plaintiff failed to request an evidentiary hearing before the trial court. We agree with the defendant that the court did not err in declining to hold an evidentiary hearing.

Even assuming, arguendo, that the plaintiff properly requested an evidentiary hearing before the court, we nevertheless conclude that the court did not err in failing to hold an evidentiary hearing before granting the defendant's exemption from execution on the grounds of res judicata and/or collateral estoppel. "Section 52-367b governs the execution against debts due from banks. Once a judgment debtor claims an exemption from execution pursuant to § 52-367b (e), the court must schedule a short calendar hearing on the exemption claim. The exemption claim filed by the debtor is considered prima facie evidence that the claimed exemption exists. General Statutes [Rev. to 1989] § 52-367b (f). The court, after conducting this hearing, must decide whether the exemption claim is meritorious; General Statues [Rev. to 1989] § 52-367b (i); and, if so, whether all or only part of the money deposited in the subject account is exempt. General Statutes [Rev. to 1989] § 52-367b (j)." (Footnote omitted.) *People's Bank* v. *Perkins*, 22 Conn. App. 260, 262–63, 576 A.2d 1313, cert. denied, 216 Conn. 813, 580 A.2d 58 (1990).

The plaintiff relies on *People's Bank* v. *Perkins*, supra, 22 Conn. App. 263–64, to argue that "[w]hether an exemption claim is meritorious presents a question of fact. The determination of such a factual issue requires the taking of evidence . . . not merely the presentation of legal argument by the parties or their counsel." (Internal quotation marks omitted.) Although it is true that this court stated in *Perkins* that, when a court has before it a disputed issue of fact, the court must take evidence, in addition to legal argument by the parties or their counsel; id.; whether res judicata and/or collateral estoppel applies is a question of law, not fact. *Twenty-Four Merrill Street Condominium Assn., Inc.* v. *Murray*, 96 Conn. App. 616, 619, 902 A.2d 24 (2006) (whether doctrine of res judicata applies to facts of case is question of law). Accordingly, *Perkins* is inapplicable in the present case.

The court additionally did not deny the plaintiff's request to present evidence but, rather, delayed its decision on whether to hold an evidentiary hearing until it had resolved the issue of law of whether res judicata and/or collateral estoppel barred the present action.[16] The court was bound only to hold a hearing in accordance with § 52-367b. The court, *Lynch*, *J.*, held a hearing in this case in which each party was given an opportunity to argue their position. This hearing was sufficient to satisfy the requirements of § 52-367b. We therefore conclude that the court did not err in failing to hold an evidentiary hearing before granting the defendant's motion for an exemption from execution.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MICHAEL RICHEY (AC 46170)

Alvord, Cradle and Clark, Js.

Syllabus

The defendant, who had been convicted, following a jury trial, of the crime of threatening in the second degree, appealed to this court, claiming that there was insufficient evidence to support his conviction and that the trial court erred in refusing to provide the jury with an instruction on defense of premises. The victim, P, was a state marshal who had entered the defendant's property to serve the defendant with court documents in a civil matter. P was accompanied by a state trooper, O, whose body camera recorded the interaction between the defendant and P. The defendant repeatedly told P that P had previously been told not to trespass on his property and, after P had returned to his vehicle,

[16] Specifically, the court stated: "I'm going to order that the bank extend holding the funds. I'm also going to order both parties within two weeks to provide a written brief to the court about why res judicata should not apply with regard to Judge Shaban's order from December 22, 2021. And then, depending upon the court's ruling on that regard, if I feel it's necessary to hear testimony on this issue from [the plaintiff] or the defendant, I will schedule it for a hearing."

stood outside the vehicle door and stated, inter alia, that "you're going to get a bullet in your head," and "I'll go to jail. I don't give a shit." At trial, the state introduced testimony from O and P and O's body camera footage. *Held*:

1. The defendant could not prevail on his claim that the evidence was insufficient to sustain his conviction because his statements did not constitute true threats: a reasonable person would have foreseen that P would interpret the defendant's statements as a serious threat of harm or assault, as, inter alia, the defendant asserted during the interaction that he was willing to accept the consequences of carrying out his threats, and P's behavior in bringing O with him to serve the documents and in remaining in his car once the defendant became confrontational demonstrated that he took the defendant's threats seriously; moreover, the defendant's assertion that his threatened violence was allegedly not imminent and was premised on a contingent future event was unpersuasive because those conditions are not a requirement for a true threat.
2. The trial court properly denied the defendant's request to provide the jury with an instruction on defense of premises; the defendant failed to meet his burden of production to provide evidence that P was criminally trespassing on his property, as the evidence adduced at trial would not have enabled the jury to reasonably infer anything other than that P believed that he was rightfully carrying out his duties as a state marshal when he entered the defendant's property to serve him with court documents and that P was not aware of any alleged no trespassing signs or orders barring him from the property.

Argued March 6—officially released June 18, 2024

Procedural History

Substitute information charging the defendant with two counts of the crime of threatening in the second degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the jury before *Klatt*, *J.*; verdict and judgment of guilty of one count of threatening in the second degree, from which the defendant appealed to this court. *Affirmed*.

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Jonathan M. Shaw*, assistant

state's attorney, and *Jaclyn Preville*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Michael Richey, appeals from the judgment of conviction, rendered after a jury trial, of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2) (A).[1] On appeal, the defendant claims that (1) the evidence before the trial court was insufficient to sustain his conviction and (2) the trial court erred in refusing to provide the jury with an instruction on defense of premises. We affirm the judgment of the trial court.

Evidence of the following facts and procedural history are relevant to our consideration of the defendant's claims on appeal. On February 25, 2020, at approximately 4 p.m., State Marshal Timothy Poloski arrived at the defendant's residence on West Shore Road in Ellington, accompanied by Connecticut State Trooper Patrick O'Brien, to serve the defendant with court documents in a civil matter. Poloski, who was standing on a deck attached to the defendant's residence, knocked on the door of the residence while O'Brien stood several feet behind him off of the deck. The defendant answered the door, leaving a storm door closed between himself and Poloski. Poloski greeted the defendant and identified himself as a state marshal, showing the defendant the court documents and explaining that it was a notice from M&T Bank about an upcoming hearing. The defendant replied that he had nothing to do with it, and Poloski explained that the paperwork was a notice of injunction related to a camper that was the subject of the hearing. The defendant then came out onto the

[1] General Statutes § 53a-62 provides in relevant part: "(a) A person is guilty of threatening in the second degree when . . . (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person . . . ."

deck, holding the collar of a dog that had been standing beside him and repeatedly told Poloski to "back off my deck." When the defendant refused to accept in-hand service of the court documents, Poloski dropped them inside the defendant's residence through the open storm door.

O'Brien was making attempts to calm the defendant, who continued to express his displeasure about the matter involving the camper. Meanwhile, Poloski had returned to sit in his car, which was blocked in the defendant's driveway by O'Brien's cruiser. The defendant, pointing at Poloski, began repeatedly to shout that Poloski had been told twice not to trespass and directed O'Brien to arrest Poloski for criminal trespass. After O'Brien declined to do so, the defendant shouted to Poloski, "You come back, I guarantee you, you won't walk away." Despite O'Brien's repeated attempts to diffuse the situation, the defendant continued to address Poloski, leaving the deck and moving toward Poloski's car. The defendant stated, "You come back, [O'Brien's] my witness, you're done. . . . Got it? You come back in any way, shape, or form—I see you in public, just like I did yesterday . . . . You were at the town hall, same thing, screwing around." The defendant then continued repeatedly to state that Poloski had "been trespassed from [the] property." At the same time, the defendant's dog, which the defendant had released, was jumping on O'Brien in a friendly manner. When O'Brien remarked that the dog was "fine" in response to the defendant's command to the dog to "stay down," the defendant replied that "she's good unless I say something. I'll guarantee you, she's fine."

As O'Brien was returning to his cruiser, the defendant approached Poloski's car, stating, "Trust me, pal. Trust me. I'm going to get even with you. [O'Brien] ain't going to be on your ass all day. You want to fuck with me? Come on, get out of the car. . . . Come on, get out of

the car, big mouth. . . . I've fucked with you before, and I've won every goddamned time. You keep fucking around . . . . You see the sign up there? Says absolutely you're trespassing. You keep fucking around, you're going to get a bullet in your head. I'll guarantee you that, pal." At that point, O'Brien walked back toward the defendant, instructing him to go back into his house. The defendant refused to do so and continued to address Poloski, stating, "You keep fucking around, marshal. You go ahead. You keep fucking around. . . . I'll go to jail. I don't give a shit. But, you won't leave. . . . This is your last warning. You can call [inaudible] and ask him whether or not you think I'm not going to do it." O'Brien then returned to his cruiser, and he and Poloski left the premises. Later that day, O'Brien and three other police officers returned to arrest the defendant, and Poloski provided a written statement about the incident.

The operative information, dated December 5, 2022, charged the defendant with two counts of threatening in the second degree in violation of § 53a-62.[2] A jury

[2] Count one of the operative information states in relevant part: "[The defendant] did, with the intent to terrorize another person, to wit: [Poloski], threaten to commit a crime of violence against such person, to wit: 'come back I guarantee you won't walk away,' 'you come back you're done,' 'this is not going to end well,' ' trust me pal, I'm going to get even with you, he isn't going to be on your ass all day,' 'you keep fucking around you're going to get a bullet in your head I guarantee you that pal,' 'you keep fucking with me you're going to get it,' 'I'll go to jail I don't give a shit but you won't leave,' any of which statements viewed on their own, or in conjunction with each other, constitute a violation of § 53a-62 (a) (2) (A) . . . ."

Count two of the operative information states in relevant part: "[The defendant] did, with reckless disregard of the risk of causing terror to another person, to wit: [Poloski], threaten to commit a crime of violence against such person, to wit: 'come back I guarantee you won't walk away,' 'you come back you're done,' 'this is not going to end well,' ' trust me pal, I'm going to get even with you, he isn't going to be on your ass all day,' 'you keep fucking around you're going to get a bullet in your head I guarantee you that pal,' 'you keep fucking with me you're going to get it,' 'I'll go to jail I don't give a shit but you won't leave,' any of which statements viewed on their own, or in conjunction with each other, constitute a violation of § 53a-62 (a) (2) (B) . . . ."

trial was held on December 5 and 6, 2022, during which the state introduced into evidence O'Brien's body camera footage of the incident and the testimony of Poloski and O'Brien. The defendant did not present any evidence. The jury then found the defendant guilty of the first count, threatening in the second degree in violation of § 53a-62 (a) (2) (A), and not guilty of the second count, threatening in the second degree in violation of § 53a-62 (a) (2) (B), and the court, *Klatt*, *J.*, sentenced the defendant to six months of incarceration, execution suspended, with a one year conditional discharge, the conditions of which required him to have no contact with Poloski and no new arrests. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that the evidence is insufficient to sustain his conviction for threatening because his statements did not constitute true threats and were, therefore, protected by the first amendment to the United States constitution.[3] We disagree.

The following additional procedural history is relevant to the resolution of this claim. At trial on December 6, 2022, the court's jury charge provided in relevant part: "As to count one, that's the intentional threatening, threatening in the second degree in violation of § 53a-62 (a) (2) (A). The statute defining this offense reads in pertinent part as follows: A person is guilty of threatening in the second degree when that person threatens to commit any crime of violence with the intent to terrorize another person. For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. The first element

[3] For jurisprudential reasons, we address the sufficiency of the evidence claim first, although this differs from the order in which the claims were presented by the defendant in his principal appellate brief.

is that the defendant threatened to commit a crime of violence. A crime of violence is one in which physical force is exerted for the purpose of violating, injuring, damaging, or abusing another person. The state must prove that the defendant behaved in a manner that indicated his intent to commit such a crime.

"Now, a threat can only be punishable when it is a true threat, that is, a threat that a reasonable person would understand as a serious expression of an intent to harm or assault, and not mere puffery, bluster, jest, or hyperbole. In determining whether the threat is a true threat, consider the particular factual context in which the allegedly threatening conduct occurred, which could include the reaction of the person allegedly being threatened and the defendant's conduct before and after the allegedly threatening conduct.

"Now, the second element of this count is that the defendant intended to terrorize another person. To terrorize means to cause intense fear or apprehension. A person acts intentionally with respect to a result when his conscious objective is to cause such a result." The jury subsequently found the defendant guilty of threatening in the second degree in violation of § 53a-62 (a) (2) (A).

On appeal, the defendant argues that, rather than true threats, which are punishable under § 53a-62 (a) (2) (A), his statements were "classic examples of hyperbole, bluster, or puffery protected by the first amendment [to the United States constitution]" and, therefore, were not sufficient evidence of any criminal violation.[4]

[4] The state argues in its appellate brief that "the defendant's . . . claim that he made his threats in defense of premises . . . implicitly concedes that they were true threats, made to frighten Poloski into leaving the premises." Even if we were to agree with this argument, "it is axiomatic that a defendant may present inconsistent defenses to the jury." *State* v. *Nathan J.*, 294 Conn. 243, 262, 982 A.2d 1067 (2009).

"The standard of review we [ordinarily] apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In [*State* v. *DeLoreto*, 265 Conn. 145, 152–53, 827 A.2d 671 (2003)], however, [our Supreme Court] explained that [t]his [c]ourt's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated. . . . In cases [in which] that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the [f]irst [a]mendment . . . protect. . . . We must [independently examine] the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *State* v. *Carter*, 141 Conn. App. 377, 397–98, 61 A.3d 1103 (2013), aff'd, 317 Conn. 845, 120 A.3d 1229 (2015). "We emphasize, however, that the heightened scrutiny that this court applies in first amendment cases does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted a true threat, we accept all subsidiary credibility

determinations and findings that are not clearly erroneous." (Internal quotation marks omitted.) *Haughwout* v. *Tordenti*, 332 Conn. 559, 573, 211 A.3d 1 (2019).

"The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

"[For example] the [f]irst [a]mendment . . . permits a [s]tate to ban a true threat. . . .

"True threats encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. . . .

"Thus, we must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . . In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." (Citations omitted; internal quotation marks omitted.) *State* v. *Krijger*, 313 Conn. 434, 448–50, 97 A.3d 946 (2014).

"[O]ur Supreme Court has stated that [a]lleged threats should be considered in light of their entire factual context . . . . Moreover, our Supreme Court has identified several factors that a court may use to assess the factual context in which an alleged threat is made, including (1) the history of the relationship between the person who made the alleged threat and the person or group to whom it was addressed, (2) the reaction of the statement's recipients, and (3) whether the person who made the statement showed contrition immediately after the statement was made." (Citation omitted; internal quotation marks omitted.) *State* v. *Taupier*, 197 Conn. App. 784, 805, 234 A.3d 29, cert. denied, 335 Conn. 928, 235 A.3d 525 (2020), cert. denied, U.S. , 141 S. Ct. 1383, 209 L. Ed. 2d 126 (2021).

In the present case, the defendant's statements to Poloski were neither political hyperbole nor a mere joke. Rather, a reasonable person would have foreseen that Poloski would interpret the statements as a serious threat of harm or assault. The evidence was sufficient to support such a finding in light of the defendant's apparent attempts to communicate the seriousness of

his threats. For example, the defendant asserted that he was willing to accept the consequences of carrying out his threats, by stating, "I'll go to jail. I don't give a shit. But you won't leave." He also demonstrated a willingness to take immediate action by approaching Poloski's vehicle and inviting him to "come on, get out of the car." Further, the jury could have inferred from the defendant's statement that "[O'Brien] ain't going to be on your ass all day" that, although O'Brien was providing Poloski with immediate protection, the defendant could carry out his threats at a time when Poloski was without a police escort. The defendant even invited Poloski to verify that the defendant would carry out his threats by stating, "You can call [inaudible] and ask him whether or not you think I'm not going to do it." Therefore, a reasonable person would have foreseen that Poloski would interpret the defendant's statements as serious threats of harm.

The factual context surrounding the incident further supports this conclusion. First, the record suggests a problematic history. Poloski, whose duties require him to serve the defendant with legal paperwork from time to time, testified that he felt the need to ask a state trooper to accompany him to the defendant's residence on February 25, 2020. He testified that, although he had been a marshal for more than thirty years, he had only asked for a police escort when serving papers a couple of times and that it was "very, very rare" to do so. Second, Poloski's reaction to the defendant's threats is telling. Poloski testified that he was concerned about the threats in light of the defendant's statement that he sees Poloski around town, because Poloski is in public every day, unarmed and without a bulletproof vest. He testified that he took the defendant's statements as serious threats. His testimony is supported by evidence that he retreated to his car and remained there once the defendant became confrontational, and that, despite

being contacted on a later date to once again serve the defendant, he referred the work to another marshal as a result of the incident. Third, there is no evidence in the record that the defendant showed any contrition. To the contrary, the evidence reveals that he continued making threats until Poloski and O'Brien left the premises.

The defendant's argument that his case is analogous to *State* v. *Parnoff*, 329 Conn. 386, 186 A.3d 640 (2018) is unpersuasive. In *Parnoff*, two workers entered the private property of the defendant, Laurence V. Parnoff, pursuant to an easement, and explained to him that they were employed by the water company to perform maintenance on a fire hydrant located on his property. Id., 388, 391. Parnoff became "very upset, throwing his arms up and down, yelling, and [telling] them to leave his property multiple times." Id., 391. "Despite [the water company employees'] explanation, [Parnoff] told [them] that they had no right to be on his property. According to [one of the employees], [Parnoff] then told him that, 'if [they] didn't get off his property, he was going to get a gun . . . [t]o shoot [them].' " Id. The court concluded that Parnoff's statement did not constitute fighting words. The court's discussion and holding in *Parnoff*, therefore, involved only the fighting words exception to protected speech, because "[t]he state pursued this case as a fighting words case—not a true threats case—and the jury was not charged under the true threats doctrine." Id., 405. Resultantly, this case is not instructive.

We are similarly unconvinced by the defendant's argument that his case is distinguishable from *State* v. *Pelella*, 327 Conn. 1, 170 A.3d 647 (2017). In *Pelella*, the defendant, Michael Pelella, was involved in an altercation with his brother, who "reported to the police that [Pelella] had told him, if you go into the attic I will hurt you." (Internal quotation marks omitted.) Id., 4. Our

Supreme Court held that "a jury reasonably could find that [Pelella's] statement was an unprotected true threat prohibited by § 53a-62 (a)"; id., 10; reasoning, in part, that the statement was unambiguous. Id., 20. The defendant in the present case argues that his statements, in contrast, were "ambiguous, not direct." Several of the defendant's statements, as found in the record, belie this assertion. For example, the defendant's statement, "[if] you come back, I guarantee you, you won't walk away," like Pelella's statement, was unambiguously an ultimatum. See *State* v. *Pelella*, supra, 20 ("unlike the precatory statements at issue in [*State* v. *Krijger*, supra, 313 Conn. 440]—for example, I'm going to be there [when you get hurt] . . . the statement in the present case unambiguously communicated not a wish but an ultimatum" (citation omitted; internal quotation marks omitted)).

Further, the defendant's assertion that the violence he threatened was allegedly not imminent and was "premised upon a contingent future event" is unpersuasive because imminence is neither a requirement nor the primary focus in determining whether a statement constitutes a true threat. See *State* v. *Pelella*, supra, 327 Conn. 17 ("[t]hough relevant, the primary focus of our inquiry is not immediacy but whether the threat convey[s] a gravity of purpose and likelihood of execution" (internal quotation marks omitted)); *State* v. *DeLoreto*, supra, 265 Conn. 158 ("[i]mminence . . . is not a requirement under the true threats doctrine"). Similarly, our courts have rejected claims that a threat of conditional future action cannot constitute a true threat. See, e.g., *State* v. *Pelella*, supra, 3–4; *State* v. *Cook*, 287 Conn. 237, 256–58, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). Accordingly, we conclude that the defendant's statements were true threats, and his claim that the evidence was insufficient to sustain his conviction fails.

II

The defendant also claims that the trial court erred in refusing to provide the jury with his requested instruction on defense of premises. He argues that "the evidence sufficiently established that [he] reasonably believed that he was using reasonable force to prevent a criminal trespass on his property" and that "[t]his issue should have been determined by the jury, as trier of fact." We are not persuaded.

The following procedural history is relevant to the resolution of this claim. On December 5, 2022, the defendant filed a request to charge that included an instruction on defense of premises.[5] The court, *Klatt*, *J.*, denied

[5] The defendant's proposed jury instruction provided in relevant part: "A person is justified in the use or threatened use of force against another person that would otherwise be illegal if he is acting in the defense of premises. It is a complete defense to certain crimes, including threatening in the second degree. When, as in this case, evidence that the defendant's actions were in defense of premises is introduced at trial, the state must not only prove beyond a reasonable doubt all the elements of the crime charged to obtain a conviction but must also disprove beyond a reasonable doubt that the defendant acted in defense of premises. If the state fails to disprove beyond a reasonable doubt that the defendant acted in defense of premises in accordance with my instructions, you must find the defendant not guilty of threatening in the second degree despite the fact that you have found the elements of that crime proved beyond a reasonable doubt. The defendant has no burden of proof whatsoever with respect to this defense. . . .

"To convict the defendant of threatening in the second degree, the state must disprove beyond a reasonable doubt one of the following elements:

"*Element 1—Right to defend premises*

"The first element is that the defendant had possession or control of the premises. . . .

"*Element 2—From a criminal trespass*

"The second element is that . . . Poloski was criminally trespassing on the premises. The right to defend premises does not allow the use or threatened use of physical force every time someone enters those premises without consent. For example, the use or threatened use of force may not be used against someone who enters the premises merely by accident or mistake. Rather, the use of threatened use of physical force may be used only to prevent an actual or attempted criminal trespass.

"In this case, the defendant contends that . . . Poloski committed a criminal trespass in the third degree, in violation of [General Statutes] § 53-109 (a) (1). . . .

the defendant's request to charge, reasoning that "both [Poloski and O'Brien] testified that they believed that the state marshal had a right to be there [and] that he was serving papers . . . . Neither [was] aware . . . of any legal order otherwise, that that particular marshal should not have been on the premises. . . .

"[T]he only evidence that we have that perhaps they didn't have that right was [that], while the defendant

"For . . . Poloski to have committed a criminal trespass, he must have entered or remained on premises which are posted in a manner prescribed by law or reasonably likely to come to the attention of intruders, or fenced or otherwise enclosed in a manner designed to exclude intruders.

"It must also be shown that . . . Poloski unlawfully entered or remained on the premises. A person unlawfully enters or remains when he is not licensed or privileged to do so. To be 'licensed or privileged,' [Poloski] must either have consent from the person in possession of the premises or have some other right to be on the premises. . . .

"A state marshal, acting in the performance of execution or service of process functions, has the right of entry on private property. It is up to you to decide whether or not the state has proven beyond a reasonable doubt that . . . Poloski was a state marshal acting in the performance of his duties giving him a right to enter or remain on the premises.

"For . . . Poloski to have committed a criminal trespass, he must also know that he was not licensed or privileged to enter or remain on the premises. A person acts 'knowingly' with respect to conduct or circumstances when he is aware that his conduct is of such nature or that such circumstances exist.

"*Element 3—Actual belief that force was necessary*

"The third element of defense of premises is that the defendant actually—that is, honestly and sincerely—believed that . . . Poloski was trespassing on the premises . . . and was refusing to leave having been asked to. The defendant must have actually believed that the use or threatened use of physical force was necessary to terminate the trespass.

" 'Physical force' means actual physical force or violence or superior physical strength. Physical force may not be used, however, if it reasonably appears that the trespasser is leaving or about to flee, nor may it be used once the trespasser has left the premises, for this would no longer be defensive force, but retaliatory and unlawful force.

"*Element 4—Reasonableness of that belief*

"The fourth element is that the defendant's belief was reasonable, and not irrational or unreasonable under the circumstances. You must ask whether a reasonable person in the defendant's situation, viewing the circumstances from the defendant's point of view, would have shared the belief. In other words, was the defendant's belief that the use or threatened use of physical force was necessary to prevent or terminate the criminal trespass of . . . Poloski reasonable under the circumstances. . . ."

was speaking . . . he . . . kept repeating to the state trooper that that particular marshal was not allowed on the premises, but that's the only evidence we have. Nothing more. There's nothing that's been presented that suggested there was an actual order, and from the defendant's own mouth, he said . . . this so-called order for this marshal not to be there was apparently given to him from another constable, who would not have any type of authority to take that kind of action or make that kind of order. . . .

"[T]he court, based on that one line that the defendant said—or those few lines that the defendant said, just does not find that to be sufficient evidence.

"The rule is that the evidence must be sufficient that, if credited by the jury, would raise a reasonable doubt in the [mind] of a rational juror. I just don't think that the language that the defendant used would rise to that level."

On appeal, the defendant argues that he had a constitutional right to a jury instruction on a defense of premises defense because he met his burden of production. The defendant further contends that the trial court's ruling was improperly based on testimony related to the elements of criminal trespass. He argues that this testimony was irrelevant because "defense of premises focuses on the reasonable belief of the person defending the premises, not the beliefs of the persons entering the premises. It is clear from the video . . . that the defendant believed that Poloski had no right to enter the property, and that his doing so was trespassing. . . . Further, there is no evidence that the defendant was aware of the . . . existence [of a statute granting the marshal authority to enter the defendant's premises]." Nevertheless, he also contends that, viewed in the light most favorable to providing the instruction, his assertions that there were no trespassing signs on

the property and that there was a court order barring Poloski from the property would establish that Poloski would have known that he was not licensed or privileged to enter the property.[6] Finally, the defendant argues that, in any case, whether Poloski's and the defendant's beliefs about Poloski's right to be on the property were reasonable are disputed points to be resolved by the trier of fact.[7]

The following legal principles are applicable to our resolution of this claim. "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 294 Conn. 399, 412, 984 A.2d 721 (2009). "An improper instruction on a defense, like an improper instruction on an element of an offense, is of constitutional dimension. . . . [T]he standard of review to be applied to the defendant's constitutional claim is whether it is reasonably possible that the jury was misled. . . . In reviewing the trial court's failure to charge as requested, we must adopt the version of facts most favorable to the defendant which the evidence would reasonably support." (Citations omitted; internal quotation marks omitted.) *State* v. *Singleton*, 292 Conn. 734, 745–46, 974 A.2d 679 (2009).

"In asserting a claim of defense of [premises], the defendant has only the burden of production, meaning

[6] The defendant further contends that our state's law should recognize as a trespasser a person who "makes a lawful entry into the property of another [but] . . . refuses to leave upon an order by the owner." Although the defendant cites law from other jurisdictions to support this argument, we decline to address it in the present case because there is no evidentiary support for a finding that Poloski was refusing to leave the defendant's premises.

[7] We note that the defendant also asserted, in his appellate brief, that the omission of the requested instruction was harmful, because it "eradicated" his argument to the jury that he made the threats as a defense of premises against Poloski's criminal trespass. Because we hold that the court did not err in denying his request to charge, we need not decide whether any alleged constitutional violation was harmful.

that he merely is required to introduce sufficient evidence to warrant presenting his claim of [defense of premises] to the jury. . . . [T]he evidence adduced by the defendant must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in [defense of premises]. . . . The burden of production on the defendant is slight and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . and in producing evidence, the defendant may rely on evidence adduced either by himself or by the state to meet this evidentiary threshold. . . . [O]nce a defendant identifies sufficient evidence in the record to support a requested jury charge, he is entitled thereto as a matter of law, even if his own testimony, or another of his theories of defense, flatly contradicts the cited evidence. . . .

"Although the defendant's burden may be slight, [b]efore the jury is given an instruction on [defense of premises] . . . there must be some evidentiary foundation for it. A jury instruction on [defense of premises] is not available to a defendant merely for the asking. . . . However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation." (Citations omitted; internal quotation marks omitted.) *State* v. *Hall-Davis*, 177 Conn. App. 211, 226–27, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017).

The justification defense of the use of force in defense of premises is set forth in General Statutes § 53a-20, which provides in relevant part: "A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person

when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises . . . .'"[8] Therefore, the defendant was required to produce evidence of (1) his right to defend the premises, (2) Poloski's status as a criminal trespasser on those premises, (3) the defendant's actual belief that (a) Poloski was a criminal trespasser and (b) the reasonable physical force the defendant used was necessary to prevent or terminate Poloski's criminal trespass upon the defendant's premises, and (4) the reasonableness of those beliefs. See *State* v. *Terwilliger*, supra, 294 Conn. 409 (defendant must produce evidence that he reasonably believed that victim was trespassing and that extent of force used was necessary); *State* v. *Brunette*, 92 Conn. App. 440, 448, 886 A.2d 427 (2005) (victim must be criminally trespassing in order for defense of premises to apply), cert. denied, 277 Conn. 902, 891 A.2d 2 (2006); see also General Statutes § 53a-20. Pursuant to the defendant's claim that the court should have instructed the jury on this justification defense theory, the defendant had the burden to introduce evidence sufficient to raise a reasonable doubt in the mind of a rational juror that he was defending his premises from Poloski trespassing on it. A person commits criminal trespass in the third degree[9] when, "knowing that such person

[8] The defendant argues that, as an issue of first impression in our state, § 53a-20 should apply not only to uses of physical force but also to threats of the use of physical force. We decline the invitation to address this question because we resolve the defendant's claim on the basis of a threshold issue—namely that the evidence presented at trial would not have raised a reasonable doubt in the mind of a rational juror as to whether Poloski was criminally trespassing.

[9] The defendant, in his proposed jury charge, contended that "Poloski committed criminal trespass in the third degree, in violation of [General Statutes] § 53a-109 (a) (1)." The defendant, in his appellate brief, also contends that Poloski committed criminal trespass in the first degree, in violation of General Statutes § 53a-107. Although the court, in denying the defendant's request to charge, "turned to the instruction on criminal trespass in the *first degree* and . . . second and third degree"; (emphasis added); we decline

is not licensed or privileged to do so . . . [s]uch person enters or remains in premises which are posted in a manner prescribed by law or reasonably likely to come to the attention of intruders or are fenced or otherwise enclosed in a manner designed to exclude intruders . . . .'' General Statutes § 53a-109 (a) (1).

In particular, evidence that Poloski was criminally trespassing on the defendant's property on February 25, 2020, would be a prerequisite to a finding that the defendant's use of force was justified under the theory of defense of premises. See *State* v. *Brunette*, supra, 92 Conn. App. 448 (''[i]n order for [§ 53a-20] to apply in this case, the victims . . . would need to have been criminal trespassers pursuant to General Statutes §§ 53a-107, 53a-108 and 53a-109''). A reasonable jury can only make a finding of criminal trespass if the alleged trespasser *knew* that he was not licensed or privileged to enter or remain on the defendant's premises. See *Burke* v. *Mesniaeff*, 334 Conn. 100, 116–17, 220 A.3d 777 (2019); see also General Statutes §§ 53a-107, 53a-108 and 53a-109. Therefore, before reaching the defendant's arguments as to the reasonableness of his own beliefs, a threshold question is whether the evidence adduced at trial, if credited by the jury, was sufficient to raise a reasonable doubt in the mind of a rational juror as to whether Poloski knew that he was not licensed or privileged to be on the defendant's property. ''A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an

to review the defendant's claim on appeal that Poloski committed criminal trespass in the first degree. The trial court made its ruling as to the request to charge on the basis of an element common to §§ 53a-107 and 53a-109, stating that ''all [of the criminal trespass instructions] . . . refer to the second element as knowledge, that the defendant knew that he was not licensed or privileged to be in a place. . . . Both [O'Brien and Poloski] believed that . . . [Poloski] had the right to be present on the property and serving the paperwork.'' Because we, like the trial court, resolve the defendant's appellate claim on the basis of this common element, a separate analysis of criminal trespass in the first degree is unnecessary.

offense when he is aware that his conduct is of such nature or that such circumstance exists . . . .'' (Internal quotation marks omitted.) *State* v. *Harper*, 167 Conn. App. 329, 337, 143 A.3d 1147 (2016); see id., 337–38 (applying statutory definition of ''knowingly'' to determination of whether defendant charged with criminal trespass knew that he was not licensed or privileged to be on premises); see also General Statutes § 53a-3 (12).

As revealed by the body camera video footage admitted into evidence, the defendant repeatedly accused Poloski of having ''trespassed twice'' and that he was ''told twice to stay off of here.'' He also made one reference to a sign ''up there'' that ''[s]ays absolutely'' Poloski was trespassing. Lastly, he asserted that a police sergeant ''[has] got the notice'' and offered to ''dig out the sheet'' that ostensibly would show that Poloski was trespassing. He alleged that, on a previous occasion, he had ''served [Poloski] back, saying that [Poloski was] not allowed on [his] property for that camper whatsoever'' and that M&T Bank's lawyer had told Poloski twice to stay off the property.

Even if the jury were to credit the statements the defendant made to Poloski, as recorded by O'Brien's body camera, those statements do not establish that Poloski knew that he was not licensed or privileged to serve the defendant with process on that day. The evidence adduced at trial would not enable the jury to reasonably infer anything other than that Poloski believed that he was rightfully carrying out his legal duty as a state marshal when he entered the defendant's property to serve him with court documents on February 25, 2020. See generally *State* v. *Hargett*, 343 Conn. 604, 625, 275 A.3d 601 (2022) (holding that defendant did not uphold his burden of production and was not entitled to instruction of self-defense); see also General Statutes § 6-38a (b) (providing in relevant part that

"[a]ny state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property"). The evidence at trial reflected that Poloski was not aware of any alleged no trespassing signs[10] or any alleged order barring him from the defendant's property[11] and that he and O'Brien both believed that he was licensed and privileged to enter the property on that day to serve court documents on the defendant.[12] For the foregoing reasons, we conclude that the defendant did not satisfy his burden of

[10] Poloski testified that he did not open a gate to get onto the defendant's property and that he did not recall seeing any no trespassing signs. O'Brien also testified that he did not notice any no trespassing signs anywhere, and there were no signs depicted in his body camera video footage.

[11] The following colloquy took place between the prosecutor and Poloski at trial on December 5, 2022:

"[The Prosecutor]: To your knowledge, was there any legal order preventing you from being there?

"[Poloski]: No. There was not.

"[The Prosecutor]: Had anyone told you that you weren't allowed to go there?

"[Poloski]: No."

The following colloquy took place between defense counsel and Poloski at trial on December 5, 2022:

"[Defense Counsel]: [Y]our testimony is [that] you never received any notice from M&T Bank not to go to [the defendant's] property?

"[Poloski]: No.

"[Defense Counsel]: Nothing that you recall?

"[Poloski]: I have no idea—I don't have any idea what that's about. I don't know if that was another marshal or something else or what. It wasn't me.

"[Defense Counsel]: You were never told by their attorney or a judge not to go onto [the defendant's] property?

"[Poloski]: No. The attorney is the one that sent me there.

"[Defense Counsel]: You never received any sort of written notice . . . in the mail or served on you?

"[Poloski]: No. Nothing."

[12] The following colloquy took place between the prosecutor and Poloski at trial on December 5, 2022:

"[The Prosecutor]: [The defendant] indicated that you weren't allowed to be there, correct?

"[Poloski]: He did . . . say that while he was talking. I don't know what he was referring to. We do have a right to go onto private property as state marshals to serve a legal notice."

The following colloquy took place between defense counsel and Poloski at trial on December 5, 2022:

"[Defense Counsel]: Do you recall on [the video] footage where [the defendant] says to you—he refers to some no trespassing signs as you've absolutely—look at the sign, absolutely no trespassing? Do you recall that part? . . .

production to establish an evidentiary foundation that Poloski committed a criminal trespass, and, thus, a jury instruction on defense of premises, which depends on such evidence, would be misleading and therefore constitutionally improper.[13] See, e.g., *State* v. *Terwilliger*, supra, 294 Conn. 416–17 (concluding that jury instruction that "could have misled a reasonable juror" violated defendant's due process right to fair trial). Accordingly, we conclude that the court properly denied the defendant's request to charge, and the defendant's claim fails.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

SANDRA E. CZUNAS *v.* RICHARD J. MANCINI (AC 45848)

Cradle, Seeley and Westbrook, Js.

Syllabus

The defendant, whose marriage to the plaintiff had previously been dissolved, appealed to this court from the judgment of the trial court

"[Poloski]: I remember him yelling this. Yeah.

"[Defense Counsel]: But you don't recall whether or not you saw those signs when you came in?

"[Poloski]: Yeah, because, I mean, we . . . still have to go onto the property to make service of process. . . . [T]hat is part of what our job is. . . . It wouldn't have made a difference if he had that sign or not."

Further, the video footage reveals that, in response to the defendant's assertion that Poloski "had been told twice to stay out," Poloski replied, "I have to. It's my legal duty to deliver that notice." O'Brien also responded that "[Poloski's] not trespassing. . . . He's serving you legal notice," and he later reminded the defendant that Poloski "was trying to explain . . . that he has a legal obligation to deliver service."

[13] Because we resolve this claim on the basis of the defendant's failure to meet his burden of production, we need not address the arguments in his appellate brief that the state failed to meet its burden. See *State* v. *Bryan*, 307 Conn. 823, 835, 60 A.3d 246 (2013) ("[o]nly when [a defense] has been sufficiently raised does the state have the burden of disproving such a defense beyond a reasonable doubt" (internal quotation marks omitted)).

[14] The state asserts, as an alternative ground for affirmance, that a defense of defense of premises does not apply to criminal conduct in response to entries by police officers or individuals accompanied by police officers.

denying his motion to modify his child support obligation and ordering him to pay $10,000 to the plaintiff to defend against his appeal. Subsequent to the dissolution judgment, the parties had entered into several stipulated agreements that reduced the defendant's weekly child support obligation and expanded his parenting time with the parties' minor child. The defendant claimed, inter alia, that it was inequitable for him to continue paying child support in light of the parties' shared parenting plan. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly found that there had been no substantial change in the parties' circumstances since the date of the previous child support order so as to warrant a modification of his child support obligation; there was no change in the custody of the child that would have required the redirection of child support to the defendant under the applicable statute (§ 46b-224), as the parties alternated weekends with the child and had enjoyed shared custody for several years, and the extension of the defendant's weekend parenting time from Sunday evening to Monday morning constituted a minimal change, extending his time with the child by little more than twelve hours every other week, including when the child was sleeping between Sunday evenings and Monday mornings.

2. The trial court did not abuse its discretion when it ordered the defendant to pay the plaintiff $10,000 for attorney's fees to defend against his appeal; the court's determination that the defendant had substantial liquid assets that the plaintiff did not have was supported by the parties' financial affidavits.

Argued February 8—officially released June 18, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Prestley*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Abery-Wetstone*, *J.*, denied the defendant's motion to modify child support, and the defendant appealed to this court; subsequently,

Because we affirm the court's ruling as to the jury instruction on the basis that the defendant had not met his burden of production, we need not reach the state's proposed alternative ground for affirmance.

the court, *Abery-Wetstone*, *J.*, granted the plaintiff's motion for attorney's fees, and the defendant filed an amended appeal; thereafter, this court dismissed the appeal in part. *Affirmed*.

Kenneth J. McDonnell, for the appellant (defendant).

David P. Mester, with whom was *P. Jo Anne Burgh*, for the appellee (plaintiff).

Opinion

CRADLE, J. In this postjudgment marital dissolution matter, the defendant, Richard J. Mancini, appeals from the judgment of the trial court denying his motion to modify child support and awarding attorney's fees to the plaintiff, Sandra E. Czunas, to defend against this appeal. The defendant claims that the court (1) improperly found that there had not been a substantial change in circumstances since the date of the entry of the prior child support order that warranted a modification of that order, and (2) the court abused its discretion in awarding the plaintiff attorney's fees in the amount of $10,000 to defend against this appeal. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims on appeal. The trial court, *Prestley*, *J.*, dissolved the parties' marriage on July 25, 2013, incorporating into the judgment of dissolution the parties' separation agreement, which provided, inter alia, that they would have joint legal custody of their minor child, his primary residence would be with the plaintiff and the defendant would have parenting time both during the week and on weekends.[1] The agreement also provided that the defendant would pay $265 per week in child support.

[1] Specifically, the dissolution judgment provided: "The [defendant] shall have the following parenting time with the minor child:

"(a) In weeks One, Two, Three and Four: [The defendant] shall have parenting time with [the minor child] every Tuesday from the pick up after work and overnight and return to [day care] . . . the following morning.

On December 13, 2016, the parties entered into a stipulation, which, inter alia, expanded the defendant's parenting time, providing that the child would be with the defendant every Tuesday and Wednesday night and alternating weekends from Friday night until Sunday evening.

On April 21, 2017, the defendant filed a motion to modify child support, alleging, inter alia: "There has been a substantial change in circumstances in that the defendant has suffered a significant reduction in his income, while the plaintiff's income has likely increased significantly. In addition, the parties share physical custody of the minor child, and the plaintiff earns more than the defendant." On July 5, 2017, the parties entered into a court-approved written agreement, which, inter alia, modified the defendant's child support obligation to $200 per week in compliance with the child support guidelines.

On April 29, 2019, the defendant filed a motion to modify, seeking to have his weekends with the minor child extended to Monday mornings. On September 27, 2021, the parties entered into another stipulation so modifying the parties' parenting plan.[2]

"(b) In weeks Two and Four: [The defendant] shall pick up [the minor child] on Thursday after work and return him to the [plaintiff] at 7:30 p.m.

"(c) In weeks One and Three: [The defendant] shall pick up [the minor child] from [day care] on Friday after work and have [the minor child] overnight until Saturday at 6 p.m.

"(d) In weeks Two and Four: [The defendant] shall have time with [the minor child] on Sunday from 9 a.m. to 5 p.m.

"(e) When the child turns three and a half (3 1/2) the week Two and Four Thursday access shall become an overnight."

[2] The stipulation also provided that the minor child would begin therapy with Dr. Bruce Freedman and that the matter would be scheduled for a status conference during the week of November 22, 2021, "to review Dr. Freedman's recommendations relating to continued therapy, Sunday overnights, appointment of a [guardian ad litem] and/or other relevant recommendations." There has been some dispute between the parties as to whether the extension of the defendant's weekends to include Sunday overnights was temporary. That disagreement is irrelevant to the issues before us now.

On July 15, 2022, the defendant filed a motion to modify child support, alleging, inter alia: "There has been a substantial change in circumstances in that the financial circumstances of one or both parties have changed. Furthermore, the parties have a shared parenting plan, and it is unfair and inequitable for the defendant to continue paying child support to the plaintiff."

On September 13, 2022, the trial court, *Abery-Wetstone*, *J.*, held a hearing on the defendant's motion to modify child support.[3] At the hearing, the defendant did not address the claim in his motion that there had been "a substantial change in circumstances in that the financial circumstances of one or both parties have changed." Rather, counsel for the defendant clarified that he had "no additional evidence to present other than the shared physical custody arrangement and the . . . change in the [Sunday] overnight since 2017." On the basis of that change, the defendant requested that neither party be ordered to pay child support. The court found that the defendant failed to prove that there had been a substantial change in circumstances since the date of the last child support order and, therefore, denied the defendant's motion. On September 27, 2022, the defendant filed this appeal.

On October 21, 2022, the plaintiff filed a motion for counsel fees to defend against this appeal. On November 23, 2022, the court held a hearing on the plaintiff's motion. The court ordered the defendant to pay the

[3] On September 13, 2022, the court also heard the parties' outstanding motions concerning custody, visitation and the appointment of a guardian ad litem. Following the hearing, the court ordered, inter alia, that the defendant would continue to have Sunday overnight visits with the minor child pursuant to the September 27, 2021 stipulation, but that those visits would remain "temporary until further order of the court." The court also granted the plaintiff's motion for the appointment of a guardian ad litem. The defendant appealed from the court's order appointing a guardian ad litem, but this court, sua sponte, dismissed that portion of the defendant's appeal for lack of a final judgment.

plaintiff $10,000 for attorney's fees to defend against the appeal. On December 6, 2022, the defendant timely amended his appeal to include his challenge to the award of attorney's fees.

I

The defendant claims that the trial court improperly found that there had not been a substantial change in circumstances since the date of the entry of the prior child support order that warranted a modification of that order.[4] Specifically, the defendant claims that the "new and changed circumstances of shared physical custody"—the extension of his weekends with the minor child from Sunday evening to Monday morning—entitled him to a modification of his child support obligation. We disagree.

The following additional procedural history is relevant to this claim. As noted, at the hearing on the defendant's motion to modify, counsel for the defendant clarified that he had "no additional evidence to present other than the shared physical custody arrangement and the . . . change in the [Sunday] overnight since 2017." The defendant testified that the parenting plan was modified in 2021, extending his weekend parenting time to Monday mornings. He asked that "no child support [be]

[4] Since the date of the filing of this appeal, there was an incident that resulted in the suspension of the defendant's parenting time with the minor child. On the basis of that change and the fact that the parties no longer enjoyed a shared custody arrangement, which was the basis for the defendant's motion to modify child support, the plaintiff argues that the defendant's appeal is moot. As of the date of oral argument before this court, the defendant's parenting time had been reinstated, and he was enjoying the same time with the minor child that he had been prior to the 2021 extension of his weekends to Monday mornings. On March 22, 2024, the parties signed a stipulation that provided, inter alia, that the defendant's weekends with the minor child would be extended to Monday mornings upon the June, 2024 end of the school year. Because the circumstances that gave rise to the plaintiff's mootness claim have resolved, we need not address it.

paid from one party to the other . . . .'' Following the defendant's very limited testimony, counsel for the defendant indicated that he had no further questions for the defendant.[5] At that time, the court told the defendant: ''[O]ther than a shared parenting plan, I need another reason to deviate from the child support guidelines. You haven't established that.'' In response, counsel for the defendant asserted that, although the defendant's financial affidavit was ''relatively the same as it was in 2017'' there had been a change in the plaintiff's financial affidavit. The court explained: ''The guidelines—both of your guidelines, show child support from father to mother at $205 and $203. That is not a significant change [from the $200 order]—it's . . . within the 15 percent. So, you need another reason, other than a shared parenting plan, to modify child support.'' The defendant indicated that ''it was shared in 2017 . . . the difference . . . is it's been . . . since 2021 . . . they had . . . full shared [custody] . . . .'' The court stated: ''That, by itself, is not sufficient to deviate from the child support guidelines down to zero. I need another reason.'' Counsel for the defendant argued that ''[t]he other reason would be the increase in the plaintiff's income since 2017.'' The court reiterated: ''But the child support, based on their current incomes, has not changed from 2017. . . . So, we don't modify child support unless there's been a substantial change in the actual child support. It's got to be 15 percent or more. It's not. . . . Both parties' income has gone up a little bit [since 2017]. The plaintiff in 2017 was showing gross income of $1959. She's currently showing gross income of $2161. [The] defendant in 2017 was showing income of $1859. It's currently $2260. . . . The court needs another reason other than simply shared custody to

[5] Contrary to the representation by the defendant's appellate counsel at oral argument before this court, the trial court did not place any restrictions whatsoever on the defendant's ability to present evidence in support of his motion to modify.

deviate downwards." Counsel for the defendant indicated that he understood the court's ruling and that he had "no additional evidence to present other than the shared physical custody arrangement and the . . . change in the overnight since 2017."

"[General Statutes §] 46b-86 governs the modification or termination of an alimony or support order after the date of a dissolution judgment. When, as in this case, the disputed issue is alimony [or child support], the applicable provision of the statute is § 46b-86 (a), which provides that a final order for alimony [or child support] may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. . . . Under that statutory provision, the party seeking the modification bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . . A finding of a substantial change in circumstances [or the lack of a substantial change in circumstances] is subject to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *De Almeida-Kennedy* v. *Kennedy*, 224 Conn. App. 19, 30–31, 312 A.3d 150 (2024).

While § 46b-86 (a) broadly encompasses all cases in which a change in a support order is contemplated,

General Statutes § 46b-224[6] addresses the distinct factual scenario of a change in custody and requires modification of a child support order from the moment a court transfers custody of minor children from a recipient of child support to a payor of child support. See *Coury* v. *Coury*, 161 Conn. App. 271, 297, 128 A.3d 517 (2015). "Modification . . . of a child support order upon a change of custody under § 46b-224 . . . comports with the default rule that child support follows the children . . . ."[7] (Internal quotation marks omitted.) Id., 299.

Thus, although a change in custody warrants a modification of child support, there was no change in custody of the minor child in this case that would have triggered § 46b-224.[8] In other words, there was no change in cus-

[6] General Statutes § 46b-224 provides in relevant part: "Whenever the . . . Superior Court, in a family relations matter, as defined in section 46b-1, orders a change or transfer of the guardianship or custody of a child who is the subject of a preexisting support order, and the court makes no finding with respect to such support order, such guardianship or custody order shall operate to: (1) Suspend the support order if guardianship or custody is transferred to the obligor under the support order; or (2) modify the payee of the support order to be the person or entity awarded guardianship or custody of the child by the court, if such person or entity is other than the obligor under the support order."

[7] We note that the defendant's motion to modify cited only § 46b-86 and did not mention § 46b-224. Similarly, the defendant failed to cite any legal authority in his principal appellate brief in support of his argument that a change in custody may be a basis for a modification of child support.

[8] The defendant argues that the trial court improperly held that a change in custody cannot support a modification of child support without a change in the parties' financial circumstances. We disagree with this characterization of the trial court's reasoning. Although the court made comments at the hearing on the defendant's motion that could be construed as expressing its belief that a change in custody, on its own, is insufficient to warrant a modification of child support, we afford a trial court every reasonable presumption in favor of the correctness of its decision and thus decline to construe the court's comments as a misapplication of the law. See *Leonova* v. *Leonov*, 201 Conn. App. 285, 334, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). Rather, we construe its remarks that it could not modify child support based on a shared parenting plan alone as a determination that it could not do so based on the minimal change in *this* case, without more. Moreover, the record appears to reflect that the court's inartful comments may have been in response to the defendant's request

tody that required child support to be redirected to a new custodial parent so that it followed the minor child. Although the defendant's parenting time on his weekends was extended from Sunday evening to Monday morning, the parties essentially have enjoyed shared custody of the minor child since 2016, as asserted by the defendant in his 2017 motion to modify child support.[9] Because the parties alternate weekends spent with the minor child, the extension of the defendant's weekends implicates only every other Sunday evening, extending his time with the minor child by little more than twelve hours every other week, including when the child is sleeping between Sunday evening and Monday morning. We cannot conclude that the court erred in holding that this minimal change, without more, did not constitute a substantial change in circumstances that warranted a modification of the child support order or a determination that there had been a change in custody.

II

The defendant also claims that the court abused its discretion in ordering him to pay to the plaintiff $10,000 for attorney's fees to defend against this appeal. We disagree.

The following additional procedural history is relevant to our consideration of this claim. In the plaintiff's motion for attorney's fees to defend against this appeal, she alleged, inter alia, that, based on the parties' respective financial affidavits, the "defendant is in a significantly more enhanced financial position to pay attorney's fees to pursue the appeal." At the November 23,

that neither party pay child support based on their shared parenting plan, which would constitute a deviation from the child support guidelines.

[9] As noted herein, the defendant specifically alleged in his motion to modify that there had been a substantial change in circumstances in that the financial circumstances of the parties had changed. He then stated, as he did in his 2017 motion to modify, that the parties share physical custody of the minor child. He did not allege that there had been a change in custody or that any change in the parenting plan constituted a substantial change in circumstances.

2022 hearing, the court granted the plaintiff's motion and ordered the defendant to pay the plaintiff $10,000 to defend against this appeal, reasoning that the defendant "has substantial liquid assets that the plaintiff does not."

General Statutes § 46b-62 (a) supports an award of attorney's fees if, inter alia, the prospective recipient of a fee award lacks ample liquid assets to cover the cost of his or her own legal expenses. *Leonova* v. *Leonov*, 201 Conn. App. 285, 329, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). "A determination of what constitutes ample liquid funds . . . requires . . . an examination of the total assets of the parties at the time the award is made." (Internal quotation marks omitted.) *Olson* v. *Mohammadu*, 169 Conn. App. 243, 265, 149 A.3d 198, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016). "A trial court is not limited to awarding fees for proceedings at the trial level. Connecticut courts have permitted postjudgment awards of attorney's fees to defend an appeal." *Leonova* v. *Leonov*, supra, 327. "Whether to allow counsel fees, [under § 46b-62 (a)], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.) Id.

Here, the court based its award of attorney's fees on its determination that the defendant had substantial liquid assets that the plaintiff did not have. That determination is supported by the parties' financial affidavits, which reflect that the plaintiff had only $500 in a checking account and no other liquid assets, whereas the defendant had $160,000 in checking accounts. We therefore conclude that the court did not abuse its discretion in awarding $10,000 to the plaintiff to defend against this appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

NADINE WYLIE, ADMINISTRATRIX (ESTATE OF KEITH WYLIE) *v.* APT FOUNDATION, INC. (AC 46061)

Cradle, Seeley and Norcott, Js.

Syllabus

The plaintiff, acting in her capacity as the administratrix of the estate of the decedent, appealed to this court from the judgment rendered by the trial court for the defendant following the granting of the defendant's motion to strike her operative complaint. The defendant operated a center for drug rehabilitation and provided methadone treatment for opioid dependent patients at its premises. As the decedent began to walk up the public sidewalk toward the entrance to the defendant's driveway, an individual approached and fatally stabbed the decedent directly in front of the defendant's premises. The plaintiff brought an action for wrongful death, setting forth claims of, inter alia, public nuisance. The plaintiff alleged, inter alia, that local residents had developed concerns regarding loitering, drug use, crime, prostitution, and public defecation on private property in the immediate vicinity surrounding the defendant's premises, that the defendant created a magnet for criminal activity in the immediate vicinity surrounding the premises by providing a methadone treatment program without also providing for proper security, and that over the nine month period immediately preceding the decedent's death the police responded to forty-two complaints of criminal activity in the area. In its motion to strike, the defendant noted that the complaint alleged that the stabbing occurred on the public sidewalk that the defendant neither owned nor controlled and claimed that the allegations set forth in the operative complaint did not support the claims that the operation of a methadone clinic at the premises had a natural tendency to create danger and to inflict injury on public property or that the defendant's use of its property was unreasonable or unlawful. *Held* that the trial court properly granted the defendant's motion to strike the public nuisance claim as alleged in the plaintiff's operative complaint: this court concluded that the defendant's premises did not have a natural tendency to create danger and to inflict injury as, although the conditions alleged to be existing in the immediate vicinity of the premises in the operative complaint were not pleasant and may have been dangerous, they did not imbue the premises itself with a natural tendency to create danger and to inflict injury; moreover, the allegations in the plaintiff's operative complaint failed to provide the necessary factual basis to support her claim of a public nuisance, as referencing the numerous police responses to the premises in a given time period did not establish whether those responses were due to the defendant's operation of its drug rehabilitation center or whether the police responses were related to individuals on the defendant's premises,

and the plaintiff's conclusory assertion regarding the lack of proper security was not sufficient to set forth a claim of public nuisance.

Argued January 16—officially released June 18, 2024

Procedural History

Action to recover damages for, inter alia, public nuisance, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*, granted the defendant's motion to strike; thereafter, the court, *Wilson, J.*, granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew D. Popilowski, for the appellant (plaintiff).

Steven J. Zakrzewski, with whom were *Kelcie B. Reid* and, on the brief, *John J. Robinson*, for the appellee (defendant).

Opinion

NORCOTT, J. The plaintiff, Nadine Wylie, acting in her capacity as the administratrix of the estate of Keith Wylie (decedent), appeals from the judgment rendered by the trial court in favor of the defendant, APT Foundation, Inc., following the granting of a motion to strike her amended substitute complaint dated July 21, 2021. On appeal, the plaintiff claims that the court improperly concluded that she failed to allege sufficient facts to support her public nuisance claim. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as alleged in the plaintiff's amended substitute complaint and construed in the manner most favorable to sustaining its legal sufficiency,[1] and procedural history are relevant to our discussion. The defendant operated a center for drug rehabilitation and provided methadone treatment for opioid dependent patients at 495 Congress Avenue in New

[1] See, e.g., *Doe* v. *Cochran*, 332 Conn. 333, 328, 210 A.3d 469 (2019); *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117, 889 A.2d 810 (2006).

Haven (premises). In 2017, the decedent was in a relationship with K, who was receiving treatment at the premises for her drug addiction. The decedent regularly accompanied K to her appointments at the premises. At some point, the decedent ended his relationship with K and, in September, 2017, commenced a new relationship with A, who also was receiving treatment at the premises. K, who attended group therapy with A, was unhappy about the decedent's new relationship and she entered into a romantic relationship with Daniel Streit.

On multiple occasions between September and October, 2017, the decedent was on the premises while visiting A, as was permitted by the defendant's patient handbook. During each of these occasions, Streit approached the decedent and a physical fight ensued. Despite the animosity between the decedent and Streit, the defendant did not take any action against K.

On October 7, 2017, the decedent traveled to the premises to visit A. Streit, wearing purple latex gloves and holding a knife, was waiting for the decedent at the end of the driveway leading to the parking lot of the premises. The defendant owned, controlled and/or maintained the driveway. As the decedent began to walk up the sidewalk toward the entrance to the driveway, Streit approached him. A physical altercation ensued and resulted in Streit fatally stabbing the decedent on the public sidewalk directly in front of the premises.

The plaintiff thereafter brought this wrongful death action[2] against the defendant pursuant to General Stat-

[2] The plaintiff commenced this action on August 27, 2019. The plaintiff filed a revised complaint on January 14, 2020. The defendant moved to strike the revised complaint on February 13, 2020. On May 15, 2020, the plaintiff requested leave to file an amended complaint. On August 14, 2020, the plaintiff requested leave to file a second amended complaint. One month later, the defendant moved to strike the second amended complaint, and the court granted this motion on April 15, 2021. The plaintiff then filed a substitute complaint on April 30, 2021, and, on July 21, 2021, requested leave to file an amended substitute complaint, which the court granted over the defendant's objection.

utes § 52-555.[3] In a two count amended substitute complaint, the plaintiff set forth claims of negligence and public nuisance.[4] With respect to the negligence count, the plaintiff generally alleged that the defendant failed (1) to provide adequate security for the premises and surrounding area, (2) to remove and prevent Streit from loitering, and (3) to recognize and remedy the hostilities between the decedent, Streit, K, and A, which ultimately resulted in the decedent suffering lethal injuries.

As to the public nuisance count, the plaintiff alleged that local residents have developed concerns regarding loitering, drug use, crime, prostitution, and public defecation on private property in the immediate vicinity surrounding the premises. Next, she alleged that the defendant "created a magnet for criminal activity in the immediate vicinity surrounding the premises by providing a methadone treatment program without also providing for proper security, safety protocols, and monitoring of its facility, its patients, and the immediate

[3] General Statutes § 52-555 (a) provides: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of."

[4] "Public nuisance is a tort, defined as an unreasonable interference with a right common to the general public." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 231 n.7, 131 A.3d 771 (2016). Our Supreme Court has explained: "Public nuisance law is concerned with the interference with a public right, and cases in this realm typically involve conduct that allegedly interferes with the public health and safety." (Internal quotation marks omitted.) *Fisk* v. *Redding*, 337 Conn. 361, 373, 253 A.3d 918 (2020); see also *Demond* v. *Project Service, LLC*, 331 Conn. 816, 861, 208 A.3d 626 (2019) ("Nuisances are public where they . . . produce a common injury . . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence." (Internal quotation marks omitted.)); see generally *Pestey* v. *Cushman*, 259 Conn. 345, 355, 788 A.2d 496 (2002) ("[t]here is perhaps no more impenetrable jungle in the entire

vicinity in order to protect the general public." For the time period from January 1 to October 7, 2017, the police responded to forty-two complaints of criminal activity, including multiple calls for violent behavior and altercations. The plaintiff also alleged that the lack of adequate security and safety protocols had a tendency to create a risk of danger and injury to those coming in contact with the premises and that the numerous calls to the police evidenced the continuous and ongoing threat to the public. The plaintiff further claimed that allowing feuding patients and their visitors to "mingle and loiter" on or near the premises, which provided methadone treatment in a high crime neighborhood without providing adequate security, safety protocols, and monitoring, constituted an unreasonable use of the property. Finally, the plaintiff alleged that the nuisance created by the defendant was the direct and proximate cause of the death of the decedent.

On January 5, 2022, the defendant moved to strike the plaintiff's amended substitute complaint pursuant to Practice Book § 10-39.[5] In its attached memorandum of law, the defendant noted that the amended substitute complaint alleged that the stabbing occurred on the public sidewalk that it neither owned nor controlled. As to the negligence count, the defendant argued that, in the absence of a special relationship with the decedent, it had no duty to prevent fights on the public sidewalk outside of its premises. As to the public nuisance count, the defendant claimed that the allegations set forth in the amended substitute complaint did not support the claims that the operation of a methadone clinic at the premises had a natural tendency to create

law than that which surrounds the word nuisance" (internal quotation marks omitted)).

[5] Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever a party wishes to contest: (1) the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . ."

danger and to inflict injury on public property or that the defendant's use of its property was unreasonable or unlawful.

On March 4, 2022, the plaintiff filed an objection to the defendant's motion to strike. Therein, the plaintiff argued that, because she had pleaded sufficient facts that the defendant owed a duty to the decedent, the motion to strike her negligence claim should be denied. Additionally, she claimed that a cause of action for public nuisance had been pleaded sufficiently. Specifically, the plaintiff stated: "Here, the existence and operation of the methadone clinic by the defendant has continually attracted crime and allowed individuals to loiter in the driveway and in the immediate vicinity surrounding the premises while partaking in illegal activities such as drug use, prostitution, and defecation. This continuous danger has been evidenced by numerous 911 calls for criminal activity from January 1, 2017, to October 7, 2017. . . . The amended complaint alleges that the [defendant's] allowing individuals like [Streit] to loiter on or near their property and use their parking lot to wait to attack [the decedent] is an unreasonable use of the property." The defendant filed a reply in support of the motion to strike on March 11, 2022.

On October 3, 2022, the court, *Wilson*, *J.*, issued a memorandum of decision granting the defendant's motion to strike as to both counts of the plaintiff's amended substitute complaint. Regarding the negligence count, the court concluded that the plaintiff failed to demonstrate that the defendant owed a duty to the decedent.[6] With respect to the public nuisance count,

[6] In particular, the court explained that "it is well established in Connecticut that a defendant owes no duty to a party who is injured on property not owned, controlled or maintained by that defendant. . . . Without a special relationship to either the decedent or Streit, the allegation that Streit waited on the outskirts of the defendant's premises before attacking the decedent on the public sidewalk does not change the analysis the court undertook in its previous memorandum of decision [regarding the lack of a duty]." (Citation omitted; internal quotation marks omitted.) See, e.g.,

the court first stated that the amended substitute complaint contained conclusory allegations that were not supported by facts. Next, the court noted that the amended substitute complaint lacked "factual allegations to indicate that the methadone clinic itself had a natural tendency to create danger and inflict injury upon person or property." Relying on this court's decision in *Perry* v. *Putnam*, 162 Conn. App. 760, 131 A.3d 1284 (2016), the trial court explained that, "unpleasant as the activities are in the surrounding area of the methadone clinic, such activities do not imbue the methadone clinic with a natural tendency to create danger and to inflict injury."

On October 19, 2022, the defendant moved for judgment on the plaintiff's amended substitute complaint, which had been stricken in its entirety.[7] The court granted the defendant's motion on November 14, 2022, and rendered judgment thereon. This appeal followed.

On appeal, the plaintiff contends that she pleaded sufficient facts to support her public nuisance claim.[8] Specifically, she argues that the court improperly determined that the allegations regarding inadequate security were conclusory and that there were no factual allega-

Basone v. *Whole Foods Market Group, Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-19-6043885-S (December 14, 2020) (Connecticut law has recognized that, although business proprietor has duty to protect invitees from criminal acts of third parties, no duty exists to protect party injured on property not owned, controlled, or maintained by said proprietor); *McPherson* v. *Staples, Inc.*, Docket No. CV-12-6017390-S, 2014 WL 4099329, *3 (July 15, 2014) (same).

[7] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading; provided that in those instances where an entire complaint . . . or any count in a complaint . . . has been stricken, and the party whose pleading or a count thereof has been so stricken fails to file a new pleading within that fifteen day period, the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . ."

[8] In her appeal, the plaintiff does not challenge the court's striking of her negligence claim.

tions to indicate that the methadone clinic itself had a natural tendency to inflict injury upon person or property. The defendant counters that the allegations in the amended substitute complaint regarding its rehabilitation and treatment facility being located at the premises do not satisfy any of the four elements of a public nuisance claim. We conclude that the court properly granted the defendant's motion to strike the public nuisance claim as alleged in the amended substitute complaint.

We begin by setting forth our standard of review and the relevant legal principles. "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . [The court takes] the facts to be those alleged in the complaint . . . and [construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted. . . . Our review of a trial court's decision to grant a motion to strike is plenary. . . . *The legal conclusions contained in a complaint, however, are not deemed to be admitted by a court ruling on a motion to strike.*" (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Ins. Co.*, 224 Conn. App. 429, 441–42, 313 A.3d 1219 (2024); see also *Bennetta* v. *Derby*, 212 Conn. App. 617,

622, 276 A.3d 455, cert. denied, 344 Conn. 903, 277 A.3d 135 (2022); see generally *Lavette* v. *Stanley Black & Decker, Inc.*, 213 Conn. App. 463, 470, 278 A.3d 1072 (2022). Additionally, we note that a motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged or if the complaint lacks sufficient factual allegations that, if proven, would satisfy all the elements of the cause of action asserted. See *Stevens* v. *Khalily*, 220 Conn. App. 634, 645–46, 298 A.3d 1254, cert. denied, 348 Conn. 915, 303 A.3d 260 (2023).

Next, we set forth the elements of a claim of public nuisance. "[A] plaintiff must prove four elements to succeed in a nuisance cause of action: (1) the condition complained of had a natural tendency to create danger and inflict injury [on] person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of the plaintiffs' injuries and damages." (Internal quotation marks omitted.) *Kumah* v. *Brown*, 160 Conn. App. 798, 804–805, 126 A.3d 598, cert. denied, 320 Conn. 908, 128 A.3d 953 (2015); see also *Demond* v. *Project Service, LLC*, 331 Conn. 816, 860–61, 208 A.3d 626 (2019); *Ugrin* v. *Cheshire*, 307 Conn. 364, 374, 54 A.3d 532 (2012).

The resolution of this appeal is guided by our decision in *Perry* v. *Putnam*, supra, 162 Conn. App. 760. In that case, the plaintiffs claimed that the defendant town's construction of a parking lot adjacent to their property constituted a nuisance. Id., 762. In support of their claim, the plaintiffs alleged "a litany of annoyances emanating from the parking lot, ranging from vehicle noise, littering of automotive parts, assorted criminal activity, loud music, and headlights shining directly into the plaintiffs' home." (Internal quotation marks omitted.) Id., 763.[9] The trial court granted the defendant's motion

[9] The plaintiffs in *Perry* further alleged that third parties engaged in activities such as "[o]vernight parking of trucks . . . with motors running while

to strike and rendered judgment in favor of the defendant. Id., 763–64.

In affirming the court's judgment, we stated that, "[f]irst and foremost, a parking lot does not have a natural tendency to create danger and inflict injury [on] person or property . . . [and] [o]ur Supreme Court has repeatedly characterized this element as essential to the tort of nuisance." (Citation omitted; internal quotation marks omitted.) Id., 765. We further explained: "Connecticut cases have never deemed a parking lot to have a natural tendency to create danger and to inflict injury. Conditions deemed to have such a tendency include a diving board positioned over very shallow, murky water, without signage to indicate the danger; *Hoffman* v. *Bristol*, 113 Conn. 386, 387, 155 A. 499 (1931); a public town dump, in which unattended fires frequently burned, and which the town fire marshal had considered a hazard for some time, adjacent to marshland that abutted a row of buildings; *Marchitto* v. *West Haven*, 150 Conn. 432, 437–38, 190 A.2d 597 (1963); and landfills that leaked contaminants into the plaintiffs' water supplies; *Filisko* v. *Bridgeport Hydraulic Co.*, 176 Conn. 33, 36–37, 404 A.2d 889 (1978); *Dingwell* v. *Litchfield*, 4 Conn. App. 621, 625, 496 A.2d 213 (1985). The parking lot in this case lacks the dangerous qualities of the conditions complained of in the cited cases. *Unpleasant as the activities that the plaintiffs describe must be to endure, such activities do not imbue the parking lot with a natural tendency to create danger and to inflict injury.*" (Emphasis added.) *Perry* v. *Putnam*, supra, 162 Conn. App. 766.

vehicle operators sleep in the cabs, [i]nappropriate sexual activity in parked motor vehicles, [u]nderage drinking, [i]llegal drug sales, [o]vernight gatherings of vehicles and people playing loud music and engaging in boisterous behavior, and [d]angerous driving . . . ." (Internal quotation marks omitted.) *Perry* v. *Putnam*, supra, 162 Conn. App. 768.

The plaintiff contends, notwithstanding our decision in *Perry*, that the amended substitute complaint contains sufficient factual allegations. First, she notes that it alleges that, days before the fatal stabbing, the decedent and Streit had engaged in a physical altercation directly in front of the premises and that a security guard employed by the defendant responded and wrote a report about the event. Additionally, the plaintiff points to the allegations of forty-two police responses to the premises for complaints of criminal activity in the time period from January 1 to October 7, 2017. Finally, she directs our attention to the allegations that the premises was "under scrutiny from local residents for loitering, drug use, crime, prostitution, and defecation on private property . . . ." We are not persuaded.

We conclude that the defendant's premises does not have a natural tendency to create danger and to inflict injury. See *Perry* v. *Putnam*, supra, 162 Conn. App. 765; see also *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 369, 780 A.2d 98 (2001) (typical examples of public nuisances included pollution and obstruction of waterways, air and noise pollution, maintenance of fire or explosion hazard, or other unsafe premises, maintenance of house of prostitution, obstruction of safe travel on public highway, and maintenance of junkyard or dump). The premises in the present case, a center for drug rehabilitation and methadone treatment for opioid dependent patients, lacks the dangerous qualities akin to a diving board placed over shallow and murky water without warning signs, an unattended fire at a public town dump near a row of buildings, or contaminants leaking from a landfill into water supplies. See *Perry* v. *Putnam*, supra, 766. Although the conditions alleged to be existing in the immediate vicinity of the premises in the amended substitute complaint are not pleasant and may be dangerous, they do not imbue the premises itself with a natural tendency to create danger and to inflict injury. Id.

The plaintiff's argument that the allegations in the amended substitute complaint provide the necessary factual basis to support her claim of a public nuisance is unavailing. Referencing the numerous police responses to the premises in a given time period does not establish whether these responses were due to the defendant's operation of its drug rehabilitation center. The plaintiff's allegations do not state whether these police responses were related to individuals on the defendant's premises. Further, there are no specific facts alleged to connect the actions of the defendant with a natural tendency to create danger or inflict injury. Additionally, the plaintiff's conclusory assertion regarding the lack of "proper security" is not sufficient to set forth a claim of public nuisance. See *Kelsey* v. *Connecticut Performing Arts, Inc.*, Docket No. CV-00-0441464-S, 2002 WL 237424, *3 (Conn. Super. January 28, 2002) (plaintiff's allegation that he was assaulted while on defendant's premises as result of unsafe conditions and inadequate security was insufficient to state necessary facts to prevail on claim of public nuisance). For these reasons, we conclude that the plaintiff's substitute amended complaint failed to set forth a claim of public nuisance, and therefore the court properly granted the defendant's motion to strike.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] As a result of our conclusion, we need not address the defendant's other appellate arguments that the amended substitute complaint failed to plead facts showing that danger created by the premises was continuing, that the defendant's use of the premises as a drug treatment and rehabilitation center was an unreasonable or unlawful use of the land, and that the purported nuisance was the proximate cause of the decedent's injuries.

L. K. *v.* K. K.*
(AC 45849)

Clark, Seeley and Palmer, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, filed a motion to modify his unallocated alimony and child support obligation. The trial court denied the motion, and the defendant appealed to this court. *Held*:

1. This court rejected the argument of the defendant's counsel, raised for the first time at oral argument, that the trial court lacked subject matter jurisdiction over the defendant's motion to modify his unallocated alimony and child support obligation: although counsel stated that the trial court lacked subject matter jurisdiction to enter orders regarding an adult child, which statement appeared to rest on the general rule that a parent's legal obligation to support a child terminates when the child attains the age of eighteen, the trial court did not enter any child support orders regarding an adult child but denied a motion to modify the defendant's unallocated alimony and support obligation, which stemmed from a written agreement that he had voluntarily entered into with the plaintiff and which was deemed fair and equitable and was approved by the trial court.
2. The defendant could not prevail on his claim that the trial court abused its discretion by failing to address his claim that a reduction in the child support component of his unallocated alimony and child support obligation was warranted because one of the parties' three children had reached the age of majority: the trial court clearly explained that the issue of one of the parties' children reaching the age of majority was not before it because that issue had not been raised in the motion to modify that was before the court.
3. The trial court did not abuse its discretion in denying the defendant's motion to modify by declining to consider certain financial evidence submitted by the defendant: although the defendant argued that the trial court ignored his income and the information set forth on his financial affidavit, it was clear that the court, instead, did not credit that information; moreover, contrary to the defendant's assertions, the trial court was not required to credit the defendant's updated financial affidavit

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

and, therefore, the trial court's findings with respect to the defendant's assertion that he suffered a reduction in income were not clearly erroneous, as they were based on the evidence and its credibility determinations, which this court would not disturb.

Argued January 11—officially released June 18, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Tindill*, *J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court, *Sheldon*, *Elgo* and *Stevens*, *Js.*, which reversed the trial court's judgment as to the financial orders and remanded the case to that court for further proceedings; thereafter, the court, *M. Moore*, *J.*, denied the defendant's motion to modify unallocated alimony and child support, and the defendant appealed to this court. *Affirmed.*

William W. Taylor, with whom, on the brief, was *K. K.*, self-represented, for the appellant (defendant).

Igor G. Kuperman, for the appellee (plaintiff).

Opinion

SEELEY, J. In this postjudgment dissolution matter, the defendant, K. K.,[1] appeals challenging the judgment of the trial court denying his motion to modify the amount of unallocated alimony and child support that he is obligated to pay to the plaintiff, L. K. On appeal, the defendant raises various claims concerning the denial of his motion to modify, which we distill to the following: (1) the court, in its written order denying the motion to modify, improperly failed to address the defendant's

[1] At the time the defendant filed this appeal and his appellate briefs, he was acting in a self-represented capacity. At oral argument before this court, however, he was represented by counsel, who also had provided representation to the defendant, at times, concerning various postdissolution matters in this case.

claim that a reduction in the child support component of the unallocated order was warranted due to the fact that one of the parties' three children had reached the age of majority, and (2) the court abused its discretion in denying the motion to modify by ignoring the tax returns, financial statements and other financial documents that had been submitted into evidence.[2] We disagree and affirm the judgment of the court.

The following facts and procedural history guide our resolution of this appeal. The plaintiff and the defendant were married on July 19, 1997, and they have three children together. Their marriage was dissolved by a judgment dated June 21, 2016. Pursuant to that judgment, the defendant was ordered to pay unallocated alimony and support to the plaintiff in the amount of $12,500 per month "until the death of either party, the plaintiff's remarriage, or November 3, 2025, whichever [occurred] first," and the duration and amount to be paid were nonmodifiable by either party. In making that order, the court indicated that it was deviating from the presumptive support amount set forth in the child support guidelines "based on the extraordinary disparity in income and the provision of alimony."

The defendant appealed from the dissolution judgment to this court, arguing, inter alia, that the court's

[2] We note that the defendant, in his principal appellate brief, also raises the following claim: "The court's order fails to address the issue of the court's prior order dated July 5, 2022, now enforcing an order, which it well knows by the facts in evidence, that is not in accord with the Connecticut child support guidelines, nor [General Statutes §] 46b-84." That statement of the claim is followed by three paragraphs of analysis, which concern the modification of an order of unallocated alimony and child support when a child attains the age of majority. It is not clear from that analysis, however, what order the defendant is referring to when he argues that the "the court's order fails to address" the court's July 5, 2022 decision denying the motion to modify. Nonetheless, this purported third claim on appeal seems to be related to, and subsumed within, the defendant's first claim. For that reason, we do not analyze it separately.

order for the payment of nonmodifiable, unallocated alimony and child support constituted an abuse of its discretion in that it precluded reductions based on each child attaining the age of majority. This court agreed, concluding in the prior appeal[3] that the trial court abused its discretion in making its order of unallocated alimony and child support nonmodifiable as to term and amount.[4] Therefore, the judgment was reversed only as to the financial orders and the case was remanded for further proceedings.

Following the remand order from this court, the trial court scheduled a hearing for May 2 and 3, 2019, to address the financial issues. On May 2, the first day scheduled for the hearing, the parties entered into a written agreement that resolved the financial issues. The agreement provided in relevant part: "The [defendant] will continue to pay unallocated alimony and child support with the next payment beginning on May 23, 2019, in the amount of [$12,500] monthly for a period of three years. . . . After three years, he will pay unallocated child support and alimony at the rate of [$7500] per month or until their youngest son is eighteen years old (last payment to be made on October 23, 2025)." The agreement incorporated other provisions from the June 21, 2016 dissolution judgment and provided that "[a]ll other orders not incorporated in this agreement from the June 21, 2016 [dissolution judgment] shall remain null and void." (Emphasis omitted.) The agreement further provides: "The parties have entered into

[3] Because the names and identities of the parties are set forth in the prior appeal in this matter, which was decided prior to the issuance of a protective order, we do not include an official citation to our decision in that prior appeal in accordance with our obligation under federal law to protect the identity of any person or persons protected by a protective order. See 18 U.S.C. § 2265 (d) (3) (2018).

[4] In the prior appeal, this court also determined that the trial court erroneously calculated the defendant's presumptive child support obligation on the basis of his earning capacity, rather than his actual income.

this agreement freely and voluntarily; [t]he parties find this agreement to be fair and equitable under the circumstances; [and] [t]he parties find this agreement to be in the best interests of their minor children." The court approved the agreement, which was made an order of the court.

On January 22, 2020, the plaintiff filed a motion for contempt, claiming that the defendant was late in making two payments and that he also had failed to pay 50 percent of all unreimbursed medical expenses for the children, as required by their agreement.[5] The next day, January 23, 2020, the defendant filed the motion to modify that is the subject of this appeal—motion number 432 on the trial court docket (motion to modify 432)—seeking a modification of his unallocated alimony and child support obligation based on a substantial change in circumstances. The defendant filed the motion in a self-represented capacity by filling out a court form. On the form, he checked the box indicating a substantial change in circumstances, with a handwritten notation stating, "[i]n addition to the attach[ed], the motion of contempt in reference to taxes paid on unallocated alimony [and] child support need[s] to be addressed." He also checked the boxes indicating that he was seeking an increase and decrease in child support, as well as a decrease in alimony. Attached to the form is a written motion, which sets forth the following reasons why the defendant was seeking a modification of his unallocated alimony and child support obligation: (1) "Business partner/producer, George Goettlemann, has called the sale of his original book of business"; (2) "Technology upgrades [related to the defendant's business] had to be made immediately. All computers

[5] The plaintiff also filed two other motions for contempt that were considered by the court along with the defendant's motion to modify: one that was filed on January 24, 2020, and another that was filed on November 5, 2020.

are not supported by Microsoft 2007 and had to be upgraded to Microsoft 2010. As well as scanner and software upgrades. Total estimates $25,000"; (3) "Business debt needs to be paid. It has been accruing interest"; (4) "My staff has been completely overworked since 2014. Contingency compensation has decreased 37.5 [percent] among main employees. They are asking for salary increases and better benefits. We need to hire additional employees to relieve workload"; (5) "My personal income has declined"; (6) "We have outstanding fiduciary accounts who have defaulted on premium payments, totaling $30,000 in 2019"; (7) "My credit has been ruined, due [to] the plaintiff not paying the mortgage on the [marital] home . . . for [seventeen] months"; and (8) "My personal reputation has been defamed and ruined in conjunction with the plaintiff . . . using numerous protective order [statutes] and creating false allegations that were subsequently published on the Internet. Moreover, this has directly affected my business . . . ."

A remote hearing on the plaintiff's motions for contempt and the defendant's motion to modify his unallocated alimony and child support obligation commenced on April 8, 2021. The hearing continued, in person, on two more dates—March 17 and April 29, 2022, after which the parties filed simultaneous posthearing briefs on May 31, 2022, as ordered by the court. In a written order dated July 1, 2022, the court denied the defendant's motion to modify and granted in part the plaintiff's motions for contempt. Thereafter, the defendant filed a motion to reargue and reconsider, which the court denied on August 11, 2022. The defendant subsequently filed a second motion to reargue and reconsider, which the court also denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before we address the defendant's claims on appeal, we set forth our well established standard of review in family matters. We review the trial court's judgment denying the defendant's motion to modify his unallocated alimony and child support obligation under an abuse of discretion standard. See *Berman* v. *Berman*, 203 Conn. App. 300, 303, 248 A.3d 49 (2021). "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's 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. . . . 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. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *De Almeida-Kennedy* v. *Kennedy*, 224 Conn. App. 19, 29–30, 312 A.3d 150 (2024).

"General Statutes § 46b-86 governs the modification of an alimony or child support order after the date of a dissolution judgment. Section 46b-86 (a) provides that a final order for alimony or child support may be modified by the trial court upon a showing of a substantial change in the circumstances of either party. Under that statutory provision, the party seeking the modification

bears the burden of demonstrating that such a change has occurred. . . . To obtain a modification, the moving party must demonstrate that circumstances have changed since the last court order such that it would be unjust or inequitable to hold either party to it. Because the establishment of changed circumstances is a condition precedent to a party's relief, it is pertinent for the trial court to inquire as to what, if any, new circumstance warrants a modification of the existing order. . . .

"Once a trial court determines that there has been a substantial change in the financial circumstances of one of the parties, the same criteria that determine an initial award of alimony and support are relevant to the question of modification. . . . Thus, [w]hen presented with a motion for modification, a court must first determine whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and, on the basis of the [General Statutes § 46b-84] criteria, make an order for modification. . . . A finding of a substantial change in circumstances is subject to the clearly erroneous standard of review. . . . *Flood* v. *Flood*, 199 Conn. App. 67, 77–78, 234 A.3d 1076, cert. denied, 335 Conn. 960, 239 A.3d 317 (2020).

"Moreover, [i]t is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable

construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . *Giordano* v. *Giordano*, 200 Conn. App. 130, 136, 238 A.3d 113, cert. denied, 335 Conn. 970, 240 A.3d 286 (2020); see also *Winthrop* v. *Winthrop*, 189 Conn. App. 576, 581–82, 207 A.3d 1109 (2019)." (Internal quotation marks omitted.) *Berman* v. *Berman*, supra, 203 Conn. App. 304–305.

I

We first address an argument raised by the defendant's counsel during oral argument before this court. Specifically, at the end of his rebuttal argument, the defendant's counsel raised an issue related to subject matter jurisdiction that had not been briefed by the defendant, asserting that the trial court lacked subject matter jurisdiction to "enter orders [regarding] an adult child." According to the defendant's counsel, the case must be remanded on that issue. We do not agree.

We first note that "[a]ppellate courts generally do not consider claims raised for the first time at oral argument." (Internal quotation marks omitted.) *State* v. *Cicarella*, 203 Conn. App. 811, 817 n.5, 251 A.3d 94, cert. denied, 337 Conn. 902, 252 A.3d 364 (2021); see also *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 586 n.17, 22 A.3d 518 (2011) (" 'claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court' "). Nevertheless, we address this issue "because [u]nlike jurisdiction over the person, subject matter jurisdiction cannot be created through consent or waiver. . . . Once the question of lack of jurisdiction is raised, it must be disposed of no matter in what

form it is presented. . . . The court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *State* v. *Booker*, 28 Conn. App. 34, 39, 611 A.2d 878, cert. denied, 223 Conn. 919, 614 A.2d 826 (1992), cert. denied, 507 U.S. 916, 113 S. Ct. 1271, 122 L. Ed. 2d 666 (1993); see id., 38–39 (addressing issue of subject matter jurisdiction raised for first time at oral argument before reviewing court).

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *O'Bryan* v. *O'Bryan*, 67 Conn. App. 51, 53–54, 787 A.2d 15 (2001), aff'd, 262 Conn. 355, 813 A.2d 1001 (2003). "[T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case. . . . [B]ecause [a] determination regarding . . . subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Jefferson Solar, LLC* v. *Dept. of Energy & Environmental Protection*, 224 Conn. App. 688, 698, 313 A.3d 514 (2024).

"[T]he Superior Court is a general jurisdiction tribunal with 'plenary and general subject matter jurisdiction over legal disputes in "family relations matters" ' under General Statutes § 46b-1"; *Sousa* v. *Sousa*, 322 Conn. 757, 776–77, 143 A.3d 578 (2016); which includes alimony and support. *Amodio* v. *Amodio*, 247 Conn. 724,

729, 724 A.2d 1084 (1999); see also *Hepburn* v. *Brill*, 348 Conn. 827, 842–43, 312 A.3d 1 (2024). Our Supreme Court previously has explained that § 46b-1, together with General Statutes § 46b-86 (a), which "provides the trial court with continuing jurisdiction to modify support orders," provide a trial court with subject matter jurisdiction over a motion to modify a child support order. *Amodio* v. *Amodio*, supra, 729.

Additionally, we also recognize that, "[a]s a general matter, it is settled that the statutory obligation of a parent to support a child normally terminates when the child attains the age of majority, which currently is eighteen."[6] *Loughlin* v. *Loughlin*, 280 Conn. 632, 654, 910 A.2d 963 (2006). Thus, "a court may issue support orders only for minor children under the age of eighteen . . . ." Id., 660; see also *Hughes* v. *Hughes*, 95 Conn. App. 200, 208–209, 895 A.2d 274 ("[t]he statutory grant of jurisdiction to the Superior Court in matters relating to child support incident to the dissolution of a marriage likewise expressly circumscribes the court's jurisdiction to orders involving only minor children" (footnote omitted; internal quotation marks omitted)), cert. denied, 280 Conn. 902, 907 A.2d 90 (2006); *Lowe* v. *Lowe*, 47 Conn. App. 354, 357, 704 A.2d 236 (1997) (" '[a]bsent . . . a written agreement by the parties, the court does not have jurisdiction to order payment of child support

[6] There are two notable exceptions to this rule pertaining to postmajority support. First, "under General Statutes § 46b-56c (b), (c) and (e), a court may issue an educational support order for college age children upon a motion of a party and after making certain findings." *Loughlin* v. *Loughlin*, 280 Conn. 632, 657, 910 A.2d 963 (2006). Second, under "General Statutes § 46b-66 (a) . . . if the parties to a dissolution action submit to the court a written agreement providing for the care, education, maintenance or support of a child beyond the age of eighteen and the court finds the agreement to be fair and equitable, it may incorporate it by reference into the order or decree of the court." Id., 658. "Thus, [i]n the absence of a statute or agreement providing for postmajority assistance . . . a parent ordinarily is under no legal obligation to support an adult child." (Internal quotation marks omitted.) Id.

beyond the age of majority and may not enforce such an order' ").

Our resolution of this claim requires little discussion. First, there is no question that the trial court in the present case had subject matter jurisdiction over the defendant's motion to modify his unallocated alimony and child support obligation. See *Amodio* v. *Amodio*, supra, 247 Conn. 729. The defendant's claim appears to rest on the general rule that a parent's legal obligation to support a child terminates when the child attains the age of eighteen. As stated previously in this opinion, at the close of oral argument before this court, the defendant's counsel asserted that the trial court lacked subject matter jurisdiction to "enter orders [regarding] an adult child." In the present case, however, the court did not enter any child support orders regarding an adult child; rather, it denied a motion to modify the defendant's unallocated alimony and child support obligation. Significantly, the defendant's child support obligation stems from a written agreement that he voluntarily had entered into with the plaintiff, which was deemed fair and equitable and was approved by the court. If, and to whatever extent, that agreement does provide for postmajority support for the children,[7] under General Statutes § 46b-66 trial courts have "jurisdiction to enforce written provisions in dissolution agreements, incorporated into court orders, for the care, education, maintenance or support of a child beyond the age of eighteen . . . ." (Internal quotation marks omitted.) *Walsh* v. *Jodoin*, 283 Conn. 187, 205 n.21, 925 A.2d 1086 (2007); see *Tarbox* v. *Tarbox*, 84 Conn. App. 403, 410, 853 A.2d 614 (2004) ("§ 46b-66 permits parents to agree in writing to provide child support for a child beyond the age of eighteen years"); see also footnote 6 of this opinion. We, therefore, reject

[7] See part II of this opinion.

the jurisdictional claim raised by the defendant's counsel at oral argument and turn to the claims raised by the defendant in this appeal.

II

We next address the defendant's claim that the court, in its written order denying the motion to modify, improperly failed to address his claim that a reduction in the child support component of the unallocated order was warranted because one of the parties' three children had reached the age of majority. We disagree.

The following additional facts and procedural history are relevant to this claim. At the outset of the remote hearing that took place on April 8, 2021, at which the defendant appeared in a self-represented capacity, the court sought to clarify the motions that were before it at the hearing. In addition to several motions for contempt filed by the plaintiff, the court indicated that the defendant's motion to modify 432 was one of the motions to be addressed at the hearing. When the court asked the defendant what he had to say about "what motions we are addressing today," the defendant responded by referencing an amended motion to modify that he had filed on April 5, 2021, just three days prior to the hearing, which is motion number 460 on the trial court docket (motion to modify 460). Thereafter, the following colloquy transpired:

"The Court: Sir, we can't hear a motion that you filed on [April 5] today. Okay.

"[The Defendant]: Well, but—

"The Court: You can't file a motion—hold on, sir.

"[The Defendant]: Yeah.

"The Court: —three days before the hearing and expect [the] plaintiff and [the] plaintiff's counsel to be prepared to defend whatever your allegations are on a

motion that, from what I understand, hasn't even been served yet. You don't have a date on the—

"[The Defendant]: It's been served.

"The Court: Okay. . . .

"[The Defendant]: It was served on April 5th . . .

"[The Plaintiff's Counsel]: Your Honor, it has been served . . . upon the plaintiff on April 5th and filed on April 6th, and I got it, I believe, either yesterday at night or today in the morning.

"The Court: Okay. And, sir, do you have a date on the motion, a date, a citation date?

"[The Defendant]: That it was served?

"The Court: No. . . . That you need to appear for the . . . modification. . . .

"[The Defendant]: No, not yet.

"The Court: Okay.

"[The Defendant]: Okay. But it's pretty much the same motion, except there's a few other issues that have developed.

"The Court: Well, sir, *we are not going to hear the few other issues* that developed today. We will hear the motion for modification, which is motion 432, but not the motion for modification that you filed two or three days ago, okay? . . .

"[The Defendant]: . . . Judge . . . I am asking you that it all be heard. It's not . . . you guys are aware of some of my health issues. You know, my daughter is going to be eighteen years old, so child support issues can be addressed, and then there's some [COVID-19] issues. The only thing that—they don't even have to prepare for it. I can prove it. It's just to show how much business I have lost because of [COVID-19].

"[The Plaintiff's Counsel]: Your Honor, I will object. . . . I will object to . . . obviously not to the questions about . . . [COVID-19] and all of that. We can definitely—because it's part of an ongoing situation with the defendant. But the issue that the defendant raises with respect to the kids turning a certain age is a completely separate issue from anything and everything that he was raising before. And it requires a . . . separate showing of evidence because, Your Honor, I believe this particular factor has been addressed in the original agreement between the plaintiff and the defendant. So, as far as the defendant is claiming new issues that were not raised previously, Your Honor, that will require a separate hearing and separate preparation.

"The Court: So, sir, did you raise this issue previously in your motion for modification about your daughter turning eighteen?

"[The Defendant]: Well, the reason why—Your Honor, the reason why I did not, because, when I put in the original motion over a year ago, my daughter wasn't—she was a year and change away from being eighteen. Now that, because of [COVID-19] and because of . . . these motions getting delayed, now my daughter is eighteen. So, there isn't much to debate. She is eighteen. We have a, you know, a child . . . an amended child form and there is really nothing to debate here. She is eighteen and she is going to be eighteen. And, you know, child support should be adjusted when they are eighteen. It's not very complicated. It's standard procedure among—

"The Court: Well, sir, here's the issue . . . . You're seeking a modification today, but you haven't filed an updated financial affidavit.

"[The Defendant]: Well, I just did. I did. I filed it just recently.

"The Court: When? . . . There's no financial affidavit in your file. There is no financial affidavit in the clerk's office.

* * *

"The Court: . . . You are representing yourself, okay, and you have been for quite some time. There are trial management, hearing management orders that you need to produce these documents not today, but a minimum of five days prior to the hearing date. Okay. Today is not five days prior to the hearing date. There is no financial affidavit in the courthouse. I had the clerk look yesterday. I had the clerk look today." (Emphasis added.)

The court concluded the discussion by stating that, with respect to the defendant's motion to modify 460 that he "just filed that is pending," the defendant would "get a hearing date for that, at which point [he could] proceed with [his] motion for modification." The court further stated: "[T]his is what we are going to do. Since, again, I don't have your financial affidavit, sir, what you are going to do is [speak with an attorney about what your issues are as you have indicated] and then the next time everyone is back for the modification, sir, provided your financial affidavit has been filed, then we can address it after you have an opportunity to speak with [an attorney]." Thereafter, the hearing on that day proceeded forward with respect to the plaintiff's motions for contempt.

The hearing resumed on March 17, 2022, and the defendant, represented by counsel, testified regarding motion to modify 432 that he had filed in January, 2020. Specifically, the defendant testified that he has health issues stemming from the fact that he had contracted COVID-19 twice, that he has an aortic aneurysm that is being monitored, and that he has a nodule in his thyroid that might need to be removed. He also testified

that, as a result of his physical ailments and COVID-19, he was not able to do certain things for a long period of time, and that he no longer works forty hours per week, due, in part, to the fact that he had not been feeling well and, in part, because his office was closed. The defendant testified further that he has not seen his children in a long time, that his business has been affected in a number of ways by the COVID-19 pandemic, and about various loans and business transactions. In support of his testimony, the defendant offered into evidence a number of financial documents, including personal and business tax returns for various years, and an updated financial affidavit. When asked what had caused him to file his motion to modify in January, 2020, the defendant responded that he could not afford to keep paying the amount set for unallocated alimony and child support because he was getting further in debt and having trouble keeping up with other things that needed to be paid and because he had lost business in January, 2020, which was further compounded by the onset of the COVID-19 pandemic shortly thereafter. The defendant also testified about why he had entered into the May 2, 2019 agreement to continue paying the plaintiff $12,500 monthly, the same amount ordered in the dissolution judgment that had been reversed on appeal.[8] At no point during the testimony of the defendant or the plaintiff concerning motion to modify 432 was anything mentioned about any of the children reaching the age of majority,[9] nor was there any mention

[8] Specifically, the defendant testified, inter alia, that he made the decision to do so (1) to clarify tax responsibilities in the unallocated order, (2) because it gave him the opportunity to negotiate a drop to $7500, and (3) in the hope that it would resolve some issues with respect to their children so that he could see them.

[9] In fact, during the hearing on March 17, 2022, the defendant testified that he was under stress because his children do not talk to him anymore. He was asked when the last time was that he had any access with his children, to which he replied that he had not seen his son since the son graduated from middle school in 2021. That prompted the defendant's counsel to ask, "[h]ow old are your kids?" The defendant responded only that

of the defendant's motion to modify 460, in which that issue had been raised. In his posthearing brief, the defendant made a cursory reference to this issue when he asserted: "To date, the number of minor children has reduced from three to one (see current child support guidelines worksheet, Def. Trial Ex. C)," and that "[t]he child support order must be reduced from $603 a week . . . to $297 per week . . . as only one child remains a minor."

In its July 1, 2022 written order denying the defendant's motion to modify, the court expressly set forth the motions that were covered by the order and referenced motion to modify 432, the defendant's January 23, 2020 motion to modify; the written order does not reference motion to modify 460, the defendant's amended motion to modify that was filed on April 5, 2021, in which the defendant sought a modification on the ground that one of his children had reached the age of majority. As a result, the court did not address that ground in deciding the January, 2020 motion to modify. The defendant subsequently filed a motion to reargue and reconsider the denial of his motion to modify, in which he argued, inter alia, that the court improperly failed to address the issue of whether his unallocated alimony and child support obligation had to be reduced due to one of the children reaching the age of majority.

On August 11, 2022, the court denied the defendant's motion to reargue and for reconsideration. In its written order, the court stated: "The defendant's motion [to modify] 432 fails to request a modification of unallocated alimony and child support based on a child reaching the age of majority. '[P]leadings have their place in our system of jurisprudence. While they are not held to the strict and artificial standard that once prevailed,

his son was fifteen and did not mention anything about any of the other children reaching the age of majority.

we still cling to the belief, even in these iconoclastic days, that no orderly administration of justice is possible without them. . . . It is fundamental in our law that the right of a party to recover is limited to the allegations in his pleading. Thus, it is clear that the court is not permitted to decide issues outside of those raised in the pleadings.' *Wheeler* v. *Beachcroft, LLC*, 210 Conn. App. 725, 753, 271 A.3d 141 (2022).

"Practice Book § 25-26 (e) provides in relevant part: 'Each motion for modification shall state the specific factual and legal basis for the claimed modification . . . .' In *Prial* v. *Prial*, [67 Conn. App. 7, 12–13, 787 A.2d 50 (2001)], the Appellate Court held [that] it was an abuse of discretion for the court to consider grounds not raised in a motion to modify financial orders. . . .

"At the commencement of the hearing on [April 8, 2021], the defendant was self-represented. Motion [to modify] 460 [which raised the issue of one of the children reaching the age of majority] was filed by the defendant three (3) days prior to the commencement of the hearing. The court informed the defendant [that] motion [to modify] 460 was not being heard by the court because the plaintiff was not provided adequate notice that the motion was before the court. The self-represented defendant failed to request a continuance and the hearing proceeded on the defendant's motion [to modify] 432 . . . ." (Citation omitted.)

Despite the court's clear explanation as to why the issue of one of the parties' children reaching the age of majority was not before it with respect to the defendant's motion to modify 432, the defendant, nonetheless, filed another motion to reargue and for reconsideration raising the same argument about one of his children reaching the age of majority. The court summarily denied the motion.

On appeal, the defendant makes a number of arguments in support of his claim that the court erred in failing to address the issue of one of his children reaching the age of majority and to modify the child support portion of his unallocated alimony and child support obligation accordingly. First, he argues that he "clearly checked the box on the court form ([motion to modify] 432) that he was requesting a 'decrease in child support,' " and that, as a self-represented party at that time, he should have been allowed deference or leeway. He also asserts that, at the hearing, he "introduced *evidence*, *by way of testimony*, regarding the ages of his children," as well as a child support guidelines worksheet, which included the children's names and dates of birth. (Emphasis added.) Next, he argues that Connecticut law "mandates" that the court take this fact into account and that, by law, he is entitled to a reduction in the child support portion of his unallocated alimony and child support obligation. Finally, the defendant argues that, under Connecticut law, there was a substantial change in circumstances as a result of one of his children turning eighteen years old.

Before we address the defendant's claims, we first set forth general principles governing this issue. "Our rules of practice state what a party must include in any motion to modify custody. Motions to modify custody are governed by Practice Book § 25-26. Section 25-26 (e) provides: 'Each motion for modification shall state the specific factual and legal basis for the claimed modification and shall include the outstanding order and date thereof to which the motion for modification is addressed.' " *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 513, 146 A.3d 26 (2016). The purpose of a pleading "is to limit the issues at trial, and . . . pleadings are calculated to prevent surprise. . . . It is fundamental in our law that the right of a [party] to recover is limited to the allegations in his [pleading]. . . . Facts found

but not averred cannot be made the basis for a recovery. . . . Thus, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings. . . . A judgment in the absence of written pleadings defining the issues would not merely be erroneous, it would be void. . . . *Breiter* v. *Breiter*, [80 Conn. App. 332, 335–36, 835 A.2d 111 (2003)]; see also *Westfall* v. *Westfall*, 46 Conn. App. 182, 185, 698 A.2d 927 (1997) ([a] judgment cannot be founded on a finding of facts not in issue, although they may have been shown in evidence to which no proper objection was taken . . .)." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, supra, 516.

"[I]n the context of motions to modify support orders, we have held that a court's reliance on a ground not raised in a motion to modify is an abuse of discretion in the absence of an amendment to the motion." (Internal quotation marks omitted.) *Marcus* v. *Cassara*, 223 Conn. App. 69, 83–84, 308 A.3d 39 (2023); see, e.g., id., 84 (court improperly considered whether extracurricular activities order was deviation under child support guidelines and modified order on ground not contained in motion for modification). "In exercising its statutory authority to inquire into the best interests of the child, the court cannot sua sponte decide a matter that has not been put in issue, either by the parties or by the court itself. Rather, it must . . . exercise that authority in a manner consistent with the due process requirements of fair notice and reasonable opportunity to be heard." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, supra, 167 Conn. App. 515.

In the present case, the defendant's appeal challenges the judgment of the trial court denying his motion to modify 432. In that motion, the defendant did not raise any claim seeking a modification on the ground that one of his children had reached the age of majority, and he acknowledged that fact at the hearing on April

8, 2021. When the defendant requested that the court also consider at that hearing his motion to modify 460, in which such a claim was raised, the court expressly declined to do so on the ground that motion to modify 460 had just been filed three days before the hearing, and that proceeding on that motion would deprive the plaintiff of an opportunity to prepare to defend against the allegations raised in the motion. Moreover, the plaintiff's counsel objected, arguing that the defendant, in making that claim, was raising an issue that was entirely separate from what he previously had raised and would require "a separate hearing and separate preparation." It is also noteworthy that the hearing on the defendant's motion to modify 432 did not resume until almost one year later, on March 17, 2022. At no time between the initial hearing date of April 8, 2021, and the second hearing date of March 17, 2022, did the defendant, or his counsel, who filed an appearance on April 13, 2021, renew the defendant's request that his motion to modify 460 be consolidated with his motion to modify 432. Furthermore, at no time during the hearing on March 17, 2022, did the defendant, through his counsel, mention his motion to modify 460, nor was any testimony presented concerning the issue of one of the parties' children reaching the age of majority. On the basis of this record, we cannot conclude that the court abused its discretion in declining to consider a claim that was not raised in the motion before it and of which the plaintiff had not been given proper notice.

To the extent that the defendant suggests he is entitled to a reduction because one of his children has turned eighteen years old, regardless of whether the claim was made in the motion that was before the court, we do not agree. This court has stated previously that the fact that a child has attained the age of majority does not "automatically entitle the [parent] to a reduction

in his alimony and support obligation" but, rather, "provides a basis for the [parent] to seek a modification." *Hughes* v. *Hughes*, supra, 95 Conn. App. 209. Specifically, "[w]hen, as part of a divorce decree, a parent is ordered to pay a specified amount periodically for the benefit of more than one child, the emancipation of one child does not automatically affect the liability of the parent for the full amount. . . . The proper remedy . . . is to seek a modification of the decree." (Internal quotation marks omitted.) Id. The defendant in the present case already has filed a motion to modify asserting this ground as a basis for modifying his unallocated alimony and child support obligation. When that motion is heard, the parties can litigate the issue of whether the parties took into consideration the children reaching the age of majority when they crafted their agreement regarding financial matters,[10] which is structured in such a way as to have two built-in step-downs: the defendant is required to pay $12,500 monthly for three years, after which he will pay "$7500 per month or *until their youngest son is eighteen years old* . . . ." (Emphasis added.) The present appeal, however, concerns the court's judgment denying a different motion in which this issue was not raised. The defendant has not directed this court to any authority, nor are we aware of any, to support his claim that the court was mandated under Connecticut law to take the ages of his children into consideration when it denied his motion to modify 432, even though that issue was not raised in the motion before the court and the court specifically stated that it would not be deciding the issue pertaining

[10] This issue was suggested by the plaintiff's counsel at the hearing on April 8, 2021, when counsel objected to the defendant's raising the issue of the children reaching a certain age and stated, "Your Honor, I believe this particular factor has been addressed in the original agreement between the plaintiff and the defendant." The plaintiff's appellate counsel also stated at oral argument before this court that this issue was "contemplated by the parties as [referenced] by [the] agreement

to the children reaching the age of majority, which would be adjudicated at a different time, when the defendant's motion to modify 460 raising that issue is heard. Indeed, the court arguably would have acted in abuse of its discretion if it had decided the motion before it on the basis of a ground not raised in the motion. See *Marcus* v. *Cassara*, supra, 223 Conn. App. 83–84.

We also briefly address the assertion by the defendant in his appellate brief and by his appellate counsel at oral argument before this court that evidence and testimony concerning the issue of one of the parties' children reaching the age of majority were presented, without objection, at the hearings in this matter. "[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." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, supra, 167 Conn. App. 517. The present case, however, does not present such a circumstance. First, the record clearly demonstrates that the plaintiff's counsel objected to the court's consideration of the defendant's motion to modify 460 and to the issue of any of the children reaching a certain age being heard at the hearing on April 8, 2021. Second, the only references in the transcripts of the underlying proceedings to one of the parties' children attaining the age of eighteen occurred when the court engaged in a colloquy at the outset of the hearing with the plaintiff's counsel and the defendant, as a self-represented party, to clarify the motions that were being heard at the hearing, which occurred before the court heard testimony on any of the motions. When the court heard testimony on the defendant's motion to modify 432 on March 17, 2022, there was not a single reference to any of the children

reaching the age of majority in any of the testimony presented.

The defendant asserts in his appellate brief multiple times that he introduced testimony regarding the ages of the children, without any citation to the transcripts.[11] See Practice Book § 67-4. It is not clear whether the defendant is asserting that his colloquy with the court and opposing counsel constituted testimony and, thus, evidence concerning the ages of the children. It is well known that "arguments of counsel are not evidence . . . ." *State* v. *Gonzalez*, 188 Conn. App. 304, 317, 204 A.3d 1183 (2019), aff'd, 338 Conn. 108, 257 A.3d 283 (2021). That rule applies equally to the statements and arguments of parties who appear in a self-represented capacity. As this court has stated: "Argument is argument, it is not evidence. . . . So, too, arguments of a pro se litigant are not proof. . . . *In re Justin F.*, 116 Conn. App. 83, 96, 976 A.2d 707, appeal dismissed, 292 Conn. 913, 973 A.2d 660, cert. denied, 293 Conn. 914, 978 A.2d 1109 (2009), cert. denied sub nom. *Albright-Lazzari* v. *Connecticut*, 559 U.S. 912, 130 S. Ct. 1298, 175 L. Ed. 2d 1087 (2010); see also *Baker* v. *Baker*, [95 Conn. App. 826, 832–33, 898 A.2d 253 (2006)] (representations of counsel are not evidence)." (Internal quotation marks omitted.) *Hall* v. *Hall*, 182 Conn. App. 736,

[11] "[A]lthough we recognize and adhere to the well-founded policy to accord leeway to self-represented parties in the appeal process, our deference is not unlimited; nor is a litigant on appeal relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court." *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487, 189 A.3d 1232 (2018). "[I]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 803–804, 256 A.3d 655 (2021)." (Internal quotation marks omitted.) *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022).

756, 191 A.3d 182 (2018), aff'd, 335 Conn. 377, 238 A.3d 687 (2020); see also, e.g., *Berman* v. *Berman*, supra, 203 Conn. App. 313 (self-represented defendant's statements and closing argument at hearing did not constitute evidence).

Nevertheless, any such claim is unavailing given the court's ruling that motion to modify 460, in which the claim concerning the ages of the children was raised, was not before the court and would not be heard at the hearing. Thus, the fact that the children's ages were mentioned during the brief colloquy between the court, the plaintiff's counsel and the defendant had no bearing on the court's decision. We also reject the defendant's argument that he introduced evidence of his children's ages, without objection, through the child support guidelines worksheet he submitted, which shows the dates of birth of the children. First, as this court has stated previously, "[f]acts proved but not averred cannot be made the basis of a recovery . . . . A judgment cannot be founded on a finding of facts not in issue, although they may have been shown in evidence to which no proper objection was taken." (Citation omitted; internal quotation marks omitted.) *Westfall* v. *Westfall*, supra, 46 Conn. App. 185. Second, "[w]hen presented with a motion for modification, *a court must first determine* whether there has been a substantial change in the financial circumstances of one or both of the parties. . . . Second, if the court finds a substantial change in circumstances, it may properly consider the motion and . . . make an order for modification. . . .

"In the context of a trial court's consideration of a motion to modify, *the guidelines become relevant only after a change in circumstances has been shown, if that is the ground urged in support of modification* . . . or in determining whether the existing child support order substantially deviates from the guidelines,

if that is the ground urged in support of modification." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Brown* v. *Brown*, 199 Conn. App. 134, 157–58, 235 A.3d 555 (2020); see also *De Almeida-Kennedy* v. *Kennedy*, 188 Conn. App. 670, 679, 205 A.3d 704 ("because the defendant did not raise as a basis for the court's review his claim that his unallocated alimony and child support obligation substantially deviated from the child support guidelines, the court properly did not make findings under the child support guidelines when it determined that there was not sufficient evidence of a substantial change in circumstances to justify modification"), cert. denied, 332 Conn. 909, 210 A.3d 566 (2019). In the present case, because the ground urged in support of motion to modify 432 was that a substantial change in circumstances had occurred, the guidelines would have been relevant only after such a change in circumstances had been shown, which the defendant failed to do.

Accordingly, we reject the defendant's assertion that the court, in its written order denying motion to modify 432, improperly failed to address the defendant's claim that a reduction in the child support component of the unallocated order was warranted due to the fact that one of the parties' three children had reached the age of majority.

III

The defendant next claims that the court abused its discretion in denying his motion to modify by ignoring the tax returns, financial statements and other financial documents that had been submitted into evidence, and that the court made clearly erroneous factual findings in denying the motion to modify. We are not persuaded.

The following additional facts are relevant to this claim. In its written order denying the defendant's motion to modify 432, the court made the following

findings: "At the time of entering the agreement in May, 2019, the defendant filed a financial affidavit (pleading [number] 408 [on the trial court docket]). He listed gross weekly income of $3867.07 and net weekly income of $2891.99. He listed total liabilities of $1,810,471.69 and total cash value of assets of $231,645. Additionally, he listed total weekly expenses and liabilities of $1486. The defendant list[ed] on his financial affidavit dated [April 5, 2021] (pleading [number] 462 [on the trial court docket]), gross weekly wage at $2423 and his net weekly wage at $1691.51. The defendant list[ed] total weekly expenses and liabilities at $1215 and total liabilities to be $2,160,721. In neither of the defendant's affidavits [did] he list when the debts were incurred or the weekly payments. Taking the defendant's financial affidavit at face value, he pays $812 per week for rent or mortgage and $80 per week for restaurants.

"In 2019, the defendant listed ownership of a house in Weston. He failed to list the value and only the mortgage. In 2022, the home disappeared from his financial affidavit; however, the defendant testified [that] he continued to reside in the home and pay for improvements. The defendant purchased a Mercedes Benz automobile for his employees to drive and a new Jeep for himself. He continues to live an extravagant lifestyle for an individual with failing health and reduced income, as he claims. The defendant asserts a reduction in business income as a result of the pandemic; however, he reduced the payments of alimony and child support prior to the commencement of the pandemic. Moreover, he received pandemic loans and assistance. The court does not find the defendant's testimony credible." The court stated further that "[a] review of the evidence shows the defendant has no issue spending on himself, including meals out, travel and transportation. The defendant paid off significant debts during the period of time he engaged in self-help and reduced his alimony

and child support payments to the plaintiff. The defendant controlled sufficient funds to pay his agreed upon alimony and child support order; however, he unilaterally chose not to do so."

As we stated previously in this opinion, we review the trial court's judgment denying the defendant's motion to modify his unallocated alimony and child support obligation under an abuse of discretion standard. See *Berman* v. *Berman*, supra, 203 Conn. App. 303. That is, we "will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]he trial court's findings [of fact] are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id.

Under § 46b-86 (a), the defendant had the burden, as the party seeking a modification, of establishing a substantial change in circumstances since the last court order, which was the parties' May 2, 2019 agreement. See id., 304. The establishment of a substantial change in circumstances is a condition precedent for the party seeking relief. See id. Only if such a change is established may the court "properly consider the motion and, on the basis of the [General Statutes § 46b-84] criteria, make an order for modification. . . . A finding of a substantial change in circumstances is subject to the

clearly erroneous standard of review." (Internal quotation marks omitted.) Id. In the present case, the trial court, which cited the proper standard in its decision, made no express finding concerning whether a substantial change in circumstances had been established. A fair reading of the court's decision denying the motion to modify, however, leads us to conclude that the court implicitly found that no substantial change in circumstances had been established by the defendant. See id., 310.

On appeal, the defendant first asserts that the court ignored "all tax returns, financial statements, debt statements and hundreds of pages of other financial documents that were in evidence." In particular, the defendant argues that the court improperly ignored the information on his financial affidavit. We do not agree.

Although the defendant argues that the court "ignored" his income and the information set forth on his financial affidavit, it is clear that the court, instead, did not credit that information. See *Gainty* v. *Infantino*, 222 Conn. App. 785, 809–10, 306 A.3d 1171 (2023) (rejecting defendant's argument that court improperly failed to consider financial affidavits when "court expressly found the defendant not credible with respect to his claimed decrease in earnings"), cert. denied, 348 Conn. 948, 308 A.3d 36 (2024); *Giordano* v. *Giordano*, 203 Conn. App. 652, 659, 249 A.3d 363 (2021) (court did not ignore defendant's letters and accounting but, rather, discredited them, and this court would not disturb that credibility determination). In doing so, the court noted that certain information was missing from the defendant's financial affidavit concerning when certain claimed debts were incurred. It also found a discrepancy concerning a home in which the defendant resided, as the defendant listed ownership of the home on his 2019 financial affidavit but the home was not mentioned on the defendant's most current financial affidavit, despite

his testimony that he continued to reside there and pay for improvements. The defendant was questioned extensively about his tax returns and discrepancies on those returns, as well as concerning discrepancies with his revenue and expenses as set forth on an expense summary versus his tax returns, which showed different numbers. Contrary to the defendant's assertions, the court was not required to credit the defendant's updated financial affidavit. See *Talbot* v. *Talbot*, 148 Conn. App. 279, 293–94, 85 A.3d 40, cert. denied, 311 Conn. 954, 97 A.3d 984 (2014). As this court has stated previously, "[c]redibility must be assessed . . . not by reading the cold printed record, but by observing firsthand the witness' conduct, demeanor and attitude. . . . An appellate court must defer to the trier of fact's assessment of credibility because [i]t is the [fact finder] . . . [who has] an opportunity to observe the demeanor of the witnesses and the parties; thus [the fact finder] is best able to judge the credibility of the witnesses and to draw necessary inferences therefrom. . . . Because the trial court is the sole arbiter of witness credibility, it has discretion to reject even uncontested evidence." (Citation omitted; internal quotation marks omitted.) *Blum* v. *Blum*, 109 Conn. App. 316, 329, 951 A.2d 587, cert. denied, 289 Conn. 929, 958 A.2d 157 (2008).

The court also expressly stated in its decision that it did not find the defendant's testimony credible with respect to his claimed decrease in income, and it is not for this court to second-guess that credibility determination. "The trial court . . . is not bound by the uncontradicted testimony of any witness . . . and is in fact free to reject such testimony. . . . [T]he trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility. . . . This court defers to the trial court's discretion in matters of determining credibility and the weight to be

given to a witness' testimony. . . . We cannot retry the matter, nor can we pass on the credibility of a witness." (Citations omitted; internal quotation marks omitted.) *Giulietti* v. *Giulietti*, 65 Conn. App. 813, 878–79, 784 A.2d 905, cert. denied, 258 Conn. 946, 788 A.2d 95 (2001), and cert. denied sub nom. *Vernon Village, Inc.* v. *Giulietti*, 258 Conn. 947, 788 A.2d 97 (2001), and cert. denied, 258 Conn. 947, 788 A.2d 96 (2001), and cert. denied sub nom. *Giulietti* v. *Vernon Village, Inc.*, 258 Conn. 947, 788 A.2d 96 (2001). We, therefore, reject the defendant's claim that the court abused its discretion by ignoring his financial affidavit and other financial documents.

The defendant also asserts that the court made a number of clearly erroneous findings, namely, that the defendant asserted a reduction in his business income as a result of the pandemic, that the defendant paid off significant debts during the time period when he reduced his alimony and child support payments to the plaintiff, that the court did not find his testimony credible, that he continued to live an extravagant lifestyle and that he "controlled sufficient funds to pay the agreed upon alimony and child support order [but] unilaterally chose not to do so."[12] We disagree.

[12] The defendant also asserts, without any analysis, that "[t]he holding [in] *Ferraro* v. *Ferraro*, 168 Conn. App. 723, 147 A.3d 188 (2016), necessitates reversal in this case." In *Ferraro*, this court concluded that the trial court's "finding as to the defendant's weekly net income [was] without evidentiary support" because "[t]he federal and state tax deduction figures used by the court to determine net income, as reflected in its . . . child support guidelines worksheet, did not come from the parties' testimony at trial, the exhibits submitted, or the parties' financial affidavits." Id., 733. We decline to review this claim as inadequately briefed, as the defendant has simply made the conclusory statement that *Ferraro* "necessitates reversal," without any explanation about how the circumstances in *Ferraro* apply to the present case. See *Simms* v. *Zucco*, 214 Conn. App. 525, 546 n.14, 280 A.3d 1226 (When an "assertion is unaccompanied by any supporting analysis . . . we decline to review this claim on the ground that it is inadequately briefed. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 749, 183 A.3d 611 (2018) (declining to review claim asserted in single sentence as inadequately briefed); *Studer* v. *Studer*, 320 Conn. 483, 493 n.11, 131 A.3d 240 (2016)

With respect to the court's finding that "[t]he defendant asserts a reduction in business income as a result of the pandemic; however, he reduced the payments of alimony and child support prior to the commencement of the pandemic," the defendant asserts that his January, 2020 motion to modify did not list COVID-19 as a reason for the modification sought. Nevertheless, in his testimony at the hearing on March 17, 2022, the defendant referred to COVID-19 numerous times. Specifically, he testified that he has health issues and recurring lung problems as a result of having contracted COVID-19 twice, and how that has affected his business, including that it caused him to close down his office. He testified further how all of these issues caused his income to substantially decrease. When asked if he believed that his income had substantially decreased "based on all these factors, COVID-19, your health issues, any other factors [or his] business," he responded that, prior to COVID-19, he started "losing a bunch of business," but that COVID-19 "accentuated all that on top of it." At another point in his testimony the defendant clearly stated, "[COVID-19] affected my business." In summary, the defendant repeatedly referred to COVID-19 in his testimony explaining his purported decrease in income, which was a ground raised in his motion to modify 432. It was not unreasonable, therefore, for the court to find that the defendant, in claiming in his motion to modify that his income had decreased, was asserting COVID-19 as a basis, even though COVID-19 had not been referenced specifically in the motion. We conclude that the court's finding was based on the defendant's testimony and was not clearly erroneous.

The defendant next argues that the court's finding that he "paid off significant debts during the period of

(declining to review claim that was made in four sentences in appellate brief as inadequately briefed)."), cert. denied, 345 Conn. 919, 284 A.3d 982 (2022).

time he engaged in self-help and reduced his alimony and child support payment to the plaintiff" is clearly erroneous. In making that argument, the defendant relies on his financial affidavits as well as his testimony at the hearings. As we stated previously in this opinion, the court reasonably could have found not credible the defendant's testimony and the information in his financial affidavit, and we will not second-guess the court's credibility determinations. This claim, therefore, fails.

Finally, the defendant asserts that the following statements of the court are unsupported by the record: (1) "[t]he court does not find the defendant's testimony credible"; (2) the defendant "continues to live an extravagant lifestyle for an individual with failing health and reduced income as he claims"; and (3) "[t]he defendant controlled sufficient funds to pay the agreed upon alimony and child support order; however, he unilaterally chose not to do so." There is no merit to the defendant's assertions. First, it was within the discretion of the court, as the sole arbiter of witness credibility, to find the defendant's testimony not credible, even if it was uncontested. See *Blum* v. *Blum*, supra, 109 Conn. App. 329. That "credibility finding is unassailable on appeal. See *Ruiz* v. *Gatling*, 73 Conn. App. 574, 576, 808 A.2d 710 (2002) ('[w]here the trial court is the arbiter of credibility, this court does not disturb findings made on the basis of the credibility of witnesses')." *J. Wm. Foley, Inc.* v. *United Illuminating Co.*, 158 Conn. App. 27, 57, 118 A.3d 573 (2015). Second, there was evidence and testimony in the record to support those findings of the court. Given all of the discrepancies in the defendant's claimed expenses and income, one of which amounted to a $40,000 difference, the court's failure to credit the defendant's testimony regarding the decrease in his business income, as well as the evidence and testimony concerning a loan from the defendant to

another individual for $138,000, the court reasonably could have concluded that the defendant had sufficient funds to pay his alimony and child support obligation. Its finding about the defendant's extravagant lifestyle is further supported by the evidence concerning the defendant's purchases of a Mercedes Benz automobile for his employees to drive and a new Jeep for himself, despite the defendant's claims of his reduced income. According to the defendant's testimony, he purchased the Jeep for $40,000. The record also contains the defendant's credit card statements, which provide further evidence of his extensive spending on such things as restaurants, clothing, and home improvements. In fact, the defendant testified that, in 2019, he spent $8600 on clothing, which amounted to about $700 worth of clothing every month, and $16,000 on restaurants. On the basis of this record, we conclude that the court's findings are supported by evidence and are not clearly erroneous.

Accordingly, the defendant has failed to demonstrate that the court erred in denying his motion to modify his unallocated alimony and child support obligation.

The judgment is affirmed.

In this opinion the other judges concurred.

TIMOTHY TOWNSEND *v.* COMMISSIONER OF CORRECTION
(AC 44158)

Moll, Cradle and Westbrook, Js.

Syllabus

Pursuant to statute (§ 54-280a (a) (1)), any individual who has been convicted of an offense committed with a deadly weapon and is released into the community on or after January 1, 2014, shall, following such release, register with the Commissioner of Emergency Services and Public Protection.

Pursuant further to statute (§ 54-280a (a) (2)), prior to accepting a plea of guilty from a person with respect to an offense committed with a deadly weapon, the court shall inform the person that he will be subject to the registration requirement of § 54-280a (a) (1) and understands the consequences of the plea.

The petitioner sought a writ of habeas corpus, claiming his plea of guilty to the charge of murder, under the *Alford* doctrine, was obtained in violation of his due process rights under the state and federal constitutions because he was not canvassed about the requirement that he register, pursuant to § 54-280a, as an offender on the Deadly Weapon Offender Registry (DWOR) upon his release. The petitioner was not canvassed for the DWOR requirement because he was convicted in 2002, and the legislature enacted § 54-280a in 2013. The respondent, the Commissioner of Correction, admitted in his return the petitioner's claim that he would be subject to the registration requirement of § 54-280a upon his release. The habeas court, in denying the petition, found that the failure to advise the petitioner of a collateral consequence that did not exist at the time he entered his plea did not violate his due process rights. On appeal to this court, the petitioner raised the unpreserved claim that he was not required to register as a deadly weapon offender because § 54-280a did not apply to him in connection with his 2002 conviction for murder and sought a judgment declaring that he was not subject to registration on the DWOR on the basis of his underlying conviction. Subsequently, the respondent, despite admitting the petitioner's allegation that he would have to register on the DWOR upon release, deferred to the position of the Department of Emergency Services and Public Protection (department), the agency tasked with establishing and maintaining the DWOR, which was that § 54-280a did not apply to the petitioner. The respondent claimed that the petitioner's appeal was not ripe because he would not likely have to register and that the petition should be remanded to the habeas court and dismissed on ripeness grounds. *Held*:

1. The petitioner's claim was ripe for review: there was a substantial question as to whether § 54-280a applied to the petitioner's 2002 conviction, and that determination would result in practical relief to the petitioner and guide the present conduct of the parties; moreover, the adversity of the parties' interests at the time of the amended petition and return evidenced a justiciable controversy, which has not been rendered moot by the current position of the respondent that § 54-280a did not apply to the petitioner.

2. This court, exercising its supervisory authority to review the petitioner's unpreserved claim, concluded that the habeas court improperly denied the habeas petition because the entire premise of the habeas court's decision, that § 54-280a was applicable to the petitioner's 2002 conviction, was incorrect: the plain and unambiguous text of § 54-280a

expressly limits the registration requirement set forth therein to offenders of eligible crimes who are both convicted of an offense committed with a deadly weapon and released into the community on or after January 1, 2014; moreover, the question of whether the phrase "on or after January 1, 2014," applied to the petitioner's date of conviction or only to the petitioner's date of release, was resolved by reference to the requirement in § 54-280a (a) (2) that a court, prior to accepting a plea of guilty to an eligible charge, canvass a criminal defendant about the registration requirement of § 54-280a, and it necessarily followed that § 54-280a (a) (2) would be rendered meaningless in the context of an otherwise eligible conviction rendered prior to January 1, 2014; furthermore, this interpretation of § 54-280a was consistent with the department's interpretation of the statute, as represented to this court through the respondent's counsel, and its conclusion that the registration requirement of § 54-280a did not apply to the petitioner in relation to his 2002 conviction, a representation that the habeas court did not have the benefit of in making its determination; accordingly, the petitioner was entitled to the reversal of the habeas court's judgment.

Argued January 11—officially released June 18, 2024

Procedural History

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

Timothy Townsend, self-represented, the appellant (petitioner).

Brett R. Aiello, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Sean McGuinness*, assistant state's attorney, for the appellee (respondent).

Opinion

MOLL, J. The self-represented petitioner, Timothy Townsend, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his second amended petition for a writ of habeas corpus, in which he claimed that the

retroactive application of the Deadly Weapon Offender Registry (DWOR) requirement of General Statutes § 54-280a[1] to him renders his underlying guilty plea involuntary. On appeal, the petitioner raises for the first time the precise claim that he is not required to register as a deadly weapon offender because § 54-280a does not apply to him in connection with his 2002 conviction for murder. Exercising our supervisory authority to review this unpreserved claim, we agree and, accordingly, reverse the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. Following events that transpired in 2000, the petitioner was arrested and charged with murder in violation of General Statutes

[1] General Statutes § 54-280a, which the legislature enacted in 2013, provides in relevant part: "(a) (1) Any person who has been convicted . . . of an offense committed with a deadly weapon and is released into the community on or after January 1, 2014, shall, within fourteen calendar days following such release or, if such person is in the custody of the Commissioner of Correction, at such time prior to release as the Commissioner of Correction shall direct, and whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record, residence address and electronic mail address with the Commissioner of Emergency Services and Public Protection, on such forms and in such locations as the Commissioner of Emergency Services and Public Protection shall direct, and shall maintain such registration for five years.

"(2) Prior to accepting a plea of guilty . . . from a person with respect to an offense committed with a deadly weapon, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (B) determine that the person fully understands the consequences of the plea. . . .

"(c) Any person who is subject to registration under this section who violates any provisions of subsection (a) or (b) of this section, except a violation consisting of failure to notify the Commissioner of Emergency Services and Public Protection of a change of name or address, shall be guilty of a class D felony. Any person who is subject to registration under this section who fails to notify the Commissioner of Emergency Services and Public Protection of a change of name or address not later than five business days after such change of name or address shall be guilty of a class D felony."

§ 53a-54a,[2] carrying a pistol without a permit in violation of General Statutes § 29-35 (a),[3] criminal possession of a weapon in violation of General Statutes § 53a-217,[4] and criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c.[5] On May 23, 2002, while represented by counsel, the petitioner entered a guilty plea to one count of murder under the *Alford* doctrine[6] in exchange for a sentence of twenty-five years of incarceration, which plea the trial court, *Fasano*, *J.*, following a canvass, accepted. On August 2, 2002, the court sentenced the petitioner to twenty-five years of incarceration in accordance with the plea agreement, whereupon the state nolled the additional weapons charges. The petitioner did not file a direct appeal from the judgment of conviction.

In August, 2014, the self-represented petitioner commenced the present action by filing a petition for a writ of habeas corpus, in which he claimed (1) ineffective assistance of counsel and (2) "bill of attainder / ex post facto violations due to the [DWOR]. P.A. 13-3 / 13-220." Thereafter, on October 21, 2014, the law firm of Ruane Attorneys at Law appeared on the petitioner's behalf as appointed habeas counsel.

[2] Although § 53a-54a was the subject of amendments in 2012; see Public Acts 2012, No. 12-5, § 7; and in 2015; see Public Acts 2015, No. 15-84, § 9; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] Since the events underlying this appeal, § 29-35 was the subject of several amendments that have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[4] Since the events underlying this appeal, § 53a-217 was the subject of several amendments that have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[5] Since the events underlying this appeal, § 53a-217c was the subject of several amendments that have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

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

On March 1, 2017, the petitioner's appointed counsel filed a motion to withdraw its appearance. In a memorandum of law accompanying the motion to withdraw, the petitioner's counsel submitted that it could not pursue the petitioner's claims in good faith because the claims lacked legal or evidentiary support.[7] On September 10, 2018, the habeas court, *Sferrazza*, *J.*, denied the motion to withdraw (Judge Sferrazza's order). The court stated: "The court agrees that the legal claims as to ineffective assistance of trial and habeas counsel are frivolous. The court also agrees that the [dangerous weapon offender] registration statutes are constitutional. However, it appears that . . . § 54-280a (a) (2) contains a requirement that a convictee be canvassed as to knowledge of the registration obligations before his guilty plea is accepted. The transcript[s] of the 2002 guilty plea lack reference to this requirement, enacted in 2013."

On December 7, 2018, notwithstanding that he was represented by appointed counsel, the petitioner himself filed a motion titled "motion for pretrial ineffective assistance of counsel," in which he claimed in relevant part that his counsel "insist[ed] on approaching the [DWOR] claim by making an argument of ex post facto violation, but the [petitioner] insist[ed] on approaching the [DWOR] claim by making an argument based on the meaning of the statute (i.e., legislative intent)" in an attempt to "keep the claim in unison with [Judge Sferrazza's order] . . . that the . . . statutes are constitutional. . . . The petitioner simply would offer evidence as to the legislature's intention to make the statute prospective or retroactive . . . . [I]f the legislature intended for the statute to be prospective then the current language of . . . § 54-280a (a) (2) is clear and unambiguous and intended for convictees who plead

[7] See *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

guilty on or after the statute's enactment in 2013, which would exclude the petitioner from the registration requirement and obligations. The petitioner's . . . attorney is against making any alternative arguments outside of his ex post facto argument." (Internal quotation marks omitted.) As relief, the petitioner requested that his appointed counsel be replaced with new counsel. A hearing on the petitioner's motion was held on February 15, 2019, whereupon the court, *Newson*, *J.*, treating the motion as a motion for the removal of counsel and for replacement counsel, denied the motion. Following the court's February 15, 2019 ruling, Attorney Dennis V. Mancini of Ruane Attorneys at Law exclusively submitted pleadings and appeared on the petitioner's behalf for the remainder of the proceedings before the habeas court.

On June 3, 2019, the petitioner, through Mancini, filed an amended petition for a writ of habeas corpus, claiming that § 54-280a as applied to him violates guarantees against ex post facto laws and his right to due process under the Connecticut and United States constitutions. On July 29, 2019, the respondent, the Commissioner of Correction, filed a return denying the petitioner's claimed constitutional violations.

On August 9, 2019, the respondent filed a motion to dismiss the amended habeas petition on the basis that the petitioner had failed to state a claim upon which relief can be granted. At the hearing held by the court, *Bhatt*, *J.*, on the respondent's motion to dismiss, Mancini addressed the court and requested leave to file a second amended habeas petition on the basis that "the way [he] drafted the [amended habeas] petition . . . was not in line with what was in . . . [Judge Sferrazza's order]." Specifically, as the court described on the record, "the amended petition as filed d[id] not include the nonfrivolous claim that was identified in [Judge Sferrazza's order] . . . . [T]he amended petition . . .

does not raise th[at] issue." The court subsequently granted the petitioner leave to file a second amended petition and took no action on the motion to dismiss.

Thereafter, on November 7, 2019, the petitioner, through Mancini, filed a one count second amended petition for a writ of habeas corpus (operative petition). In the operative petition, the petitioner alleged that, "[a]s a result of [§ 54-280a], [he] will be required to abide by the [DWOR] upon his release from the Department of Correction." The petitioner alleged that his plea was obtained in violation of his due process rights under the Connecticut and United States constitutions because he was not canvassed when he pleaded guilty to murder in 2002 about the requirement—not yet in effect—that he register as a deadly weapon offender on the DWOR, and, therefore, he did not knowingly and voluntarily enter his plea. The petitioner claimed further that, had he been aware of the registration requirement, he would not have pleaded guilty and would have instead proceeded with a trial. The respondent filed a return on December 27, 2019. The respondent admitted therein, inter alia, the petitioner's allegation that the petitioner would be subject to the requirements of § 54-280a upon his release. In addition, relying on *Ramos* v. *Commissioner of Correction*, 67 Conn. App. 654, 789 A.2d 502, cert. denied, 260 Conn. 912, 796 A.2d 558 (2002), the respondent denied the petitioner's allegations in support of his claim that his plea was not knowingly and voluntarily made in violation of his constitutional right to due process.

The matter was tried to the court on February 10, 2020. The court heard testimony from the petitioner and admitted four transcripts from his criminal proceedings as full exhibits. During trial, the petitioner testified, inter alia, that he was notified by an unspecified individual that he was subject to the registration

requirement of § 54-280a.[8] He also testified that he did not think that he would be bound by the DWOR upon his release from custody, "[b]ut [he] was told, yes."

On February 25, 2020, the court issued a memorandum of decision denying the petitioner's operative petition. The court concluded that the "[f]ailure to advise the petitioner of a collateral consequence . . . that did not exist at the time he entered that plea" does not violate due process. In addressing the petitioner's claim predicated on the assertion that the petitioner would not have pleaded guilty had he known of § 54-280a, the court determined that the statute was not punitive in nature and that registration was a collateral consequence of the petitioner's plea such that the criminal trial court was not constitutionally required to inform the petitioner of the consequences relating to the DWOR. Thereafter, the habeas court granted the petitioner's petition for certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the petitioner raises for the first time the precise claim that the court improperly denied his operative petition because § 54-280a does not apply to him,[9] and he seeks a judgment declaring that he is not subject to the DWOR on the basis of his underlying conviction. The petitioner asks that we exercise our

[8] The petitioner maintains on appeal that the Department of Correction informed him that he was subject to the registration requirement of § 54-280a.

[9] Although the petitioner's appellate brief references the additional claims that were determined to be frivolous by Judge Sferrazza's order, in his conclusion and request for relief, the petitioner states only that he "would like the court to find that the habeas court erred when it found that the petitioner must register as a deadly weapon offender" and to have "the . . . decision overturned, in the interest of justice, and a new trial or directed decision ordered." We therefore construe the petitioner's claim on appeal as challenging the judgment of the habeas court only insofar as it was predicated on the presumption that § 54-280a applied to the petitioner's 2002 conviction.

supervisory authority to review his claim. As we explain subsequently in this opinion, the respondent now defers to the interpretation of the statute by the Department of Emergency Services and Public Protection (DESPP), which is tasked with establishing and maintaining the DWOR; see General Statutes § 54-280 (b); and which, according to the respondent for the first time on appeal, takes the position that § 54-280a does not apply to the petitioner.[10] Nonetheless, the respondent requests that this court (1) remand the case with direction to dismiss the operative petition for lack of subject matter jurisdiction because the petitioner's claim below was not ripe, or (2) alternatively, affirm the judgment of the habeas court.[11]

Before discussing the petitioner's statutory interpretation claim, we set forth the following additional, relevant procedural history. On January 11, 2024, during oral argument before this court, the petitioner, in addressing the viability of his claim raised on appeal,

[10] In his appellee's brief, the respondent states that these representations are "based upon communication with [the DESPP]," and "the [respondent] avers that the DWOR has not historically been applied to individuals in the petitioner's position . . . whose conviction *and* release from incarceration do not *both* occur after January 1, 2014." (Emphasis in original.)

[11] In his appellee's brief, the respondent posits the following arguments: (1) neither the claim contained in the operative petition nor raised on appeal is justiciable because (a) § 54-280a likely does not apply to the petitioner, and (b) even if applicable, the registration obligations occur upon his release, which has yet to happen; (2) the petitioner has abandoned the claim raised in his operative petition, and, in any event, the court properly denied the operative petition on the merits; and (3) the petitioner's claim on appeal is unpreserved and unreviewable because it was not raised in the operative petition, during the habeas proceedings, or addressed by the court in its memorandum of decision.

The respondent argues that the petitioner's claims are unripe because "the . . . claim below was based on the foundational premise that the petitioner will be required in the future to register . . . which has not happened, and may . . . never happen." The respondent also acknowledged that "the petitioner's new claim on appeal is relevant to his position that the petitioner's claim below was premature and unripe . . . ."

asserted that he was improperly precluded from raising the issue of whether § 54-280a applied to his 2002 conviction during the pendency of the habeas action, and iterated his argument that he is not subject to the DWOR pursuant to the language of the statute. In addition, the petitioner represented that he is experiencing pressure from the Department of Correction (department) to comply with the registry requirements while he remains incarcerated, and he seeks a judgment declaring that he is not subject to registration.[12]

During the respondent's argument before this court, counsel for the respondent represented the position of the DESPP that the petitioner is not required to register on the DWOR. Specifically, the respondent's counsel stated: "[T]hat's the official position of the DESPP . . . . I can make that representation as an officer of the court . . . . That is how they've applied it . . . .

"This is the first time we've heard that the [department] told [the petitioner] he would have to go on [the DWOR], and frankly, I'm not disputing what the

[12] The petitioner stated, for example, that "the Department of [Correction] told [him] that, [he] ha[s] to register" or he "would be denied parole . . . if it became available . . . . I'm eligible for a halfway house . . . but, because I'm noncompliant, I could be denied." He also stated that he believed his noncompliance with the DWOR requirement could result in his being "beat[en] up" because "[a]nything that you fail to do that the Department of [Correction] requires . . . there's a penalty behind it within the Department of [Correction]. . . . If they're requiring [me] to register, [I] have to register or there's a penalty for it. . . . It was never said by the [respondent] at the habeas trial that I wouldn't be made to register. What they said is, 'it's ok it's just like the sex offender registry so just do it.' . . . Now . . . they're trying to say [that I don't have to register] just to get [this court] to dismiss . . . then come to me again and say . . . 'you [have] to register.' . . .

"[W]hat the Department of [Correction] does is . . . take away [risk reduction earned credit] time, or parole . . . so what they try do is get somebody to deny a program or requirement that it requires . . . so now . . . they [can] keep you in jail as long as possible . . . . This is what's going on. Whether people want to believe it, they care or they don't care, this is what's going on."

petitioner said . . . someone very well may have told him [that he had to register], but . . . the DESPP is in charge of this registry, and . . . they've represented that [§ 54-280a] simply doesn't apply to the petitioner because his conviction was pre-2014 and, I, I believe . . . that [the DESPP's position] *is supported by the statute as well*. . . . [Its] position *is based . . . on the statute*, that . . . the registry requirement would apply only to a conviction and release from incarceration post-2014. . . .

"[The petitioner] *is right*, but for a different reason. . . . [His claim] *is based on a foundational premise that he would have to register on the DWOR* . . . . This case really should never have gone forward. . . . [T]he habeas trial is what it is. . . . I don't know why that fact wasn't established, but I am representing to this court that, according to the DESPP, he would not have to register." (Emphasis added.)

Following oral argument and on the basis of our review of the record, we ordered, sua sponte, the respondent to file a supplemental memorandum "stating clearly the position of the Commissioner of the Department of [Correction] regarding whether . . . § 54-280a applies to the petitioner in connection with his 2002 conviction for murder." On February 16, 2024, the respondent filed a supplemental memorandum and appended thereto the department's official response to our question. The response provided in relevant part: "[T]he [d]epartment . . . has no official interpretation of this statute . . . . Whether or not [the petitioner] is required to register on the DWOR upon or after his release from incarceration is a matter for [the DESPP] . . . .

"[The department] does not maintain [the DWOR], does not report individuals who are not compliant with that registry, or use the failure to register if required

by law in any determination or decision it makes about an incarcerated person. . . .

"[The department] does not decide whether an individual may be released on parole or the conditions of parole. . . . [The petitioner] may, however, be released . . . prior to his end of sentence through the discretion of the [respondent] under the [respondent's] own release authority. . . . [R]egistration on the DWOR is not a condition or requirement of this community release and does not influence transitional housing or any other aspect of community release. . . .

"[The department] does advise individuals it is releasing . . . of their need to register for the DWOR. This advisement, however, does not affect release or any conditions of release. [The department] bases its advisement on whether outside sources have indicated that there is a registration requirement . . . . [The petitioner's] current computerized record indicates no DWOR requirement . . . .

"As [the department] does not use registration . . . in any of its decisions regarding incarceration or release, it is never called upon to interpret the applicability of . . . [§] 54-280a. It, therefore, respectfully declines to take any official position on whether this statute applies to [the petitioner] and his 2002 murder conviction."

The foregoing representations reflect that the respondent, now almost one decade following the commencement of this habeas petition, defers to the DESPP's position that § 54-280a does not apply to the petitioner; it nevertheless contends that the petitioner is not entitled to relief because, inter alia, his claim is unripe and/or unpreserved. The petitioner requests that we exercise our supervisory authority to entertain his unpreserved claim and grant him relief.

I

Because it implicates subject matter jurisdiction, we first address the respondent's claim that this matter should be remanded to the habeas court with direction to render judgment dismissing the petitioner's operative petition on ripeness grounds.[13] See *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 624, 822 A.2d 196 (2003) ("ripeness is a sine qua non of justiciability," which must be resolved as threshold question of subject matter jurisdiction (internal quotation marks omitted)). For the reasons that follow, we conclude that the case before us is ripe for appellate review.

We begin with the standard of review. "[J]usticiability comprises several related doctrines, namely, standing, *ripeness*, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of a ripeness claim] is plenary. . . .

"[T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, [we] must be satisfied that the

[13] Based on our review of the record, it appears that the respondent did not raise below, and the habeas court did not address, the issue of ripeness. "Our Supreme Court has stated that [o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Board of Education* v. *Bridgeport*, 191 Conn. App. 360, 378–79 n.8, 214 A.3d 898 (2019). Because "ripeness implicates the court's subject matter jurisdiction"; id., 379 n.8; we consider the ripeness issue raised by the respondent on appeal.

case before [us] does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire." (Emphasis in original; internal quotation marks omitted.) *Francis* v. *Board of Pardons & Paroles*, 338 Conn. 347, 358–59, 258 A.3d 71 (2021). We conclude that the case before us satisfies this requirement.

We turn to a review of the evolution that the respondent's position has taken throughout the course of this litigation with regard to the applicability of § 54-280a to the petitioner's 2002 conviction. In his operative petition, the petitioner alleged that, "[a]s a result of [§ 54-280a], [he] will be required to abide by the [DWOR] upon his release from the department . . . ." In his return, the respondent *admitted* that allegation. On appeal, however, the respondent's position changed course. In his principal appellee's brief, the respondent contended that, "[u]pon information and belief, based upon communication with the [DESPP], the [respondent] avers that the DWOR has not historically been applied to individuals in the petitioner's position at all whose conviction *and* release from incarceration do not *both* occur after January 1, 2014. See also General Statutes § 54-280a (a) (1) (use of conjunctive 'and' in stating 'Any person who has been convicted . . . of an offense committed with a deadly weapon *and* is released into the community on or after January 1, 2014 . . . .')." (Emphasis in original.) Thus, the respondent argued that the petitioner's claim below was not ripe because he "likely will not have to" register. In his supplemental memorandum, the respondent's position took a slight shift again, i.e., he "decline[d] to take any official position on whether this statute applies to [the petitioner] and his 2002 murder conviction," in incongruity with the admission in the respondent's return and notwithstanding the court's order to "stat[e] clearly the position of the [respondent] regarding whether . . .

§ 54-280a applies to the petitioner in connection with his 2002 conviction for murder." Instead, the respondent represented that he defers to the interpretation of the statute by DESPP. We highlight at this juncture, however, that, although the DESPP is statutorily tasked with establishing and maintaining the DWOR, the department is not without its own obligations under § 54-280a. That is, § 54-280a (a) (1) provides that an eligible convictee, "if such person is in the custody of the Commissioner of Correction," shall register with the DWOR "at such time prior to release as the Commissioner of Correction shall direct . . . ."

This background evidences a justiciable controversy where the parties' interests were adverse at the time of the operative petition and return, and the adversity of their interests has not been rendered moot by the current position of the respondent. See *Stafford* v. *Commissioner of Correction*, 207 Conn. App. 85, 93–98, 261 A.3d 791 (2021). There remains a substantial question in dispute, which we now resolve, as to whether § 54-280a applies to the petitioner's 2002 conviction—a determination that results in practical relief to the petitioner and a guide to the present conduct of the parties. In sum, we conclude that the petitioner's claim is ripe for review.

II

We now turn to the merits of the petitioner's claim that § 54-280a does not apply to his 2002 conviction. As our Supreme Court has explained, "in addition to the authority to review unpreserved claims under the plain error doctrine and [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015)], a reviewing court has the authority to review such claims under its supervisory power." (Emphasis omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown &*

Brown of Connecticut, Inc., 311 Conn. 123, 155, 84 A.3d 840 (2014). "It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Three criteria must be met in order for this court to consider exercising its supervisory authority: (1) the record must be adequate for review; (2) all parties must be afforded an opportunity to be heard on the issue; and (3) review of an unpreserved claim must not prejudice a party. . . . If these three threshold considerations are satisfied, the reviewing court next considers whether one of the following three circumstances exists: (1) the parties do not object; (2) the party that would benefit from the application of this court's supervisory powers cannot prevail; or (3) a claim of exceptional circumstances is presented that justifies deviation from the general rule that unpreserved claims will not be reviewed." (Citations omitted; internal quotation marks omitted.) *In re Jacquelyn W.*, 169 Conn. App. 233, 239, 150 A.3d 692 (2016); see also *Bridgeport* v. *Freedom of Information Commission*, 222 Conn. App. 17, 36–37, 304 A.3d 481 (2023) (exceptional circumstances may justify review of unpreserved claim by reviewing court), cert. denied, 348 Conn. 936, 306 A.3d 1072 (2024). We also note that "a reviewing court, although not *bound* to consider a claim that was not raised to the trial court, may do so at its discretion. . . . We are unaware of any statutory or procedural rule limiting that discretion." (Emphasis in original; internal quotation marks omitted.) *Curley* v. *Phoenix Ins. Co.*, 220 Conn. App. 732, 743–44, 299 A.3d 1133, cert. denied, 348 Conn. 914, 303 A.3d 260 (2023).

The threshold requirements for the exercise of our supervisory authority to review the petitioner's unpreserved claim are satisfied in this case, as (1) the record is adequate to review the claim, (2) the parties have been afforded an opportunity to be heard on the claim, and (3) we discern no prejudice to any party resulting from our review of the claim, particularly given that the respondent no longer contends that § 54-280a applies to the petitioner. In addition, we conclude that there are exceptional circumstances justifying review of this unpreserved claim, as determining the applicability of § 54-280a to the petitioner would serve the important interests of judicial efficiency, clarity in the law, and the fair administration of justice. See *Stafford* v. *Commissioner of Correction*, supra, 207 Conn. App. 96 ("the petitioner would benefit from a judicial determination of [parole] eligibility because it is an enforceable judgment that would ensure that [he] would not need to seek such a declaration by a court in the future if the respondent or the department were again to change their position"). Moreover, although the respondent has represented that, according to the DESPP, § 54-280a does not apply to the petitioner, "the notion that no actual controversy between the parties exists regarding the issue of the petitioner's eligibility is somewhat belied by this appeal. . . . [I]f there truly is no dispute between the parties on the issue . . . the parties could have so stipulated at any time, or the respondent could have confessed to a judgment in the petitioner's favor in the habeas court." Id., 97–98. Accordingly, we exercise our supervisory authority to address the petitioner's unpreserved claim.

The following legal principles are relevant to our resolution of the petitioner's claim. "Whether a habeas court properly [denied] a petition for a writ of habeas corpus presents a question of law over which our review is plenary. . . . [When] the legal conclusions of the

court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) Id., 100.

Resolving the petitioner's claim requires us to construe § 54-280a, which presents a question of statutory interpretation subject to plenary review. See *Keller* v. *Beckenstein*, 305 Conn. 523, 532, 46 A.3d 102 (2012) ("[i]ssues of statutory interpretation constitute questions of law over which the court's review is plenary" (internal quotation marks omitted)). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Bridgeport* v. *Freedom of Information Commission*, supra, 222 Conn. App. 48.

"It is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Internal quotation marks omitted.) *Barry* v. *Quality Steel Products, Inc.*, 280 Conn. 1, 9, 905 A.2d 55 (2006). Applying this principle to § 54-280a, and for the reasons that follow, we conclude that, in

order for a convictee to be subject to the registration requirements of § 54-280a, both the conviction date and the release date must be on or after January 1, 2014.

We now turn to the text of the relevant statutes. Section 54-280 charges the DESPP with "establish[ing] and maintain[ing] a registry of all persons required to register under section 54-280a as offenders convicted of an offense committed with a deadly weapon. . . ." General Statutes § 54-280 (b). Section 54-280a (a) (1) sets forth the eligibility requirements that, when met, subject an individual to registration on the DWOR and provides that "[a]ny person who has been convicted . . . of an offense committed with a deadly weapon *and* is released into the community *on or after January 1, 2014*, shall . . . following such release or, if such person is in the custody of the Commissioner of Correction, at such time prior to release as the Commissioner of Correction shall direct, and whether or not such person's place of residence is in this state, register such person's name, identifying factors, criminal history record, residence address and electronic mail address with the [DESPP] . . . ." (Emphasis added.) Because the petitioner was convicted prior to January 1, 2014, but could only be released into the community sometime after January 1, 2014, the specific statutory question before us is whether the phrase "on or after January 1, 2014," applies to the petitioner's date of conviction or only to the petitioner's date of release.

The next subdivision, § 54-280a (a) (2), is instructive on this question and provides that, "[p]rior to accepting a plea of guilty or nolo contendere from a person with respect to an offense committed with a deadly weapon, the court shall (A) inform the person that the entry of a finding of guilty after acceptance of the plea will subject the person to the registration requirements of this section, and (B) determine that the person fully

understands the consequences of the plea." Because this subdivision requires a court, prior to accepting a plea of guilty or nolo contendere to an eligible charge, to canvass a criminal defendant about the registration requirements of § 54-280a, the violation of which constitutes a class D felony, it necessarily follows that the conviction date referenced in subdivision (a) (1) must be on or after January 1, 2014. To conclude otherwise would render subdivision (a) (2) meaningless in the context of an otherwise eligible conviction rendered prior to January 1, 2014. See *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 474, 28 A.3d 958 (2011) ("[I]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . [I]n construing statutes, we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous." (Internal quotation marks omitted.)). That is, the court, when canvassing the petitioner in 2002 with respect to his guilty plea, could not have complied with the additional canvass requirement set forth in § 54-280a, enacted in 2013.

In sum, the plain and unambiguous text of § 54-280a expressly limits the registration requirements set forth therein to offenders of eligible crimes who are both "convicted . . . of an offense committed with a deadly weapon *and* . . . released into the community *on or after January 1, 2014* . . . ." (Emphasis added.) General Statutes § 54-280a (a) (1). This reading of the statute is consistent with the DESPP's interpretation of the statute, as represented to this court through the respondent's counsel and its conclusion that the registration requirement of § 54-280a does not apply to the petitioner in relation to his 2002 conviction.

In reaching its conclusion on the petitioner's claim below, the habeas court did not have the benefit of

the respondent's representation that, according to the DESPP, § 54-280a does not apply to the petitioner's 2002 conviction. As the respondent indicated in his supplemental memorandum and as the record reflects,[14] the court "appeared to assume, without explicitly making a finding, that the petitioner would be required to register on the DWOR" in rendering its decision on the petitioner's operative petition. Therefore, the court, through no fault of its own and relying on Judge Sferrazza's order, did not correctly apply the law when it determined that § 54-280a, as applied to the petitioner's 2002 conviction, did not violate the petitioner's right to due process. Thus, the petitioner is entitled to the reversal of the habeas court's judgment.

In sum, understanding that the exercise of our supervisory powers under these circumstances is an extraordinary remedy, we conclude that the habeas court improperly denied the petitioner's operative petition because the entire premise of the habeas court's decision, that § 54-280a is applicable to the petitioner's 2002 conviction, was incorrect.

The judgment is reversed and the case is remanded with direction to render judgment stating that General Statutes § 54-280a does not apply to the petitioner with respect to his 2002 conviction.

In this opinion the other judges concurred.

[14] For example, in its legal analysis, the court set forth the questions that it considered "[t]o determine whether the . . . failure to inform the petitioner that *he would be required to register* on [the DWOR] renders that plea involuntary . . . ." (Emphasis added.) In addition, and as discussed in this opinion, the petitioner filed his second amended petition because his prior amended petition did not contain the only claim identified in Judge Sferrazza's order as nonfrivolous, namely, that the petitioner was not canvassed on § 54-280a at the time he entered his guilty plea. In addressing the request to amend the petition, the court stated that it had "no choice but to allow [the petitioner] to amend the petition to conform to that ruling. Otherwise . . . essentially, it is ineffective assistance of counsel for failing to do that."

JAMES DEMARCO *v.* CHARTER OAK TEMPLE RESTORATION ASSOCIATION, INC.
(AC 46099)

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

Syllabus

The plaintiff appealed to this court from the judgment rendered for the defendant employer on the plaintiff's claim for employment discrimination pursuant to the Connecticut Fair Employment Practices Act (CFEPA) (§ 46a-51 et seq.). The defendant terminated the plaintiff's employment shortly after the plaintiff took a leave of absence to be with his newborn son. The son suffered from various ailments, all allegedly serious medical conditions that rendered him physically disabled within the meaning of CFEPA. The plaintiff alleged in his complaint that the defendant had violated a provision (§ 46a-60 (b) (1)) of CFEPA when it terminated the plaintiff's employment because of his association with a disabled individual, namely, his son. The trial court granted the defendant's motion to strike the operative complaint on the ground that § 46a-60 (b) (1) did not apply to claims of discrimination arising from an employee's association with a physically disabled individual. *Held* that the trial court properly concluded that CFEPA does not create a cause of action for associational discrimination: although the plain and unambiguous language of § 46a-60 (b) (1) clearly protects physically disabled employees from being discharged from their employment on account of their own physical disabilities, there is no language in § 46a-60 (b) (1) or elsewhere in CFEPA that extends protection to employees who, though not physically disabled themselves, associate with physically disabled individuals; moreover, although CFEPA is remedial in nature and, therefore, must be interpreted, whenever reasonably possible, to effectuate the beneficent purpose of eliminating employment related discrimination, that principle of statutory construction did not authorize this court to ignore the plain language of § 46a-60 (b) (1) and the limits that the language places on achieving this purpose; furthermore, the application of the plain and unambiguous language of § 46a-60 (b) (1) does not lead to bizarre or unreasonable results and the statute as literally construed reaches the entire protected class of employees who have physical disabilities.

Argued December 4, 2023—officially released June 18, 2024

Procedural History

Action to recover damages for employment discrimination, and for other relief, brought to the Superior

Court in the judicial district of Hartford, where the court, *Rosen*, *J.*, granted the defendant's motion to strike; thereafter, the court, *Rosen*, *J.*, granted the plaintiff's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

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

Bernard E. Jacques, with whom was *Lauren T. Graham*, for the appellee (defendant).

Opinion

PALMER, J. The plaintiff, James Demarco, appeals from the judgment of the trial court rendered in favor of the defendant, Charter Oak Temple Restoration Association, Inc., following the granting of the defendant's motion to strike the plaintiff's revised complaint. The revised complaint alleged that the defendant violated General Statutes § 46a-60 (b) (1),[1] a provision of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq., by terminating the plaintiff's employment because of his association with a disabled individual. On appeal, the plaintiff claims that

[1] General Statutes § 46a-60 provides in relevant part: "(b) It shall be a discriminatory practice in violation of this section:

"(1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence . . . ."

Section 46a-60 was amended after the plaintiff's employment was terminated in 2018; see, e.g., Public Acts 2019, No. 19-16, § 4; and again after he initiated this action in 2021; see, e.g., Public Acts 2022, No. 22-78, §§ 7 and 8; but those changes are not relevant to this appeal. For convenience, we refer to the current revision of § 46a-60.

the trial court improperly concluded that his allegations failed to state a valid cause of action under CFEPA because, as the court determined, CFEPA does not recognize claims for associational discrimination on the basis of disability. We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following procedural history and facts, as alleged in the plaintiff's revised complaint,[2] are relevant to our resolution of the issue on appeal. The plaintiff had been employed by the defendant as a programming coordinator since March 25, 2017. The plaintiff was qualified for that job, was not inattentive at work and performed his job well. At some point prior to November 7, 2018, the plaintiff took a leave of absence from work to be with his newborn son, who suffered from jaundice, lip tie and silent reflux, all serious medical conditions that rendered his son physically disabled within the meaning of CFEPA. On November 7, 2018, the defendant terminated the plaintiff's employment. During the plaintiff's termination meeting, the defendant made reference to the fact that the plaintiff's son was ill. The defendant believed that the plaintiff's association with his disabled son would cause the plaintiff to be inattentive at work.

In response to the defendant's actions, the plaintiff filed a complaint with the Commission on Human Rights and Opportunities (commission) on May 3, 2019. The commission issued a release of jurisdiction on October 29, 2020, and on January 27, 2021, the plaintiff commenced this action alleging that the defendant "violated [CFEPA] when [it] terminated the [plaintiff's employment] because of his association with a disabled individual," namely, his son. The plaintiff filed a revised complaint on May 24, 2021, and the defendant filed a motion

[2] "[I]n ruling on a motion to strike, we take the facts alleged in the complaint as true." (Internal quotation marks omitted.) *Ring* v. *Litchfield Bancorp*, 174 Conn. App. 813, 815, 167 A.3d 462 (2017).

to strike the revised complaint in its entirety. In support of its motion, the defendant argued that the plain language of CFEPA does not prohibit discrimination on the basis of an employee's association with a disabled individual. The plaintiff filed an objection to the defendant's motion in which he argued that "CFEPA permits claims to be brought by individuals not specifically included in CFEPA's list of protected classes" and that, consequently, he had properly stated a claim for associational discrimination. The defendant subsequently filed a reply to the plaintiff's objection.

On February 10, 2022, the court, *Rosen*, *J.*, granted the defendant's motion to strike. The court concluded that § 46a-60 (b) (1) is "clear and unambiguous" and, by its plain language, "applies only to discrimination based on [a plaintiff's own] disabilities, not to alleged discrimination based on [a plaintiff's] association with an individual with a disability." In support of its conclusion, the court observed that, "when the legislature intended to broaden the scope of a discrimination statute to include persons associated with a disability, it expressly did so," as exemplified by General Statutes § 46a-64c (a) (6) (A) and (B), which prohibits associational discrimination in the housing context. The plaintiff thereafter filed a motion for judgment, which the court granted on December 5, 2022. This appeal followed.

On appeal, the plaintiff claims that the court's conclusion that CFEPA does not prohibit disability discrimination by association derives from too narrow an interpretation of § 46a-60 (b) (1) and defeats its remedial purpose. The defendant responds that the plain language of § 46a-60 (b) (1) leaves no room for interpretation. It argues that § 46a-60 (b) (1) clearly and unambiguously provides protection from discrimination to individuals who themselves have physical disabilities but not to individuals based upon their association with

other individuals who have physical disabilities. We agree with the defendant that CFEPA does not create a cause of action for associational discrimination as the plaintiff contends.

We begin our analysis by setting forth our standard of review and the legal principles relevant to our resolution of this claim. "The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. . . . [The court takes] the facts to be those alleged in the complaint . . . and [construes] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover . . . [w]hat is necessarily implied [in an allegation] need not be expressly alleged. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Mashantucket Pequot Tribal Nation* v. *Factory Mutual Ins. Co.*, 224 Conn. App. 429, 441–42, 313 A.3d 1219 (2024).

In the present case, the court granted the defendant's motion to strike because it concluded that CFEPA, and § 46a-60 (b) (1) more specifically, does not apply to claims of discrimination arising from an employee's association with a physically disabled individual. Analysis of this legal conclusion presents a question of statutory construction over which we exercise plenary review. See *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 782, 105 A.3d 103 (2014).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent

of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. General Statutes § 1-2z." (Citation omitted; internal quotation marks omitted.) *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 83–84, 282 A.3d 1253 (2022). "[A] statute is plain and unambiguous when the meaning . . . is so strongly indicated or suggested by the [statutory] language . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning. . . . [I]f the text of the statute at issue . . . would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021).

We now turn to the language of § 46a-60 (b), which provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (1) For an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or *to discharge from employment any individual* or to discriminate against any individual in compensation or in terms, conditions or privileges of employment *because of the individual's* race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability,

physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence . . . .'' (Emphasis added.) These plain and unambiguous terms prohibit employers from ''discriminating against any employee or prospective employee in the terms, conditions or privileges of employment.'' *McWeeny* v. *Hartford*, 287 Conn. 56, 67, 946 A.2d 862 (2008). With respect to a discrimination claim based on disability, § 46a-60 (b) (1) prohibits an employer from ''discharg[ing] from employment any individual . . . because of *the individual's* . . . physical disability . . . .''[3] (Emphasis added.) The use of the term ''individual's'' as a possessive noun attached to ''physical disability'' plainly establishes that the ''physical disability'' is that of the employee. See *Glastonbury Volunteer Ambulance Assn., Inc.* v. *Freedom of Information Commission*, 227 Conn. 848, 852, 633 A.2d 305 (1993) (construing statute ''in the light of ordinary rules of English grammar and sentence structure''). This language evinces only one meaning—that § 46a-60 (b) (1) protects physically disabled employees from being discharged from their employment on account of their own physical disabilities. See *Ledyard* v. *WMS Gaming, Inc.*, supra, 338 Conn. 698 n.6; see also *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 775 (''[u]nder [CFEPA] . . . employers may not discriminate against certain protected classes of individuals, including those who are physically disabled'').

Moreover, as the plaintiff recognizes, there is no language in § 46a-60 (b) (1), or elsewhere in CFEPA, that extends protection to employees who, though not physically disabled themselves, associate with physically disabled individuals. ''[I]t is a well settled principle of statutory construction that the legislature knows how to

[3] General Statutes § 46a-51 provides in relevant part: ''(15) 'Physically disabled' refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to,

convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so." (Internal quotation marks omitted.) *Costanzo* v. *Plainfield*, 344 Conn. 86, 108, 277 A.3d 772 (2022). In fact, as the trial court observed, the legislature did precisely that in § 46a-64c (a) (6) (A) and (B), pertaining to discrimination in housing practices. Section 46a-64c (a) (6) (A) and (B) expressly prohibits discrimination in connection with the sale or rental of a dwelling to any buyer or renter because of, inter alia, "a . . . physical . . . disability of . . . any person associated with such buyer or renter. . . ." This supports the conclusion that, if the legislature had intended to include disability discrimination by association within the purview of CFEPA, it would have conveyed that intent expressly. Indeed, "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (Internal quotation marks omitted.) *State* v. *Cody M.*, 337 Conn. 92, 103, 259 A.3d 576 (2020).

A long-standing distinction between CFEPA and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. (2018), buttresses this conclusion. See *Evening Sentinel* v. *National Organization for Women*, 168 Conn. 26, 35 n.5, 357 A.2d 498 (1975) ("we follow the usual rule in statutory interpretation that the difference between the state and federal acts was purposeful and is meaningful"). The ADA prohibits discrimination on the basis of physical disability at the federal level and, unlike CFEPA, it expressly prohibits employers from "excluding or otherwise denying equal jobs or benefits to a qualified individual *because of the known disability of an individual with whom the qualified individual is known to have a relationship*

epilepsy, deafness or being hard of hearing or reliance on a wheelchair or other remedial appliance or device . . . ."

or association . . . ." (Emphasis added.) 42 U.S.C. § 12112 (b) (4) (2018). The ADA was enacted in 1990; see Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; and, although our legislature has amended CFEPA several times since 1990, it has not adopted the same or similar language. This strongly suggests that our legislature intended to maintain this distinction between CFEPA and the ADA and that its decision not to include associational discrimination within the scope of CFEPA was purposeful. See *Beason* v. *United Technologies Corp.*, 337 F.3d 271, 277–78 (2d Cir. 2003) ("Given that the definition of disability used by the ADA essentially pre-dates the definition of physical disability promulgated by the Connecticut General Assembly for [CFEPA], the General Assembly, had it wished to do so, could have adopted the ADA definition. The fact that the General Assembly chose not to adopt that language readily supports an inference that the Connecticut legislature appreciated the scope of the ADA definition and intended the CFEPA definition to be different."); *Wallace* v. *Caring Solutions, LLC*, 213 Conn. App. 605, 625–26, 278 A.3d 586 (2022) (legislature's failure to alter causation standard for CFEPA discrimination claims to comport with standards employed at federal level, despite having amended CFEPA numerous times, was indicative of its intention to maintain existing standard). We conclude, for these reasons, that § 46a-60 (b) (1), by its plain and unambiguous terms, does not prohibit disability discrimination by association.

The plaintiff argues, nonetheless, that we should construe § 46a-60 (b) (1) "to include the protection of employees from associational disability discrimination even though such protection is not explicitly stated" therein. He relies primarily on "CFEPA's remedial purpose" and argues that the "broad interpretation" he advocates furthers the legislature's intent to "stamp out

employment discrimination in all of its forms." He also places great emphasis on our Supreme Court's decision in *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 773, the Massachusetts Supreme Judicial Court's decision in *Flagg* v. *AliMed, Inc.*, 466 Mass. 23, 992 N.E.2d 354 (2013), and cases construing Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. We are not persuaded by the plaintiff's arguments.

With respect to the plaintiff's reliance on CFEPA's remedial purpose, "[i]t is axiomatic that remedial statutes should be construed liberally in favor of those whom the law is intended to protect . . . ." (Internal quotation marks omitted.) *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 338 Conn. 803, 815, 259 A.3d 1157 (2021). To this end, we acknowledge that CFEPA generally reflects this state's laudable public policy to eliminate employment related discrimination. See, e.g., *McWeeny* v. *Hartford*, supra, 287 Conn. 70; *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 706, 802 A.2d 731 (2002). Even so, "[a]lthough we agree that the important and salutary public policy expressed in the antidiscrimination provisions of [§ 46a-60 (b) (1)] cannot be overstated . . . the plain language of [§ 46a-60 (b) (1)] limiting its protections to [the class of persons identified therein] is, itself, an expression of public policy that cannot be separated from the policy reflected in the [statute's] ban on discriminatory employment practices." (Citation omitted; internal quotation marks omitted.) *McWeeny* v. *Hartford*, supra, 70. "[O]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [W]e are not free to accomplish a result that is contrary to [that] intent . . . ." (Citation omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 165, 140 A.3d 190 (2016).

Construing § 46a-60 (b) (1) as the plaintiff proposes would contravene, not further, the legislature's clearly expressed intent. Although CFEPA is remedial in nature and, therefore, must be interpreted, whenever reasonably possible, to effectuate the beneficent purpose of eliminating employment related discrimination, that principle of statutory construction does not authorize this court to ignore the plain language of § 46a-60 (b) (1) and the limits that the language places on achieving this purpose. See *Doe* v. *Stamford*, 241 Conn. 692, 697, 699 A.2d 52 (1997) ("[a]lthough the parties . . . called . . . attention to the public policy implication of [the] case, the issue presented [was], at bottom, a matter of statutory construction"). As we have explained, § 46a-60 (b) (1) clearly and unambiguously limits the class of individuals CFEPA protects from employment discrimination based upon a physical disability to those who are, themselves, physically disabled. It is the province of the legislature, not this court, to determine whether to expand this class by adding disability discrimination by association to the list of practices § 46a-60 (b) (1) prohibits. See *Stratford Police Dept.* v. *Board of Firearms Permit Examiners*, 343 Conn. 62, 73, 272 A.3d 639 (2022) ("it is well settled that [this court is] not permitted to supply statutory language that the legislature may have chosen to omit" (internal quotation marks omitted)).

The case law upon which the plaintiff relies to support his argument that we should read protection against disability discrimination by association into CFEPA also is unpersuasive. Turning first to our Supreme Court's opinion in *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 773, the plaintiff argues that the court in that case broadly construed CFEPA to protect individuals who were *perceived* as disabled even though "such protection [was] not explicitly stated" and that we should apply the same logic "in

order to permit [his] claim of disability discrimination by association." The plaintiff's reliance on *Desrosiers* is misplaced.

In *Desrosiers*, the plaintiff's employer terminated her employment the day after she informed her manager that she would need time off to have surgery to address a tumor on her shoulder. *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 777. She brought an action in which she alleged, among other things, that her employer had discriminated against her on the basis of her "physical disability and/or her perceived disability." Id., 778. The trial court granted the employer's motion for summary judgment to the extent the plaintiff alleged a cause of action based on a perceived disability because "a cause of action based on a perceived disability is not a legally recognized action in Connecticut." (Internal quotation marks omitted.) Id. The disputed issue on appeal was whether CFEPA's prohibition against discrimination based on an "individual's . . . physical disability" pertained only to individuals who, in fact, had physical disabilities or whether those individuals who were merely perceived by their employers as being physically disabled were protected as well. Id., 775.

After examining the pertinent provisions of § 46a-60, the court in *Desrosiers* concluded that the statute's plain text did "not protect individuals who are perceived to be physically disabled from employment discrimination . . . ." Id., 784. The court explained, however, that a literal application of that language to the facts in *Desrosiers* would lead to bizarre results. Id., 785–86. The court reasoned that, "under the plain [statutory] language . . . if an employee has a chronic disease, the employer may not discharge the employee on that basis. If, however, the employee is undergoing testing that leads his employer to believe that he has a chronic disease, the literal terms of [the statute] do not protect

the employee from discharge on that basis, despite the fact that the employer's action, in both cases, was premised on the same discriminatory purpose. Similarly . . . an employee who is discharged because his employer believes a rumor that he has a chronic impairment can pursue a cause of action, but only if the rumor is true and the employee actually *has* the chronic impairment. If the rumor is false, and the employee does not have the impairment, but is merely believed to have the impairment, the employee has no recourse, despite the fact that in either case the employer's action was based on the same discriminatory motive." (Emphasis in original.) Id., 785. In other words, it should not matter whether the physical disability was perceived or actual because either way the employer's actions would be predicated on the "individual's . . . physical disability." A literal application of the statutory language to the facts in *Desrosiers*, however, would not have prohibited all discriminatory actions based upon an "individual's . . . physical disability," and thus some members of the protected class would have been left vulnerable to discrimination and without recourse.

Because that interpretation would have led to an absurd and unworkable result, the court considered extratextual evidence to assist in its construction of the statute and, after doing so, held that CFEPA also "protects individuals who are perceived to be physically disabled from employment discrimination . . . ." *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 781. The court did not broadly construe CFEPA's plain and unambiguous language to add a new protected class of persons that the legislature did not identify. Rather, it interpreted CFEPA in accordance with the well settled rules of statutory construction to give effect to the "legislature's clear statement that discrimination based on [an individual's] physical disability is prohibited" and concluded that it applied to all the members of that

protected class. (Internal quotation marks omitted.) Id., 785–86.

In the present case, the application of the plain and unambiguous language of § 46a-60 (b) (1) does not lead to bizarre or unreasonable results and the plaintiff does not argue otherwise. Applied literally, § 46a-60 (b) (1) allows employees to bring discrimination claims based on their own protected conditions, including, but not limited to, their own physical disabilities. As applied to the facts of this case, and unlike the situation in *Desrosiers*, the statute as literally construed reaches the entire protected class of employees who have physical disabilities. Although the plaintiff is an employee, he does not have a physical disability. Likewise, although the plaintiff's son has a physical disability, he is not an employee or a prospective employee. Thus, neither is a member of the protected class and, consequently, *Desrosiers* provides no support for the position advocated by the plaintiff.

Nor does *Flagg* v. *AliMed, Inc.*, supra, 466 Mass. 23, advance the plaintiff's cause. In *Flagg*, the Massachusetts Supreme Judicial Court held that claims for associational discrimination based on a handicap fit within the scope of the Commonwealth's antidiscrimination statutory scheme even though the applicable statutory provision, Mass. Gen. Laws c. 151B, § 4 (16) (2012), did not expressly identify such claims as a form of unlawful employment discrimination. Id., 24. In reaching this conclusion, the court recited the relevant statutory language[4] and "[t]he general and familiar rule . . . that a

[4] The court in *Flagg* was interpreting the following pertinent language from Mass. Gen. Laws c. 151B, § 4 (16) (2012), which makes it unlawful "[f]or any employer, personally or through an agent, to dismiss from employment or refuse to hire, rehire or advance in employment or otherwise discriminate against, *because of his handicap, any person alleging to be a qualified handicapped person*, capable of performing the essential functions of the position involved with reasonable accommodation, unless the employer can demonstrate that the accommodation required to be made to the physical or mental limitations of the person would impose an undue hardship to the

statute must be interpreted according to the intent of the [l]egislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished." (Internal quotation marks omitted.) Id., 28. The court then looked to the purpose and objectives of the statute before "return[ing] to the language of" the statute; id., 31; and evaluating that language "in the context of the overarching purpose of the statute itself." Id., 28. The court did not assess, in the first instance, the text of the statute to ascertain whether that text was plain and unambiguous and, if so, whether its application yielded absurd or unworkable results, before turning to extratextual evidence, as we are required to do. See, e.g., *Desrosiers* v. *Diageo North America, Inc.*, supra, 314 Conn. 785; see also *State* v. *Ruocco*, 151 Conn. App. 732, 753–54, 95 A.3d 573 (2014) ("Section 1-2z directs us to determine the meaning from the text of the statute itself and its relationship to other statutes. If, after doing so, the term is plain and unambiguous then our inquiry ends and extratextual evidence shall not be considered."), aff'd, 322 Conn. 796, 144 A.3d 354 (2016); *Matamoros* v. *Broward Sheriff's Office*, 2 F.4th 1329, 1332–33 (11th Cir. 2021) (plain language of Florida Civil Rights Act of 1992, Fla. Stat. § 760.01 et seq., does not prohibit discrimination based on plaintiff's association with disabled individual); *Barnett* v. *Central Kentucky Hauling, LLC*, 617 S.W.3d 339, 341–42 (Ky. 2021) (plain language of Kentucky Civil Rights Act, Ky. Rev. Stat. Ann. § 344.010 et seq., does not create cause of action for associational discrimination). As set forth herein, the plain text of § 46a-60 (b) (1) and its relationship to other Connecticut statutes provide no indication that CFEPA prohibits

employer's business . . . ." (Emphasis in original; internal quotation marks omitted.) *Flagg* v. *AliMed, Inc.*, supra, 466 Mass. 27–28.

disability discrimination by association. Accordingly, *Flagg* is not persuasive precedent for purposes of our resolution of the present case.

Finally, the plaintiff relies on Title VII[5] and the decisions by courts that, he claims, have interpreted it "to ban [associational] discrimination." Although courts have recognized associational discrimination as a violation of Title VII, the circumstances in which they have done so involve allegations of discrimination due to *the employee's own protected condition*. See, e.g., *Zarda* v. *Altitude Express*, *Inc.*, 883 F.3d 100, 128 (2d Cir. 2018) (recognizing violation of Title VII for associational discrimination based on sex and holding that "sexual orientation discrimination . . . is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee *based on their own sex*" (emphasis added)), aff'd sub nom. *Bostock* v. *Clayton County*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020); *Holcomb* v. *Iona College*, 521 F.3d 130, 139 (2d Cir. 2008) ("where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race" (emphasis in original)); *Parr* v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition,

[5] "In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. . . . The text of Title VII provides, in relevant part:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." (Citation omitted; internal quotation marks omitted.) *Zarda* v. *Altitude Express*, *Inc.*, 883 F.3d 100, 111 (2d Cir. 2018), aff'd sub nom. *Bostock v. Clayton County*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

that he has been discriminated against *because of his race*" (emphasis altered)). Here, the plaintiff is not alleging discrimination based upon his own protected condition but, rather, the protected condition of someone else.

For these reasons, we conclude that the court properly granted the defendant's motion to strike because § 46a-60 (b) (1), by its plain and unambiguous terms, does not prohibit disability discrimination by association.

The judgment is affirmed.

In this opinion the other judges concurred.

FINOCCHIO BROTHERS, INC. *v.* 587 CTA, LLC
(AC 46392)

Alvord, Seeley and Bear, Js.

Syllabus

The plaintiff, a provider of refuse hauling and recycling services, sought to recover damages from the defendant, the owner of an apartment building, for, inter alia, breach of contract. The plaintiff claimed that the defendant failed to terminate the contract in accordance with the notice provision set forth therein and, therefore, that the contract had been renewed automatically for a two year period. The defendant claimed that it timely provided notice of its intention to terminate the contract. Following a court trial, the trial court rendered judgment for the defendant, from which the plaintiff appealed to this court. *Held* that the trial court's finding that the defendant properly cancelled the contract within the time frame required by the parties' contract was not clearly erroneous: the trial court expressly credited the testimony of D, the president of the parent company of the defendant, and found that his testimony should be accorded greater weight than other evidence introduced at trial; moreover, on the basis of D's testimony and statements he made in emails to the plaintiff, the court found that the defendant sent its cancellation notice to the plaintiff by certified mail as required and the plaintiff received this notice within the time frame to terminate the parties' contract, and it is well established that in 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.

Argued February 6—officially released June 18, 2024

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and tried to the court, *Golger*, *J.*; judgement for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Nicholas J. Adamucci, for the appellant (plaintiff).

Laura B. Indellicati, for the appellee (defendant).

Opinion

BEAR, J. The plaintiff, Finocchio Brothers, Inc., appeals from the judgment of the trial court, rendered after a court trial, in favor of the defendant, 587 CTA, LLC. On appeal, the plaintiff claims that the court improperly found that the defendant had cancelled the parties' contract in accordance with the terms set forth therein. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth in the court's memorandum of decision, and procedural history are relevant to the resolution of this appeal. "[T]he plaintiff, [a provider of refuse hauling and recycling services] and the defendant, [the owner of an apartment building] executed a two year contract for refuse and recycling services on or about September 12, 2016, and . . . the contract was automatically renewable for two years thereafter. The contract further stated that, if the defendant desired to terminate its contract with the plaintiff and not exercise its renewal option, it would have to provide notice to the plaintiff by certified mail no less than ninety days prior to [and not more than 180 days

before] the expiration of the two year term." The parties' contract renewed on September 12, 2018, for another two year period. The parties dispute whether the contract renewed again for the time period of September 12, 2020, to September 12, 2022, as the plaintiff claims, or whether the defendant timely provided notice of its intention to terminate the contract.

On May 17, 2021, the plaintiff commenced the present action. In its revised complaint dated September 15, 2021, the plaintiff alleged a breach of contract claim. Specifically, it contended that the defendant had failed to terminate the contract in accordance with the terms contained therein and, therefore, that the contract had been renewed automatically and remained in effect for the time period of September 12, 2020, until September 12, 2022. The plaintiff further alleged that the defendant "unambiguously stated it will not perform its obligations under the service contract," and thereby breached the contract, causing the plaintiff to suffer damages. The plaintiff's revised complaint also set forth a claim of breach of the implied covenant of good faith and fair dealing, as well as three causes of action that the plaintiff described as negligent breach of contract, reckless breach of contract, and intentional breach of contract.

The court, *Golger*, *J.*, conducted a trial on January 11, 2023. The plaintiff presented two witnesses, Christopher Vigilante, an office manager employed by the plaintiff, and Thomas Finocchio, the president of the plaintiff. Both of the plaintiff's witnesses testified that they did not recall receiving a cancellation letter sent by certified mail from the defendant. The court summarized the evidence presented by the defendant as follows: "The defense presented testimony through Bryan Dietz, the president of EDG Properties, the parent company of the defendant. Dietz testified that he signed the original contract between the parties and agreed to the

initial two year renewal of that contract. He further testified that he notified the plaintiff in May of 2020 that the defendant did not wish to renew its contract with the plaintiff for an additional two years. He testified that his decision to terminate was based on a desire to consolidate the waste removal needs of [the defendant's] properties with one company. Dietz testified that he sent the notice of his intention not to renew by certified mail but did not request a return receipt. He, however, did produce an email string demonstrating communications with the plaintiff concerning this issue subsequent to the initial notice having been allegedly sent and he testified that he received a phone call from a representative of the plaintiff acknowledging receipt of his cancellation notice."

As the trier of fact, the court concluded that the testimony of Dietz "was credible notwithstanding the fact that he could not produce a receipt for the certified letter that he sent out. According to Dietz, he had various communications with representatives of the plaintiff after he sent his initial cancellation notice. Those communications were initiated by the plaintiff. The court finds that this testimony serves as confirmation of the plaintiff's receipt of the initial notice and that the notice was sent well within the time frame for proper cancellation of the contract between the parties." The court then noted that all of the plaintiff's causes of action were "premised on the proposition that the defendant did not properly cancel the contract at issue [and] having found to the contrary, [rendered] judgment in favor of the defendant on all counts." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court's finding that the defendant cancelled the parties' contract in accordance with the terms set forth therein, which required the defendant to give written notice of termination by certified mail within a certain time frame, was

clearly erroneous. Specifically, it argues that the contract required actual delivery of the termination notice to the plaintiff, and there was insufficient evidence supporting the court's finding that the notice was actually received by the plaintiff. Additionally, the plaintiff contends that the evidence was insufficient to establish when the defendant sent the termination notice. We conclude that the court's findings regarding the timing and manner of the defendant's notice of termination of the parties' contract were not clearly erroneous and, therefore, the plaintiff's arguments are without merit.

As an initial matter, we identify the relevant legal principles and our standard of review. This court has observed that, "[i]f a party who has a power of termination by notice fails to give the notice in the form and at the time required by the agreement, it is ineffective as a termination. . . . One who deviates from the terms and the circumstances specified in the agreement for giving notice . . . may be regarded as having repudiated the contract, with all the effects of repudiation including giving the injured party a right to damages . . . . [A] party's failure to comply with the notice provision in a termination clause . . . amounts to a material breach of the contract." (Citation omitted; internal quotation marks omitted.) *Semac Electric Co.* v. *Skanska USA Building, Inc.*, 195 Conn. App. 695, 715, 226 A.3d 1095, cert. denied, 335 Conn. 944, 238 A.3d 17 (2020), and cert. denied, 335 Conn. 945, 238 A.3d 19 (2020); see also *Li* v. *Yaggi*, 212 Conn. App. 722, 732, 276 A.3d 976, cert. denied, 345 Conn. 904, 282 A.3d 981 (2022). Whether a contract has been breached is a question of fact. *Centerplan Construction Co., LLC* v. *Hartford*, 343 Conn. 368, 419, 274 A.3d 51 (2022); *Semac Electric Co.* v. *Skanska USA Building, Inc.*, supra, 705.

Additionally, we note that, "[i]n a case tried before the court, the trial judge is the sole arbiter of the credibility of witnesses and the weight to be afforded to

specific testimony. . . . [When] the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. . . . 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. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Downing* v. *Dragone*, 216 Conn. App. 306, 316, 285 A.3d 59 (2022), cert. denied, 346 Conn. 903, 287 A.3d 601 (2023); *Parrott* v. *Colon*, 213 Conn. App. 375, 387, 277 A.3d 821 (2022); see also *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 219 Conn. App. 464, 485, 295 A.3d 470 (2023).

In the present case, the defendant presented testimony from Dietz, the president of the parent company of the defendant. Dietz explained that he wanted to terminate the parties' contract to consolidate the refuse and recycling service for the defendant's property with another provider. Dietz recalled that he was aware of the limited time frame for cancellation, and he therefore reviewed the termination language of the parties' contract several times. He also referenced his intention to avoid the financial consequences of breaching the contract that would result from the failure to comply with the contract's terms regarding cancellation.

Dietz further testified that he sent the cancellation letter, dated May 13, 2020, via certified mail from the

Darien post office.[1] He could not recall the exact date that he had mailed it, but he did testify on redirect examination that he sent it in May, 2020, which was within the time frame for cancellation of the parties' contract. Dietz then stated that he received a phone call from a representative of the plaintiff one or two weeks after he sent the termination letter. This representative acknowledged the receipt of the letter and inquired about the defendant's "dissatisfaction and how they could correct it."[2] Dietz informed the plaintiff's representative that the only reason for ending the contract was the defendant's intention to consolidate its refuse and recycling services.

Dietz subsequently spoke with a representative of the plaintiff in either June or July of 2020 regarding the removal of the plaintiff's containers from the defendant's property. In an effort to facilitate the removal of these containers, Dietz ceased payment to the plaintiff.[3] In September of 2020, he sent a letter to the plaintiff, stating that it was the defendant's "second attempt" to terminate the contract. Dietz also indicated that he emailed the plaintiff on September 22, 2020, in which he referenced his prior communications with the plain-

[1] Dietz specifically testified: "I recall going to the Darien post office [where] I handle my correspondence through and I was kicking myself that I did not bring a copy to staple the receipt to, the little yellow or green slip." Dietz then explained that he made efforts to locate the receipt for the certified letter, but was not able to locate it, either in his office or in the defendant's archives.

[2] Dietz testified as follows: "So, I remember receiving the call because I was working with a contractor on my house. The call came in saying that they were from [the plaintiff] and that they received the letter and they wanted to know . . . what was my dissatisfaction and how they could correct it. And I said that it was simply that I wanted to consolidate but—and I had no other reason. And they said that someone else would be calling me."

[3] Dietz subsequently testified that he "withheld payment for the last two to three invoices so that [he] would get some attention" from the plaintiff and that he eventually paid the invoices in October, 2020.

tiff.[4] In his subsequent email on September 24, 2020, Dietz declared: "As I wrote before, *someone reached out to me from* [*the plaintiff*] *after my first notice in May, but never followed up*." (Emphasis added.)

The trial court expressly credited Dietz' testimony and found that it "*should be accorded greater weight than other evidence introduced in this proceeding*." (Emphasis added.) We emphasize that "[i]t 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. . . . As trier of fact, the court was free to accept or reject, in whole or in part, the testimony offered by either party." (Citation omitted; internal quotation marks omitted.) *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 135, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014); see also *Companions & Homemakers, Inc.* v. *A&B Homecare Solutions, LLC*, 348 Conn. 132, 148, 302 A.3d 283 (2023); *Hebrand* v. *Hebrand*, 216 Conn. App. 210, 223, 284 A.3d 702 (2022). Additionally, this court will make every reasonable presumption in favor of the trial court's factual findings and does not examine the record to determine whether it could have reached a different conclusion. See *Clark* v. *Quantitative Strategies Group, LLC*, 224 Conn. App. 224, 236 n.11, 311 A.3d 732 (2024); see also *Commissioner of Transportation* v. *ACP, LLC*, 221 Conn. App. 708, 722, 302 A.3d 936 (2023). On the basis of Dietz' testimony and the statements he made in his emails to the plaintiff, the court found that the defendant sent its cancellation notice to

[4] This email stated: "I am writing to you because I have tried more than once to terminate my contract with [the plaintiff] and have not gotten any response. Attached is a second notice [a letter dated September 12, 2020, requesting information on coordinating the last date of service and collection of the plaintiff's containers] that was recently mailed. I had hoped that there would be a professional response on [the plaintiff's] side, *but I haven't heard from anyone other than an initial call from someone who promised a follow up call, which never happened*." (Emphasis added.)

the plaintiff by certified mail and the plaintiff received this notice within the time frame to terminate the parties' contract. We conclude, therefore, that the court's finding that the defendant properly cancelled the contract within the time frame required by the parties' contract was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT LEE NICHOLS (AC 46102)

Elgo, Moll and Prescott, Js.

Syllabus

Convicted, after a jury trial, of the crimes of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court, claiming, inter alia, that the evidence was insufficient to demonstrate that he intentionally touched the minor victim for the purpose of the defendant's sexual gratification. After the minor victim began exhibiting behavioral problems, his mother accepted an offer from the defendant and his wife to have the victim live with them for two weeks to help address those problems. During that time, the defendant entered the bathroom where the victim had showered and beat his buttocks, after which he led the victim to the defendant's bedroom and made him sleep in bed with the defendant and his wife. While in bed, the defendant unbuttoned the victim's pants, rubbed the victim's legs and the side of his buttocks, and repeatedly touched the victim's penis, events that reoccurred almost every night during the victim's stay at the defendant's home. At trial, the victim yelled an expletive during the defendant's testimony, after which the victim left the courtroom demonstrably upset. Defense counsel moved for a mistrial on the ground that the victim's outburst had irreparably harmed the defendant's right to a fair trial. The court denied the motion for a mistrial and gave the jury a curative instruction directing it to disregard the outburst. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion when it denied his motion for a mistrial; the victim's outburst during the defendant's testimony, although inappropriate, was brief and isolated, the court did not observe any improper interaction between the jury and the victim or his mother, and the defendant did not demonstrate any indication that the jury failed to abide by the court's curative instruction, which obviated any possible harm to the defendant.

2. The evidence was sufficient to support the defendant's conviction of sexual assault in the fourth degree: the victim testified that the defendant forced him into the defendant's bed and sexually assaulted him there nearly every night during his stay at the defendant's home, conduct that easily justified a reasonable inference that the defendant did not touch the victim's penis for some reason other than to obtain sexual gratification; moreover, when the victim informed the defendant that he intended to report his conduct, the defendant made statements that caused the victim to fear that the defendant would harm the victim's mother, and the defendant's rebuke of his wife when she expressed discomfort with his conduct, as well as the recurrent nature of that conduct, further supported a reasonable inference that the defendant's intentional touching of the victim was for the defendant's sexual gratification.

Argued May 15—officially released June 18, 2024

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the fourth degree and one count of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, and transferred to the Superior Court in the judicial district of Hartford, geographical area number fourteen; thereafter, the case was tried to the jury before *Gustafson, J.*; subsequently, the court denied the defendant's motions for a judgment of acquittal and for a mistrial; verdict of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal or a new trial; subsequently, the court, *Gustafson, J.*, vacated the conviction as to one count of sexual assault in the fourth degree and rendered judgment of guilty of one count each of sexual assault in the fourth degree and risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Michael S. Taylor, with whom was *Brendon P. Levesque*, for the appellant (defendant).

Bharbara Viegas Rocha and *Connor R. Reed*, certified legal interns, with whom were *Ronald G. Weller*, senior assistant state's attorney, and, on the brief,

Sharmese L. Walcott, state's attorney, and *Michael W. Riley*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Robert Lee Nichols, appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2009) § 53a-73a (a) (1) (A)[1] and risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] The defendant claims that (1) the trial court abused its discretion in denying his motion for a mistrial predicated on an outburst by the victim[3] while the defendant was testifying at trial and (2) there was insufficient evidence to support the conviction of sexual assault in the fourth degree. We disagree and, accordingly, affirm the judgment of conviction.

[1] General Statutes (Rev. to 2009) § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ."

Hereinafter, all references to § 53a-73a are to the 2009 revision of the statute.

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . except that, if . . . the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

Section 53-21 was amended since the events underlying this appeal by No. 13-297, § 1, of the 2013 Public Acts and by No. 15-205, § 11, of the 2015 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, we refer to the current revision of the statute.

[3] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of the defendant's claims. The victim and his mother became acquainted with the defendant in 2007 while the victim attended an after-school program operated by the defendant. Additionally, the victim participated in a summer program also operated by the defendant. In the summer of 2010, the victim was exhibiting behavioral problems, including struggling to control his temper, getting into fights, and having arguments with his mother, who was raising the victim as a single mother. The victim's mother discussed the victim's issues with the defendant and his wife, Tamara Nichols (Tamara), both of whom offered to have the victim live with them for two weeks to help address his ongoing problems. The victim's mother agreed to the arrangement, and the victim proceeded to live with the defendant and Tamara in their home in Manchester for approximately ten days during the summer in 2010. At that time, the victim was eleven years old and the defendant was thirty-one years old.

When the victim first arrived at the defendant's home, the defendant permitted the victim to call his mother only three times per day. Nevertheless, during the first night, the victim, feeling scared and homesick, called his mother in violation of the defendant's rule. The following day, the victim's mother mentioned to the defendant that the victim had called her the previous night. Thereafter, the defendant prohibited the victim from calling home at all.

The victim engaged in various activities during the daytime while staying at the defendant's home. On his second day at the defendant's home, the victim performed landscaping work outside. Afterward, the victim went inside and showered. When the victim exited the shower, he discovered that the defendant was in the bathroom with him. The defendant then repeatedly beat

the victim's buttocks with his hands. After the victim had dressed himself, the defendant led the victim to the defendant's bedroom and made the victim sleep in bed with both the defendant and Tamara. The victim had slept in a guest room the previous night.[4]

On the victim's third day at the defendant's home, the victim again (1) was beaten by the defendant in the bathroom following a shower and (2) slept in bed with the defendant and Tamara in the defendant's bedroom. During the third evening, while in bed with the victim and Tamara, the defendant unbuttoned the victim's pants and rubbed the victim's legs, rubbed the side of the victim's buttocks, and repeatedly touched the victim's penis. These events reoccurred every night thereafter during the victim's stay at the defendant's home, except for Sundays. At one point, Tamara expressed her discomfort with the defendant's conduct; however, the defendant told her to "shut up," that "this is his house," and that "[h]e does what he wants."

Prior to the end of his stay at the defendant's home, the victim conveyed to the defendant that he intended to report the defendant's actions. The defendant responded by indicating that he knew the victim's mother and would find her if anything happened. This statement made the victim feel threatened and concerned that the defendant was going to harm his mother. After the victim had returned to his home following his stay with the defendant, the victim's grandmother noticed injuries on his body. When the victim's grandmother inquired about the injuries, the victim, feeling worried about his mother, told his grandmother that he had injured himself by falling.

In 2019, Detective Claire Hearn received a complaint from the victim, which prompted her to commence an

[4] The guest room was occupied by another young male when the victim arrived at the defendant's home. The victim had not been the first child, unrelated to the defendant, to stay over at the defendant's home.

investigation with regard to the events that had occurred in the summer of 2010. After taking a statement from the victim, Hearn prepared an arrest warrant for the defendant. The defendant subsequently was arrested, and in its operative amended long form information (operative information), the state charged the defendant with two counts of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) and one count of risk of injury to a child in violation of § 53-21 (a) (2).

The matter was tried to a jury on September 26, 2022. During its case-in-chief, the state called as witnesses (1) the victim, (2) the victim's mother,[5] and (3) Hearn.[6] During the defendant's case-in-chief, the defense called as witnesses (1) the defendant and (2) Tamara. The trial court, *Gustafson*, *J.*, admitted two exhibits in full, namely, a photograph submitted by the state and a video recording submitted by the defendant. During trial, defense counsel orally moved for a mistrial on the basis of an outburst by the victim that had occurred during the defendant's direct examination. Following argument, the court denied that motion. The next day, the jury found the defendant guilty on all counts. On October 17, 2022, the defendant filed a postverdict motion seeking (1) a judgment of acquittal on the two sexual assault counts for lack of sufficient evidence or, in the alternative, (2) a new trial on the ground that the court had deprived him of a fair trial in denying his motion for a mistrial. On November 22, 2022, the court denied that motion.[7]

[5] The state briefly recalled the victim's mother on rebuttal.

[6] After the state rested its case-in-chief, defense counsel orally moved for a judgment of acquittal on the ground that the state had failed to prove intent as to any of the crimes charged. The court denied that motion.

[7] In the postverdict motion, the defendant also requested a new trial on the basis of the court's alleged improper denial of a motion in limine that he had filed seeking to preclude certain evidence. The court denied the postverdict motion as to that ground as well. The defendant does not raise that issue on appeal, and, therefore, we need not discuss it further.

On November 29, 2022, after vacating the conviction of sexual assault in the fourth degree as alleged in count two of the operative information,[8] the court sentenced the defendant to a total effective sentence of twenty years of incarceration, execution suspended after eight years, five years of which was a mandatory minimum, followed by ten years of probation. This appeal followed. Additional procedural history will be set forth as necessary.

I

The defendant first claims that the trial court abused its discretion in denying his motion for a mistrial stemming from an outburst by the victim while the defendant was testifying at trial. We disagree.

The following additional procedural history is relevant to our resolution of this claim. On direct examination, the defendant testified that, while the victim was at his home during the period in question, the victim

[8] Count one of the operative information alleged that the defendant committed sexual assault in the fourth degree by intentionally subjecting the victim to sexual contact, by touching the victim's genitalia for the sexual gratification of the defendant, when the victim was eleven years old and the defendant was more than two years older than the victim. Count two of the operative information alleged that the defendant committed sexual assault in the fourth degree by intentionally subjecting the victim to sexual contact, by touching the victim's genitalia to humiliate and to degrade the victim, when the victim was eleven years old and the defendant was more than two years older than the victim. Prior to the defendant's sentencing, the court stated that it would vacate the conviction on one of those counts because "the conduct involved one victim and one course of conduct . . . ." See *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013) (proper remedy for violation of double jeopardy arising from convictions of greater and lesser included offenses is vacatur of conviction of lesser included offense); *State* v. *Miranda*, 317 Conn. 741, 749, 120 A.3d 490 (2015) ("in *Polanco*, [our Supreme Court] invoked [its] supervisory powers to readopt vacatur as a remedy for a cumulative conviction that violated double jeopardy protections"); see also *State* v. *Wright*, 320 Conn. 781, 829–30, 135 A.3d 1 (2016) (proper remedy for violation of double jeopardy arising from convictions of three conspiracy counts based upon single conspiratorial agreement was vacatur of two of conspiracy convictions).

experienced an issue with showering. In particular, the defendant testified: "The issue with showering was, ah, prior to [the victim] coming to arrive at my home that weekend, I was asked by [his] mom if it was possible for me to help show [the victim] how to take a shower because, up to that point, [the victim] had refused and had never done it. And [the victim's mother] just wanted to know if it was possible, could I help him. So, I told her okay. Ah, you know, I'll try and we'll see."[9]

Immediately following that testimony, the trial transcript reflects that (1) there was "some banging in the courtroom," (2) the victim stated, "[t]his is bullshit,"[10] (3) the marshal in the courtroom conferred with the victim, and (4) counsel approached the bench for an off-the-record conversation. Following the off-the-record conversation, the court issued the following instruction to the jury: "So, ladies and gentlemen of the jury, outbursts in court are not to be considered as evidence and be disregarded by you. Thank you." Defense counsel then continued with the defendant's examination.

Later in the afternoon, following a lunch recess, defense counsel orally moved for a mistrial on the basis of the victim's outburst during the defendant's testimony.[11] Defense counsel argued that (1) the victim and his mother were observed loudly speaking within the hearing of the jury, (2) at least two jurors were watching and listening to the victim and his mother, rather than watching the defendant testify, and (3) the victim left the courtroom while yelling an expletive. Defense counsel maintained that, as a result of the victim's conduct,

[9] The victim's mother later testified that she did not request that the defendant teach the victim how to shower.

[10] The victim was not under a sequestration order.

[11] In denying the defendant's postverdict motion seeking, inter alia, a new trial, the court stated that, during the off-the-record conversation, defense counsel had requested that the jury be excused in order to allow counsel to move for a mistrial, and the court explained that it would permit counsel to move for a mistrial outside of the jury's presence at the next recess.

the defendant's right to a fair trial had been irreparably harmed. The state responded that the court's curative instruction to the jury immediately after the victim's outburst had cured any harm suffered by the defendant. Following argument, the court orally denied the motion for a mistrial. The court stated that, (1) during the defendant's testimony, the court observed the victim abruptly leave the courtroom while looking "demonstrably upset," although the court could not hear what the victim had said and did not hear anything else, (2) the court, while paying "pretty careful attention," did not observe the jury exchange looks with either the victim or his mother during any testimony, and (3) the court "anticipate[d] [that] it won't happen again," as the state had spoken to the victim and his mother[12] and, as the court iterated, "the decorum that we need in the courtroom is nothing but professionalism." The court further stated that it had instructed the jury to disregard the victim's outburst. In sum, the court determined that it "[did not] think [the defendant's right to] a fair trial [had been] irreparably harmed by the very limited, two second outburst that [the court] did provide a curative instruction on."

In his postverdict motion seeking, inter alia, a new trial, the defendant contended that the court improperly had denied his motion for a mistrial because the victim's outburst had "resulted in substantial and irreparable prejudice to the defendant's case. Despite the court's curative instruction, in the context of the proceedings as a whole, including the very short length of the trial and the contest of veracity between the defendant's testimony and the [victim's] testimony, the conduct was such that the jury reasonably could not be presumed to have disregarded it." In denying the postverdict

[12] While setting forth its reasoning for denying the defendant's motion for a mistrial, the court noted for the record that the victim and his mother had returned to the courtroom.

motion as to that ground, the court stated that, (1) during the defendant's testimony at issue, the victim became "demonstrably upset," "exclaimed 'bullshit' as he walked approximately thirty feet to the exit [of the courtroom]," and "angrily left the courtroom," (2) notwithstanding the defendant's contention "that [the victim] and his mother were near the jury and were animatedly reacting to the defendant's testimony, the court did not observe any other distracting or inappropriate conduct prior to or after the subject outburst," (3) following a sidebar with counsel, the court issued a curative instruction to the jury, (4) there were no additional disturbances, and (5) neither party requested any additional instructions to the jury, and no additional instructions were given. The court further stated that, notwithstanding the victim's "patently improper" outburst, the court immediately instructed the jury to disregard the outburst, which instruction the jury was presumed to follow. Accordingly, the court rejected the defendant's claim.

The defendant claims on appeal that the court abused its discretion in denying his motion for a mistrial, maintaining that (1) the victim's outburst during the defendant's testimony "resulted in substantial and irreparable prejudice" and (2) notwithstanding the court's issuance of a curative instruction to the jury following the outburst, in light of the circumstances, including the short length of the trial and the credibility contest between the victim and the defendant at trial, the jury reasonably could not be presumed to have disregarded the outburst. We are not persuaded.

The following legal principles and standard of review govern our review of the defendant's claim. Practice Book § 42-43 provides in relevant part: "Upon motion of a defendant, the judicial authority may declare a mistrial at any time during the trial if there occurs during the trial an error or legal defect in the proceedings, or

any conduct inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant's case. . . ." The defendant bears the burden to establish prejudice.[13] See *State* v. *Gore*, 342 Conn. 129, 168–69, 269 A.3d 1 (2022). "We review a trial court's ruling on a motion for a mistrial under the abuse of discretion standard. . . . When reviewing a ruling on a mistrial motion, we must ask whether the trial court considered the totality of the circumstances in arriving at its decision. . . . Further, our review must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided." (Citations omitted; internal quotation marks omitted.) *State* v. *Henderson*, 348 Conn. 648, 666–67, 309 A.3d 1208 (2024). "Every reasonable presumption will be given in favor of the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Anderson*, 163 Conn. App. 783, 791, 134 A.3d 741, cert. denied, 321 Conn. 909, 138 A.3d 931 (2016).

"Furthermore, [w]hile the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A]

[13] In his principal appellate brief, citing *Remmer* v. *United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654 (1954), the defendant asserted that a rebuttable presumption of prejudice (*Remmer* presumption) arose from the victim's outburst during the defendant's testimony. See id., 229 ("In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the [g]overnment to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."). The defendant further maintained that the trial court improperly failed to analyze his claim under *Remmer*. In response, the state argued that the *Remmer* presumption was inapplicable to this action because the victim's outburst was not a "private" communication with a juror. During oral argument before this court, the defendant's appellate counsel expressly withdrew the contention that the *Remmer* presumption applied in the present action. Accordingly, we need not address the applicability of the *Remmer* presumption further.

mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances [that] may arise during the trial in which his [or her] function is to assure a fair and just outcome. . . . The trial court is better positioned than we are to evaluate in the first instance whether a certain occurrence is prejudicial to the defendant and, if so, what remedy is necessary to cure that prejudice." (Internal quotation marks omitted.) *State* v. *Collins*, 206 Conn. App. 438, 441–42, 260 A.3d 507, cert. denied, 339 Conn. 914, 262 A.3d 135 (2021).

In resolving the defendant's claim, we are guided by our Supreme Court's decision in *State* v. *Savage*, 161 Conn. 445, 290 A.2d 221 (1971). In *Savage*, the defendant, who was charged with incest, testified at trial. Id., 446, 447–48. As the defendant was leaving the witness stand following his testimony, the complainant, who was the defendant's daughter, "screamed that he was a liar and had not told the truth." Id., 448–49. The trial court excused the jury, which had been present for the complainant's outburst, and the defendant moved for a mistrial, which the court denied. Id., 449. After recalling the jury, the court "instructed [the jury] at length to disregard the complainant's outburst. The court again so instructed the jury during its final charge." Id. On appeal, our Supreme Court upheld the trial court's denial of the defendant's motion for a mistrial, concluding that "[t]he [trial] court's careful and correct instructions to the jury to disregard the complainant's outburst obviated any possible harm to the defendant from this outburst . . . ." Id.

In light of *Savage*, as well as the totality of the circumstances in the present case, we conclude that the court properly denied the defendant's motion for a mistrial. As the court found, although the victim's outburst in the courtroom was inappropriate, the outburst was brief and isolated, and the court did not observe any improper interaction between the jury and the victim or his mother.[14] Moreover, immediately following the sidebar with counsel that had occurred after the victim's outburst, the court issued a curative instruction to the jury directing it to disregard the outburst, as it did not constitute evidence.[15] "[A]s a general matter, the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary." (Internal quotation marks omitted.) *State* v. *Roberto Q.*, 170 Conn. App. 733, 746, 155 A.3d 756, cert. denied, 325 Conn. 910, 158 A.3d 320 (2017). The defendant has not demonstrated any indication that the jury failed to abide by the court's curative instruction, which "obviated any possible harm" to the defendant from the victim's outburst. *State* v. *Savage*, supra, 161 Conn. 449.

In sum, we conclude that the court did not abuse its discretion in denying the defendant's motion for a mistrial.

[14] The defendant maintains that, contrary to the court's findings, (1) the victim exclaimed, "[t]his is *fucking* bullshit"; (emphasis added); rather than "[t]his is bullshit," and (2) at least two jurors were paying attention to the victim and his mother, rather than to the defendant, during the defendant's testimony. The defendant offers no support for these contentions other than counsel's representations, which are inadequate. See *Magana* v. *Wells Fargo Bank, N.A.*, 164 Conn. App. 729, 734, 138 A.3d 966 (2016) ("representations of counsel are not evidence and are certainly not proof" (internal quotation marks omitted)).

[15] The court did not repeat its curative instruction in its final charge to the jury the next day. With respect to the evidence in the case, however, the court instructed the jury that "[t]he evidence from which you are to decide the facts consist[s] of one, the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; and two, the exhibits that have been admitted into evidence." The court further instructed the jury that "[y]ou may not go outside the evidence introduced in court to find the facts."

II

The defendant next claims that there was insufficient evidence to support his conviction of sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) as alleged in count one of the operative information (count one).[16] We do not agree.

General Statutes (Rev. to 2009) § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ." " 'Sexual contact' " is statutorily defined as "any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." General Statutes (Rev. to 2009) § 53a-65 (3). " 'Intimate parts' " is statutory defined as "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts." General Statutes (Rev. to 2009) § 53a-65 (8).

[16] Notwithstanding the court's vacatur of the defendant's conviction of sexual assault in the fourth degree as alleged in count two of the operative information; see footnote 8 of this opinion; the parties have addressed the sufficiency of the evidence as to both counts one and two, which is appropriate given the possibility that we may reverse the defendant's conviction with respect to count one and order the reinstatement of his conviction as to count two. See *State* v. *Polanco*, 308 Conn. 242, 262–63, 61 A.3d 1084 (2013) (reinstatement of conviction vacated as violative of double jeopardy is proper remedy when cumulative conviction is reversed on appeal for reasons unrelated to viability of vacated conviction). Because we affirm the defendant's conviction with regard to count one, we need not address the merits of the defendant's claim that the evidence was insufficient to support his conviction as to count two.

The following additional procedural history is relevant to our resolution of this claim. In support of count one, the state alleged that "during the summer of 2010 in Manchester . . . the defendant intentionally subjected [the victim] to sexual contact, who was eleven years of age and the defendant is more than two years older than [the victim]. This sexual contact was the touching of [the victim's] genitalia by the defendant for the sexual gratification of the defendant."

In his postverdict motion seeking, inter alia, a judgment of acquittal as to his conviction on count one, the defendant asserted that "the evidence [was] not sufficient to demonstrate . . . that [he] had the specific intent to obtain sexual gratification from the sexual contact . . . at the time of the alleged offense . . . ." (Emphasis omitted.) In denying the motion as to that ground, the court determined that the trial evidence, along with all inferences reasonably drawn therefrom, when viewed in the light most favorable to sustaining the verdict, established that the defendant had touched the victim's genital area for the purpose of his sexual gratification, as the defendant's conduct (1) occurred at night in the defendant's bed and (2) included rubbing the victim's penis and buttocks.

On appeal, the defendant concedes that, on the basis of the evidence, the jury reasonably could have found, inter alia, that, (1) at the time of the events in question, the victim was under the age of thirteen years old and the defendant was more than two years older than the victim, and (2) the defendant intentionally touched the victim in a sexual manner in that the defendant, while in bed in the defendant's bedroom with the victim and Tamara, at night, repeatedly touched the victim's penis, which conduct was also accompanied by the defendant rubbing the victim's legs and the side of the victim's buttocks. The defendant asserts, however, that there was insufficient evidence demonstrating that he acted

with the specific intent required pursuant to § 53a-73a (a) (1) (A) because the evidence was not adequate to establish that he intentionally touched the victim for the purpose of his sexual gratification. We disagree.

"We begin our analysis by setting forth the relevant legal principles and standard of review. The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We also note that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that

would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Thomas S.*, 222 Conn. App. 201, 211–12, 304 A.3d 513 (2023), cert. denied, 348 Conn. 943, 307 A.3d 909 (2024).

"The specific intent to subject a person under thirteen years of age to sexual contact, when the actor is more than two years older than the victim, is an essential element of the crime of sexual assault in the fourth degree [in violation of § 53a-73a (a) (1) (A)]." *State* v. *Andersen*, 132 Conn. App. 125, 143–44, 31 A.3d 385 (2011), cert. denied, 305 Conn. 906, 44 A.3d 182 (2012). "It is well established that the question of intent is purely a question of fact. . . . The state of mind of one accused of a crime is often the most significant and, at the same time, the most elusive element of the crime charged. . . . Because it is practically impossible to know what someone is thinking or intending at any given moment, absent an outright declaration of intent, a person's state of mind is usually proven by circumstantial evidence . . . . Intent may be and usually is inferred from [conduct. . . . Whether] such an inference should be drawn is properly a question for the jury to decide. . . . [I]ntent may be inferred from the events leading up to, and immediately following, the conduct in question . . . the accused's physical acts and the general surrounding circumstances." (Citation omitted; internal quotation marks omitted.) *State* v. *Thompson*, 146 Conn. App. 249, 277–78, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013); see also *State* v. *Roy D. L.*, 339 Conn. 820, 852, 262 A.3d 712 (2021) ("It is well established that [i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of

inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence such as . . . the events leading up to and immediately following the incident. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.)).

Viewing the evidence in the light most favorable to sustaining the verdict, we conclude that there was sufficient evidence to support a reasonable inference that the defendant intentionally touched the victim's genitalia for the purpose of his sexual gratification. The victim's testimony[17] established that, starting on the third evening of the victim's approximate ten day stay at the defendant's home and reoccurring every night thereafter, except for Sundays, the defendant (1) forced the victim into an intimate location, that is, the defendant's bed in his bedroom, at nighttime, accompanied by Tamara, and (2) unbuttoned the victim's pants and repeatedly touched the victim's penis and rubbed the victim's legs and the side of the victim's buttocks. These circumstances easily justify a reasonable inference that the defendant did not touch the victim's penis for some reason other than to obtain sexual gratification.

In addition, the victim testified that when (1) he informed the defendant that he intended to report the defendant's conduct, the defendant made statements regarding his mother that caused him to fear that the defendant would harm his mother, and (2) Tamara

[17] Other than the victim's testimony, there was no evidence describing the contours of the defendant's abuse. The testimony of the defendant, as well as Tamara, contradicted the victim's account and denied any abuse of the victim by the defendant. As this court has explained, however, "a jury reasonably can find a defendant guilty of sexual assault on the basis of the victim's testimony alone." *State* v. *Gene C.*, 140 Conn. App. 241, 247, 57 A.3d 885, cert. denied, 308 Conn. 928, 64 A.3d 120 (2013).

expressed discomfort with the defendant's actions, the defendant told her to "shut up," that "this is his house," and that "[h]e does what he wants." This evidence further supports a reasonable inference that the defendant's intentional touching of the victim was for the purpose of the defendant's sexual gratification.[18] Otherwise, if the conduct had been for some nonsexual purpose, there would have been little need for (1) the defendant to threaten the victim with harm toward his mother, (2) Tamara to express discomfort with the defendant's conduct, and (3) the defendant to rebuke Tamara for sharing her concerns.

Finally, the reasonableness of these inferences is further bolstered by the recurrent nature of the defendant's conduct. See *State* v. *Roy D. L.*, supra, 339 Conn. 854 (agreeing with trial court's statement that " 'repeated and almost ritualistic nature' " of defendant's conduct made inference of sexual gratification " 'particularly reasonable' ").

In sum, we reject the defendant's claim that there was insufficient evidence to sustain his conviction of sexual assault in the fourth degree as alleged in count one.

The judgment is affirmed.

In this opinion the other judges concurred.

[18] The defendant posits that "there must be some circumstances beyond the doing of the act itself that would warrant [intent being inferred from behavior] by the jury" and that, although "the jury reasonably could have found intentional sexual touching . . . the jury should not be allowed to infer, from that conduct alone, that the touching in question was for any particular purpose." (Emphasis omitted.) As we explain in this opinion, it is not the defendant's singular act of intentionally touching the victim's genitalia from which the jury reasonably could infer that the defendant acted for the purpose of his sexual gratification; instead, this inference stems from the defendant's conduct examined in conjunction with the circumstances surrounding the conduct. Indeed, there are conceivable scenarios involving the intentional touching of a child's intimate areas, such as a parent washing their child for hygienic purposes or a doctor performing a medical examination of a child, where a reasonable inference of sexual gratification would not arise.