**CASES ARGUED AND DETERMINED**

IN THE

# APPELLATE COURT

OF THE

# STATE OF CONNECTICUT

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## IN RE AVIANA J.*
## (AC 47807)

Elgo, Suarez and Westbrook, Js.

*Syllabus*

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child. The mother claimed, inter alia, that the court improperly determined that she had failed to achieve the requisite degree of personal rehabilitation required by statute (§ 17a-112 (j) (3) (B) (i)). *Held*:

The trial court's unchallenged factual findings, including findings regarding the respondent mother's ongoing struggles with substance abuse and her lack of housing and income, supported its determination, by clear and convincing evidence, that the mother failed to achieve such degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i), as would encourage the belief that, within a reasonable time, she could assume a responsible caretaking position in the child's life.

The trial court's determination that the termination of the respondent mother's parental rights was in the child's best interest was not clearly erroneous and was supported by sufficient evidence.

Argued January 13—officially released February 24, 2025**

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

** February 24, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Bridgeport, Juvenile Matters, and tried to the court, *McLaughlin*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

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

*Opinion*

SUAREZ, J. The respondent mother, Elizabeth T., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor child, Aviana J.[1] On appeal, the respondent claims that the court improperly determined (1) that she failed to achieve a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i), and (2) that the termination of her parental rights was in Aviana's best interest.[2] We affirm the judgment of the court.

[1] Initially, the petitioner named the respondent's boyfriend as the father of Aviana. However, a subsequent paternity test conclusively established that he was not the father. Thereafter, the court issued orders of nonpaternity with respect to him, and the petitioner withdrew the action as to him. The petitioner also named John Doe as the putative father of Aviana. The court terminated the parental rights of John Doe as to Aviana, and he is not participating in this appeal. All references in this opinion to the respondent are to Elizabeth T. only.

[2] The attorney for the minor child filed a statement adopting the brief filed by the petitioner.

The following facts, which the court found by clear and convincing evidence or are otherwise undisputed, and procedural history are relevant to the resolution of this appeal. The respondent came to the attention of the Department of Children and Families (department) shortly after Aviana was born in June, 2021. "On June 18, 2021, the department received a call on its Careline[3] from the Bridgeport Hospital, where [Aviana] was born, reporting that the [respondent] and [Aviana] had tested positive for cocaine. [Aviana] experienced withdrawal symptoms including hypertonia and jitters. [Aviana] was fed by way of a [nasogastric] tube. The [respondent] notified hospital staff that she had a history of heroin use and last had used heroin on June 15 or 16 [2021, mere] days before giving birth to [Aviana]. The [respondent] denied using cocaine or marijuana. [That same day], the department met with the [respondent]. She reported that she never received any prenatal care because she did not realize she was pregnant until approximately a month to a month and half before [Aviana] was born. She continued using heroin after learning she was pregnant. The [respondent] told the department that she did not have supplies for [Aviana]." (Footnote added.)

"On June 24, 2021, the [petitioner] filed an ex parte order of temporary custody (OTC) and neglect petition on behalf of [Aviana]. On June 24, 2021, the court granted the ex parte OTC. The court sustained the OTC on July 2, 2021, vesting temporary custody of [Aviana] in the [petitioner]. At the hearing sustaining the OTC, the court ordered preliminary specific steps for the [respondent]. On August 5, 2021, the court adjudicated [Aviana] neglected and committed [her] care and custody to the [petitioner]. The court also ordered final

[3] Careline "is a department telephone service that mandatory reporters and others may call to report suspected child abuse or neglect." (Internal quotation marks omitted.) *In re S. G.*, 229 Conn. App. 834, 837 n.3, 328 A.3d 737 (2024).

specific steps[4] for the [respondent]. . . . On January 17, 2023, the [petitioner] filed [the] termination of parental rights petition . . . . On February 6, 2024, the court approved a permanency plan of termination of parental rights and adoption." (Footnote added; footnote omitted.)

On May 2, 2024, the court, *McLaughlin*, *J.*, held a hearing on the petitioner's petition for the termination of parental rights. The respondent appeared and was represented by appointed counsel. On May 16, 2024, the court issued a memorandum of decision terminating the respondent's parental rights. In its memorandum of decision, the court found by clear and convincing evidence that the respondent had an ongoing substance abuse problem for which she failed to consistently engage in treatment. The court found that, "[o]n June 18, 2021, the department referred the [respondent] to [Center for Human Services (CHS)]—Recovery Network Program for the methadone maintenance program and Project Courage for substance use treatment. On June 22, 2021, the [respondent] completed an intake with Project Courage. She failed to engage in treatment. The department referred the [respondent] to individual therapy with Gary Vertula. She failed to engage."

The court further found that, "[i]n July, 2021, the department referred the [respondent] to CHS for substance use treatment. She engaged with CHS and entered

[4] With respect to the respondent, the court ordered her, inter alia, to "[t]ake part in counseling and make progress toward the identified treatment goals," namely, "to remain substance abuse free [and] to address your mental health in order to parent the child," to "[s]ubmit to substance abuse evaluation and follow the recommendations about treatment, including inpatient treatment if necessary, aftercare and relapse prevention," to "[n]ot use illegal drugs or abuse alcohol or medicine," to "[c]ooperate with service providers recommended for parenting/individual/family counseling, in-home support services and/or substance abuse assessment/treatment," and to "[g]et and/or maintain adequate housing and a legal income."

the methadone maintenance program, the intensive outpatient program [IOP] and attended individual counseling. At the commencement of her treatment in July, 2021, the [respondent] tested positive for cocaine, fentanyl, and marijuana. In August, 2021, she tested positive for opiates, benzodiazepines, cocaine, and fentanyl. In August, 2021, CHS recommended the [respondent] attend a higher level of care through inpatient treatment with New Prospects. The [respondent] failed to follow through with treatment at New Prospects. In August, 2021, the [respondent] stopped engaging with CHS.

"From August, 2021, until April, 2022, the [respondent] failed to engage in any substance use treatment.[5] On April 20, 2022, the [respondent] was arrested on charges of larceny in the sixth degree, conspiracy to commit larceny, interfering with an officer and violation of probation. The criminal court placed the [respondent] on conditions of release which included cooperating with the Pathway Program with [Jay Brothers Unified Resource Center (Jay Brothers)]—a treatment program for women involved in the criminal justice system with substance abuse issues. The Office of Adult Probation supervised the [respondent] on her conditions of release. In April, 2022, the [respondent] entered a detoxification program. At her intake, the [respondent] tested positive for cocaine, methadone, fentanyl, and ecstasy.

"From April, 2022, through July, 2022, the [respondent] participated in inpatient treatment through the Families in Recovery Program. The [respondent] successfully completed inpatient treatment on July 27, 2022, and moved in with her mother. The [respondent] was offered methadone maintenance, mental health services and medication management services through the

[5] "The [respondent] reported that she reengaged with CHS in January, 2022. CHS denied that [the respondent] was engaged in its programming at that time."

Liberations Program. She completed her intake for the methadone clinic on July 28, [2022], and the intake for mental health services on July 29, [2022]. The [respondent] attended her first medication management session on August 3, 2022, and continued to participate sporadically thereafter. She never followed up for mental health services. . . .

"Although, in the summer and fall of 2022, the [respondent] was participating in substance use treatment, she began using drugs on a regular basis. On September 12, 2022, the [respondent] tested positive for cocaine and fentanyl. On September 19, 2022, the [respondent] tested positive for cocaine, opiates, and fentanyl. On September 22, 2022, the [respondent] tested positive for cocaine and opiates. Due to the [respondent's] consistent use of illicit substances, her provider recommended that she participate in a higher level of care through inpatient substance abuse treatment. . . .

"From October, 2022, through November 22, 2022, the [respondent] engaged in substance use treatment with the Stonington Institute. The Stonington [Institute] program included hospitalization and intensive outpatient services. On November 22, 2022, the [respondent] successfully completed her treatment and moved to a sober house, the Tina Klem House.

"On November 23, 2022, the [respondent] completed an intake with CHS for methadone maintenance and mental health services. On November 29, 2022, the [respondent] started an IOP with Regional Counseling Services (RCS). She inconsistently attended the group sessions. Her toxicology screenings in November and December, 2022, were negative for all substances.

"In March, 2023, the [respondent] successfully completed outpatient treatment with RCS but continued, as recommended, with group sessions. In April, 2023, the [respondent] successfully left the Tina Klem House.

Although the [respondent] did not consistently attend her IOP group sessions, in June, 2023, she successfully completed her ongoing outpatient treatment with RCS. At that time, she was testing negative for all substances.

"Approximately a month after successfully completing her outpatient treatment, the [respondent] started testing positive for illicit substances again. On July 20, 2023, the [respondent] tested positive for cocaine. The Office of Adult Probation referred the [respondent] to the APT Foundation for treatment. The [respondent] failed to engage.

"On August 28, 2023, the [respondent] tested positive for cocaine and fentanyl. The Office of Adult Probation referred the [respondent] for a substance abuse evaluation with Southwest Community Health Center (SCHC). The [respondent] failed to attend the evaluation. In August, 2023, the department referred the [respondent] to an [advanced practice registered nurse (APRN)] with CHS for medication management. The [respondent] never followed up with the APRN.

"The [respondent] had been attending sporadically the methadone maintenance program with CHS during the summer months of 2023. In August, 2023, CHS discharged the [respondent] from the methadone maintenance program due to her failure to regularly attend. The [respondent] told the department that she was engaging with Kinsella Treatment Center for methadone maintenance. When the department reached out to Kinsella [Treatment Center] to confirm the [respondent's] engagement, [it] notified the department that the [respondent] was not one of its clients. . . .

"In October, 2023, the [respondent] tested positive for cocaine. In October, 2023, the [respondent] claimed that she was referred to [Midwestern Connecticut Council of Alcoholism, Inc. (MCCA)], not SCHC, for a substance abuse evaluation. At this point, the Office of

Adult Probation told the [respondent] that she was in technical violation of her probation because of her continued use of illicit substances and her failure to engage in treatment. On November 9, 2023, the [respondent] tested positive for cocaine and fentanyl. The Office of Adult Probation referred the [respondent] to the APT Foundation for treatment. The [respondent] failed to engage.

"On November 15, 2023, the [respondent] completed an intake with MCCA. At intake, she tested positive for cocaine, fentanyl, opiates, and marijuana. MCCA recommended that the [respondent] engage in IOP. The [respondent] failed to return to MCCA until November 29, 2023. When the [respondent] reengaged, MCCA administrated a drug screen, and the [respondent] tested positive for cocaine, fentanyl, opiates, and marijuana. MCCA discharged the [respondent] on December 18, 2023, and recommended that she engage in a detoxification program. On December 19, 2023, the [respondent's] adult probation officer notified her that she was filing a formal violation of probation (VOP) due to the [respondent's] continued drug use and failure to engage in treatment. On January 3, 2024, the VOP issued. . . .

"In March, 2024, the [respondent] submitted to a drug screen with Jay Brothers at the request of the department. She tested positive for cocaine and fentanyl. . . . On May 1, 2024, the day before the [termination of parental rights] trial, the [respondent] submitted to an 'instant' drug screen with Jay Brothers. The screen was positive for cocaine, fentanyl, and opiates." (Footnote in original; footnotes omitted.)

After setting forth the foregoing subordinate factual findings, the court found by clear and convincing evidence that (1) the department had made reasonable efforts to locate the respondent and to reunify the respondent with Aviana and that the respondent was

unable or unwilling to benefit from the reunification efforts, (2) the petitioner established that a statutory ground for termination of the respondent's parental rights exists, namely, that the respondent had failed to achieve a sufficient level of personal rehabilitation as required by § 17a-112 (j) (3) (B) (i), and (3) termination of the respondent's parental rights was in the best interest of Aviana. Accordingly, the court terminated the respondent's parental rights. This appeal followed.

The general legal principles applicable to proceedings to terminate parental rights are well settled. "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights [under § 17a-112 (j)] exists by clear and convincing evidence." (Internal quotation marks omitted.) *In re Shane M.*, 148 Conn. App. 308, 316, 84 A.3d 1265 (2014), aff'd, 318 Conn. 569, 122 A.3d 1247 (2015). Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition [to terminate parental rights] if it finds by clear and convincing evidence that . . . (3) . . . (B) the child . . . has been found . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and [the parent] has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ." "If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interests

of the child." (Internal quotation marks omitted.) *In re Shane M.*, supra, 316.

I

On appeal, the respondent first claims that the court improperly determined that she failed to achieve a sufficient degree of personal rehabilitation within the meaning of § 17a-112 (j) (3) (B) (i). Specifically, the respondent argues that the bond between her and Aviana "undermines confidence in the trial court's conclusions" and justifies affording the respondent additional time to rehabilitate. We are not persuaded.

It is well established that a "trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue. . . . [The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . .

"During the adjudicatory phase of a termination proceeding, a court generally is limited to considering only evidence that occurred before the date of the filing of the petition or the latest amendment to the petition, often referred to as the adjudicatory date. . . . Nevertheless, it may rely on events occurring after the [adjudicatory] date . . . [in] considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Citation omitted; internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 488–89, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024). "[T]he fact that [a parent] may love [a] child does not in itself show rehabilitation, and motivation to parent is not enough; ability is required." (Internal quotation marks omitted.) *In re Lil'Patrick T.*, 216 Conn. App. 240, 254, 284 A.3d 999, cert. denied, 345 Conn. 962, 285 A.3d 387 (2022).

"A conclusion of failure to rehabilitate is drawn from both the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been

made. . . . Thus, [i]t is not the function of this court to sit as the [fact finder] when we review the sufficiency of the evidence . . . . In making this determination, [t]he evidence must be given the most favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Citation omitted; footnote omitted; internal quotation marks omitted.) *In re Niya B.*, supra, 223 Conn. App. 489–90.

In the present case, the respondent has not challenged the court's subordinate factual findings as clearly erroneous. Instead, she points to the bond between herself and her daughter, arguing that it "undermines confidence in the trial court's conclusions and decision." Because the respondent has not challenged any of the court's factual findings in support of its determination that she failed to achieve a sufficient degree of personal rehabilitation, we limit our review to whether the court reasonably could have concluded, upon the subordinate factual findings it made and the reasonable inferences drawn therefrom, that the respondent failed to rehabilitate and to the impact of the bond between the respondent and Aviana on such a conclusion. See *In re S. G.*, 229 Conn. App. 834, 853, 328 A.3d 737 (2024).

In concluding that the respondent failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i), the court found by clear and convincing evidence that, "[a]t the time of the adjudication [of neglect], the issues for the [respondent] were substance use and mental health. The court ordered final specific steps for the [respondent] at the adjudication. . . . From August, 2021, until the filing of the petition in January, 2023, the [respondent] failed to comply with her final steps in that she failed to consistently engage in substance abuse and

mental health treatment, she continued using illicit substances, and she failed to gain employment or housing.

"Taking into consideration the time after the filing of the [termination of parental rights] petition, the [respondent] still had not gained sobriety. She was not engaged in substance use and mental health treatment. She failed to visit [Aviana] consistently.[6] She failed to obtain employment. Throughout the summer and fall of 2023, the [respondent] routinely tested positive for illicit substances, including, but not limited to, cocaine and fentanyl. Her drug use continued . . . just prior to trial testing positive for cocaine and fentanyl in March, 2024, and positive for cocaine, fentanyl, and opiates on May 1 [2024]. . . . The [respondent] failed to engage in any substance use or mental health services in 2024.

"At trial, the court observed the [respondent] to be very thin and fidgety. At times, the [respondent] appeared to fall asleep. . . . The [respondent] testified in earnest that she loved her daughter. She also explained to the court that addiction was hard. She was candid about the safety plan the department instituted for her visitations with [Aviana]. Pursuant to that plan, the [respondent] testified that she washed her hands and face before seeing [Aviana]. The [respondent] said that the department had her wash her hands and face to ensure that there was no drug residue on her that could impact [Aviana]. The [respondent] testified that she would not harm [Aviana]. The court believed that the [respondent] would never intentionally harm [Aviana]. However, the [respondent's] continued drug use demonstrated to the court that the [respondent] could inadvertently physically harm [Aviana] and that

[6] "Visiting [Aviana] as often as possible was also part of the [respondent's] steps. [Sophie] Hale, [a department social worker assigned to the family's case] credibly testified that the [respondent] missed several visits or arrived late for visits in 2024."

the [respondent] did not understand the impact her continued drug use had on [Aviana].

"The [respondent] argued that the court should not consider the drug results from May 1 [2024] that were positive for cocaine, fentanyl, and opiates because the results had not been verified by a lab. [Anika] Alcala, [the counselor at Jay Brothers] who supervised the test, testified that, in her experience with the instant test, it was highly likely that the lab would confirm the positive results. The court credited [Alcala's] testimony. Considering [Alcala's] testimony and the [respondent's] other positive drug screens, the court finds it more likely than not that the instant test results were accurate, and the [respondent] used illicit substances just prior to trial. It was clear to the court from the credible evidence that at the time of the trial the [respondent] was an active illicit drug abuser.

"[Jessica] Biren Caverly [a licensed clinical psychologist who performed two court-ordered evaluations of the respondent] testified that, in October, 2023, [after her initial evaluation] it was her recommendation that the [petitioner] provide the [respondent] with additional time to gain sobriety before moving forward with the [termination of parental rights] petition. It was undisputed that, by May, 2024, the [respondent] had not gained sobriety. [Biren Caverly] testified that, based on the [respondent's] continued drug use and failure to engage in treatment, she supported the [termination of parental rights] petition.

"The court notes that the [respondent] also failed to obtain employment or housing. At [Aviana's] birth, the [respondent] lived a transient lifestyle. When the [respondent] left the sober house in April, 2023, she moved in with her mother. Living with her mother was not a long-term solution for the [respondent's] housing. However, the [respondent] had no plans for housing.

Further, the [respondent] knew she needed to obtain employment to support herself and [Aviana]. The [respondent] had three years to find some employment. She found none.

"The [respondent] has had three years to rehabilitate. She has failed to do so. The [respondent's] active drug use, complete disengagement in treatment, and failure to obtain housing or employment leads the court to conclude that she will not play (let alone resume) a useful role in [Aviana's] life in the foreseeable future. [Aviana] needs permanency. She deserves a stable, nurturing home in which to develop. The [respondent] cannot provide such a home." (Footnote in original.)

On the basis of the foregoing, the court found that "[t]he evidence established clearly and convincingly that the [respondent] has not rehabilitated and will not rehabilitate in the foreseeable future. To allow the [respondent] any additional time to attempt to rehabilitate when she has shown no ability to do so would be pointless and to the detriment of [Aviana]."

In sum, the court found by clear and convincing evidence that, over the past three years, the respondent's ongoing struggles with substance abuse and a lack of housing and income have not improved to the point whereby the respondent has gained the ability to care for Aviana's needs. Moreover, the court found that rehabilitation was unlikely to occur within a reasonable time and that Aviana's need for permanency, stability, and a caretaker outweighed the remote possibility of the respondent achieving rehabilitation in the future. On the basis of these findings, it was reasonable for the court to determine that the respondent failed to rehabilitate. See *In re S. G.*, supra, 229 Conn. App. 855–57 (respondent's persistent drug use and failure to engage in treatment were bases for failure to rehabilitate, particularly when children's need for permanency was considered); *In re Lil'Patrick T.*, supra, 216 Conn. App.

257–58 (respondent's failure to achieve stable housing and his delay in participating in treatment programs were bases for failure to rehabilitate); *In re Carissa K.*, 55 Conn. App. 768, 779, 740 A.2d 896 (1999) (respondent's substance abuse and lack of housing and employment were bases for failure to rehabilitate). The respondent's bond with Aviana, albeit deep and sincere, does not alter this conclusion, as "[t]he fact that [a parent] may love [a] child does not in itself show rehabilitation . . . ." (Internal quotation marks omitted.) *In re Lil'Patrick T.*, supra, 254.

Accordingly, we conclude that the court's factual findings are sufficient to support its determination that the respondent failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, she could assume a responsible caretaking position in Aviana's life.[7]

II

Next, the respondent claims that the court erred in determining that the termination of her parental rights was in Aviana's best interest. Again, the respondent does not challenge any subordinate finding made by the court in support of its best interest determination. Instead, the respondent argues that "[t]he evidence clearly demonstrated that the respondent . . . expresses love and affection for [Aviana], is concerned for [Aviana's] health and well-being, and while [Aviana] is not able to live with her, the respondent . . . engages enough with her daughter with love and affection so

[7] We note that, during oral argument before this court, the respondent's counsel conceded: "Admittedly, there is not a strong argument to be made with respect to the failure to rehabilitate other than [that the respondent] was attempting to engage in services but . . . to quote [the respondent] . . . 'addiction is hard.' " This assessment of the strength of the respondent's argument is consistent with our analysis and conclusion.

that her daughter recognizes her as her mother." Moreover, the respondent asserts that she "has been nurturing and giving to her daughter to the best of her abilities and circumstances." We are not persuaded that this evidence undermines the court's conclusion that termination of the respondent's parental rights is in Aviana's best interest.

We begin by setting forth the following relevant legal principles. "Our standard of review in a challenge to a trial court's best interest determination in a proceeding to terminate parental rights is well established. [A]n appellate tribunal will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . . In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . In the dispositional phase . . . the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § 17a-112 [(k)].[8] . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites

[8] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the [department] has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent

that need to be proven before termination can be ordered. . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . [A] trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound. . . .

"Our appellate courts have recognized that long-term stability is critical to a child's future health and development . . . . In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Furthermore, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives. . . . Additionally, although [a] respondent may love her children and share a bond with them, *the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination.* . . .

to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

Our courts consistently have held that even when there is a finding of a bond between parent and a child, it still may be in the child's best interest to terminate parental rights." (Citations omitted; emphasis in original; footnote added; footnote omitted; internal quotation marks omitted.) *In re S. G.*, supra, 229 Conn. App. 861–63.

In the present case, the respondent argues that the court's best interest finding is clearly erroneous because a strong bond exists between her and Aviana. Our case law, however, treats the existence of a bond between parent and child, even when deep and sincere, as relevant to, but not dispositive of, a court's best interest determination. See id., 863–65 (respondent mother's bond with children was not dispositive in light of her ongoing substance abuse); *In re Autumn O.*, 218 Conn. App. 424, 444–45, 292 A.3d 66 (respondent mother's bond with children was not dispositive in light of her repeated cohabitation with individuals who created violent home environment), cert. denied, 346 Conn. 1025, 294 A.3d 1026 (2023). "Consequently, so long as there is sufficient evidence to support the court's reliance on other factors, its best interest determination is entitled to deference." *In re S. G.*, supra, 229 Conn. App. 864.

In making its best interest determination, the court took into consideration "all credible evidence and arguments of counsel," and it found by clear and convincing evidence that it was in Aviana's best interest to terminate the parental rights of the respondent. Specifically, the court considered that "[Aviana] is almost three years old, born [in June, 2021], and has been in the care of the [petitioner nearly] since birth. [Aviana] needs permanency and stability in her life to successfully develop. . . .

"The [respondent] made nominal attempts to alter her lifestyle until July, 2023, after that time the [respondent]

made no attempts. . . . She never parented [Aviana] beyond her three hours of weekly visitation. . . . Although the [respondent] continues to be addicted to illicit substances, she made every effort to visit with [Aviana] until 2024. As the trial date approached, the [respondent] became less consistent with her visits; however, the undisputed evidence was that the [respondent] and [Aviana] have a bond. The [respondent] never gained sobriety or stability for the department to consider allowing the [respondent] to parent [Aviana] full-time. [Aviana] has never lived with the [respondent]. She has known only one home; the home with her foster mother.

"The overwhelming evidence established that the [respondent] has not made real efforts to adjust her circumstances, conduct or conditions to make it in [Aviana's] best interest to be reunited or returned to the [respondent's] care." Although the court observed that "[t]he [respondent's] love for [Aviana] was evident at the trial," it ultimately determined that the termination of the respondent's parental rights was necessary to provide Aviana with a "loving, nurturing, and stable home," which "love alone does not create" and the respondent cannot provide due to her ongoing substance abuse, inability to meaningfully engage in services, and lack of stable housing and employment.

In light of the court's foregoing factual findings, we conclude that the court's finding, by clear and convincing evidence, that the termination of the respondent's parental rights was in the best interest of Aviana, even given the existence of a bond between the respondent and Aviana, is not clearly erroneous and, moreover, is factually supported and legally sound. We therefore will not substitute our judgment for that of the court.

The judgment is affirmed.

In this opinion the other judges concurred.

# IN RE MATTHEW W.*
## (AC 47853)

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

*Syllabus*

The respondent mother appealed from the judgment of the trial court terminating her parental rights with respect to her minor child. The mother claimed, inter alia, that the court improperly determined that she had failed to achieve a sufficient degree of personal rehabilitation within the meaning of the statute (§ 17a-112 (j) (3) (E)). *Held*:

The trial court's unchallenged factual findings, including its findings regarding the respondent mother's transience, mental health issues and substance abuse, were sufficient to support its determination that the petitioner, the Commissioner of Children and Families, had proven, by clear and convincing evidence, that the mother had failed to achieve such degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (E), as would encourage the belief that, within a reasonable time, she could assume a responsible position in the child's life.

Argued January 9—officially released February 28, 2025**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Bridgeport, Juvenile Matters, and tried to the court, *Skyers*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

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

** February 28, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

*Rebecca A. Rebollo*, attorney for the minor child.

*Opinion*

BRIGHT, C. J. The respondent mother, Johnna W., appeals from the judgment of the trial court terminating her parental rights to her minor child, Matthew W.[1] On appeal, the respondent claims that the court improperly determined that she had failed to achieve a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (E).[2] We affirm the judgment of the trial court.

The following undisputed facts, either as found by the court or as appear in the record, are relevant to the respondent's appeal. The respondent has struggled with her mental health since childhood. "[S]he was in and out of psychiatric hospitals from an early age. She is diagnosed with post-traumatic stress disorder (PTSD), bipolar disorder, and anxiety. [The respondent] has a history of substance abuse and has utilized both inpatient and outpatient treatments . . . to address the issue. She . . . continued to [abuse] substances up until the time of her incarceration in November, 2022.

"[The respondent] is the mother of five children, none of [whom has] been consistently in her care. Her oldest child, [D], was born [in December, 2004]. [D] was removed from [the respondent's] care and placed with her maternal aunt . . . in 2007. Her second child, [R], was born [in February, 2008]. Guardianship of [R] was

[1] The court also terminated the parental rights of the putative father, John Doe, who is not involved in this appeal. Accordingly, all references to the respondent in this opinion are to the respondent mother.

[2] The attorney for the minor child has filed a statement adopting the appellate brief of the petitioner.

awarded to [the respondent's] maternal grandmother . . . on October 24, 2008 . . . . The third child, [J], was born [in December, 2016]. [J] was removed from [the respondent's] care at birth due to testing positive for cocaine and marijuana. The Department of Children and Families [(department)] transferred guardianship of [J] to [the respondent's] maternal aunt . . . on May 4, 2022. The fourth child, [T], was removed from [the respondent's] care at birth due to issues related to substance abuse, mental health, and intimate partner violence. [The respondent's] parental rights [to T] were terminated on July 27, 2022, pursuant to a petition filed by [the petitioner, the Commissioner of Children and Families]. [T] was adopted in November, 2022."

Matthew was born in February, 2023. The respondent "does not know the identity of Matthew's father. At the time of his birth, [the respondent] was incarcerated at York Correctional Institution and hospitalized at Yale New Haven Hospital." On February 3, 2023, a hospital social worker reported to the department that the respondent was unable to care for Matthew, as she was "exhibiting some signs of paranoia," including making "comments about her fear of staff raping the baby." The petitioner invoked an administrative ninety-six hour hold on behalf of Matthew that same day. On February 6, 2023, the petitioner filed a neglect petition as to Matthew, and she sought and obtained an order of temporary custody, which the court, *McLaughlin*, *J.*, later sustained on February 10, 2023.

"On March 23, 2023, the court ordered [the respondent] to attend inpatient substance abuse treatment at New Prospects in Bridgeport . . . . In May, 2023, [the respondent] was discharged from New Prospects. Thereafter, she moved to a shelter and was [required to wear] a [global positioning system] monitoring device. Due to concerns regarding her behavior, her

bond was increased, and [the respondent] was reincarcerated at York Correctional [Institution] on May 25, 2023."

On June 21, 2023, the court, *Maronich*, *J.*, adjudicated Matthew neglected, committed him to the care and custody of the petitioner, and ordered final specific steps for the respondent.[3] Matthew was placed in a nonrelative foster home with the same foster parents who adopted Matthew's sibling, T, in November, 2022. "Matthew is well bonded with his foster parents and receives love and support from them. The foster parents are ready, willing, and able to adopt Matthew."

The petitioner filed the underlying petition for termination of the respondent's parental rights on June 23, 2023, alleging that the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (E).

The respondent "was referred to Connecticut Valley Hospital from July, 2023, to September, 2023, for competency restoration. Upon discharge from Connecticut Valley Hospital, she went back to York Correctional Institution. She was released from York [Correctional Institution] in September, [2023]. After her criminal charges were resolved, she was placed on probation for a period of two years.

[3] The final specific steps required, inter alia, that the respondent keep all appointments set by or with the department; cooperate with the department's home visits; let the department know where she resides; take part in counseling and make progress toward individual treatment goals; submit to a substance abuse evaluation and follow the recommendations about treatment; not use illegal drugs or abuse alcohol or medicine; get and maintain adequate housing and a legal income; comply with any criminal court orders and follow her conditions of probation; visit Matthew as often as permitted; sign releases allowing the department to communicate with service providers to check on her attendance, cooperation, and progress toward identified goals; and cooperate with the service providers recommended for counseling, in-home support services, substance abuse assessment or treatment, and intimate partner violence services.

"Upon [her release from incarceration, the respondent] reported that she did not have stable housing. She reported that she was residing with friends in both New York and Connecticut. Her communication with the department was inconsistent. [The respondent] testified that she recently obtained housing that she shared with two other adults. However, her living arrangements were never observed or evaluated by the department.

"[The respondent] was referred to [Connecticut Renaissance (CT Renaissance)] for a mental health and substance abuse assessment. . . . [The respondent] completed the intake in October, 2023, but struggled with her attendance at the eight week program. She eventually completed the program [shortly before the trial in February, 2024]. . . . [The respondent] also was previously referred by the department to engage in mental health treatment, substance abuse counseling and resource management while her case was pending with [T].

"[The respondent's] first successful visit with Matthew was in November, 2023. She was referred to the Boys and Girls Village Quality Parenting Center [(parenting center)]. At the [parenting center] program, she would be able to have visitation [with Matthew] and parent coaching. [The respondent] had weekly visits at [the parenting center] with Matthew beginning in December, 2023."

On December 7, 2023, the court approved a permanency plan of termination of parental rights and adoption. On January 23, 2024, Robert Guerrera, a psychiatrist employed by CT Renaissance, conducted a psychological evaluation of the respondent and diagnosed her with bipolar disorder, cannabis use disorder, and stimulant use disorder. In his written evaluation, Guerrera noted that the respondent was three months

pregnant at the time of the evaluation and that she had "elected not to take medications during her pregnancy unless absolutely necessary." He also noted that the respondent continued to use marijuana daily despite her pregnancy and that she was encouraged to "reduce or abstain from cannabis use during her pregnancy."

On February 21, 2024, the court, *Skyers*, *J.*, held a trial on the termination of parental rights petition. The court heard testimony from Karla Jimenez, an employee at the parenting center who observed the respondent's visits with Matthew; Nadia Mondestin, a licensed alcohol and substance abuse counselor employed by CT Renaissance; Denise Fuzie and Erica Laguerre, the department social workers assigned to Matthew's case; and the respondent. The court admitted ten exhibits into evidence, including records from CT Renaissance and the parenting center; Guerrera's psychological evaluation; the social study in support of termination of parental rights; the study in support of the permanency plan; court updates from the department; a copy of the court-ordered specific steps; and a copy of the respondent's criminal history establishing that the respondent had been convicted of larceny in 2012 and assault in 2017, and found in violation of probation in 2018 and 2022.

Jimenez testified that, when the respondent began the six month parenting center program in November, 2023, the respondent was homeless. Jimenez explained that the respondent's interactions with Matthew at the parenting center "were positive. But it did take some time for Matthew to adjust [to] having visits with his mother" because "[h]e was not familiar with [her]." Jimenez also noted that the respondent occasionally used profanity during the visits, although the respondent was "okay" with Jimenez' attempts to redirect her.

Mondestin testified about the respondent's participation in the cognitive behavioral therapy group for her

substance abuse issues. Mondestin explained that the respondent began the group therapy, which was supposed to take place once a week for eight weeks, in October, 2023. The respondent, however, was unable to complete that program until February, 2024, because "[s]he struggled with her attendance" due, in part, to her inability to obtain stable housing. Despite the respondent's struggles, Mondestin acknowledged that the respondent "did make progress in taking care of herself. . . . [N]ot having someplace stable to stay, you know that [takes] a toll on . . . decision making. But apart from that, she has tried." Mondestin also testified that the respondent was not taking medication for her conditions because she was approximately three months pregnant at the time of the trial. Mondestin noted that the respondent's probation officer was supposed to submit a recommendation for the respondent to engage in additional individual outpatient therapy "to help make sure that the [respondent's] symptoms are not flaring up" while she was not taking her medication. Mondestin further explained that, with bipolar disorder, "[y]ou could have good days. You could have bad days. You could be very depressed. And, you know, so these are the things that we want to look out for and help her." During cross-examination, Mondestin explained that the respondent was subjected to random drug tests as part of the CT Renaissance program and that she had tested positive for marijuana.

Fuzie, who was assigned to Matthew's case in February, 2023, testified that the issues identified by the department in regard to the respondent's previous children were "her unstable mental health, extensive substance [abuse] history, [intimate partner violence], parenting, as well as housing." While Fuzie was assigned to Matthew's case, her communication with the respondent "was inconsistent due to [the respondent being] in and out of different programs." Fuzie referred the

respondent to the parenting center because it provided visitation as well as parenting coaching.

Laguerre, who previously had worked with the respondent in T's case in 2021, testified that the department had identified several issues for the respondent to address in T's case, including her mental health, substance abuse, intimate partner violence, employment, and resource management due to her lack of stable housing. She further testified that, although the department had recommended mental health services for the respondent in T's case, the respondent "was inconsistent with [that] treatment." Laguerre also was assigned to Matthew's case in December, 2023, and she testified that she communicated with the respondent "pretty frequently, via text or phone calls" regarding visitation and monthly meetings at the parenting center. When asked about the respondent's progress with her substance abuse treatment through CT Renaissance, Laguerre noted that the respondent was not consistent with that program or her mental health treatment.

The respondent testified that she was residing with three other individuals in a three bedroom apartment in Bridgeport, that she continued to use marijuana, and that she wanted to "be a productive mother. A proactive mother. A determined mother. I have done so many things that I'm not proud of in my past. You know . . . I felt like I haven't had a chance to be a mother, to step up to be a mother. I was kind of frightened. I was young. I had . . . like no stability at all. So, now that I'm actually progressing in a lot of changes that I've made I decided that I feel like I'm suitable to making that [happen]. I know it doesn't justify what happened in the past, but I feel like I'm ready to be a mother and stay for treatment and therapy with my child, not just alone."

When asked how things are different with Matthew as opposed to her previous children, the respondent

explained: "I am getting proper treatment, which is adjusting my mental status, which is making me a little bit more leveled. I am okay with my living situation now that . . . I did find an apartment, which is great. I did engage in treatment and still [am engaging] . . . on my own with treatment even though it's not mandatory for me to do. I chose to [do it]. I just [chose] to also do family therapy with my son. These are things that I've never [sought] . . . for my other children. And I'm not trying to shun them all. And I do apologize, but I feel like I deserve a chance. And this for me right now is a big pull for me. Like, I feel amazing. I did this much work myself."

During cross-examination, the respondent claimed to have been diagnosed with depression, anxiety, and PTSD but denied being diagnosed with bipolar disorder. She explained that "[b]ipolar [disorder] could be [mistaken for] PTSD . . . ." When asked about her decision not to take medication due to her pregnancy, the respondent stated: "Well, [Guerrera] stated that my moods were not medication doable. So, like he's been putting me on medication. He told me if I get off the medication and I feel depressed or [something], which I most likely will because it's postpartum. I am looking . . . to [get] back on a different medication besides Latuda, I felt like Latuda wasn't helping me. And I told him that."

As to her living arrangements, the respondent testified that her housing situation was temporary and that she would not want to bring Matthew to her apartment. On redirect examination, the respondent testified that her "ultimate plan for housing" was to find a studio apartment, though she also explained, "I've seen a lot of loft studios, which were in my budget range. We're unable to still have money left if Matthew needs anything. So, that's . . . my living situation."

On May 28, 2024, the court issued a memorandum of decision and rendered judgment terminating the respondent's parental rights. In the adjudicatory portion of its decision,[4] the court found by clear and convincing evidence that (1) the department made reasonable efforts to locate the respondent and to reunify her with Matthew, (2) the respondent was unwilling or unable to benefit from reunification services, and (3) the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (E).[5] In finding that the respondent was unable or unwilling to benefit from the department's reunification efforts, the court stated that the respondent "was either incarcerated or in and out of treatment programs from the time of Matthew's birth until September, 2023. . . . She has not demonstrated any period of stability that would demonstrate her ability to care for the needs of Matthew."

As to the respondent's failure to rehabilitate, the court stated that the respondent's "parental rights were

[4] "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interest of the child." (Internal quotation marks omitted.) *In re Timothy B.*, 219 Conn. App. 823, 835, 296 A.3d 342, cert. denied, 349 Conn. 919, 318 A.3d 439 (2023).

[5] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent . . . unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (2) termination is in the best interest of the child, and (3) . . . (E) the parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the Commissioner of Children and Families . . . ."

terminated with respect to her son, [T], in 2022 . . . . [H]er history of transient living, her long-standing untreated mental health and [substance abuse issues] have demonstrated that she has not been able to address her challenges to achieve a level of personal rehabilitation. Although [the respondent] attended treatment and most recently completed the CT Renaissance sessions, she remains in no better position to serve as a caretaker for Matthew. Therefore, the court finds by clear and convincing evidence that she'' failed to rehabilitate within the meaning of the statute.[6]

In the dispositional phase, the court considered and made written findings regarding the seven best interest factors set forth in § 17a-112 (k).[7] Specifically, the court

[6] We note that the court's reasoning as to the adjudicatory ground for termination of the respondent's parental rights is only a single paragraph consisting of three sentences. We emphasize that a court should set forth its reasoning and make express findings as to the specific facts on which it relies in reaching its ultimate determination. Indeed, a complete and thorough statement of the court's factual findings in child protection cases "provides the best illustration that the trial court properly considered all of the elements of § 17a-112 (j) in arriving at its ultimate conclusion that the respondent's parental rights should be terminated." *In re Jayce O.*, 323 Conn. 690, 693 n.3, 150 A.3d 640 (2016). Issuing a comprehensive decision also facilitates appellate review of the judgments rendered in these significant cases.

[7] General Statutes § 17a-112 (k) provides in relevant part: "[I]n determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the

found that the respondent's "substance abuse and untreated mental health issues that led to the termination [of] her rights with respect to her son [T] in 2022, are still prevalent now" and that she "has failed to sufficiently adjust her circumstances, conduct or conditions to make it in the best interest of the child to be reunified with her in the foreseeable future. [The respondent] has been incarcerated during much of this case and there is little evidence that she has continued to address her substance abuse or mental health issues. [Her] parental rights with respect to [T] were terminated in 2022. She has been unable or unwilling to sufficiently address the reasons why her children were removed from her care, and she is not able to provide Matthew with a safe, permanent and stable home environment where he would be able to thrive."

On the basis of these subordinate findings, the court found, by clear and convincing evidence, that the termination of the respondent's parental rights was in the best interest of the child. The court stated that "Matthew is . . . a happy child. He is very bonded and attached to his foster parents. He looks to them for support and comfort. He is [nearly eighteen months] old and has been with his current foster parents for all of his life. He needs a permanent home where he can continue to flourish and grow. His foster parents are committed to ensuring that he is in a safe, loving and stable home. The foster parents have expressed that they are willing

foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

to be a long-term resource for him." Accordingly, the court terminated the respondent's parental rights and appointed the petitioner as Matthew's statutory parent. This appeal followed.

On appeal, the respondent does not challenge any of the court's subordinate findings as being clearly erroneous. Rather, her sole claim is that the court improperly determined that she had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (E). Specifically, she claims that, "[w]hen considering events up until the time of trial, the evidence was insufficient to support the trial court's determination that the [petitioner] had demonstrated by clear and convincing evidence that the respondent had failed to rehabilitate such that she could not assume a responsible role in the life of the child within a reasonable time considering the age and needs of the child." We disagree.

We begin our analysis with the applicable standard of review and relevant legal principles regarding a parent's failure to rehabilitate pursuant to § 17a-112 (j). "[The] standard of review of a trial court's finding that a parent has failed to achieve sufficient rehabilitation . . . is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]." (Internal quotation marks omitted.) *In re Zarirai S.*, 229 Conn. App. 239, 246, 326 A.3d 1148 (2024). When applying this standard,[8] "[t]he evidence must be given the most

[8] Although the respondent claims that the "evidentiary sufficiency is an improper standard of review in child protection cases," she also recognizes that, as an intermediate appellate court, we are bound by our Supreme Court's decision in *In re Shane M.*, 318 Conn. 569, 122 A.3d 1247 (2015), in which the court held that evidentiary sufficiency is the proper standard of review. Id., 587–88; see, e.g., *Stamford Property Holdings, LLC* v. *Jashari*, 218 Conn. App. 179, 198 n.12, 291 A.3d 117 ("[a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it" (internal quotation marks omitted)), cert. denied, 347 Conn. 901, 296 A.3d 840 (2023).

favorable construction in support of the [judgment] of which it is reasonably capable. . . . In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *In re Niya B.*, 223 Conn. App. 471, 490, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024).

"An important corollary to these principles is that the mere existence in the record of evidence that would support a *different* conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is *enough* evidence in the record to support the finding that the trial court made." (Emphasis in original.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

"Personal rehabilitation as used in [§ 17a-112] refers to the restoration of a parent to [her] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the child at issue. . . . An inquiry regarding personal rehabilitation requires us to obtain a historical perspective of the respondent's child-caring and parenting abilities. . . . Although the standard is not full rehabilitation, the parent must show more than any rehabilitation. . . . Successful completion of the petitioner's expressly articulated expectations is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. . . . [E]ven if a parent has made successful strides in her ability to manage her life and may have achieved a level of stability within her limitations, such

improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, she could assume a responsible position in the life of her children." (Citations omitted; internal quotation marks omitted.) *In re Zarirai S.*, supra, 229 Conn. App. 254–55.

"During the adjudicatory phase of a termination proceeding, a court generally is limited to considering only evidence that occurred before the date of the filing of the petition or the latest amendment to the petition, often referred to as the adjudicatory date. . . . Nevertheless, it may rely on events occurring after the [adjudicatory] date . . . [in] considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time. . . .

"Furthermore, [i]t is well established that a respondent's failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation. . . . [A]s a general proposition, the failure to acknowledge and make progress in addressing the issues that led to a child's removal may be one of many contributing factors to a court's determination that a parent has failed to achieve a sufficient degree of personal rehabilitation." (Citations omitted; internal quotation marks omitted.) *In re A. H.*, 226 Conn. App. 1, 17–18, 317 A.3d 197, cert. denied, 349 Conn. 918, 317 A.3d 784 (2024).

Construing the record in the manner most favorable to sustaining the judgment, as we must; see *In re Niya B.*, supra, 223 Conn. App. 490; we conclude that the evidence reasonably supports the court's ultimate determination that the respondent had failed to rehabilitate within the meaning of § 17a-112 (j) (3) (E). As the respondent acknowledges, the primary obstacles to her

reunification with Matthew were her "transience and her mental health and substance abuse issues." The evidence in the record supports the court's determination that these issues persisted and that the respondent therefore remained in no better position to care for Matthew.

In the present case, the court considered events occurring after the adjudicatory date in June, 2023, in determining that the respondent had failed to achieve a sufficient degree of personal rehabilitation. As to the respondent's transiency issue, Laguerre testified that, in T's case, the department had identified the respondent's lack of stable housing and her mental health and substance abuse issues as the issues she needed to address and that the respondent had been inconsistent in the recommended treatments at that time. Both Laguerre and Jimenez testified that the respondent remained homeless in November, 2023, when the respondent began visitation at the parenting center. Mondestin likewise testified about the respondent's lack of stable housing during that time, explaining that her struggles with attendance at CT Renaissance were attributable to her lack of stable housing. The respondent herself testified that her living situation at the time of trial was temporary and unsuitable for Matthew, and she acknowledged that she was unable to afford a suitable dwelling while also providing for Matthew's needs. Consistent with this evidence, the court found that the respondent "ha[d] not demonstrated any period of stability that would demonstrate her ability to care for the needs of Matthew." Accordingly, the court's finding that the respondent's history of transiency remained unresolved is supported by the evidence in the record. See, e.g., *In re Lil'Patrick T.*, 216 Conn. App. 240, 257, 284 A.3d 999 (record provided evidentiary basis for court's finding that "the respondent would likely not be able,

within a reasonable time, to provide stable housing"), cert. denied, 345 Conn. 962, 285 A.3d 387 (2022).

As to her mental health issues, the evidence established that, after successfully completing inpatient treatment for mental health and substance abuse issues at New Prospects in May, 2023, the respondent was unable to remain in New Prospects' shelter due to issues with her behavior. Although the respondent testified that she was "getting proper treatment, which [was] adjusting [her] mental status," she also denied that she suffered from bipolar disorder and stated that she was not taking medication. In addition, the respondent testified that Guerrera had "stated that [her] moods were not medication doable," whereas Guerrera specifically stated in his psychological evaluation that the respondent had stopped taking medication for her bipolar disorder because she was three months pregnant. The respondent thus denied her well documented diagnosis of bipolar disorder and was unable to treat her conditions with medication due to her pregnancy, which indicates a failure to acknowledge and an inability to address her underlying mental health issues. See, e.g., *In re Shane M.*, 318 Conn. 569, 589, 122 A.3d 1247 (2015) (parent's "failure to acknowledge the underlying personal issues that form the basis for the department's concerns indicates a failure to achieve a sufficient degree of personal rehabilitation" (internal quotation marks omitted)); *In re A. H.*, supra, 226 Conn. App. 17 (same).

The same is true as to the respondent's substance abuse issues. Guerrera noted that the respondent had last used ecstasy in April, 2023, which was during the time that she was receiving inpatient treatment at New Prospects. He also noted, however, that, despite being three months pregnant in January, 2024, the respondent "continue[d] to smoke marijuana daily." Although Guer-

rera advised the respondent to abstain from using marijuana, the respondent admitted at trial that she continued to use marijuana, and Mondestin confirmed that the respondent tested positive for marijuana on multiple occasions while engaged in the CT Renaissance program. The respondent's continued use of marijuana, despite being advised to refrain from doing so while pregnant, demonstrates a failure to acknowledge or address her underlying substance abuse issues.

The respondent nevertheless argues that the record establishes that she had addressed her "transience and her mental health and substance abuse issues" in that she had (1) completed the CT Renaissance program, (2) "obtained housing and was willing to [allow] the department [to examine] the housing," (3) participated "in weekly visitation with Matthew through" the parenting center, and (4) "cooperated with probation and avoided involvement with the criminal justice system . . . ." In short, although the respondent argues that some of the evidence in the record could have supported a different conclusion than the one reached by the court, that simply "is not relevant to our analysis . . . . [T]he mere fact that there was evidence in the record that would have supported a different finding is not enough to call into question the sufficiency of the evidence that does provide support for the court's finding." *In re Jayce O.*, supra, 323 Conn. 718. For this reason, the evidence identified by the respondent does not undermine our conclusion that there is sufficient evidence to support the court's finding that she failed to rehabilitate within the meaning of § 17a-112 (j) (3) (E).

Finally, the respondent argues that the court improperly based its decision on her history rather than on her abilities at the time of trial.[9] In support of her argument, the respondent highlights the court's reference

[9] The respondent also argues that "[t]he trial court's failure to grant additional time for the respondent to address secondary concerns, such as employment, is contrary to the statutory language that insists the respondent

to her "history of transient living, her long-standing untreated mental health and abuse of substances . . . ." We are not persuaded that this reference to the respondent's history demonstrates that the court improperly focused on the respondent's history rather than on her present abilities.

As this court has explained, "the court in a termination of parental rights hearing should consider *all* potentially relevant evidence, no matter the time to which it relates. . . . In order for the court to make a determination as to the respondent's prospects for rehabilitation, the court was required to obtain a historical perspective of the respondent's child caring and parenting abilities. . . . Because the parent-child relationship is at issue, all relevant facts and family history should be considered by the trial court when deciding whether to terminate the respondent's parental rights. . . . The entire picture of that relationship must be considered whenever the termination of parental rights is under consideration by a judicial authority." (Emphasis in original; internal quotation marks omitted.) *In re Gabriel C.*, 196 Conn. App. 333, 367, 229 A.3d 1073, cert. denied, 335 Conn. 938, 248 A.3d 708 (2020).

In the present case, the court properly considered the respondent's history with the department and her

does not need to show full and complete rehabilitation at the time of the termination trial." "[U]nder § 17a-112 (j) (3) (E), a parent's rights may be terminated without the provision of specific steps" and "the petitioner may seek a simultaneous adjudication of neglect and a judgment terminating parental rights." *In re Jayce O.*, supra, 323 Conn. 712. Accordingly, when the petitioner seeks to terminate a parent's parental rights pursuant to § 17a-112 (j) (3) (E), the statute imposes no requirement that the parent be afforded any amount of time to demonstrate sufficient rehabilitation. In the present case, however, the respondent was provided with specific steps and allowed time to rehabilitate, as the trial on the petition to terminate her parental rights did not occur until more than six months after it was filed. Thus, because the respondent was afforded more time than the statute requires, her argument is unavailing.

inability to address the issues giving rise to the termination of her parental rights as to another child in evaluating the respondent's current prospects for rehabilitation. See, e.g., *In re Christopher B.*, 117 Conn. App. 773, 787–88, 980 A.2d 961 (2009) ("court properly exercised its discretion in considering evidence of the department's involvement with the respondent and [her child] before the . . . petition, and in according appropriate weight to that evidence"). Indeed, that is precisely what the court was required to do. See *In re Anna Lee M.*, 104 Conn. App. 121, 128, 931 A.2d 949 ("for the court to make a determination as to the respondent's prospects for rehabilitation, the court was required to obtain a historical perspective of the respondent's child caring and parenting abilities" (internal quotation marks omitted)), cert. denied, 284 Conn. 939, 937 A.2d 696 (2007). Moreover, the court set forth the correct legal standard, stating that "[t]he ultimate issue the court must evaluate is whether the parent has gained the insight and ability to care for his or her child given the age and needs of the child within a reasonable time." (Internal quotation marks omitted.) Given the court's analysis and its citation to the correct legal standard, we are not persuaded that its discussion of the respondent's "history of transient living, her long-standing untreated mental health and [her] abuse of substances" demonstrates that the court improperly focused on the respondent's history with the department. See, e.g., *In re Fayth C.*, 220 Conn. App. 315, 325, 297 A.3d 601 ("court's analysis of the respondent's failure to achieve sufficient personal rehabilitation evinces the use of a correct legal standard, as the court detailed the respondent's lack of engagement in services that were aimed at rehabilitation and inability to care for the needs of [the child] within a reasonable time, cited the correct legal standard, and repeated that standard in its conclusion"), cert. denied, 347 Conn. 907, 298 A.3d 275 (2023). Instead,

the court properly considered the respondent's history as part of "[t]he entire picture" of the parent-child relationship, including her present prospects for rehabilitation, as the statute requires. (Internal quotation marks omitted.) *In re Gabriel C.*, supra, 196 Conn. App. 367.

In sum, we conclude that there is sufficient evidence to support the court's determination that the petitioner had proven, by clear and convincing evidence, that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief, that within a reasonable time, considering Matthew's age and needs, she could assume a responsible position in his life.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* BRUSHAUN THOMPSON-BAKER
## (AC 46871)

Elgo, Suarez and Seeley, Js.

*Syllabus*

Convicted of assault of public safety personnel, the defendant appealed to this court. The defendant claimed that the evidence was insufficient to support a finding beyond a reasonable doubt that, when he assaulted K, a judicial marshal, K was acting in the performance of his official duties. *Held*:

The trial court reasonably concluded that the evidence and the reasonable inferences drawn therefrom demonstrated beyond a reasonable doubt that K was acting in the performance of his duties when the defendant assaulted him because K and another judicial marshal testified that they had accompanied the defendant from the courthouse, where he had been arraigned, to a hospital, that he guarded the defendant at the hospital, and that K informed the defendant and hospital staff that the defendant was not permitted to eat, and that he did so pursuant to a judicial directive prohibiting the consumption of food by inmates while at a hospital, which prompted the defendant to spit in K's right eye.

The trial court reasonably could have found that K denied the defendant access to food because he had a good faith, albeit erroneous, belief that a judicial directive prohibited the consumption of food by inmates while at a hospital, and this court declined to conclude that K had testified untruthfully, acted in bad faith or was otherwise engaged in a personal frolic, as such a conclusion would substitute its own judgment for that of the trier of fact, which evaluated the evidence and the witnesses' credibility firsthand.

Argued November 14, 2024—officially released March 4, 2025

*Procedural History*

Two part substitute information charging the defendant, in the first part, with the crime of assault of public safety personnel, and, in the second part, with being a persistent serious felony offender, brought to the Superior Court in the judicial district of Fairfield, where the first part of the information was tried to the court, *E. Richards*, *J.*; finding of guilty; thereafter, the second part of the information was tried to the court, *E. Richards*, *J.;* finding that the defendant was a persistent serious felony offender; judgment of guilty and sentence enhanced for being a persistent serious felony offender, from which the defendant appealed to this court. *Affirmed.*

*Gary A. Mastronardi*, assigned counsel, for the appellant (defendant).

*Olivia M. Hally*, deputy assistant state's attorney, with whom, on the brief, were *Joseph Corradino*, state's attorney, and *Michael DeJoseph*, senior assistant state's attorney, for the appellee (state).

*Opinion*

SUAREZ, J. The defendant, Brushaun Thompson-Baker, appeals from the judgment of conviction rendered by the trial court of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (5). On appeal, the defendant claims that the evidence was insufficient to support a finding beyond a reasonable doubt that, when he assaulted a judicial marshal,

the marshal was acting in the performance of his official duties.[1] We affirm the judgment of the trial court.

The following evidence was presented at trial. On June 9, 2022, the defendant, having been arrested the previous day, was brought to the courthouse in the judicial district of Fairfield at Bridgeport, geographical area number two (G.A. 2), for the purposes of arraignment. After the defendant's arraignment, he became agitated and aggressive. He yelled obscenities, talked over both the judge and his public defender, and threatened McKenzie Bushnell, one of the judicial marshals who escorted him from the courtroom back to the holding cell. Specifically, the defendant referred to Bushnell as a "bitch," and stated that he was going to remember her and that she was "not to fucking touch him . . . ."

Later that morning, the defendant was transported by ambulance from G.A. 2 to St. Vincent's Medical Center in Bridgeport in connection with an unspecified illness. He was accompanied by two judicial marshals, Jason Kramer and Joshua Dalby. The defendant appeared to be agitated while at the hospital; he yelled at medical staff members and demanded that they identify themselves and their supervisors. The defendant requested food from the hospital staff, but Kramer informed both the defendant and the attending nurse that the defendant was not permitted to consume food while at the hospital, although he was permitted to drink water.

Upon being informed that he was not allowed to eat, the defendant became even more aggressive in his words and conduct by standing face-to-face with Kramer and backing him against the hospital room door.

[1] In his principal appellate brief, the defendant also claimed that the court improperly imposed on him a sentence involving a period of special parole under General Statutes § 54-125e (b) (1). In his reply brief, the defendant withdrew this claim.

In response, Dalby physically inserted himself between the defendant and Kramer. The defendant then called Kramer "[a] fucking cracker," said "I'm going to fuck you up," and spat in his right eye. Immediately after spitting on Kramer, the defendant made several hostile comments. According to Kramer and Dalby, the defendant stated: "I spit on him, yes, I did. I will take the charge"; "it's only six months, I can take that"; "it probably won't stick, there's no cameras"; "[I'll] meet [Kramer] at 5:01 when he gets off of work"; and "[I'm] going to fuck him up after work."

Thereafter, the defendant was arrested and charged with assault of a public safety officer.[2] The defendant pleaded not guilty, waived his right to a jury trial, and elected to be tried by the court. At trial, the prosecutor presented testimony from three witnesses: Bushnell, Kramer, and Dalby. After the prosecutor rested the state's case-in-chief, defense counsel offered as the defense's sole evidence a stipulation that the state judicial marshals' handbook (handbook) does not contain any directive or guidance prohibiting "an inmate who is at the hospital from receiving food from the hospital."[3] The prosecutor agreed to this stipulation, and the defense rested.

The court then issued its ruling, finding the defendant guilty of assault of a public safety officer and setting forth the following findings: "The court has listened to testimony and arguments of counsel. The court has also reviewed and considered all applicable statutes,

[2] The defendant also was charged, in a part B information, with being a persistent serious felony offender pursuant to General Statutes § 53a-40 (c).

[3] Specifically, when offering the stipulation, defense counsel stated that he "had the opportunity to speak to . . . Lieutenant Greenbay . . . who was kind enough to review the marshals' handbook with—with the chief in this—in this building. And, I've been advised that there is no directive or guidance which prohibits an inmate who is at the hospital from receiving food from the hospital."

testimony and arguments of counsel in deliberations upon this matter. . . . The court finds that, on June 9, 2022, the defendant was being transported to St. Vincent's Medical Center . . . from G.A. 2 in Bridgeport to address an unspecified illness. The defendant was in the care of . . . Marshal[s] . . . Kramer and . . . Dalby. At approximately 11 a.m., testimony reveals that the defendant spit in the eye of [Kramer] during an altercation.

"That the defendant specifically intended to prevent [Kramer] from performing his lawful duties was established by the inference drawn from the facts. . . . [T]hat the defendant was . . . in the custody of [Kramer]. That he became upset with [Kramer] when [Kramer] refused to give him his sandwich. That he called [Kramer] a cracker and threatened to kick his ass. And that, according to [Kramer] and [Dalby], the defendant spit in [Kramer's] eye.

"All of these factors support a finding that the defendant specifically intended, in the court's mind, to prevent a readily identifiable marshal from carrying out his lawful duties in this case by spitting in his face. As a result, the court finds that the state has proven beyond a reasonable doubt the assault [of] public safety [personnel] count."[4]

On May 31, 2023, the court sentenced the defendant to twenty-seven months of incarceration, followed by ten years of special parole. This appeal followed.

We set forth our standard of review and the relevant legal principles. "When a criminal conviction is reviewed for the sufficiency of the evidence, we apply a well established [two part] test. First, we construe the evidence in the light most favorable to sustaining

[4] Following the court's decision on the assault charge, the defendant was found to be a persistent serious felony offender pursuant to General Statutes § 53a-40 (c).

the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [trier of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [P]roof 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 [trier 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 [trier of fact's] verdict of guilty. . . .

"Our review is a fact based inquiry limited to determining whether the inferences drawn by the [trier of fact] are so unreasonable as to be unjustifiable. . . . [T]he inquiry into whether the record evidence would support a finding of guilt beyond a reasonable doubt does not require a court to ask itself whether it believes that the evidence . . . established guilt beyond a reasonable doubt. . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Kyle A.*, 212 Conn. App. 239, 245–46, 274 A.3d 896 (2022), aff'd, 348 Conn. 437, 307 A.3d 249 (2024).

"[W]e give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses. . . . In evaluating evidence that could yield contrary inferences, the trier of fact is not required to

accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Dunbar*, 165 Conn. App. 93, 97, 138 A.3d 455 (2016). "[W]e do not substitute our own judgment for that of the [trier of fact] if there is sufficient evidence to support its verdict." *State* v. *Terry*, 161 Conn. App. 797, 808, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).

Section 53a-167c (a) provides in relevant part: "A person is guilty of assault of public safety . . . personnel when, with intent to prevent a reasonably identifiable peace officer . . . from performing his or her duties, and while such peace officer . . . is acting in the performance of his or her duties . . . (5) such person throws or hurls, or causes to be thrown or hurled, any bodily fluid including, but not limited to, urine, feces, blood or saliva at such peace officer . . . ."[5] Under this statute, the state, therefore, was required to prove the following essential elements beyond a reasonable doubt: (1) the defendant assaulted a reasonably identifiable judicial marshal, (2) the assault occurred while the judicial marshal was acting in the performance of his official duties, (3) the defendant acted with the specific intent to prevent the judicial marshal from performing his lawful duties, and (4) the defendant threw or hurled, or caused to be thrown or hurled, any bodily fluid at the judicial marshal. See Connecticut Criminal Jury Instructions 4.3-3, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited February 18, 2025).

[5] A "[p]eace officer" is defined, inter alia, to include "a judicial marshal in the performance of the duties of a judicial marshal . . . ." General Statutes § 53a-3 (9).

"The question of [w]hether [a judicial marshal] is acting in the performance of his duty within the meaning of . . . [§ 53a-167c (a)] . . . must be determined in the light of that purpose and duty. If he is acting under a good faith belief that he is carrying out that duty, and if his actions are reasonably designed to that end, he is acting in the performance of his duties. . . . The phrase in the performance of his official duties means that the . . . [judicial marshal] is simply acting within the scope of what [he] is employed to do. The test is whether the [judicial marshal] is acting within that compass or is engaging in a personal frolic of his own. . . . [W]hether the . . . [judicial marshal] was acting in the performance of his official duties or engaging in a personal frolic [are] factual questions for the [trier of fact] to determine on the basis of all the circumstances of the case . . . ." (Footnote omitted; internal quotation marks omitted.) *State* v. *Mansfield*, 201 Conn. App. 748, 768, 243 A.3d 822 (2020), cert. denied, 336 Conn. 910, 244 A.3d 561 (2021).

In the present case, the defendant challenges only whether the state proved beyond a reasonable doubt that the assault occurred while Kramer was acting in the performance of his official duties as a judicial marshal. The defendant argues that the court erred in finding that Kramer was acting in the performance of his official duties when he told the hospital staff that the defendant could not consume food while at the hospital, and that Kramer, instead, deliberately provoked the defendant's outburst as part of a personal frolic. Moreover, the defendant argues that, to the extent that Kramer testified at trial that he believed that an official policy supported his denial of food, Kramer committed perjury. The defendant also contends that, in concluding that this essential element had been proven beyond a reasonable doubt, the court improperly relied solely

on its finding that the assault occurred while he was in the care and custody of Kramer.

The following additional evidence is relevant to our analysis. At trial, Kramer testified regarding his training and experience as a judicial marshal. He further testified that he accompanied the defendant to the hospital, that he guarded the defendant at the hospital, that he informed the defendant and the attending nurse that the defendant was not allowed food while at the hospital, and that the defendant subsequently spat in his eye. During the prosecutor's direct examination of Kramer, the following colloquy occurred regarding Kramer's reasoning for denying food to the defendant:

"Q. All right. And why was [the defendant] not allowed to have any food or nonwater beverage provided by the hospital?

"A. First of all, I think it could interfere with the medical staff providing medical care. But it also comes from a directive from the Judicial Branch and Judicial Marshal Services.

"Q. So, the higher-ups in Judicial Marshal Services have instructed the other marshals not to allow an inmate to consume food or a nonwater beverage while at the hospital?

"A. Yes.

"Q. Okay. And did you follow that directive?

"A. Yes."

On cross-examination, Kramer testified that "[he didn't] know the exact policy number or directive, but it's—it's in the policy and directives."

Dalby testified regarding his experience and training as a marshal, that he had accompanied the defendant to the hospital and guarded him at the hospital, that

Kramer had denied the defendant's request for food, and that the defendant subsequently spat on Kramer. When questioned on direct examination regarding a prohibition on inmates consuming food while at the hospital, Dalby testified that "there is a guideline through the judicial guidelines . . . ." On cross-examination, the following exchange occurred between defense counsel and Dalby:

"Q. [Kramer] indicated the only thing that could be provided to [the defendant] was water—

"A. Okay.

"Q. —is that correct?

"A. I believe so, based on those guidelines."

We first address the defendant's contention that the court improperly based its finding that Kramer was acting in the performance of his official duties solely on the fact that the assault occurred while the defendant was in Kramer's care and custody at the hospital. The defendant correctly argues that this finding, on its own, improperly would lead to an overbroad conclusion that all of a judicial marshal's conduct while an inmate is in his care and custody occurs in the performance of an official duty. See, e.g., *State* v. *Casanova*, 255 Conn. 581, 596, 767 A.2d 1189 (2001) (characterizing as overbroad state's belief that any conduct by police officer properly dispatched to scene should be considered within performance of his or her official duties), overruled in part on other grounds by *State* v. *Brocuglio*, 264 Conn. 778, 826 A.2d 145 (2003).

In the present case, the court did not specifically set forth the basis for its conclusion that Kramer was acting in his official capacity. Contrary to the defendant's assertion, we do not interpret the court's decision to suggest that the court based this conclusion on any one fact, let alone solely on its finding that the assault

occurred while the defendant was in the care and custody of Kramer. The court's finding that the defendant was in the care and custody of Kramer at the time of the assault was relevant to, but was not dispositive of, its determination of whether the assault occurred while Kramer was acting in the performance of his official duties as a judicial marshal. It is well settled that "[w]e do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden demonstrating the contrary." *State* v. *Crumpton*, 202 Conn. 224, 231, 520 A.2d 226 (1987).

Viewing the evidence in the light most favorable to sustaining the trial court's judgment, we conclude that the totality of the evidence presented, including the reasonable inferences therefrom, supports a finding that the state proved beyond a reasonable doubt that Kramer was acting in the performance of his duties as a judicial marshal when the defendant spat in his eye. Kramer and Dalby both testified that they had been tasked with accompanying the defendant from the courthouse to the hospital and guarding him while he was there. Kramer testified that he informed the defendant and the attending nurse that the defendant was not permitted to eat, and that he did so pursuant to a judicial directive prohibiting the consumption of food by inmates while at the hospital, which prompted an outburst from the defendant that culminated in him spitting in Kramer's eye. Dalby also testified as to his belief that there was a judicial directive or guideline prohibiting inmates from consuming food while at the hospital and that the defendant's assault on Kramer was prompted by Kramer informing the defendant that he was not permitted to eat.

The evidence that such a directive did not exist in the handbook does not necessarily lead to an inference that Kramer testified untruthfully or that he did not act

pursuant to a good faith belief that he was carrying out his duties. Rather, on the basis of the evidence presented, the court reasonably could have found that Kramer denied the defendant access to food because he had a good faith, albeit erroneous, belief that there was a judicial directive prohibiting the consumption of food by inmates while at the hospital, or that the prohibition at issue existed but was not codified in the handbook.[6] The stipulation offered was that no directive or other guidance within the handbook prohibits inmates from consuming food while at the hospital. The stipulation did not provide that the handbook was the exclusive repository for every guideline, policy or directive governing the official duties of the marshals. The stipulation also left unanswered the question of whether this prohibition was communicated to Kramer in oral or any other form. Further, the stipulation does not address whether Kramer simply misunderstood the policy. For this court to conclude that Kramer testified untruthfully, acted in bad faith, or was otherwise engaged in a personal frolic, would be to substitute our own judgment for that of the trial court and to ignore the deference owed to the trier of fact that evaluated the evidence and witnesses' credibility firsthand. See *State* v. *Dunbar*, supra, 165 Conn. App. 97; *State* v. *Terry*, supra, 161 Conn. App. 808.

Accordingly, on the basis of the evidence as a whole and the rational inferences drawn therefrom, we conclude that the trial court reasonably could have found beyond a reasonable doubt that the defendant assaulted

[6] We note that Kramer did not testify conclusively with respect to whether the prohibition at issue necessarily appeared in the handbook. During his direct examination, Kramer testified as to his belief that "higher-ups in Judicial Marshal Services [had] instructed the other marshals" to prohibit inmates from consuming food while they were at the hospital. During his cross-examination, he testified that the prohibition had been set forth "in the policy and directives."

Kramer while Kramer was acting in the performance of his official duties.

The judgment is affirmed.

In this opinion the other judges concurred.

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## CHRISTOPHER J. HAMER ET AL. *v.* MARIAN BYRNE ET AL.
## (AC 46367)

Alvord, Elgo and Clark, Js.

*Syllabus*

The plaintiffs appealed from the judgment of the trial court finding, inter alia, that they had not proved their cause of action for adverse possession of certain property owned by the defendant M. The plaintiffs own real property on Evergreen Avenue in Westport, with a rear property line that abuts the property of M, who installed a stockade fence along that property line. M owns the strip of land along Evergreen Avenue that provides access to M's property, the plaintiffs' property, and to the property of the defendant J, that is located across the access strip from the plaintiffs' property. The access strip is encumbered by deed language that provides the plaintiffs and J with rights over the access strip for purposes of ingress and egress and for all purposes for which a public highway can be used. The plaintiffs claimed, inter alia, that the court erred in its determination that the fence erected between the properties by M was not a spite structure. The defendants M, and her two adult children P and R, cross appealed from, inter alia, the trial court's judgment for the plaintiffs on the count of their counterclaim, that alleged that the actions of the plaintiff C constituted the commission of a prima facie tort. *Held*:

The trial court did not err in rendering judgment for M on the plaintiffs' cause of action asserting the erection of an alleged spite fence, as the court properly concluded that the plaintiffs failed to sustain their burden of proof with respect to all of the elements necessary to state a cause of action under the statutes (§§ 52-480 and 52-570) governing the malicious erection of a structure.

The trial court did not err in concluding that three fixed objects located near Evergreen Avenue and within the access strip, namely, a fence erected by J and mailboxes owned by J and M, did not materially and substantially interfere with the plaintiffs' use and enjoyment of their easement rights, as the plaintiffs were still able to use the access strip for ingress to and egress from the dominant estate and they failed to demonstrate that the three fixed

objects interfered with their reasonable use or expansion of the access strip as a public highway.

The trial court's finding that the plaintiffs failed to establish by clear and convincing evidence their claim of adverse possession of a strip of land between their property and M's property was not clearly erroneous.

The trial court did not err in rendering judgment for C on the count of the counterclaim brought by M, P and R that alleged that C committed a prima facie tort, because, even assuming that Connecticut recognizes prima facia tort as a viable cause of action, the alleged conduct was adequately governed by existing torts and was similar to the elements necessary to establish the traditional torts of intentional and/or negligent infliction of emotional distress and M, P and R conceded that they failed to prove the element that any emotional distress that they suffered by C's conduct was severe.

The trial court did not improperly award only nominal damages to P and R with respect to the count of their counterclaim alleging vexatious litigation against C with respect to a prior action that C had brought in 2019 that the court found was vexatious as to P and R, as the court based its award on evidence that established that neither P nor R incurred attorney's fees defending themselves in the prior action and they failed in their burden of proving the nature and extent of their loss for compensatory damages.

Argued October 22, 2024—officially released March 4, 2025

*Procedural History*

Action seeking, inter alia, a permanent injunction, and other relief, brought to the Superior Court in the judicial district of Bridgeport, where the named defendant et al. filed a counterclaim; thereafter, the case was tried to the court, *Hon. Robert L. Genuario*, judge trial referee; judgment in part for the defendants on the complaint and judgment in part for the plaintiffs on the counterclaim, from which the plaintiffs appealed and the named defendant et al. cross appealed to this court. *Affirmed.*

*Edward N. Lerner*, with whom, on the brief, was *George K. Guarino*, for the appellants-appellees (plaintiffs).

*Alan R. Spirer*, for the appellees-appellants (named defendant et al.).

*Joseph R. Ciollo*, for the appellee (defendant Janis Melone).

*Opinion*

ALVORD, J. This appeal centers on three adjacent properties located in Westport. The plaintiffs, Christopher J. Hamer and Cynthia Hamer, appeal from the judgment of the trial court rendered in favor of the defendants, Janis Melone, Marian Byrne, Jack Precious, and Rachel Precious, on all but one portion of one count of the plaintiffs' cause of action.[1] In their appeal, the plaintiffs claim that the court erred in (1) denying the plaintiffs' claim that Marian improperly erected a spite fence; (2) not awarding the plaintiffs damages in connection with the construction of the spite fence; (3) not ordering the removal of Janis' mailbox, Janis' fence, and Marian's mailbox from the easement area; and (4) finding that the plaintiffs had not sustained their burden and proven their cause of action for adverse possession. The Byrnes cross appeal from the judgment of the court, rendered in part in favor of the plaintiffs, on the Byrnes' counterclaim. In their cross appeal, the Byrnes claim that the court erred in (1) failing to find that Christopher's actions constituted the commission of a prima facie tort and (2) awarding only nominal damages to Rachel and Jack with respect to their vexatious litigation claim. We affirm the judgment of the trial court.

[1] In the interest of simplicity, we refer to Christopher Hamer, Cynthia Hamer, Janis Melone, Marian Byrne, Jack Precious, and Rachel Precious individually by their first names. We refer to Christopher and Cynthia collectively as the plaintiffs. Also, we refer to Janis, Marian, Jack, and Rachel collectively as the defendants. Janis' name has been spelled as both Janice and Janis in various documents in this case; for convenience, we use the spelling that is consistent with the summons and complaint. Further, we refer to Marian, Jack, and Rachel, all of whom live on the Byrne property, collectively as the Byrnes.

The plaintiffs also named Ryan Verlin and Nicole Vines Verlin as defendants but subsequently withdrew the action as to them.

The following facts and procedural history are relevant to this appeal. To aid the reader, we include a reproduction of a trial exhibit (plaintiff's exhibit 32), an aerial photographic image of the properties at issue, as an appendix to this opinion. This dispute involves parties who own three adjacent parcels located on Evergreen Avenue in Westport. Marian owns a 2.5 acre parcel (Byrne property), the majority of which is located behind the two other lots that are on Evergreen Avenue. Marian now resides with her adult children, Rachel and Jack, on the Byrne property. Marian holds title to a strip of land, which is 27.7 feet wide along Evergreen Avenue and is 187 feet long (access strip). The access strip provides access to the three properties at issue here.

Christopher and Cynthia own a parcel (Hamer property) that lies between the bulk of the Byrne property and Evergreen Avenue. The Hamer property lies adjacent to the access strip. Janis owns a property (Melone property) on the opposite side of the access strip from the Hamer property. The rear property line of the Hamer property abuts the property line of the Byrne property for approximately ninety-five feet. The access strip owned by Marian is encumbered by deed language which provides the plaintiffs and Janis with rights over the access strip "for purposes of ingress and egress and all purposes for which a public highway can be used."

There is a brook and a pond on the Byrne property. The residential building and the bulk of the Byrne property is mostly located on the south side of the pond. The land on the north side of the pond abuts the Hamer property and other properties located on Evergreen Avenue. There is a drop in elevation between the property line that divides the Hamer and Byrne properties and the brook and pond. Similar to other properties fronting on Evergreen Avenue, there exists significant vegetation, including shrubbery, deciduous trees, and

brush, on the land between the Hamer property and the brook and pond.

The Hamer property has a view of the pond and the Byrne property (to the south of the pond). The view of the pond from the Hamer property varies by season: there is less obstruction of the view at times of the year when there are fewer leaves on the vegetation between the pond and the Hamer property than seasons when the vegetation is thriving. The view enhances the enjoyment of the Hamer property.

The Hamer residence is located toward the northern side of their property, which allows space for a side yard and a paved driveway area immediately abutting the access strip. There is a garage on the Hamer property, which is located toward the back of the property and abuts the access strip. An area of the Hamer property that lies between the garage and the Byrne/Hamer property line is used at various times for storing personal property.

"Marian and her family have lived on the Byrne parcel and Marian has owned an interest in the Byrne parcel since 1995. [Janis] has owned her property since 1988, however, she moved out of the property and began renting it approximately around 2007 or 2008. "The plaintiffs have lived on the Hamer property since 2017. Cynthia was the sole titleholder until 2020, when she quitclaimed an interest in the Hamer property to Christopher.

"In 2019, [Christopher], alone, brought an action against Marian, Rachel, Jack, [Janis] and two of [Janis'] tenants. [Christopher] was self-represented at the time he brought the action. The 2019 action by [Christopher] alleges many of the facts that are the basis of the subject action brought by [the plaintiffs] against the same defendants. . . . Subsequent to the filing of the 2019 action, the [plaintiffs] retained counsel. Rather than amending

the complaint and pleadings filed by the self-represented [Christopher], counsel, on behalf of [Christopher], withdrew the 2019 action and began the subject action."

In July, 2020, the plaintiffs commenced the present action. The complaint alleged the following: in count one, the plaintiffs acquired, by virtue of adverse possession, a strip of land between the Hamer and Byrne properties; in count two, the defendants interfered with their easement rights; in counts three and four, Marian constructed a spite fence; in counts five and six, the plaintiffs are entitled to damages and equitable relief by way of an injunction against the Byrnes for wrongful acts committed on the Hamer property; and, in count seven, the Byrnes spoliated evidence. The Byrnes filed a counterclaim alleging, in counts one through six, that an action filed by Christopher in 2019 was vexatious and brought without probable cause, entitling them to damages, and, in count seven, that Christopher committed wrongful acts directed against them which "constitute the commission of a prima facie tort."

Following a trial to the court, *Hon. Robert L. Genuario*, judge trial referee, the court issued a memorandum of decision in which it rendered judgment "in favor of Marian on counts one, three and four of the [plaintiffs'] complaint"; "in favor of Marian, Rachel, and Jack on counts five, six and seven of the [plaintiffs'] complaint"; "in favor of the [plaintiffs] and against Marian on the second count of the [plaintiffs'] complaint, only in so far as it order[ed] Marian to remove the pole in the location of the former utility pole and relocate her mailbox" adjacent to Janis' mailbox; "in favor of [Janis], Rachel, and Jack on the remaining claims of the second count"; "in favor of Marian, Rachel, and Jack on the seventh count of the [plaintiffs'] complaint"; "in favor of the [plaintiffs] and against Marian on counts one and two of her counterclaim"; "in favor of Rachel and Jack

on counts three, four, five and six respectively on their complaint," in addition to awarding "damages of $1 on each count to each Rachel and Jack"; and "in favor of the [plaintiffs] on the seventh count of the counterclaim . . . ."[2] This appeal and cross appeal followed. Additional facts will be set forth as necessary.

I

THE PLAINTIFFS' APPEAL

On appeal, the plaintiffs claim that the court erred in rendering judgment in favor of the defendants on the plaintiffs' cause of action asserting the erection of a spite fence, adverse possession of a parcel, and encroachment on an easement. We address each in turn.

A

The plaintiffs first claim the court erred in rendering judgment in favor of Marian on the plaintiffs' cause of action regarding her alleged spite fence. Specifically, they argue that the court, in determining that Marian did not construct a spite fence, erred by failing to find that the fence was constructed maliciously, is intended to injure the enjoyment of the plaintiffs' land, and is useless to Marian. Marian responds that the evidence adequately supports the court's findings. We agree with Marian.

We begin by setting forth the relevant standard of review that guides our analysis of the plaintiffs' claim. "When the factual basis of a trial court's decision . . .

[2] In a separate action, which was later consolidated in the trial court, Marian asserted four counts in her complaint alleging "that she has acquired by way of prescriptive easement the right to travel over a corner of the Hamer property." The plaintiffs asserted four counts in their counterclaim, which the court found to be duplicative of many of the counts asserted in the plaintiffs' complaint. The court rendered its "judgment in favor of the [plaintiffs] on the first, second, third and fourth count of the Byrne complaint," and the court rendered "judgment in favor of Marian on the first, second, third and fourth count on the counterclaim."

is challenged, our function is to determine whether, in light of the pleadings and evidence in the whole record, these findings of fact are 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.) *Errichetti* v. *Botoff*, 185 Conn. App. 119, 125, 196 A.3d 1199 (2018).

The following additional facts, as found by the trial court, are relevant to the plaintiffs' claim. In 2019, Marian applied for and received a permit from the Westport Conservation Commission (conservation commission) to install a fence along a portion of the property line between the Hamer property and the Byrne property. Once the permit was issued, Marian installed a stockade fence along that property line. This eight foot tall wood fence is similar, in size and material, to that installed by the plaintiffs along one of their property lines. The fence blocks the view of the pond and brook on the Byrne property from at least the ground level of the Hamer property. Appraisers found that the fence impairs the value of the Hamer property because it blocks the view of the pond. The plaintiffs' enjoyment of their property was impaired by eliminating this view, as well.

The following legal principles are relevant to our resolution of this claim. "The Connecticut progenitor of what have commonly been called the spite fence cases appears to be *Whitlock* v. *Uhle*, 75 Conn. 423, 53 A. 891 (1903). . . . In [*Whitlock*], our Supreme Court construed and applied the predecessors to General Statutes §§ 52-480 and 52-570 and set forth the elements necessary to state a cause of action under §§ 52-480

and 52-570. The court held that the essential elements are: (1) a structure erected on the [defendant's] land; (2) a malicious erection of the structure; (3) the intention to injure the enjoyment of the adjacent landowner's land by the erection of the structure; (4) an impairment of the value of adjacent land because of the structure; (5) the structure is useless to the defendant; and (6) the enjoyment of the adjacent landowner's land is in fact impaired. . . . The plaintiff bears the burden of demonstrating each of these elements by a fair preponderance of the evidence." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Errichetti* v. *Botoff*, supra, 185 Conn. App. 125–26.

"Uselessness under § 52-480 focuses on whether the structure serves an actual use, not whether the defendants can merely assert a purpose for erecting the structure. See, e.g. . . . *Harbison* v. *White*, 46 Conn. 106, 109 (1878) (rejecting defense to malice element—that structure screened defendants' premises from persons occupying plaintiff's house—because '[t]o concede this would be to nullify the statute; for it is not possible for malice to conceive any kind or form of structure which would not in some measure protect premises from observation')." (Citation omitted.) Id., 130. "Initially, we note that when determining whether the plaintiff has met his burden with respect to the second and third elements of the *Whitlock* test, the court does not journey deep into the defendant's heart. . . . Whether a structure was maliciously erected is to be determined rather by its character, location and use than by an inquiry into the actual motive in the mind of the party erecting it. . . . Similarly, assessing whether the defendants possessed the requisite intent to injure relates to the thing done, its purpose and effect, and does not depend on the existence or nonexistence of personal spite or ill-will. . . .

"It is quite possible for a structure to bear on its face . . . convincing evidence that it was intended for a legitimate purpose, or that it was intended to injure the adjacent land and its owner. . . . The intention is not the motive from which it may have sprung, but the established purpose, from whatever motive, to use the land in a manner not justified by its ownership, and forbidden by law. . . . The intent to injure is determined mainly from the fact that the structure does impair the value of the adjacent land and injure the owner in its use, from the absence of any real usefulness of the structure . . . to the defendant, and from the character, location and surroundings of the structure itself . . . . When a structure, useless to the owner, injuring adjacent land and its owner, intended to work such injury, is willfully erected, it is maliciously erected; that is, it is erected in knowing disregard of the law and the rights of others. . . . [O]nce it is established that malice was the primary motive in [the fence's] erection, the fact that it also served to protect the [defendants'] premises from observation must be regarded as only incidental, since to hold otherwise would be to nullify the statutes." (Citations omitted; internal quotation marks omitted.) Id., 127–29.

In its memorandum of decision, the court set forth the six *Whitlock* elements, found facts relating to each, and concluded that the plaintiffs failed to satisfy their burden with respect to three of the six elements. The court found that "the [plaintiffs] have sustained their burden with regard to elements one, four, and six. With regard to element one, Marian erected the structure, a fence, on her property, with regard to element four, there was a testimony of appraisers, which the court finds credible, that the fence, which can best be described as a solid stockade fence, eliminates the view of the pond and, therefore, impairs the value of the

[plaintiffs'] property, and six . . . the [plaintiffs'] property has been impaired by eliminating what one witness described as a 'breathtaking view.' (The court does not find the view breathtaking, but it certainly is pleasant.)"

The court then discussed elements "two, the malicious erection of the structure, three, the intent to injure the enjoyment of the adjacent landowner's land by erection of the structure, and five, whether or not the structure is useless to the defendant." The court found that "[i]t cannot credibly be said that a fence is useless to Marian. Indeed, as the [plaintiffs'] witnesses testified, there has always been some confusion as to the property line between the Hamer property and the Byrne property. The fact that the [plaintiffs] have asserted, even unsuccessfully, a claim for adverse possession of property owned by Marian undercuts their claim that a fence marking the actual property line is useless. Marian clearly wishes to give notice to the [plaintiffs] and, indeed, to any subsequent property owners and the world at large as to where the property line exists. A fence further prevents the [plaintiffs] and subsequent owners from occupying the property or utilizing the property." As to the malicious erection of the structure and intent to injure the enjoyment of the plaintiffs' land, the court found that "Marian could have installed a less obtrusive fence such as a picket fence, or a fence of a lower height to accomplish the purpose of defining the property line. . . . While the subject fence may not be as attractive or visually pleasing as the fence along the side yard property line, it is approximately the same height and made of similar material. . . . The difficulty in this case is that the usefulness of the solid stockade fence, based upon the testimony of Marian, Rachel and Jack is to provide privacy, not in general, but frankly from the [plaintiffs]. Indeed, when Marian considered installing a fence at the time the property was owned by the [plaintiffs'] predecessor in title, she had a discussion

with that property owner and their disagreements were resolved without the installation of a fence. Much of the testimony in this case surrounded conduct by the [plaintiffs], and in particular [Christopher], that [the Byrnes] find offensive and conduct by [the Byrnes] that the [plaintiffs] find offensive. The testimony indicates that prior to the fence, the [plaintiffs] did trespass on the contested area. [Christopher] marked trees for removal. [Christopher] tends to walk at night with a bright high-powered flashlight, which he, at times, shines in the direction of the Byrne property. There is frequent activity in the [plaintiffs'] backyard. Between the southside of the [plaintiffs'] garage and the Byrne/Hamer property line, the [plaintiffs] store personal property in what might be described in an unsightly fashion. On one occasion the [plaintiffs] or their children flew a drone over the Byrne property in the area of the Byrne swimming pool where some of the parties were relaxing. There are bright lights on the Hamer garage, [shining] both on the access strip, and also on the south side facing the Hamer/Byrne property line." (Citation omitted.)

On appeal, the plaintiffs argue that the court made erroneous findings as to the usefulness of the fence.[3]

[3] The plaintiffs also argue that Connecticut courts have analyzed fences in a manner whereby merely a section of the fence may be deemed a spite fence. See, e.g., *Geiger* v. *Carey*, 170 Conn. App. 459, 487, 154 A.3d 1093 (2017); *DeCecco* v. *Beach*, 174 Conn. 29, 30–33, 381 A.2d 543 (1977). However, the plaintiffs' brief, purportedly advancing this argument, wholly lacks any relevant analysis and therefore is inadequately briefed for this court's review. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021).

They assert that the fence does not prevent light from entering into nor drones from flying above the property, and they contend that the court created "an exhaustive laundry list of ostensible 'acceptable' purposes to try and mask [Marian's] real purpose of taking away the [plaintiffs'] view . . . and decreasing the financial value of the Hamer property." The plaintiffs further indicate that the Byrnes' residence is a far distance from the Hamer property and that there exists a lot of vegetation, and a significant elevation drop, between the two properties. In addition, the plaintiffs argue that "[t]here was no evidence at trial that [Marian] had ever raised the issue of any 'personal property' being unsightly or ever sought to cure the issue in any way with [the plaintiffs] prior to constructing the fence." The plaintiffs further contend that the fence fails to actually delineate the boundary between the two properties. Upon review of the evidence in the record, we are not convinced that the court clearly erred in declining to find the fence useless. Notably, the evidence supports the court's finding that the fence addresses the Byrnes' goals to delineate the property line and support their privacy because Christopher tended to trespass and engage in activities on the Byrne property. Accordingly, we conclude that the court's finding that the fence was not useless is not clearly erroneous.

The plaintiffs also argue on appeal that the court made erroneous findings as to the malicious erection of the structure and the Byrnes' intent to injure the plaintiffs' enjoyment of their property.[4] Because the

[4] Specifically, they argue that "[t]he trial court erroneously chooses to ignore without precedent or basis in fact that [Marian] weaponized the threat of a fence to remove the water view not only against the [plaintiffs], but those families that had lived in the Hamer house prior to [Marian] even knowing who the [plaintiffs] were." Furthermore, the plaintiffs maintain that the "court heard voluminous evidence, on the record, of how [Marian] has argued, threatened spite fences, verbally assailed minor children who were alone in their own home, caused police involvement, lawyer involvement, wrote her neighbor's real estate broker before they even moved in and made her neighbors fear and avoid her." The plaintiffs contend that the

court found the fence useful, both in its purpose and effect, the court did not err in finding that there lacked an intent to injure. See, e.g., *DeCecco* v. *Beach*, 174 Conn. 29, 32, 381 A.2d 543 (1977) ("intent to injure is determined . . . [inter alia] from the absence of any *real* usefulness of the structure" (emphasis added)). Other evidence the trial court considered regarding the character and location of the fence, including the fact that the fence is similar to one installed by the plaintiffs along another property boundary, further supports the court's conclusion that the fence was not maliciously erected. Upon review of the evidence and in giving "every reasonable presumption . . . in favor of the trial court's ruling," we are not "left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Chase & Chase, LLC* v. *Waterbury Realty, LLC*, 138 Conn. App. 289, 296, 50 A.3d 968 (2012).

In sum, the court did not err with respect to any of the findings challenged by the plaintiffs in connection with the second, third, and fifth *Whitlock* elements, i.e., malice, intent to injure, and uselessness of the structure. We therefore affirm the court's conclusion that the plaintiffs did not sustain their burden of proof as to all of the elements necessary to state a cause of action under §§ 52-480 and 52-570.[5]

evidence also proves that Marian "was calculated in her attempts to conceal that she was purposefully seeking to wipe out the water view for her neighbor with the fence because she knew it was wrong and maliciously designed." The plaintiffs further argue that the evidence demonstrates that Marian knew the fence would seriously injure the plaintiffs' enjoyment of their property. In addition, the plaintiffs contend that a less obtrusive fence could have been constructed by Marian and that the court "incorrectly states that the fence is made of the same material when in fact the evidence on the record shows that the Byrne's fence material is not the same."

[5] The plaintiffs also claim that the court erred in not awarding the plaintiffs damages relating to the spite fence. Specifically, they argue that "[t]he evidence at trial established that significant damage was caused to the Hamer property during and as a result of the installation of the spite fence that took place on May 14 and May 15, 2019." They contend that the fence

B

The plaintiffs next claim that the court erred in failing to order the removal of Janis' mailbox, Janis' fence, and Marian's mailbox from the easement area. They contend that these fixed objects interfere with their use and enjoyment of the easement guaranteed by their deed, which allows the plaintiffs to use the easement for ingress or egress and other purposes for which a highway can be used. We are not persuaded.

Before we reach the merits of the plaintiffs' claims, we first set forth our standard of review and fundamental principles of law governing easements and the construction of deeds. "[T]he determination of the intent behind language in a deed, considered in the light of all the surrounding circumstances, presents a question of law on which our scope of review is . . . plenary. . . . Thus, when faced with a question regarding the construction of language in deeds, the reviewing court does not give the customary deference to the trial court's factual inferences. . . . In contrast, [t]he determination of [the] reasonableness [of the use of an easement] is for the trier of fact. . . . This court [has] observed that review of the court's conclusion that [certain] plantings violated . . . easement rights involves a mixed question of fact and law. [S]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense. . . . [Such questions require] plenary review by this court unfettered by the clearly erroneous standard. . . . When legal conclusions of the trial court are challenged on appeal, we must decide whether [those] . . . conclusions are legally and logically correct and find support in the

diminished the value of their house and their enjoyment of their property. The plaintiffs failed to sustain their cause of action under § 52-570, and the court did not clearly err by not awarding damages.

facts that appear in the record." (Citations omitted; internal quotation marks omitted.) *57 Broad Street Stamford, LLC* v. *Summer House Owners, LLC*, 184 Conn. App. 834, 840–41, 195 A.3d 1143 (2018).

"It is well settled that [a]n easement . . . obligates the possessor not to interfere with the rules authorized by the easement. . . . [T]he benefit of an easement . . . is considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose. . . . [E]asements are not ownership interests but rather privileges to use [the] land of another in [a] certain manner for [a] certain purpose . . . . In determining the character and extent of an easement created by deed, the ordinary import of the language will be accepted as indicative of the intention of the parties, unless there is something in the situation of the property or the surrounding circumstances that calls for a different interpretation. . . ." (Internal quotation marks omitted.) *Freidheim* v. *McLaughlin*, 217 Conn. App. 767, 778–79, 290 A.3d 801 (2023). "The use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit. . . . Ordinarily when [judicial] opinions speak of the use of an easement, it arises in right-of-way cases. Thus use frequently involves the amount of traffic over the easement or alterations to the land to make it passable. . . . This is not to overlook, however, that [t]he owner of an easement has all rights incident or necessary to its proper enjoyment, [although] nothing more." (Internal quotation marks omitted.) *Williams* v. *Green Power Ventures, LLC*, 221 Conn. App. 657, 670, 303 A.3d 13 (2023), cert. denied, 348 Conn. 938, 307 A.3d 273 (2024).

We begin our analysis by identifying the plaintiffs' rights under the easement. Marian's ownership of the access strip is subject to the rights of the owners of

the Hamer property to utilize "the strip of land measuring 27.70 feet by 180 feet adjoining Evergreen Avenue as shown and depicted on Westport Town Clerk Maps 6750 and 8585 for purposes of ingress or egress and all purposes for which a public highway can be used." The easement thus sets forth the right to use the burdened property for two particular purposes. See *Zirinsky* v. *Carnegie Hill Capital Asset Management, LLC*, 139 Conn. App. 706, 717, 58 A.3d 284 (2012) ("an easement generally authorizes limited uses of the burdened property for a particular purpose" (emphasis omitted; internal quotation marks omitted)). Specifically, it serves (1) the purpose of ingress to or egress from the dominant estate and (2) all purposes for which a public highway can be used.

The following additional facts, which reasonably could have been found by the court, are relevant to the plaintiffs' claim. The access strip is 27.7 feet wide and 180 feet long.[6] A portion of the access strip is paved. The paved portion is about ten to twelve feet wide, except it is slightly wider where it turns into the Hamer and Melone properties. A small part of the paved portion extends onto the front southerly corner of the Hamer property. The following structures were located near Evergreen Avenue and within the access strip at the time when the plaintiffs purchased the property: a utility pole, Janis' mailbox, and Marian's mailbox. Janis' fence, which was constructed more than thirty years ago,

[6] The plaintiffs contend that "the trial court is mistaken about the dimensions of the easement at issue. . . . The easement size is in reality 180 feet by 27.7 feet." We disagree. The court found that "[w]hile the access strip is 27.7 feet wide, the paved portion of the access strip is significantly narrower. The paved portion of the access strip is approximately ten to twelve feet wide, except where it turns into the Hamer property and their parking area, and where it turns to the Melone property and her parking area. A small portion of the paved area continues off the access strip onto the front southerly corner of the Hamer property where it meets Evergreen Avenue." The court's finding is consistent with the record.

encroaches onto the access strip by a maximum of two feet in some places. Janis' fence is located toward the rear of the Melone property and opposite the Hamer garage and the Hamer parking area. Marian did not object to the fence when it was installed. In 2019, Marian granted Janis a written license to continue Janis' use of the access strip for the limited purpose of maintaining the fence. On appeal, the plaintiffs contend that all three of the fixed objects interfere with their rights to use the access strip for ingress, egress, and "all purposes for which a public highway can be used." Specifically, the plaintiffs challenge the court's conclusions that Janis' mailbox did not need to be moved from its current position on the access strip and that Marian's mailbox did not need to be removed entirely from the access strip in order for the plaintiffs to enjoy their easement rights, because both mailboxes "[create] a poor sightline for oncoming traffic."[7] In addition, they challenge the court's finding that the mailboxes and Janis' fence did not violate their easement rights. They argue that the three objects keep them from using the entirety of the easement by "shrink[ing]" the portions of the access strip that they may drive or walk on, in addition to inhibiting them from expanding the width of the paved portion of the access strip.

As an initial matter, we note that nothing in the language of the deed provides for unlimited and "full use" of the access strip, nor does the deed state that fixed objects cannot be placed on the easement. Additionally, and more importantly, evidence admitted at trial established that the plaintiffs are still able to use the access strip for ingress to and egress from the dominant estate,

[7] The court found that Marian's mailbox was "closer to the paved area of the driveway and a reasonable expansion of the driveway might conflict with the current location of Marian's mailbox." The court ordered Marian to move her mailbox to another location but allowed her to keep the mailbox within the access strip.

as they are entitled to do under the easement. The plaintiffs have failed to demonstrate that the three fixed objects interfere with their reasonable use or expansion of the access strip as a public highway; to the contrary, the evidence supports the court's conclusion that the objects, which are commonly found on public highways, do not interfere with the plaintiffs' ability to drive and walk on the access strip nor do they inhibit the plaintiffs from expanding the width of the paved portion of the access strip. On the basis of the foregoing, we are not persuaded that the court erred in concluding that the fence and the mailboxes did not materially and substantially interfere with the plaintiffs' use and enjoyment of the easement.

C

The plaintiffs' final claim is that the court erred in determining that the plaintiffs failed to sustain their burden of proving that they adversely possessed a strip of land between their property and the Byrne property. We are not persuaded.

"As a preliminary matter, we note that, [w]hen title is claimed by adverse possession, the burden of proof is on the claimant. . . . The essential elements of adverse possession are that the owner shall be ousted from possession and kept out uninterruptedly for fifteen years under a claim of right by an open, visible and exclusive possession of the claimant without license or consent of the owner. . . . The use is not exclusive if the adverse user merely shares dominion over the property with other users. . . . Such a possession is not to be made out by inference, but by clear and positive proof. . . . In the final analysis, whether possession is adverse is a question of fact for the trier. . . . The doctrine of adverse possession is to be taken strictly. . . .

"Clear and convincing proof of the elements of an adverse possession claim is an exacting standard . . . that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true . . . . In evaluating a claim of adverse possession under that demanding standard, [e]very presumption is in favor of possession in subordination to the title of the true owner. . . . That presumption is rooted in the recognition that there are no equities in favor of a person seeking to acquire property of another by adverse holding. . . .

"The demanding burden placed on a party claiming adverse possession of the property of another reflects the fact that such actions are disfavored. . . . As the Supreme Court of Ohio explained, [a]dverse [p]ossession represents the forced infringement of a landowner's rights, a decrease in value of the servient estate, the encouraged exploitation and development of land, the generation of animosity between neighbors, a source of damages to land or loss of land ownership, the creation of forced, involuntary legal battles, and uncertainty and perhaps the loss of property rights to landowners with seisin. . . . Accordingly, we have recognized that adverse possession is disfavored. . . . Moreover, [a] successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation. . . . [T]hat is why the elements of adverse possession are stringent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Mulvey* v. *Palo*, 226 Conn. App. 495, 500–503, 319 A.3d 211, cert. denied, 350 Conn. 902, 322 A.3d 1059 (2024); see also General Statutes § 52-575.

"[T]he question of whether the elements of an adverse possession claim have been established by clear and convincing evidence is a factual one 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. . . . A trial court's findings in an adverse possession case, if supported by sufficient evidence, are binding on a reviewing court . . . ." (Citation omitted; internal quotation marks omitted.) *Mulvey* v. *Palo*, supra, 226 Conn. App. 503.

In its memorandum of decision, the court found that "the [plaintiffs] have fallen far short of proving their case for adverse possession of the contested strip.[8] Indeed, even if the burden of proof was simply a preponderance of the evidence, the court would conclude that the [plaintiffs] have fallen short.

"Because the [plaintiffs] have occupied the property for less than fifteen years, they seek to demonstrate that not only have they, but that two predecessors in title have exercised such dominion and control over the contested strip that, collectively, they have ousted Marian of possession by an open, visible exclusive possession under a claim of right. One predecessor had purchased the property in 1995. She testified that she and her tenants maintained a lawn area approximately in the area of the contested strip. On cross-examination that witness indicated that such use was with the consent of Marian and her then husband. Some planting may have been done in that strip by some of her tenants.

[8] Specifically, the contested strip is "a strip of land ninety-five feet long and four feet wide adjacent to the title property line between the Hamer and Byrne [properties]."

A subsequent owner testified that she had some disputes with Marian and her then husband, and that, at one time during her ownership beginning in 2011, Marian applied to the [conservation commission] for permission to construct a fence. While that owner may have cut the lawn in the contested area, she . . . acknowledge[d] that she did not own the property. Indeed, to the extent she may have mowed the lawn in this narrow strip, which is more visible from the Hamer [property] than from the Byrne property, it was likely with the consent of Marian and not under any claim of right. Indeed, the [plaintiffs] are correct that a property owner can assert a claim of adverse possession by tacking together their ownership with the ownership of prior title holders and demonstrating a continued uninterrupted adverse possession of fifteen years notwithstanding the fact that their ownership was less than fifteen years. . . . Nonetheless, the nature of the activity engaged in by the prior owners, and indeed the [plaintiffs], up until shortly before this lawsuit was initiated, do not evidence the type of activity necessary to establish open, visible and exclusive possession under a claim of right, and without the consent of the owner. The better evidence indicates that Marian consented to any seasonal lawn cutting or planting that was done by prior owners; that she indicated to the prior owners that the contested strip was her property; and that the prior owners accepted such determination. Indeed, the better evidence is that [Cynthia] was informed of the location of the title boundary line at or about the time she purchased the property and accepted that Marian was the owner of the contested strip. The better evidence is that the title holder of the property who sold to [Cynthia] acknowledged with Marian the title property line and did not assert ownership over the contested area. The prior owner communicated to [Cynthia] the actual location of the rear property line.

"This is reflected in a series of emails between Marian and [Cynthia], in which [Cynthia] acknowledges that they have no interest in acquiring any of Marian's property. The statement was [preceded by] discussions concerning the back property line and requests that Marian agree not to put up a fence. All of this evidence is inconsistent with a claim that the [plaintiffs], coupled with prior owners, have asserted dominion and control over the property necessary to assert a claim of adverse possession." (Citation omitted; footnote added.)

In support of their claim that the foregoing is clearly erroneous, the plaintiffs maintain that they "successfully satisfied all elements of adverse possession and proved [that] they acquired legal possession of the [contested strip]." The plaintiffs contend that the court "erroneously fail[ed] to consider evidence on the record at trial establishing [the plaintiffs'] adverse possession claim." Specifically, they claim that the following supports their adverse possession of the contested strip: Marian applied to the conservation commission to put up a fence, which demonstrates "the adversarial and open nature of [their] acts upon the adverse possession [of the contested strip]"; Marian "testified at trial that [she] did not know who was maintaining the property at issue and she never gave notice to interrupt the possession, maintaining and use of the [contested strip]"; and the plaintiffs "possessed the property as their own, caring for it . . . ."

After a thorough review of the record, we are not left with a definite and firm conviction that a mistake has been committed by the trial court regarding the plaintiffs' failure to prove the demanding standard of their adverse possession claim. See *Skelly* v. *Brucher*, 134 Conn. App. 337, 344, 38 A.3d 261 (2012) ("[t]he mere existence of evidence tending to support a rejected claim of adverse possession does not establish that the court's finding that the claim was not proven by clear

and convincing proof is clearly erroneous"). Thus, we conclude that the court's finding that the plaintiffs failed to establish their claim of adverse possession is not clearly erroneous.

II

THE BYRNES' CROSS APPEAL

The Byrnes claim in their cross appeal that the court erred in rendering judgment for Christopher on the counts of the Byrnes' counterclaim for prima facie tort and vexatious litigation. We examine each in turn.

A

The Byrnes first claim that the court improperly declined to adjudicate the count of their counterclaim for prima facie tort. Specifically, the Byrnes argue that the trial court erred in rejecting their claim that Christopher committed prima facie tort. We are not persuaded.

We begin with our standard of review. Because this claim challenges the trial court's conclusion of law, "our review is plenary and we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *New Haven* v. *G. L. Capasso, Inc.*, 151 Conn. App. 368, 371, 96 A.3d 563 (2014).

The following facts are relevant to the Byrnes' counterclaim. In the seventh count of their counterclaim, they allege that Christopher "has committed the following wrongful acts directed at the defendants [Marian] . . . [Rachel] and [Jack]:

a. [Christopher] has repeatedly screamed obscenities at [Marian] and her children;

b. [Christopher] shines floodlights and directs flashlight beams into the windows of the Byrne house;

c. [Christopher] shines floodlights from dusk until dawn which lights cause annoyance and disturbance to [the Byrnes];

d. [Christopher] has cut trees and bushes on the Byrne premises;

e. [Christopher] has destroyed areas of the driveway;

f. [Christopher] has spray-painted trees on the Byrne premises;

g. [Christopher] has dumped debris in the wetland areas of the Byrne premises;

h. [Christopher] has operated his car on unpaved areas of the Byrne premises creating an unsightly and muddy condition;

i. [Christopher] has obstructed [the Byrnes'] use of the driveway;

j. [Christopher] has tampered with [Marian's] mailbox;

k. [Christopher] has used a flashlight to blind [Rachel] while she was driving on the shared driveway; and

l. [Christopher] has posted personal identifying information relating to [Marian] on the Connecticut Judicial Branch website. . . .

"Cumulatively, the foregoing actions have been wrongfully and wilfully committed by [Christopher] without legal excuse or justification to cause injury to [Marian], to disrupt [Marian] in the peaceful enjoyment of her home and to disturb the sanctity of the Byrne household. . . . As a result of the foregoing wilful and malicious acts committed by [Christopher], [Christopher] has proximately caused and [Marian] has suffered physical injuries and emotional distress and has been injured by being denied the peaceful enjoyment of her home." The Byrnes sought to impose liability on the

plaintiffs, alleging that Christopher's actions "constitute the commission of a prima facie tort."

At the outset, we note that § 870 of the Restatement (Second) of Torts recognizes a cause of action for prima facie tort. It provides: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability." 4 Restatement (Second), Torts § 870, p. 279 (1979). The comments to § 870 explicitly establish that prima facie tort is not intended to be used to avoid the elements or defenses required of traditional torts: "the established intentional torts and their established legal privileges amount to [crystallizations] of the general principle stated in this Section. In determining whether liability should be imposed in a particular case for an established intentional tort, neither court nor jury engages afresh in balancing the conflicting interests of the parties. That has already been done in the creation of the legal rules of liability and privilege and all that is needed is to determine the facts and apply these rules to them." Id., comment (d), p. 281. Thus, not only must the injured party prove the elements of § 870, but they must also demonstrate that no other traditional torts would address their injury.

Under the circumstances of this appeal, and even assuming arguendo that Connecticut recognizes prima facie tort as a viable cause of action,[9] we conclude

[9] The Byrnes acknowledge in their brief that there is no decision from this court or our Supreme Court expressly recognizing prima facie tort as a viable cause of action. In *Connors* v. *Connolly*, 86 Conn. 641, 86 A. 600 (1913), the court stated: "The undisputed facts disclose that the plaintiff suffered damage in the loss of his employment, and that this damage was intentionally caused. These facts shown, a prima facie cause of action was made out against those who, thus acting with intent, caused the damage. Recovery, however, might be defeated by the establishment by these persons of a justification, the burden being upon them to do so." Id., 647. Although

that the trial court properly rejected the Byrnes' claim because the alleged conduct is adequately governed by existing torts. Specifically, as the trial court found, the allegations made in the Byrnes' seventh count largely are similar to the elements necessary to establish the traditional torts of intentional and/or negligent infliction of emotional distress. By labelling their cause of action as a "prima facie tort," the Byrnes are seeking recovery of damages that appear to be based on emotional distress without proving the elements of intentional and/or negligent infliction of emotional distress.[10] The Byrnes themselves acknowledge that "[a] cause of action for intentional infliction of emotional distress is unavailable to the Byrne defendants since the elements of the cause of the action require the claimant to prove that the emotional distress was severe. . . . The [Byrnes] concede that they have not suffered severe emotional distress. However, [Christopher's] conduct represents a continuing harassment of his neighbors, which conduct exceeds the bounds that are acceptable in a civilized society. The doctrine of prima facie tort is intended to address the misconduct that is alleged in this case. This

this language may be construed to describe the elements of prima facie tort, the court did not label the claim at issue as a prima facie tort, and no appellate decision since *Connors* has had the opportunity to discuss whether prima facie tort is a viable cause of action in Connecticut.

[10] "In order for the plaintiff to prevail in a case for liability under . . . [intentional infliction of emotional distress], four elements must be established. It must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." (Internal quotation marks omitted.) *Appleton* v. *Board of Education*, 254 Conn. 205, 210, 757 A.2d 1059 (2000). "[I]n order to prevail on a claim of negligent infliction of emotional distress, the plaintiff must prove that the defendant should have realized that its conduct involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily harm." (Internal quotation marks omitted.) *Carrol* v. *Allstate Ins. Co.*, 262 Conn. 433, 446, 815 A.2d 119 (2003).

is not to say that [Marian] did not experience stress and anxiety as a result of [Christopher's] tortious conduct."

We agree with the trial court that "[t]he recognition of such a claim based upon the facts alleged and proved in the case at bar would not be an expansion of Connecticut tort law, but rather a circumvention of existing law which requires certain elements in order for a party to recover for damages that include emotional distress." Thus, we cannot conclude that the court erred in rendering judgment in favor of the plaintiffs on the Byrnes' cause of action alleging prima facie tort.

B

The Byrnes also claim that the court improperly awarded only nominal damages to Jack and Rachel with respect to their vexatious litigation claim. We disagree.

Under General Statutes § 52-568, "[a]ny person who commences and prosecutes any civil action or complaint against another, in his own name or the name of others, or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble such other person, shall pay him treble damages."

"[T]he plaintiff in a vexatious [litigation] action, like any other plaintiff, has the burden of proving damages." (Internal quotation marks omitted.) *Greene* v. *Keating*, 197 Conn. App. 447, 453, 231 A.3d 1178 (2020). "In reviewing a trial court's award of compensatory damages, we have stated that [t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . To authorize a recovery of more than nominal damages, facts must exist and be shown by the evidence which

affords a reasonable basis for measuring the [plaintiff's] loss. . . . The [plaintiff has] the burden of proving the nature and extent of the loss . . . . Mathematical exactitude in the proof of damages is often impossible, but the plaintiff must nevertheless provide sufficient evidence for the trier to make a fair and reasonable estimate." (Citations omitted; internal quotation marks omitted.) *Bhatia* v. *Debek*, 287 Conn. 397, 418–19, 948 A.2d 1009 (2008).

The following additional facts are relevant to the Byrnes' counterclaim. "In 2019, [Christopher], alone, brought an action against Marian, Rachel, Jack, [Janis] and two of [Janis'] tenants. [Christopher] was self-represented at the time he brought the action. The 2019 action by [Christopher] alleges many of the facts that are the basis of the subject action brought by [Christopher] and [Cynthia] against the same defendants." "Subsequent to the filing of the 2019 action, the [plaintiffs] retained counsel. Rather than amending the complaint and pleadings filed by the self-represented [Christopher], counsel on behalf of [Christopher], withdrew the 2019 action and began the subject action."

In their counterclaim, the Byrnes "assert[ed] two counts each sounding in vexatious litigation alleging that the 2019 action was vexatious and brought without probable cause. They claim[ed] double damages pursuant to [General Statutes §] 52-568 (1). Each also alleged that the 2019 action was without probable cause and was instituted with a malicious intent to unjustly vex and trouble them. They therefore claim[ed] treble damages pursuant to . . . [§] 52-568 (2)."

The court found that "the 2019 action was vexatious as to Rachel and Jack, but not as to Marian." As for damages, the court found "[t]here [was] evidence that in the defense of the 2019 action, legal fees in the amount of $5600 dollars were incurred. However, the

evidence [was] also clear that the $5600 was paid by Marian and not by Rachel and Jack. There is no evidence[11] that Rachel and Jack were otherwise damaged or harmed by the vexatious litigation against them in 2019 and, accordingly, the court awards each of them $1 for each count in nominal damages. Accordingly, judgment will enter in favor of Christopher on count[s] one and two of the counterclaim. Judgment will enter in favor of Rachel on count[s] three and four of the counterclaim and the court awards $1 for nominal damages in favor of Rachel on each count. Judgment will enter in favor of Jack on counts five and six of the counterclaim, and the court will also award nominal damages of $1 in favor of Jack." (Footnote added.)

The Byrnes now argue that the trial court committed two errors: "(1) [t]he trial court failed to appreciate that the amount of attorney's fees incurred in the defense of a vexatious action does not need to be paid by the party defending the action . . . and (2) [t]he trial court failed to consider the damages incurred by Jack and Rachel as a result of [Christopher's] disregard of Jack and Rachel's right to be free from unjustifiable litigation and the damage to their reputation." The Byrnes assert that "there is more to the defense of a litigation than the payment of attorney's fees."

We conclude that the evidence in the record supports the trial court's award of nominal damages. The court based its award on evidence that established that neither Rachel nor Jack incurred fees defending themselves in the 2019 action. As for other compensatory damages, Rachel and Jack had the burden of proving the nature and extent of their loss. However, they failed

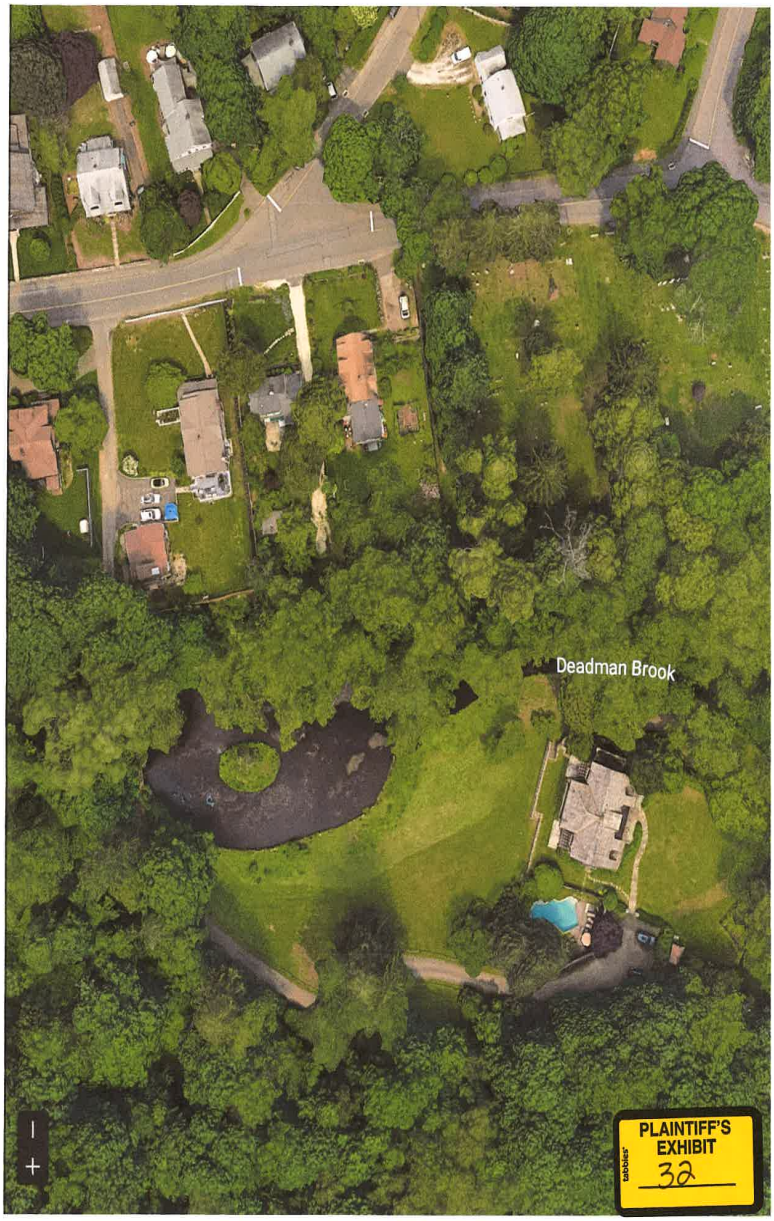
[11] The Byrnes' attorney's fees were invoiced only to Marian, not her adult children. Although Rachel and Jack claim that they will be reimbursing Marian for their attorney's fees, they have failed to provide any evidence, such as a retainer agreement with their attorney or a written agreement supporting their claim of future reimbursement to their mother.

to provide evidence for the trial court to measure their loss. Accordingly, we cannot say that the trial court's award was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

## APPENDIX



# SHERI MARZARO *v.* SEBASTIANO G. MARZARO
## (AC 46459)

Elgo, Seeley and DiPentima, Js.

*Syllabus*

The defendant appealed from, inter alia, the judgment of the trial court dissolving his marriage to the plaintiff. The defendant claimed, inter alia, that the court improperly concluded that the marital residence, which was held in a revocable trust, with the parties as cotrustees, was subject to equitable distribution pursuant to statute (§ 46b-81). *Held*:

The trial court did not abuse its discretion in distributing the marital property and assigning the marital debt even though it awarded a larger portion of the marital assets to the plaintiff and the majority of the debt to the defendant, as the court reasonably could have considered the parties' unequal earnings potential and that the majority of the liabilities listed on the defendant's financial affidavit were debts related to his business.

The trial court's distribution of the marital residence as marital property pursuant to § 46b-81 was not improper because the defendant and the plaintiff had a presently existing interest in the marital residence, as they were the lifetime beneficiaries of the trust and had the ability to invade the trust property by revoking the trust, and their children, as remainder beneficiaries, did not have a present interest in the trust and were not necessary and indispensable parties to the action.

The plaintiff, whose motion to cite in the cotrustees of the trust had been granted by the trial court, was not required to plead any additional facts with respect to counts two and three of her amended complaint because she did not raise separate causes of action in those counts or allege any wrongdoing in connection with the trust but, rather, identified the beneficiaries and trustees of the trust and claimed an interest in the marital residence that was held in the trust.

This court declined to review the defendant's claim that the trial court improperly denied his motion for contempt regarding the plaintiff's alleged failure to comply with certain discovery orders because the claim was inadequately briefed and, although the defendant sought an articulation of the factual basis of the trial court's decision to deny the motion, he failed to file a motion for review of the trial court's denial of the motion for articulation pursuant to the rule of practice (§ 66-7).

Argued October 9, 2024—officially released March 4, 2025

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *M. Moore*, *J.*, granted the plaintiff's motion to cite in the cotrustees of the Marzaro Family Trust as a defendant; thereafter, the court, *M. Moore*, *J.*, rendered judgment dissolving the marriage and granting certain other relief, from which the named defendant appealed to this court. *Affirmed.*

*William W. Taylor*, for the appellant (named defendant).

*Richard W. Callahan*, for the appellee (plaintiff).

*Opinion*

DiPENTIMA, J. The defendant Sebastiano G. Marzaro appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Sheri Marzaro.[1] On appeal, the defendant claims that (1) the court abused its discretion in fashioning its financial orders by making a grossly disproportionate property distribution in the plaintiff's favor and by assigning all of the marital debt to him, (2) the court improperly concluded that the parties' marital residence, which was held in the Marzaro Family Trust (trust), was subject to equitable distribution, (3) the plaintiff failed to plead sufficient facts to support a cause of action in counts two and three of her revised complaint and (4) the court improperly denied his motion for contempt and failed to order the

[1] In her original complaint, the plaintiff named only Sebastiano G. Marzaro as the defendant. Subsequently, the court granted the plaintiff's motion to cite in the cotrustees of the Marzaro Family Trust as an additional defendant and to amend the complaint to state facts showing the interest of the Marzaro Family Trust in this action. We note that, on his appeal form, Sebastiano G. Marzaro also listed the Marzaro Family Trust and Sebastiano G. Marzaro, cotrustee of the Marzaro Family Trust, as additional parties initiating the appeal. In this opinion, we refer to Sebastiano G. Marzaro as the defendant and to the plaintiff and the defendant, collectively, as the parties.

plaintiff to disclose certain financial documents. We affirm the judgment of the trial court.

The following facts, which were either found by the court or otherwise are undisputed, and procedural history are relevant to our resolution of this appeal. The plaintiff and the defendant were married on September 1, 1975, in Bel Air, California. Two children were born of the marriage, both of whom reached the age of majority before the dissolution judgment was rendered.

In 1999 or 2000, the parties moved to a house in Easton, Connecticut (marital residence), where the defendant continues to reside. The defendant's primary occupation during the marriage was selling shoes and leather goods imported from Italy. His income varied significantly, as he earned $500,000 in some years and $0 in others. In 2017, the defendant opened a restaurant, called Bigoi Venezia, in New York City. The restaurant is owned by Italmood, Inc., a company created by the defendant approximately twenty years ago. The plaintiff has not been employed full-time for decades. During the marriage, she served as the primary caregiver to the parties' children, and, in the past, she worked as a translator.

During the course of the marriage, the parties acquired several properties in addition to the marital residence—pistachio farmland in California, a home in Greece, and land in Italy. The parties sold the home in Greece around 2019 for approximately 240,000 euros and, with the defendant's knowledge, the plaintiff invested the proceeds with a property developer in Greece. The defendant sold a portion of the pistachio farmland in 2022 and split the proceeds with a friend, with whom he claimed he had an informal partnership. The defendant received approximately $247,000 from that sale and deposited it into his Italmood, Inc., bank account.

The plaintiff left the marital residence around 2014 and did not return. She moved to Europe, first living in Greece, then Italy, and finally France. The plaintiff did not tell the defendant that she was not returning and, despite the passage of several years, the defendant was not aware that the plaintiff had left him. At the time of the dissolution judgment, the plaintiff lived in a small apartment in Paris and was financially supported by her father.

On November 19, 2019, the plaintiff commenced the present dissolution action against the defendant on the ground that the parties' marriage had broken down irretrievably. Following a trial, on March 13, 2023, the court, *M. Moore*, *J.*, issued a memorandum of decision dissolving the parties' marriage. The court found that the breakdown of the marriage was attributable to both parties.[2] In its financial orders, the court ordered the defendant to pay alimony to the plaintiff in the amount of $1 per week "until the first to occur of the following events: the death of either party or the plaintiff's remarriage or cohabitation pursuant to statute and case law." In its property distribution, the court distributed the marital assets and debts as follows. The court ordered the parties to sell the marital residence and to divide the net proceeds of the sale 60 percent to the plaintiff and 40 percent to the defendant. The court ordered the defendant to transfer to the plaintiff $75,000 from a Chase bank account, which represented approximately 60 percent of the balance of that account. The court further ordered that the plaintiff retain the proceeds from the sale of the home in Greece; the land in Italy

[2] The court, pointing to the plaintiff's move to Europe and the defendant's failure to notice that the plaintiff no longer was living with him, found that "[t]he parties appeared severely disconnected in this long-term marriage." The court also recounted the plaintiff's testimony that the defendant was very controlling and that "[the plaintiff] believed the defendant had extramarital affairs and she admitted to falling in love with someone in Greece, but the relationship never materialized."

remains in both parties' names and, in the event that the parties sell it, each party would receive 50 percent of the equity; and the land in California is to be sold, with the parties to split the proceeds equally. The court awarded the defendant sole interest in the restaurant Bigoi Venezia as well as the company Italmood, Inc., which owns Bigoi Venezia. The court ordered each party to be responsible for the debts and liabilities listed on their respective financial affidavits, with the exception of all tax liabilities and the balance on a Nordstrom credit card, for which the defendant was solely responsible. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court abused its discretion in issuing its financial orders by making a grossly disproportionate property distribution in the plaintiff's favor and assigning all of the marital debt to the defendant.

Before turning to the defendant's specific challenges to the property distribution, we observe that the "standard of review in family matters is well settled. 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. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence 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]o 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.) *Tilsen* v. *Benson*, 347 Conn. 758, 796, 299 A.3d 1096 (2023).

"[General Statutes §] 46b-81 governs the distribution of the assets in a dissolution case. . . . That statute authorizes the court to assign to either spouse all, or any part of, the estate of the other spouse. . . . In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates. . . . Moreover, [w]e have iterated that there is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders. . . . As a panel of this court once expressed, the court has vast discretion in fashioning its orders." (Internal quotation marks omitted.) *Wethington* v. *Wethington*, 223 Conn. App. 715, 734–35, 309 A.3d 356 (2024).

"Generally, we will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Fronsaglia* v. *Fronsaglia*, 202 Conn. App. 769, 776, 246 A.3d 1083 (2021). Nevertheless, "[t]he purpose of dividing marital property is to preserve, as much as possible, the parties' existing standard of living, not to award property to one spouse to the complete exclusion of the other." *Greco* v. *Greco*, 275 Conn. 348, 356, 880 A.2d 872 (2005). An award may

be improper if it imposes a financial obligation on a party that he cannot possibly meet or that renders him destitute. See id., 349–50, 356–57 (concluding that trial court abused its discretion in awarding plaintiff more than 98 percent of marital property, alimony and attorney's fees because financial award far exceeded defendant's income, left defendant destitute, and rendered distribution impracticable); see also *Valentine* v. *Valentine*, 164 Conn. App. 354, 367, 141 A.3d 884, cert. denied, 321 Conn. 917, 136 A.3d 1275 (2016).

On appeal, the defendant contends that the court awarded him only 27 percent of the marital assets or $230,000,[3] while the plaintiff received 73 percent of the marital assets or $636,500. The defendant further contends that the court assigned him more than $1 million of debt, which encompassed all of the debt reflected on his financial affidavit in addition to the Nordstrom debt that was listed on the plaintiff's financial affidavit, while the plaintiff was assigned only her attorney's fees. The defendant claims that the court's financial orders are impossible for him to carry out and "disproportionately favor the plaintiff while simultaneously forcing [him] into financial poverty."

At the outset, we reject the factual premise of the defendant's argument. With respect to his assets and his ability to pay his debts, the defendant does not account for the value of his restaurant, of which he was awarded 100 percent, or any income derived therefrom. He also does not consider his share of the values of the properties in Italy and California.

At trial, the defendant testified that both properties had a total value of only $10,000, as the land in Italy was undeveloped agricultural property "where nothing

[3] To arrive at $230,000, the defendant valued his share of the equity in the marital residence at $180,000 and added the $50,000 that he would retain from the Chase bank account.

can be built" and the pistachio farm in California had minimal value because pistachios had not been harvested in three years. As to his restaurant, he asserts that, "at the time of trial, [his] business had no value, and in actuality [had] a negative value due to the past rent due," and that his sole source of income was Social Security. The court, however, rejected these contentions. Although the court did not assign specific values to the defendant's assets or make a specific finding as to his income,[4] it found that, "[a]ccording to [the defendant's] testimony, the assets in his name have no value and his business makes no income for him. *The court does not find the defendant's testimony credible.*"[5] (Emphasis added.) We will not disturb this credibility determination made by the court. See *Fronsaglia* v. *Fronsaglia*, supra, 202 Conn. App. 779; see also *Greco* v. *Greco*, supra, 275 Conn. 359 (on appeal, "[w]e cannot retry the facts or pass on the credibility of the witnesses" (internal quotation marks omitted)).

The defendant's argument with respect to the amount of debt assigned to him similarly rests on a faulty premise. The defendant states that the court assigned him more than $1 million of debt, which encompassed all of the liabilities reflected on his financial affidavit. The court, however, provided that, from the sale of the marital residence, "the current mortgage and equity line on

[4] "Our Supreme Court . . . has recognized that [t]he court need not . . . assign specific values to the parties' assets." (Internal quotation marks omitted.) *Walton* v. *Walton*, 227 Conn. App. 251, 266, 321 A.3d 1180 (2024). Here, the defendant cannot assert that the court improperly failed to assign a specific value to his assets given the scant evidence of valuation presented by the parties. See id., 267.

[5] The court explained that "[t]he defendant failed to list accounts, assets, and partnership interests on his financial affidavit. He failed to produce important discovery to the plaintiff until shortly before trial." For instance, the court noted that, even though the defendant characterized the land in California as worthless, he had sold a portion of land near the pistachio farmland in January, 2022, from which he testified to receiving approximately $247,000 and depositing it into a bank account.

the property shall be paid from the gross proceeds." The mortgage and home equity line of credit make up $441,630 of the debt listed on the defendant's financial affidavit. Thus, the amount of debt assigned to the defendant is significantly less than what he posits on appeal.

Considering the evidence in the record and the facts found by the trial court, we cannot conclude that the court abused its discretion in issuing its financial orders. Although the court awarded a larger portion of the marital assets to the plaintiff, "[t]here is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders." (Internal quotation marks omitted.) *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 132, 300 A.3d 1175 (2023). Section 46b-81 "authorizes the court to assign to either spouse all, or any part of, the estate of the other spouse." (Internal quotation marks omitted.) *Wethington* v. *Wethington*, supra, 223 Conn. App. 734–35. Thus, even if the court distributed the parties' property in the manner described by the defendant, such that the plaintiff received approximately 70 percent of the assets and the defendant received approximately 30 percent, that does not, by itself, render the court's award inequitable. See *O'Brien* v. *O'Brien*, 326 Conn. 81, 122, 161 A.3d 1236 (2017) (concluding that "a distribution ratio of 78 percent to 22 percent is not, on its face, excessive," and observing that "we have upheld distributions awarding as much as 90 percent of the marital estate to one party").

Furthermore, the court's distribution reasonably could have reflected the unequal earnings potential of the parties.[6] See id.; see also *Wethington* v. *Wethington*,

[6] In its decision, the court did not explicitly discuss the factors set forth in § 46b-81 (c). Nevertheless, we may examine what the court reasonably could have considered, on the basis of the facts it found, in support of its conclusion. See *K. S.* v. *R. S.*, 350 Conn. 692, 730–31, 326 A.3d 187 (2024).

supra, 223 Conn. App. 734–35 (in determining assignment of marital property under § 46b-81, court shall consider, among other things, amount and sources of income, earning capacity, employability, and opportunity of each party for future acquisition of capital assets and income). As explained previously, the court did not credit the defendant's testimony that he earned no income from his business. The defendant himself testified that the restaurant would earn him income in the future, and the court acknowledged that testimony in its decision. The court found that, throughout the parties' marriage, the defendant had been involved in various business ventures with fluctuating income, making up to $500,000 in some years, whereas the plaintiff was the primary caregiver for the parties' children and had not been employed full-time for decades, and she was currently supported financially by her father.[7]

The court also reasonably could have considered that, apart from the mortgage and home equity debt already discussed, the remaining liabilities listed on the defendant's financial affidavit—including $21,878 in sales tax debt, $40,000 in income tax debt,[8] $220,000 owed in back rent, $92,996 owed on an Italmood, Inc., credit line, and more than $120,000 in credit card debt[9]—were debts related to the defendant's business.

[7] The plaintiff's financial affidavit reflected that she received $233 per week from Social Security and $115.38 per week in interest from the investment of proceeds from the sale of the property in Greece, although the plaintiff testified that she had not collected the interest in two years.

[8] Although the defendant characterized the income tax debt as the personal debt of both parties, he explained that the debt was incurred because he withdrew money from a defined benefit pension plan to open his restaurant, and he deferred the payment of taxes at that time.

[9] The defendant testified that the only credit card that was not used for his business was the Nordstrom credit card, which the plaintiff also listed on her financial affidavit. With respect to the Nordstrom credit card debt, the plaintiff testified that the defendant had cut off her access to the credit card when she told him she wanted a divorce, and, at that time, there was no balance due.

Thus, it was not inequitable for the court to assign the responsibility of those debts to the defendant. See *Fronsaglia* v. *Fronsaglia*, supra, 202 Conn. App. 780 (rejecting claim that property distribution was grossly disproportionate because defendant, inter alia, failed to account for fact that "the debts apportioned to him included business obligations that he solely and unilaterally accumulated throughout the marriage, largely without the plaintiff's knowledge and over which the plaintiff had no control"); see also *Rozsa* v. *Rozsa*, 117 Conn. App. 1, 13, 977 A.2d 722 (2009) (plaintiff's claim that court improperly ordered him to pay all of marital debt was unavailing where record revealed that "the majority of the liabilities that were assigned to him stemmed from his business dealings").

We therefore conclude that the court's order was fair and equitable. In light of the assets awarded to the defendant and his ability to earn income, the order did not constitute the imposition of a financial obligation on the defendant that he cannot possibly meet or that rendered him destitute. See *Valentine* v. *Valentine*, supra, 164 Conn. App. 367. Accordingly, we conclude that the court did not abuse its discretion in distributing the marital property and assigning the marital debt.

II

The defendant next claims that the court improperly distributed the marital residence. Specifically, he argues that the court improperly concluded that (1) the trust holding title to the marital residence was revocable and, therefore, that the property was part of the marital estate and subject to equitable distribution pursuant to § 46b-81, and (2) the parties' children were not necessary parties to the action. We are not persuaded.

The following additional facts and procedural history are relevant to the resolution of this claim. The parties had the marital residence built in Easton and moved

in when construction was completed in 1999 or 2000. The plaintiff described the home as being very large, approximately 3900 square feet, with four bedrooms, four and one-half bathrooms, and many custom features. At the urging of the plaintiff's father, the parties put the marital residence into the trust.

Throughout the dissolution proceedings, the defendant listed the marital residence as the parties' joint asset on his financial affidavits, but, when trial was scheduled to begin, he removed the property from his financial affidavit and claimed that it belonged to the trust. During trial, the trust declaration was admitted into evidence. Both parties acknowledged that they signed title to the property as trustees back to themselves jointly several times over the years to refinance and to obtain a second mortgage on the marital residence. Nevertheless, the defendant testified that the trust was irrevocable and that the parties' children were the beneficiaries of the trust; the plaintiff, on the other hand, testified that the trust was revocable and that she and the defendant were the beneficiaries during their lifetimes.

In its memorandum of decision, the court recognized that "[a] major issue of contention between the parties was . . . whether this court can order the sale of the marital property" given that title to the property was in the name of the trust. The court determined that, pursuant to the trust declaration, the parties are the trustees of the trust, settlors of the trust and the lifetime beneficiaries of the trust. The court recognized that the trust declaration includes provisions that benefit the parties' children, but only following the death of both parties. The court additionally noted that the trust declaration provides that the parties, as the settlors, may revoke the trust during their lifetimes.

The court also determined as a threshold matter that California law governed the construction of the trust

pursuant to a choice of law provision contained in the trust declaration,[10] but that the ultimate issue of whether the court could distribute the marital residence was governed by Connecticut law.[11] The court explained that, pursuant to California case law, legal title to property owned by a trust is held by the trustee rather than by the trust itself, and, when property is held in a revocable inter vivos trust, the settlor and lifetime beneficiary have the equivalent of full ownership of the property. Applying these legal principles to the present case, the court concluded: "In the present case, according to the trust declaration, the parties are the trustees of the trust and are both the trust's settlors and the beneficiaries of the trust during their lifetimes.

[10] Article 6.1 of the trust provides in relevant part: "The validity of this trust and the construction of its beneficial provisions shall be governed by the laws of the State of California in force from time to time. This Section shall apply regardless of any change of residence of the Trustee or any beneficiary . . . ."

[11] The court also addressed a forum selection clause contained in article 4.1 of the trust declaration, which provides that "[t]he appropriate Superior Court of the State of California shall have jurisdiction for all the purposes set forth in Section 17,200 of the California Probate Code." The court concluded that the provision is permissive rather than mandatory, as it does not include language indicating exclusivity, and it therefore did not deprive the court of jurisdiction. See *Animal Film, LLC* v. *D.E.J. Productions, Inc.*, 193 Cal. App. 4th 466, 471–72, 123 Cal. Rptr. 3d 72 (2011) (explaining that permissive forum selection clauses "provide for submission to jurisdiction in a particular forum without mandating it," whereas mandatory forum selection clauses contain "language of exclusivity").

The defendant challenges this aspect of the court's decision in a cursory manner, arguing that the language of the forum selection clause is "exclusive and therefore clearly mandatory" because of its use of the term "shall." We are not persuaded. Under California law, language providing that a court "shall have jurisdiction" does not indicate exclusivity of jurisdiction. See *Intershop Communications AG* v. *Superior Court*, 104 Cal. App. 4th 191, 196–97, 127 Cal. Rptr. 2d 847 (2002) (in comparing cases, use of phrase "shall have jurisdiction" was permissive, whereas use of phrase "shall have exclusive jurisdiction" was mandatory (emphasis omitted; internal quotation marks omitted)), review denied, California Supreme Court, Docket No. S112955 (March 26, 2003); see also *Hunt Wesson Foods, Inc.* v. *Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987). Accordingly, the forum selection clause did not deprive the court of personal jurisdiction over the parties.

. . . As such, they have the equivalent of full ownership of the trust property, which includes the marital [residence]. . . . Moreover, as trustees, the parties hold legal title to the trust property, subject to their fiduciary relationship regarding the property. . . . Because the terms of the trust include no provision preventing the parties as trustees from transferring title of the marital [residence] to themselves or from selling the marital [residence], and the terms include a provision permitting the parties to revoke the trust, the parties' fiduciary obligations would not be implicated by an order from the court to sell the property and distribute the proceeds. Thus, the parties hold title to the marital [residence] and may sell or transfer [it] without violating their fiduciary obligations."[12] (Citations omitted.) The court further concluded: "[T]his court has the authority to order the sale of the marital [residence] and distribute the proceeds because the parties as trustees hold legal title to the marital [residence] and such an order would not violate any of the parties' fiduciary obligations under the trust."

After determining that "Connecticut courts have treated trust assets as 'property' under § 46b-81 and, accordingly, distributed the assets between the parties incident to a dissolution of marriage when the parties had interests in the trust that were more than mere expectancies," the court ordered the parties to sell the marital residence.

Before turning to the defendant's specific arguments in support of his claim on appeal, we set forth our standard of review. "Because resolution of this issue turns on construing trust language and applying legal principles, it is subject to plenary review." *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 455, 165 A.3d 1137 (2017).

[12] The court concluded that it would reach the same result if it applied Connecticut law.

A

The defendant first argues that the court improperly concluded that the trust is revocable and, therefore, that the marital residence is subject to equitable distribution. Specifically, he argues that the trust is irrevocable as it relates to the marital residence because (1) the marital residence is not community property, and (2) an amendment to the trust contains a no contest clause. The defendant further contends that, because the trust is irrevocable, he has no control over the trust property, neither party owns the marital residence, and it therefore cannot be distributed pursuant to § 46b-81. We are not persuaded.

As the trial court determined, our construction of the trust declaration is governed by the laws of the state of California pursuant to a choice of law provision contained in the trust declaration. Under California law, "a trustee holds legal title to property held in trust." *Boshernitsan* v. *Bach*, 61 Cal. App. 5th 883, 892, 276 Cal. Rptr. 3d 109 (2021); see also *JPMorgan Chase Bank, N.A.* v. *Ward*, 33 Cal. App. 5th 678, 685, 245 Cal. Rptr. 3d 303 (2019). "Furthermore, when settlors transfer property to a revocable living trust, there is even more reason to conclude that the property's title is held by the trustees, not the trust. Such property is considered the property of the settlor for the settlor's lifetime. . . . [*A*] *revocable inter vivos trust is recognized as simply a probate avoidance device, and when property is held in this type of trust, the settlor and lifetime beneficiary has the equivalent of full ownership of the property*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Boshernitsan* v. *Bach*, supra, 891–92.

In the present case, the trust declaration explicitly provides that the trust is revocable by either party during their joint lifetimes. Specifically, article 3.1 of the trust declaration provides in relevant part: "During the

joint lifetimes of the Settlors, this trust may be revoked in whole or in part with respect to community property by an instrument in writing signed by either Settlor and delivered to the Trustee and the other Settlor, and with respect to separate property by an instrument in writing signed by the Settlor who contributed that property to the trust, delivered to the Trustee. On revocation, the Trustee shall promptly deliver to both Settlors all or the designated portion of the community property trust assets, which shall continue to be the community property of the Settlors and shall be held and administered as community property. On revocation with respect to separate property, the Trustee shall promptly deliver to the contributing Settlor all or the designated portion of that property. . . .''

Notwithstanding this provision, the defendant first contends that the marital residence is not community property, and the trust is irrevocable as it relates to noncommunity property. Specifically, the defendant argues that the parties entered into a community property agreement on August 18, 1997,[13] the same date they created the trust, ''which defined the property to be placed in the trust.'' The defendant contends that he purchased the marital residence in his name alone after the community property agreement was executed, and, thus, it is not community property. We are not persuaded by the defendant's argument. Article 3.1 of the trust declaration provides that the trust is revocable with respect to both community property and separate property.[14] Accordingly, the revocability of the trust

[13] The community property agreement was admitted as a full exhibit at trial.

[14] In one portion of his appellate brief, the defendant states that ''the trust is not community property, nor separate property,'' but he does not explain how the property, if neither, would be characterized. See *In re Marriage of Valli*, 58 Cal. 4th 1396, 1399, 324 P.3d 274, 171 Cal. Rptr. 3d 454 (2014) (characterizing marital assets as either community property or separate property).

does not turn on whether the marital residence is characterized as community property.

The defendant also argues, with sparse analysis, that a no contest clause contained in an amendment to the trust, dated September 29, 2010, "clearly creates an unbreakable irrevocable trust."[15] The no contest clause provides in relevant part: "If any person, singly or in conjunction with any other person or persons, contests in any court the validity of this trust or of a deceased Settlor's last Will or seeks to obtain an adjudication in any proceeding in any court that this trust or any of its provisions or that such Will or any of its provisions is void, or seeks otherwise to void, nullify, or set aside this trust or any of its provisions, then the right of that person to take any interest in such Settlor's estate or in this trust shall be determined as it would have been determined had the person predeceased the execution of this instrument without surviving issue. . . ."

The foregoing language, however, already was included in article 6.8 of the original trust declaration.[16] We must "construe all parts of the instrument in relation to one another to form a consistent whole." *Autonomous Region of Narcotics Anonymous* v. *Narcotics Anonymous World Services, Inc.*, 77 Cal. App. 5th 950, 960–61, 292 Cal. Rptr. 3d 851 (2022); see also *Trolan* v. *Trolan*, 31 Cal. App. 5th 939, 949, 243 Cal. Rptr. 3d 264 (2019) ("the court must consider the whole of the trust instrument, not just separate parts of it"). In addition, "[w]e are required to construe the trust so as to give effect to each term it contains" and to read the trust declaration in a manner that "give[s] every expression some effect, rather than one that will render any of the expressions

[15] The September 29, 2010 amendment to the trust was admitted as a full exhibit at trial.

[16] The only new language contained in the amendment provides instruction as to how to proceed if the trust is contested by certain family members. The defendant does not rely on this new language in support of his argument.

inoperative." (Internal quotation marks omitted.) *Trolan* v. *Trolan*, supra, 950. Considering the trust declaration as a consistent whole, we are not persuaded that the no contest clause renders the trust irrevocable or that the amendment otherwise affects the revocability of the trust. Instead, because the original trust declaration includes both the no contest clause in article 6.8 and the revocation clause in article 3.1—which explicitly authorizes the parties to revoke the trust during their joint lifetimes—we cannot conclude that revocation of the trust would violate the no contest clause, as the defendant argues. The court, therefore, properly determined that the trust is revocable and, as a result, that the parties have the equivalent of full ownership of the property as the settlors and lifetime beneficiaries of the trust. See *Boshernitsan* v. *Bach*, supra, 61 Cal. App. 5th 891–92.

Because the court properly determined that the trust is revocable and that the parties have the equivalent of full ownership of the property, we further conclude that the court properly included the marital residence in the marital assets subject to equitable distribution pursuant to § 46b-81. Although our construction of the trust declaration was governed by California law, the ultimate question of whether the marital residence was properly subject to distribution as part of the parties' marital estate must be determined under the law of this state. See *Tremaine* v. *Tremaine*, 235 Conn. 45, 61 n.16, 663 A.2d 387 (1995). Section 46b-81 (a) provides: "At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse,

when in the judgment of the court it is the proper mode to carry the decree into effect."

To determine whether a party's interest in property held in a trust is subject to equitable distribution pursuant to § 46b-81, Connecticut courts consider whether the party has a presently existing interest in the trust property that is more than a mere "expectancy . . . ." *Rubin* v. *Rubin*, 204 Conn. 224, 227–28, 527 A.2d 1184 (1987); see also, e.g., *Krafick* v. *Krafick*, 234 Conn. 783, 797, 663 A.2d 365 (1995) ("§ 46b-81 applies only to presently existing property interests, not mere expectancies" (internal quotation marks omitted)). If the party is a residuary beneficiary with an unvested interest in the trust, or if the party created the trust for the benefit of another, he does not have a presently existing interest in the trust property. See *Powell-Ferri* v. *Ferri*, 326 Conn. 457, 465, 165 A.3d 1124 (2017); *Smith* v. *Smith*, 249 Conn. 265, 274, 752 A.2d 1023 (1999); *Rubin* v. *Rubin*, supra, 227–28; *Cooley* v. *Cooley*, 32 Conn. App. 152, 162–63, 628 A.2d 608, cert. denied, 228 Conn. 901, 634 A.2d 295 (1993). In addition, property held in trust may not be considered an asset of a party if he has no authority to invade the principal of the trust. See *Tremaine* v. *Tremaine*, supra, 235 Conn. 64.

In the present case, because the parties currently are the beneficiaries of the trust during their lifetimes, and they have the ability under the trust declaration to invade the trust property by revoking the trust, we conclude that they have a presently existing interest in the marital residence held by that trust. Accordingly, the court properly concluded that the marital residence was distributable marital property pursuant to § 46b-81.

B

The defendant also contends that the court improperly concluded that the parties' children were not necessary parties for the purpose of distributing the marital residence from the trust.

This court has adopted the view "that a third person with a claimed interest in property that is the subject of a dissolution action may properly be joined as a party. . . . [A]lthough the spouses are ordinarily the only proper parties to a dissolution action, joinder or intervention of third parties is permissible where third parties claim an interest in property involved in the proceedings. . . . The policy supporting this view is the desirability of avoiding multiple suits and of granting complete relief in a single proceeding." (Citations omitted.) *Gaudio* v. *Gaudio*, 23 Conn. App. 287, 293, 580 A.2d 1212, cert. denied, 217 Conn. 803, 584 A.2d 471 (1990).

"Necessary parties . . . are those [p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. . . . [B]ut if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties." (Internal quotation marks omitted.) *Garden Homes Profit Sharing Trust, L.P.* v. *Cyr*, 189 Conn. App. 75, 82 n.4, 206 A.3d 230 (2019).

"Parties are considered indispensable when they not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such condition that its final [disposition] may be . . . inconsistent with equity and good conscience. . . . Indispensable parties must be joined because due process principles make it essential that [such parties] be given notice and an opportunity to protect [their] interests by making [them] a party to the [action]." (Internal quotation marks omitted.) *Kosiorek* v. *Smigelski*, 138 Conn. App. 695, 705–706, 54 A.3d 564

(2012), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013); see also *Bender* v. *Bender*, 292 Conn. 696, 723 n.23, 975 A.2d 636 (2009) ("the nonjoinder of indispensable parties may violate due process because such parties must be given notice and an opportunity to protect their interests").

In the present case, as the trial court determined, the trust contains provisions that benefit the parties' children following the death of both parties. Specifically, article 2.4 of the trust provides that, upon the death of the surviving spouse, the parties' children would each receive an equal share of the trust property.

Prior to trial, the plaintiff filed a motion to cite in the cotrustees of the trust as an additional defendant, which the court granted, and she amended her complaint to reflect the parties' interests in the marital residence as the trustees and beneficiaries to the trust. The plaintiff did not seek to join the parties' children as additional parties, and the children did not seek to intervene in the action. The defendant's answer to the amended complaint contained a special defense in which he claimed that "[t]he plaintiff failed to join all interested and indispensable parties to the action as jurisdictionally required, and therefore no relief can be granted without affording all the beneficiaries an opportunity to be heard."

In its memorandum of decision, the court determined that the parties' children did not need to be joined as parties to the action. The court concluded that, "when distributing trust assets incident to a dissolution of marriage, children who are beneficiaries to the trust do not need to be joined as parties if they have no legal interest in the trust assets yet." In support of its conclusion, the court cited *Salvio* v. *Salvio*, 186 Conn. 311, 441 A.2d 190 (1982), which held that the savings account trusts of the parties' children were marital property, and because

those beneficiaries "had acquired no legal interest in the funds on deposit, they were not necessary parties for the purpose of establishing the trial court's jurisdiction over those accounts." Id., 323–25.

On appeal, the defendant claims that the parties' children were "indispensable parties" because they were remainder beneficiaries with a vested interest in the trust property. The defendant contends that, because the children were not made parties to the action, the court lacked jurisdiction to issue any orders related to the trust. He also argues that the children's due process rights were violated by the court's order related to the trust.

Initially, we note that "[i]t is well settled that the failure to join an indispensable party does not deprive a trial court of subject matter jurisdiction."[17] (Internal quotation marks omitted.) *Day* v. *Seblatnigg*, 186 Conn. App. 482, 497, 199 A.3d 1103 (2018), aff'd, 341 Conn. 815, 268 A.3d 595 (2022); see also *Bender* v. *Bender*, supra, 292 Conn. 723 n.23. In addition, the defendant failed to file a motion to strike the plaintiff's amended complaint for the nonjoinder of indispensable parties.[18] "[A]s set forth in [Practice Book §] 10-39,[19] the exclusive

[17] "[T]he failure to join an indispensable party results in a jurisdictional defect *only if* a statute mandates the naming and serving of [a particular] party." (Emphasis in original; internal quotation marks omitted.) *Day* v. *Seblatnigg*, 186 Conn. App. 482, 497, 199 A.3d 1103 (2018), aff'd, 341 Conn. 815, 268 A.3d 595 (2022). In the present case, the defendant does not argue that joinder of the parties' children was statutorily mandated.

[18] The defendant did file a motion to strike the plaintiff's amended complaint, but it was based solely on the ground that certain counts failed to state a claim upon which relief could be granted. See part III of this opinion.

[19] Practice Book § 10-39 provides in relevant part: "(a) A motion to strike shall be used whenever any party wishes to contest . . . (3) the legal sufficiency of any such complaint, counterclaim or cross complaint, or any count thereof, because of the absence of any necessary party or, pursuant to Section 17-56 (b), the failure to join or give notice to any interested person . . . . (d) A motion to strike on the ground of the nonjoinder of a necessary party or noncompliance with Section 17-56 (b) must give the name and residence of the missing party or interested person or such information as the moving party has as to the identity and residence of the missing party

remedy for nonjoinder of parties is by motion to strike." (Footnote added; internal quotation marks omitted.) *Kosiorek* v. *Smigelski*, supra, 138 Conn. App. 705. Nevertheless, the defendant raised the indispensable party issue as a special defense, which the plaintiff did not move to strike as permitted under § 10-39 (a) (5). See *Bender* v. *Bender*, supra, 722 n.23. Accordingly, we review the defendant's claim to determine whether the parties' children were necessary and indispensable parties, such that their omission violated due process; see id., 722 n.23; or created a final disposition inconsistent with equity or good conscience. See id., 724.

We conclude that the parties' children did not have a present interest in the trust sufficient to require their participation in the dissolution action. The trust is revocable, as we explained in part II A of this opinion, and the parties' children would receive a share of the trust property only upon the death of both parties. Because the parties' children had not yet acquired an interest in the trust, they were not necessary and indispensable parties to the action.

Our conclusion is supported by *Salvio* v. *Salvio*, supra, 186 Conn. 311, which similarly involved trusts that were revocable in nature. In that case, our Supreme Court considered whether the parties' children, as beneficiaries of the savings account trusts established by their parents, "presently have a beneficial interest in those accounts sufficient to require their participation in the dissolution action . . . ." Id., 321. The court looked to General Statutes (Rev. to 1981) § 36-110, the statute governing deposits in trust; id.; which is now codified at General Statutes § 36a-296. The court determined that there was a statutory presumption under which the beneficiary of an unqualified savings account

or interested person and must state the missing party's or interested person's interest in the cause of action."

trust acquires no legal interest in the funds on deposit until the death of the depositor. Id., 322. In light of that statutory presumption, and "[i]n the absence of any unequivocal act by the defendant rendering the savings account trusts irrevocable or otherwise transferring ownership rights to the beneficiaries," our Supreme Court determined that the parties' children "held no beneficial interest in the accounts at the time of the dissolution of their parents' marriage." Id., 323. The court concluded that, because the parties' children had not acquired a legal interest in the savings account trusts, they were not necessary parties to the action. Id., 324.

The defendant argues that the present case is distinguishable from *Salvio* because the trusts at issue in that case were bank accounts, unaccompanied by written instruction, that were revocable pursuant to a statutory presumption. The defendant contends that, in contrast to *Salvio*, the trust in the present case has "an extensive written estate plan in place," under the terms of which the interests of the parties' children have vested. The defendant is correct that the savings account trusts in *Salvio* were not accompanied by a statement describing the nature of the trusts. See *Salvio* v. *Salvio*, supra, 186 Conn. 312–13. The fact that there is a written trust declaration in the present case, however, does not support the defendant's claim. As we already have explained, the terms of the trust explicitly provide that the trust is revocable and that the parties' children would receive a share of the trust property only upon the death of both parties. Thus, under those terms, the parties' children did not have a vested interest in the trust. See *Bartlett* v. *Bartlett*, 220 Conn. 372, 376 and n.6, 599 A.2d 14 (1991) (beneficiary of revocable trust does not have vested property interest, but rather mere expectancy, until death of settlor renders trust irrevocable); *Rubin* v. *Rubin*, supra, 204 Conn. 230–32 (same);

see also, e.g., *Krafick* v. *Krafick*, supra, 234 Conn. 788 n.12 ("by 'vested' we refer to pension interests 'in which an employee has an *irrevocable* . . . *right*, in the future, to receive his or her account balance . . . or his or her accrued benefit . . . regardless of whether the employment relationship continues' " (emphasis added)). Accordingly, we conclude that the defendant failed to establish that the parties' children were necessary and indispensable parties to the action.

III

The defendant next claims that the plaintiff failed to plead sufficient facts to support a cause of action in counts two and three of her revised complaint. Specifically, the defendant contends that "the plaintiff failed to allege any new facts in count two or in count three of her [amended] complaint . . . other than those facts that were originally claimed in the dissolution action, related to a claim regarding the [trust], that would give rise to a Connecticut cause of action under our law" and failed to allege the violation of any law.[20] (Citation omitted.) In response, the plaintiff argues, inter alia, that she "was not pleading, nor did she have to, that the trustees or beneficiaries engaged in wrongful conduct. She was putting them on notice that she was asking the court to award her an interest in the [marital residence], in accordance with . . . § 46b-81, [and] that they themselves may have an interest." We agree with the plaintiff.

The following additional procedural history is relevant to our resolution of this claim. On February 16, 2022, when the parties' dissolution trial was scheduled to begin, the defendant's counsel brought to the court's attention that the marital residence was held in trust. The following day, the court continued the trial to afford

[20] We note that the defendant's brief is far from a model of clear analysis, and this claim in particular is difficult to divine.

the parties an opportunity to address the issue of the trust.

On February 24, 2022, the plaintiff filed a motion to cite in the trust as an additional defendant, with an amended complaint attached. The court granted the motion and ordered that "the complaint be amended to state facts showing the interest of [the trust] in this action and summon [the trust] to appear as a defendant in this action . . . ."

The defendant subsequently filed a motion to dismiss the action as against the trust on the basis that the proposed amended complaint attached to the motion to cite in, which had not been filed with the court, also had not been properly served on the trust. The court granted the defendant's motion to dismiss. On August 2, 2022, the plaintiff filed a motion to cite in the cotrustees of the trust as an additional defendant, which the court granted.

On August 31, 2022, the plaintiff filed the operative amended complaint, which contains three counts.[21] Count one, which was directed at the defendant, contained essentially the same allegations as the original complaint, seeking a dissolution of her marriage to the defendant along with, inter alia, an equitable property division. In count two of the amended complaint, which was directed at both parties as trustees of the trust, the plaintiff alleged that the parties were cotrustees of the trust, which they created in August, 1997; that the trust currently owns the marital residence; that the parties made several transfers of the marital residence throughout the years; that the parties used that marital residence as their marital home; and that "the plaintiff

[21] We note that, although the plaintiff labeled the operative complaint as a "cross complaint," the parties agree that it is, in effect, an amended complaint, and the defendant does not take issue with the mislabeling of this pleading.

claims an interest in [the marital residence] pursuant to [§] 46b-81 and such other [relief] as the court may deem appropriate and proper." Count three repeated the same allegations set forth in count two except that it named the parties as beneficiaries of the trust.

On November 18, 2022, the defendant filed a motion to strike counts two and three of the amended complaint, claiming, inter alia, that those counts failed to state a claim upon which relief could be granted. The court denied the defendant's motion to strike. The court explained in relevant part: "In the present dissolution of marriage action, title to the parties' marital residence is held in trust. The plaintiff and the defendant are cotrustees pursuant to the trust agreement and are also beneficiaries of the trust. The plaintiff alleges in count two of her [amended] complaint . . . that the parties are trustees of the [marital residence] and that the property was the parties' marital home. The plaintiff claims an interest in this real property pursuant to . . . § 46b-81 as trustee of the trust . . . . The plaintiff alleges in count three of her [amended] complaint, inter alia, that the parties have an interest in the [marital residence] as beneficiaries of the trust agreement. The plaintiff claims an interest in the [marital residence] pursuant to . . . § 46b-81 as a beneficiary of the trust . . . . The court finds that the allegations of counts two and three of the plaintiff's [amended] complaint, if proven, support causes of action claiming an interest in the [marital residence] in this dissolution of marriage action. The court therefore denies the defendant's motion to strike." (Citation omitted.)

The defendant subsequently filed an answer and special defenses in which he again asserted, inter alia, that counts two and three of the plaintiff's amended complaint failed to state a claim upon which relief could be granted; that the plaintiff "fail[ed] to allege any illegal, wrongful and/or tortious action" in those counts;

that the court lacked jurisdiction to terminate the trust and to award the real property owned by the trust pursuant to § 46b-81; and that, by entering into the trust, the plaintiff abandoned her equitable rights in the real property owned by the trust. The plaintiff did not file a reply to the special defenses.[22] In its decision, the court did not explicitly address the special defenses raised by the defendant. Nevertheless, in reaching its conclusion that the marital residence was subject to equitable distribution pursuant to § 46b-81, the court necessarily rejected the defendant's arguments.

On appeal, the defendant argues that, in counts two and three of the amended complaint, the plaintiff has failed to allege facts that "violate Connecticut law in any way, shape, or form" and that "[n]either the court nor the defendant can read the plaintiff's mind in an attempt to determine what illegality, breach, and/or tortious conduct she is trying to allege, if any."

On the basis of our review of the amended complaint, however, it is clear that the plaintiff was not attempting to raise separate causes of action against the trust, or to allege any wrongdoing in connection with the trust, in counts two and three. Instead, as the court concluded in its denial of the defendant's motion to strike,[23] counts

[22] In his appellate reply brief, the defendant focuses on the plaintiff's failure to file a reply to his special defenses. He argues that, pursuant to Practice Book § 10-19, the plaintiff's failure to respond to his special defenses results in her admission of the allegations contained therein. See Practice Book § 10-19 ("[e]very material allegation in any pleading which is not denied by the adverse party shall be deemed to be admitted, unless such party avers that he or she has not any knowledge or information thereof sufficient to form a belief"). The defendant, however, did not make this argument before the trial court, and we will not address a claim raised for the first time on appeal. See, e.g., *Westry* v. *Litchfield Visitation Center*, 216 Conn. App. 869, 878, 287 A.3d 188 (2022) ("[o]ur appellate courts, as a general practice, will not review claims made for the first time on appeal" (internal quotation marks omitted)).

[23] On appeal, the defendant does not address the court's decision on the motion to strike.

two and three of the amended complaint served to identify the parties as beneficiaries and trustees of the trust and to claim an interest in the property held in that trust pursuant to § 46b-81. This is particularly apparent when viewed in the context of the procedural history of this case, as the plaintiff's amendment to the complaint was consistent with the court's order, in granting the plaintiff's first motion to cite in the trust as an additional defendant, that "the complaint be amended to state facts showing the interest of [the trust] in this action . . . ." Because the plaintiff was not raising a separate cause of action in count two or in count three of her amended complaint, we conclude that she was not required to plead any additional facts.

IV

The defendant's final claim is that the court improperly denied a motion for contempt that he had filed prior to trial regarding the plaintiff's alleged failure to comply with certain discovery orders. We conclude that this claim is unreviewable.

The following additional procedural history is relevant to our resolution of this claim. On January 21, 2021, the defendant filed a request for production of documents, which sought, among other things, statements from bank accounts "in the name of [the plaintiff] individually, or in conjunction with any other person(s) or in the name of others for the use, benefit or trust for [the plaintiff]," and certain documents related to the sale of the property in Greece.

On January 13, 2022, the defendant filed a motion to compel the plaintiff to comply with his request for production of documents. The defendant alleged, in relevant part, that the plaintiff failed to produce any personal bank statements and any documents related to the sale of the property in Greece. On January 14,

2022, the court granted the defendant's motion to compel, ordering the plaintiff to "comply fully with all outstanding discovery requests on or before January 21, 2022."

On November 25, 2022, the defendant filed another motion to compel. In his motion to compel, the defendant argued that the plaintiff failed to produce any personal bank statements pursuant to any of his requests for production, "even though there is clear evidence she maintains bank accounts, or has maintained bank accounts, outside of the United States and in California." The defendant, more specifically, alleged that the plaintiff "has, or had, a bank account at Pacific Premier Bank in . . . California" and the plaintiff "has, or had, a personal bank account in Greece in accord with her own admissions through three various emails . . . ." (Citation omitted.) The defendant requested the court to order the plaintiff to produce those financial documents immediately. On December 12, 2022, the court granted the defendant's motion to compel and ordered the plaintiff to comply within ten days.

On December 20, 2022, the plaintiff filed a reply to the defendant's November 25, 2022 motion to compel. In her reply, the plaintiff asserted, in relevant part, that she "had an account at Piraeus Bank in Greece but that account was closed and there are no responsive documents for 2018, 2019, and 2020 for this bank," and "[t]he Pacific Premier Bank is an account under the control of [her] father and she has no access to those statements."[24]

[24] The plaintiff responded similarly to a request for production that the defendant had filed in July, 2022. Specifically, the plaintiff responded that she had provided the defendant with all of her bank statements and that "[t]here is no open account at Piraeus Bank in Greece and [she] has no account at Premier Bank in . . . California." The defendant acknowledged this response in his November 25, 2022 motion to compel.

On January 5, 2023, the defendant filed a motion for contempt in which he claimed that the plaintiff failed to comply with the court's January 14 and December 12, 2022 orders granting the defendant's respective motions to compel (discovery orders). The defendant requested as relief, inter alia, that the court order the plaintiff to provide full discovery compliance immediately.

On January 9, 2023, the first day of trial, the defendant filed an amended list of pending motions, which included his January 5, 2023 motion for contempt. Before trial started, the defendant's counsel brought the motion for contempt to the court's attention. He requested that the court address that motion first and issue an order for the plaintiff to provide the documents at issue, so that he could have those documents during the course of the trial. The plaintiff's counsel responded that she had already provided the defendant's counsel with the financial documents she had and that she "ha[d] no other documents available to [the plaintiff] to give to him." The court decided to proceed with the commencement of trial, explaining that, "[i]f the evidence demonstrates that I can make a finding of contempt, then potentially I'll make a finding of contempt, but we're going to proceed at this point."

During trial, the defendant's counsel asked the plaintiff about the motion for contempt and the financial documents that she allegedly had failed to produce, specifically, "bank accounts or information about money held in Greece and a bank account from a California bank with [the plaintiff's] name on it." The plaintiff responded that she was aware of the defendant's motion but that the documents the defendant had requested "were unproduceable." She explained that, although she previously had an account at Piraeus Bank in Greece, that account had been inactive since 2018,

it had no money it in, and it had been closed automatically for inactivity after two years. She further explained that the bank did not send out statements and nothing was online, so it was impossible for her to get statements from the bank to show that it was closed. As to the sale of the property in Greece, the plaintiff testified that she had invested the proceeds, which the defendant had agreed to do, and the money was not being held at a bank. The plaintiff also testified that she had not received any statements, nor had she requested any, from the person with which she had invested the money, and she had provided the defendant with everything she had with respect to the documentation.

Regarding the California bank account, the plaintiff testified that it was her father's bank account, and, even though she was a signer on it, it was not her account, she did not have access to it, and she had never seen a statement for it. The defendant's counsel showed the plaintiff exhibit S, which was marked as a full exhibit. Exhibit S is a letter, dated March 5, 2020, that had been sent from Pacific Premier Bank in California and was addressed to the plaintiff at the marital residence. The letter sought to confirm a request from the plaintiff to change the address information reflected on bank records, from the address of the marital residence to an address located in Northridge, California. The plaintiff testified that she presumed her father had requested the change of address, as it had her father's address on it. The plaintiff further testified that she was not familiar with the account, she had not previously received any other statements, and she was not aware if additional statements had been sent to her at the marital address because she had not lived there in nine years.

In its March 13, 2023 memorandum of decision, the court addressed the pending pendente lite motions:

"The court has considered all pending motions in making this decision. This decision resolves all pending motions. In the event this decision does not address a pending motion, the motion is denied."

The defendant subsequently filed a motion for articulation in which he requested, among other things, that the court explain the factual basis for its decision to deny the pendente lite motions, including the January 5, 2023 motion for contempt. The court summarily denied the motion for articulation. The defendant did not file a motion for review of the court's denial of the motion for articulation pursuant to Practice Book § 66-7.

On appeal, the defendant claims that the court improperly denied his motion for contempt. The defendant contends that, in denying his motion for contempt, the court improperly failed to order the plaintiff to disclose certain financial documents related to the sale of the property in Greece and the bank account in California, and, therefore, the court's financial orders were based on false information. We decline to review this claim because it is inadequately briefed, and the record is inadequate for review.

We first conclude that the defendant's claim is inadequately briefed. "We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and

fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *Cohen* v. *Rossi*, 346 Conn. 642, 689, 295 A.3d 75 (2023).

In the present case, the defendant's claim is devoid of any citations to applicable legal authority. See, e.g., *C. B.* v. *S. B.*, 211 Conn. App. 628, 630, 273 A.3d 271 (2022) (brief containing "almost no citation to applicable legal authorities" was inadequate). Although the defendant's briefing on this issue contains some citations to the record and to legal principles about the importance of discovery in dissolution cases, it does not contain a discussion of the legal principles pertaining to motions for contempt. Consequently, the defendant's brief also does not provide an analysis applying those legal principles to the facts of the present case. "Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *McNamara* v. *McNamara*, 207 Conn. App. 849, 869, 263 A.3d 899 (2021); see also *Graham* v. *Graham*, 222 Conn. App. 560, 580–81, 306 A.3d 499 (2023) (claim was inadequately briefed where appellant failed to provide legal analysis pertaining to applicability of legal doctrines at issue). Accordingly, we conclude that the defendant's claim is inadequately briefed.

Moreover, the record is inadequate to review this claim. "It is well established that the appellant bears the burden of providing an appellate court with an adequate record for review. . . . It is, therefore, the responsibility of the appellant to move for an articulation or rectification of the record where the trial court has failed to state the basis of a decision . . . . Without an adequate record, [w]e . . . are left to surmise or speculate as to the existence of a factual predicate for the trial court's rulings. Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial

court, either on its own or in response to a proper motion for articulation, any decision made by us . . . would be entirely speculative." (Internal quotation marks omitted.) *Bayview Loan Servicing, LLC* v. *Park City Sports, LLC*, 180 Conn. App. 765, 781, 184 A.3d 1277, cert. denied, 330 Conn. 901, 192 A.3d 426 (2018).

The defendant's claim that the plaintiff failed to comply with the court's discovery orders is premised on his contention that "the evidence at trial demonstrated that the information/documents existed." As set forth previously in this opinion, however, the plaintiff testified at trial that the documents did not exist, or, alternatively, that she did not have access to them. The plaintiff's testimony was subject to a credibility determination by the court and, to the extent that it conflicted with the evidence presented by the defendant, that was a matter for the court to resolve. See *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022) ("[i]t is the exclusive province of the trier of fact to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony" (internal quotation marks omitted)). It is unclear from the court's memorandum of decision to what extent the court relied on or credited the plaintiff's testimony and whether the court found that the documents requested by the defendant in fact existed.[25] Thus, the record is inadequate for review. See *In re Vada V.*, 343 Conn. 730, 742, 275

[25] If the court found the plaintiff's testimony credible, it reasonably could have concluded that the plaintiff had complied with the court's discovery orders and, thus, that the defendant had failed to prove the plaintiff's wilful noncompliance with those orders; see *Puff* v. *Puff*, 334 Conn. 341, 365, 222 A.3d 493 (2020) (party seeking order of contempt must prove alleged contemnor's wilful noncompliance with order); or that the plaintiff was unable to comply with the court's orders because she did not have access to any additional documents. See id. ("[t]he inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt" (internal quotation marks omitted)).

A.3d 1172 (2022) (record was inadequate to review respondents' claims because it was silent on, and in some cases undermined, factual predicates to claims).

Although the defendant sought an articulation of the factual basis of the court's decision to deny his motion for contempt, he failed to file a motion for review of the court's denial of the motion for articulation pursuant to Practice Book § 66-7. "[W]here a party is dissatisfied with the trial court's response to a motion for articulation, he may, and indeed under appropriate circumstances he must, seek immediate appeal . . . to this court via the motion for review." (Internal quotation marks omitted.) *Hallock* v. *Hallock*, 228 Conn. App. 81, 92 n.7, 324 A.3d 193 (2024). We recognize that, pursuant to Practice Book § 61-10 (b), "[t]he failure of any party on appeal to seek articulation pursuant to [Practice Book §] 66-5 shall not be the sole ground upon which the court declines to review any issue or claim on appeal." In the present case, however, Practice Book § 61-10 (b) does not bar forfeiture of the defendant's claim because his failure to file a motion for review is not the sole ground upon which we decline to review his claim; instead, as we already have discussed, the claim also is inadequately briefed. See *Pryor* v. *Pryor*, 162 Conn. App. 451, 459 n.7, 133 A.3d 463 (2016) (Practice Book § 61-10 (b) did not shield defendant from forfeiture of appellate review because, "besides failing to seek an articulation to provide an adequate record, the defendant has failed to adequately brief his claims"); see also *Gallagher* v. *Fairfield*, 339 Conn. 801, 817, 262 A.3d 742 (2021) (declining to consider claim where claim was inadequately briefed and record was inadequate, as plaintiff had not requested articulation); *State* v. *Waters*, 214 Conn. App. 294, 330–31, 280 A.3d 601 (declining to remand matter to trial court for articulation because defendant's failure to seek articulation was not "sole ground" on which this court declined to

review claim), cert. denied, 345 Conn. 914, 284 A.3d 25 (2022). Accordingly, we decline to consider this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

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# COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES EX REL. WENDY PIZZOFERRATO ET AL. *v.* THE MANSIONS, LLC, ET AL.
## (AC 46774)

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

*Syllabus*

The defendants appealed from the trial court's judgment for the plaintiff commission and the intervening individual plaintiffs, W and R, finding that the defendants violated the state fair housing laws (§ 46a-64b et seq.) by constructively denying the individual plaintiffs' request for an accommodation of the defendants' no pets policy for W's two emotional support dogs. The defendants claimed, inter alia, that the court improperly determined that two emotional support dogs were necessary for W's equal use and enjoyment of the dwelling. *Held*:

The defendants' claim that the trial court improperly concluded that W suffered from a disability that required an accommodation when the court found only that the defendants regarded her as being disabled was without merit because the court also found that the plaintiffs satisfied their burden of proving that W had a "record of" having a mental disability within the meaning of the statute (§ 46a-51 (20)).

The trial court improperly concluded that the plaintiffs met their burden of showing that two emotional support dogs were necessary for W's equal use and enjoyment of the dwelling, as the evidence submitted by the plaintiffs, viewed in the light most favorable to the plaintiffs, was insufficient as a matter of law to prove that both dogs were necessary to ameliorate the effects of W's mental disability.

Argued September 10, 2024—officially released March 4, 2025

*Procedural History*

Action to recover damages for, inter alia, alleged housing discrimination, and for other relief, brought to

the Superior Court in the judicial district of Tolland, where the court, *Gordon*, *J.*, granted the motion to intervene filed by Wendy Pizzoferrato et al.; thereafter, the case was tried to the court, *Huddleston*, *J.*; judgment for the plaintiffs, from which the defendants appealed to this court. *Reversed*; *judgment directed.*

*Richard M. Hunt*, pro hac vice, with whom, on the brief, was *Maria K. Tougas*, for the appellants (defendants).

*Libby Reinish*, human rights attorney, with whom was *Michelle Dumas Keuler*, for the appellee (named plaintiff).

*Robert F. Kappes*, for the appellees (intervening plaintiffs).

*Opinion*

BRIGHT, C. J. In this housing discrimination action, the defendants, The Mansions, LLC (Mansions), 75 Hockanum, Inc., and Candace Barnard,[1] appeal from the judgment of the trial court, rendered after a court trial, in favor of the plaintiff, the Commission on Human Rights and Opportunities (commission), and the intervening plaintiffs, Wendy Pizzoferrato (Wendy) and Rudy Pizzoferrato (Rudy).[2] The court found that the defendants violated the state fair housing laws, General Statutes § 46a-64b et seq., by constructively denying the Pizzoferratos' request for an accommodation of the defendants' "no pets" policy for Wendy's two emotional support dogs. On appeal, the defendants claim that the court improperly concluded that (1) Wendy needed her emotional support dogs to ameliorate the effects of a

[1] Mansions is the owner of an apartment complex in Vernon, 75 Hockanum, Inc., is the managing entity for Mansions, and Barnard is the director of operations for Mansions.

[2] The Pizzoferratos filed a notice with this court adopting the appellate brief filed by the commission. For ease of discussion, we refer to the commission and the Pizzoferratos collectively as the plaintiffs.

disability when the court found only that the defendants regarded her as being disabled and not that she actually was disabled, (2) two emotional support dogs were necessary for Wendy's equal use and enjoyment of the dwelling, and (3) the defendants constructively denied the Pizzoferratos' request for an accommodation. We agree with the defendants' second claim and, therefore, reverse the judgment of the trial court.[3]

The following facts, as found by the court, and procedural history are relevant to our analysis of the defendants' claims. "In 2017, the Pizzoferratos sold [their house] and moved into an apartment complex known as Vintage at the Grove (Vintage). At the time, they had two pet Shih Tzu dogs. Vintage was 'pet friendly' but charged a monthly fee for the two dogs. [Wendy] became friends with a manager at Vintage, who told her that the pet fees would be waived if the dogs were emotional support animals. The manager also gave her the name of a therapist, who in turn recommended Maurice LaPointe, a licensed marital and family therapist. [Wendy] contacted [LaPointe] and met with him. [LaPointe] subsequently provided a certification for Vintage that [Wendy] 'suffers from moderate anxiety and that her two canines provide relief.' Vintage accepted [LaPointe's] certification and stopped charging the pet fees. . . .

"In 2019, [the Pizzoferratos] began to look for a less expensive apartment. They first visited Mansions' rental office in May, 2019. Victoria Dumeng and Amanda Proto greeted them. Dumeng, who introduced herself as a Mansions employee, said she would answer all their questions. . . . The Pizzoferratos were impressed by

[3] Because we conclude that the defendants are entitled to judgment in their favor due to the plaintiffs' failure to establish that the requested accommodation was necessary for Wendy's equal use and enjoyment of the dwelling, we do not consider whether the court properly found that the defendants constructively denied the Pizzoferratos' request.

the complex, although the apartment was not quite what they wanted. Before paying a $200 application fee, they asked whether their two dogs would be a problem. [Dumeng] answered that 'all you need is a note from your doctor.' The Pizzoferratos completed a rental application on May 25, 2019, in which they identified their two dogs as 'assistance animals.' They did not obtain an apartment at Mansions at that time.

"In October, 2019, they again visited Mansions for a tour of a townhouse unit. They again went to Mansions' rental office, where [Dumeng] and [Proto] worked. Before touring the townhouse, [Wendy] again asked [Dumeng] if her two support animals would be a problem in light of Mansions' no pet policy. [Dumeng] said that all she would need was a note from her doctor. They toured the townhouse unit, which met their needs and suited their preferences. . . . They submitted online rental applications on October 22, 2019, which were accepted by [Dumeng] and processed by [Proto]. The online application form contained a section . . . for identifying two pets and boxes to check regarding 'assistance animal status.' [Rudy's] application indicated that they had two dogs. His application stated the names, ages, breed, and weights of the two dogs and checked the 'yes' box on the line for 'assistance animal status.'

"On October 22, 2019, the same day that they submitted the Mansions rental application, and before that application was approved by Mansions, the Pizzoferratos gave notice to Vintage that they would be vacating their Vintage apartment by December 22, 2019. . . . On October 23, 2019, [Wendy] obtained Mansions' 'Request for Accommodation' form and provided it to [LaPointe], who completed it for her. The form was preprinted with seven paragraphs, each of which had

blanks for the responding provider to fill in.[4] . . . LaPointe wrote '[Wendy]' [for] the patient's name, 'shitzu' after 'a' and before '(species and breed),' and 'panic attacks' . . . for symptoms.

"[Wendy] submitted the completed form to Mansions on October 24, 2019. [Dumeng] forwarded the accommodation request to Richard Hunt, a Texas attorney whose practice focuses on the federal Fair Housing Act [(FHA), 42 U.S.C. § 3601 et seq. (2024)] and who advises Mansions on fair housing issues. According to an entry dated October 24, 2019, in an activity log maintained by Mansions, [Dumeng] noted that 'Richard approved the request.' By email sent on October 25, 2019, [Proto] informed the Pizzoferratos that their rental application had been accepted and told them how to access and sign their lease electronically. The Pizzoferratos signed and submitted the lease documents the same day. By email [sent] on October 26, 2019, [Dumeng] advised [Wendy] that her accommodation request had been approved. Attached to [that] email were an 'Animal Addendum' and a 'Support or Service Animal Amendment to Animal Addendum' for the Pizzoferratos to complete. [Rudy] returned the completed forms to Mansions. The completed forms identified the same two dogs that the Pizzoferratos had identified on their rental application.

"It was at that point that problems arose. Although both the rental application and the animal addendum had spaces for identifying two animals, and the Pizzoferratos had clearly identified their two dogs on both of those forms, the accommodation request form had only

[4] "The preprinted paragraph 7 provided as follows:

" 'For requests related to emotional support or therapy animals only: _____'s (name of patient) animal, a _____ (species and breed), provides emotional support that alleviates the listed symptoms of _____'s (name of patient) mental impairment. (List the symptoms): _____.' "

one space. Observing that the Pizzoferratos' animal addendum listed two dogs, [Dumeng] sought advice from [Hunt]. He advised her to notify [Wendy] 'that the original request was for one dog and that we would be able to accept the one dog as an exception to our no-pet policy, however, not the second one.' [Dumeng] accordingly sent an email to [Wendy] on November 1, 2019, that stated in relevant part: 'We approved your request for accommodation based on information from your therapist indicating you needed one dog as an emotion[al] support animal to mitigate the symptoms of your anxiety. There was no indication that you needed two dogs. We will permit the one emotional support dog as an exception to our no pets policy, but not the other.'

"Before [Wendy] read that email, she appeared at Mansions' office to provide copies of the dogs' vaccination records and dog licenses for the town of Vernon, which she had obtained at Mansions' request. According to [Dumeng's] note in Mansions' activity log, [Wendy] was 'made aware of the email and that proof for the need of the second dog was necessary in order to approve [its] residency on the property. She had her husband Rudy email over the form that they had supplied to their previous residence.' The form that [LaPointe] had provided to Vintage, and that the Pizzoferratos now provided to Mansions, stated that [Wendy] 'suffers from moderate anxiety and that her two canines provide relief.' [Wendy] testified that [Dumeng] told her 'that should be fine.' However, [Dumeng] forwarded the Vintage accommodation form to [Hunt] 'to review and advise.'

"According to Mansions' activity log, on November 6, 2019, [Hunt] advised that 'we have a few different ways to go about this, depending on if we wanted to lose the resident or possibly incur a complaint.' . . . Dumeng passed the issue to [Barnard] to proceed.

"[Barnard], Mansions' director of operations, testified that 'final authority to grant or deny housing accommodation requests' rested with her. She had been away from the office when the Pizzoferratos submitted their rental application, accommodation request, and other documents. On November 6, 2019, she learned of the issue regarding the Pizzoferratos' second dog. On the same day, she sent an email to [Wendy], advising her that Mansions needed additional information to consider the second dog because the document provided by [LaPointe] 'does not constitute reliable evidence of a disability related need for a second emotional support dog.' She further stated that to consider the second dog, Mansions would need to have [LaPointe] provide the following:

" 'An explanation, on [his] letterhead, of why your anxiety requires not one, but two emotional support animals, along with a reference to scientific studies or papers justifying the conclusion that two animals will better control your anxiety than one.'

" 'An explanation of why [his] original document mentioned only a single emotional support animal.'

" 'A statement based on [his] sessions with you of how frequently your anxiety is so acute you cannot leave your apartment.'

"In addition, [Barnard's] email stated, 'we need to know whether you take one or both of your dogs with you to work on a daily basis.' She concluded that '[o]nce you provide this additional information we will evaluate your request for accommodation with respect to a second dog.'

"[Wendy] was very upset by this email. She believed that Mansions was requesting her therapist's treatment notes, which she regarded as private; she did not believe there were scientific papers of the sort requested by

[Barnard]; and she thought the email indicated that Mansions did not want the Pizzoferratos as tenants. [Rudy] was also upset. He said 'it was clear they didn't want us here.' The Pizzoferratos had already given notice that they were terminating their lease at Vintage, effective as of December 22, 2019, which gave them only a few weeks to find alternative housing. [Rudy] was concerned that if they provided additional information to fulfill Mansions' 'impossible demands,' 'they would just come up with more because . . . they didn't want us there.' They concluded that they needed to find another place to live as quickly as possible.

"On November 8, 2019, [Wendy] emailed a lengthy emotional response to [Barnard], describing [Barnard's] actions as 'vile and evil' and violative of fair housing laws and health privacy laws. She requested a refund of all money that the Pizzoferratos had paid to Mansions. Mansions' activity log indicates that as of November 12, 2019, the lease was canceled. The Pizzoferratos admitted that Mansions refunded all money that the Pizzoferratos had paid it.

"The Pizzoferratos did locate alternative housing. They considered it to be inferior to Mansions because it was smaller, more dated, and lacked the amenities that had drawn them to Mansions. They moved into a rental unit . . . for approximately [one] year before buying a new residence." (Citation omitted; footnote added; footnotes omitted.)

The Pizzoferratos filed a discriminatory practice complaint with the commission pursuant to General Statutes § 46a-82. After an initial investigation, the commission found that there was reasonable cause to believe that a discriminatory practice had been committed, and both the Pizzoferratos and the defendants elected a civil action in lieu of an administrative hearing pursuant to General Statutes § 46a-83 (g) (2). The commission

thereafter filed the underlying action against the defendants, alleging that the defendants discriminated against the Pizzoferratos on the basis of Wendy's disability by, among other things, denying their request for a reasonable accommodation in violation of General Statutes § 46a-64c. The plaintiffs asserted that Wendy has a mental disability within the meaning of General Statutes § 46a-51 (20), which provides that " '[m]ental disability' refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders [(DSM)]' . . . ."

The case proceeded to a court trial, which spanned two days in October, 2022. Wendy, Rudy, LaPointe, and Barnard all testified at trial, and the defendants also presented videos of the depositions of two psychologists, Cassandra Boness and Dennis Perez, who testified as experts for the defendants. At the conclusion of the plaintiffs' case-in-chief, the defendants moved for a judgment of dismissal pursuant to Practice Book § 15-8 for failure to make out a prima facie case. The defendants' counsel argued that the plaintiffs failed to present sufficient evidence to establish that Wendy had a disability and that the defendants constructively denied her request for a reasonable accommodation. More specifically, the defendants' counsel argued that LaPointe's testimony was not credible because he failed to testify regarding the specific diagnostic criteria he applied in diagnosing Wendy and that nothing written in Barnard's November 6 email could be construed as a denial of Wendy's requested accommodation.

In response, both the commission's counsel and counsel for the Pizzoferratos argued that, because Wendy requested an accommodation, which the defendants initially granted on the basis of the information Wendy provided to them about her disability, there was

sufficient evidence that she is disabled within the meaning of § 46a-51 (20). They further argued that Barnard's November 6 email requesting, among other things, scientific studies demonstrating the need for two support animals was a constructive denial of Wendy's request because the defendants asked for studies that their own experts asserted do not exist. The court, *Huddleston*, *J.*, reserved judgment on the motion, and the defendants presented their case-in-chief, which included testimony from Barnard and videos of the depositions of Boness and Perez.

In their posttrial briefs, the plaintiffs argued that the testimony of both Wendy and LaPointe established that she has a record of having generalized anxiety disorder, a recognized diagnosis under the DSM, and that the defendants' granting of the accommodation request for one dog established that Wendy was "regarded as" having a disability. The defendants, however, argued that the plaintiffs "presented no credible evidence at trial that [Wendy] had a disability, that she needed the accommodation, or that the accommodation was refused." As to LaPointe's testimony, the defendants argued that given "the discrepancy between his treatment notes and [both] the diagnostic criteria for generalized anxiety disorder and [Perez'] expert testimony, the [plaintiffs] failed to provide evidence making it more probable than not that [Wendy] suffered from a mental disorder diagnosed in the DSM. Thus, they failed to prove she had a 'mental disability' as defined in . . . § 46a-51 (20)."

On July 28, 2023, the court issued a memorandum of decision, rendering judgment for the plaintiffs. The court concluded that the definition of "mental disability" in § 46a-51 (20) applies to state fair housing claims[5] and that the plaintiffs had established that Wendy has a mental disability within the meaning of the statute.

[5] On appeal, the defendants claim that the court improperly concluded that § 46a-51 (20) applies to fair housing claims. In their posttrial brief in

the trial court, however, the defendants argued that Wendy "was required to prove her disability as a 'handicap' under the [FHA] or to rely on the 'includes, but is not limited to' language in § 46a-64b (8) to find some other definition of a mental disability under Connecticut law. That alternative definition is found in . . . § 46a-51 (20) . . . ." After the parties filed their posttrial briefs, during oral argument before the trial court, the defendants' counsel again argued that "[t]here are two definitions of disability. One is the Connecticut definition of a mental disability or mental impairment. The other is the [FHA] . . . ."

"[A] party cannot take a path at trial and change tactics on appeal. . . . [T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [alleged] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party." (Citation omitted; internal quotation marks omitted.) *Gladstein* v. *Goldfield*, 163 Conn. App. 579, 585, 137 A.3d 60 (2016), appeal dismissed, 325 Conn. 418, 159 A.3d 661 (2017).

The record demonstrates that the plaintiffs expressly relied on the definition of mental disability in § 46a-51 (20) and that the defendants argued that the plaintiffs had failed to establish that Wendy satisfied either prong of that definition. On appeal, however, the defendants attempt to pursue a different claim, arguing that, "[d]espite the 'includes, but is not limited to' language, the legislature's deliberate exclusion of the definition of 'mental disability' while explicitly including the definition of 'physical disability' clearly indicates an intent that the definition of 'mental disability' in [§] 46a-51 (20) does not apply to the phrase 'physical or mental disability' used in [§] 46a-64b." They rely on "the doctrine of expressio unius est exclusio alterius—the expression of one thing is the exclusion of another—[under which] we presume that when the legislature expresses items as part of a group or series, an item that was not included was deliberately excluded." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 776, 160 A.3d 333 (2017).

We question the application of the defendants' proffered canon of statutory construction given that § 46a-64b (8) expressly provides that the definitions of physical and mental disability are "not limited to" the expressed items in the series that follows. See *Woodbridge Newton Neighborhood Environmental Trust* v. *Connecticut Siting Council*, 349 Conn. 619, 637–38, 321 A.3d 363 (2024) ("The statute makes clear . . . that the list is not exclusive, because it provides that significant adverse effects 'includ[e], but [are] not limited to,' the expressly listed factors. . . . Accordingly, the legislature has not ruled out the possibility that there may be unenumerated, significant adverse effects that must be considered . . . ." (Citation omitted.)). Nevertheless, because the defendants not only failed to raise this claim before the trial court but also invited the court to apply § 46a-51 (20), we decline to review it. See *Gladstein* v. *Goldfield*, supra, 163 Conn. App. 584–85 (declining to review plaintiff's unpreserved claim that "definition of mistake, as

The court first reasoned that, "[i]n approving the accommodation request, [the defendants] treated [Wendy] as having a mental disability and as having established that an emotional support animal would alleviate at least one or more symptoms of her disability. [Therefore] [t]he plaintiffs met their burden of proving that [Wendy] was 'regarded as' having a disability and thus was disabled within the terms of both § 46a-64b (8) . . . and § 46a-51 (20)."

The court then rejected the defendants' contentions that LaPointe, as a licensed marriage and family therapist, is unqualified to provide a DSM diagnosis and that there was insufficient factual support for LaPointe's diagnosis of generalized anxiety disorder. The court reasoned that "[t]he claim that a licensed marital and family therapist is categorically unqualified by training and experience to make a DSM diagnosis is inconsistent with General Statutes § 20-195a (3), which defines the scope of practice for licensed marital and family therapists.[6] . . . Although marital and family therapists work 'within the context of marriage and family systems,' they are authorized by law to make diagnoses within that framework. . . .

advanced by all parties at trial and embraced by the trial court, was incorrect" because "she induced the action of the court from which she now complains"); see also *Healey* v. *Haymond Law Firm, P.C.*, 174 Conn. App. 230, 241 n.6, 166 A.3d 10 (2017) ("It may be misleading, however, to refer to this doctrine simply as 'induced error.' . . . Given that the doctrine implicates only a claim's reviewability, our jurisprudence is clear that the doctrine does not require us to address the merits of the claim." (Emphasis omitted.)); *Gladstein* v. *Goldfield*, supra, 585 n.3 ("[b]ecause we conclude that the plaintiff's claim is not reviewable, we need not determine whether the court's interpretation of the term 'mistake' in [General Statutes] § 52-109 was proper").

[6] General Statutes § 20-195a (3) provides: " 'Marital and family therapy' means the evaluation, assessment, *diagnosis*, counseling, management and treatment of emotional disorders, whether cognitive, affective or behavioral, within the context of marriage and family systems, through the professional application of individual psychotherapeutic and family-systems theories and techniques in the delivery of services to individuals, couples and families . . . ." (Emphasis added.)

"LaPointe testified credibly that he had completed three years in a master's degree program in marriage and family counseling, had a thousand client contact hours before taking the licensure examination, and had several internships before being licensed in 2002 as a marriage and family therapist. Since then, he has taken continuing education courses, attended workshops, and read literature to keep current in his field. Under § 7-2 of the Connecticut Code of Evidence, he was qualified by education and experience to testify as an expert within his field, including the diagnosis of 'emotional disorders, whether cognitive, affective, or behavioral' in the context of marriage and family systems." (Footnote added.)

As to whether LaPointe correctly diagnosed Wendy with generalized anxiety disorder, the court reasoned that "Perez testified as to the shortcomings in [LaPointe's] diagnosis, stating that the record did not contain sufficient information about the frequency, duration, and severity of [Wendy's] anxiety and that [LaPointe] lacked information with respect to certain of the DSM criteria for a generalized anxiety disorder diagnosis. If, as the defendants contend, the definition of 'mental disability' in § 46a-51 (20) required a plaintiff to prove that he or she *has been accurately diagnosed with* one or more mental disorders as defined in the DSM, the court would be inclined to agree that the plaintiffs' proof was insufficient. [LaPointe] did not apply the DSM criteria with mathematical precision. . . . Nevertheless, he did document symptoms she reported that are consistent with generalized anxiety disorder, including excessive worry, difficulty concentrating, difficulties sleeping, and body aches. Based on his observations of [Wendy], he testified: 'I believe [Wendy] is an anxious person, and has been an anxious person for a long time, and that encounters . . . with her son . . . would activate anxious symptoms which

she suffers from.' He stood by his diagnosis of generalized anxiety disorder. Whether . . . he properly applied all the DSM criteria, the court is persuaded that he made his diagnosis in good faith based on his personal observations of [Wendy] in therapy sessions.

"Contrary to the defendants' claims, the accuracy of [LaPointe's] DSM diagnosis is not the dispositive issue. As previously discussed, the definition of 'mental disability' in § 46a-51 (20) is not limited to persons who *have* a mental disorder as defined by the DSM, but includes any individual '*who has a record of*, or is regarded as having one or more mental disorders,' as defined in the DSM. Because the defendants treated [Wendy] as having a disability when they granted her accommodation request, the plaintiffs have proved that [Wendy] was a person with a mental disability within the meaning of § 46a-51 (20)." (Emphasis in original; footnotes omitted.)

The court then concluded that having two dogs rather than one was "necessary" for Wendy's equal enjoyment of the apartment within the meaning of § 46a-64c (a) (6) (B) (ii) because Wendy "testified that she relied on the two dogs for different types of comfort and support when she had panic attacks." Finally, the court concluded that the defendants constructively denied the request for accommodation when they requested additional documentation, which the plaintiffs "reasonably construed . . . as indicating that Mansions did not want them there." Accordingly, the trial court rendered judgment for the plaintiffs. The court imposed a $3300 civil penalty against each defendant and awarded Wendy $7500 and Rudy $5000 in damages for emotional distress. This appeal followed.

"In order to prove a failure-to-accommodate claim, a plaintiff must show (1) that the plaintiff or a person who would live with the plaintiff had a [disability] within

the meaning of § [46a-64c]; (2) that the defendant knew or reasonably should have been expected to know of the [disability]; (3) that the accommodation [may be] necessary to afford the [disabled] person an equal opportunity to use and enjoy the dwelling; (4) that the accommodation requested was reasonable; and (5) that the defendant refused to make the requested accommodation." *Olsen* v. *Stark Homes, Inc.*, 759 F.3d 140, 156 (2d Cir. 2014).[7] On appeal, the defendants claim that the plaintiffs failed to establish two of these necessary elements—namely, that Wendy has a disability within the meaning of the state fair housing laws and that the requested accommodation for two emotional support dogs was necessary to afford her an equal opportunity to use and enjoy the dwelling. We address each claim in turn.

## I

The defendants claim that the court improperly concluded that Wendy suffered from a disability that required an accommodation when the court found only

[7] "[W]hen the overlap between state and federal law is deliberate, as in this case, federal decisions are particularly persuasive." *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 386, 870 A.2d 457 (2005). Thus, in addressing claims brought under "our state fair housing laws, we are guided by the cases interpreting federal fair housing laws . . . despite differences between the state and federal statutes." (Internal quotation marks omitted.) *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 43, 272 A.3d 150 (2022); see also *Webster Bank* v. *Oakley*, 265 Conn. 539, 568, 830 A.2d 139 (2003) ("[i]t is well established that in addressing claims brought under both federal and state housing laws, we are guided by the cases interpreting federal fair housing laws . . . despite differences between the state and federal statutes" (internal quotation marks omitted)), cert. denied, 541 U.S. 903, 124 S. Ct. 1603, 158 L. Ed. 2d 244 (2004). Nevertheless, it is also well settled that "federal law defines the beginning and not the end of our approach to the subject. . . . [Thus], we have interpreted our statutes even more broadly than their federal counterparts, to provide greater protections to our citizens, especially in the area of civil rights." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, supra, 386 n.11.

that the defendants regarded her as being disabled. They argue that "[o]nce the trial court found that [Wendy] did not suffer from any real disability or handicap, a finding that her requested accommodation was necessary for her equal use and enjoyment of the apartment because of her disability became impossible. A disability that arises from a mistaken belief by the landlord cannot give rise to a need for an accommodation." The plaintiffs respond that the court found that Wendy satisfied both prongs of the definition of "mental disability" under § 46a-51 (20) because it "found that [Wendy] had a record of [generalized anxiety disorder], a mental disorder in the DSM," and "that the [defendants] regarded [Wendy] as having this disorder. . . . But either finding, standing alone, is sufficient to hold that [Wendy] is a person with a mental disability." (Citation omitted; footnote omitted.) We conclude that the defendants' claim is without merit because the court found that the plaintiffs satisfied their burden of proving that Wendy has a "record of" having a mental disability within the meaning of § 46a-51 (20).[8]

Our resolution of the defendants' claim requires that we construe the court's judgment and the relevant statutes. Accordingly, our review is plenary. See *Rader* v. *Valeri*, 223 Conn. App. 243, 257, 308 A.3d 66 (construction of court's judgment is question of law subject to plenary review), cert. denied, 348 Conn. 959, 312 A.3d 37 (2024); see also *Lopez* v. *William Raveis Real Estate, Inc.*, 343 Conn. 31, 41–42, 272 A.3d 150 (2022) (statutory construction raises question of law subject to plenary review). "It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes to ascertain and give effect to the apparent intent of the legislature." (Internal quotation

[8] Our conclusion as to the "record of" prong, discussed further in this opinion, renders moot the defendants' claim that the court improperly found that the defendants regarded Wendy as being disabled.

marks omitted.) *Lopez* v. *William Raveis Real Estate, Inc.*, supra, 42.

Pursuant to § 46a-64b (8), " '[p]hysical or mental disability' includes, but is not limited to, intellectual disability, as defined in section 1-1g, and physical disability, as defined in subdivision (15) of section 46a-51, and also includes, but is not limited to, persons who have a handicap as that term is defined in the [FHA]." The FHA[9] defines "Handicap" as "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment . . . ." 42 U.S.C. § 3602 (h) (2024). "The first definition is often referred to as the 'actual disability' prong, and the [second and] third as the [record of and] 'regarded as' prong[s]." *SoCal Recovery, LLC* v. *Costa Mesa*, 56 F.4th 802, 812–13 (9th Cir.), cert. denied, U.S. , 144 S. Ct. 422, 217 L. Ed. 2d 234 (2023). "Though the FHA uses the word 'handicap' instead of 'disability,' 'handicap' is defined using the same three alternative definitional prongs as 'disability' under the [Americans with Disabilities Act (ADA)]. Thus, the words 'handicap' and 'disability' are construed to have the same meaning."[10] Id., 811; see also 42 U.S.C. § 12102 (1) (2024).

[9] "The Fair Housing Amendments Act of 1988 amended the [FHA] to bar housing discrimination against the handicapped. Pub. L. No. 100-430, § 6, 102 Stat. 1619, 1620–22 (adding 42 U.S.C. § 3604 (f))." *Davis* v. *Echo Valley Condominium Assn.*, 945 F.3d 483, 489 (6th Cir. 2019), cert. denied, U.S. , 141 S. Ct. 162, 207 L. Ed. 2d 1099 (2020).

[10] "Until 2008, the ADA definition of 'disability' was virtually identical to the FHA definition of 'handicap,' and so the [c]ourt's interpretation of the ADA was frequently applied to the FHA." *Rodriguez* v. *Village Green Realty, Inc.*, 788 F.3d 31, 40 n.10 (2d Cir. 2015). "The definition of 'disability' under the ADA was previously interpreted narrowly. . . . In 2008, however, Congress passed the ADA Amendments Act (the 'ADAAA') . . . which broadened the definition of 'disability' under the ADA. . . . '[T]he principal purpose of the ADAAA was to overrule the [United States] Supreme Court's arguably narrow interpretation of what constitutes an ADA-qualifying disability . . . and to make clear that the substantial-limitation requirement in the definition of "disability" is not an exacting one.' " (Citations omitted.)

Accordingly, under federal law "[i]t is insufficient for individuals attempting to prove disability status under this [definition] to merely submit evidence of a medical diagnosis of an impairment. Instead, the ADA requires those claiming [to be disabled] . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." (Internal quotation marks omitted.) *Anderson* v. *Discovery Communications, LLC*, 517 Fed. Appx. 190, 195 (4th Cir. 2013), cert. denied, 571 U.S. 1164, 134 S. Ct. 1009, 187 L. Ed. 2d 851 (2014).[11]

The plaintiffs, however, alleged that Wendy was disabled within the meaning of § 46a-51 (20), which provides that " '[m]ental disability' refers to an individual who has a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the" DSM.[12] Thus, unlike the FHA, which requires that a plaintiff prove that her mental impairment "substantially limits one or more . . . major life activities"; 42 U.S.C. § 3602 (h) (2024); § 46a-51 (20)

*Hamilton* v. *Westchester County*, 3 F.4th 86, 92 (2d Cir. 2021). "The FHA, however, was not similarly amended and so our FHA interpretation is still guided by pre-ADAAA cases." *Rodriguez* v. *Village Green Realty, Inc.*, supra, 40 n.10.

We note that, because § 46a-51 (20) does not include the federal definition's substantial limitation requirement, the distinction between cases decided before and after the ADAAA has no bearing on our analysis in the present case.

[11] In *Anderson* v. *Discovery Communications, LLC*, supra, 517 Fed. Appx. 190, the court explained that the ADAAA amendments did not apply to that case "because [the plaintiff] was terminated prior to their enactment." Id., 195 n.7; see footnote 10 of this opinion.

[12] Section 46a-64b, which sets forth definitions applicable to discriminatory housing practices, makes clear in subsection (8) that mental disability "includes, *but is not limited to*, intellectual disability, as defined in section 1-1g . . . and also includes, *but is not limited to*, persons who have a handicap as that term is defined in the [FHA]." (Emphasis added.) In addition, § 46a-51 expressly provides that the definitions set forth therein apply to "this chapter," which necessarily includes § 46a-64b.

requires no functional limitation. See A. Long, "State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act," 65 U. Pitt. L. Rev. 597, 642 (2004) ("[b]ecause Connecticut's definition simply refers a court to an established list of mental conditions, a plaintiff alleging the existence of a mental disability is relieved of the task of demonstrating any functional limitation"). Another distinguishing feature of § 46a-51 (20) is that it does not include an "actual disability" prong; rather, it provides only the two alternative definitional prongs—"record of" or "regarded as."

Before the trial court, the plaintiffs presented evidence as to both prongs of § 46a-51 (20), through the testimony of Wendy and LaPointe regarding Wendy's diagnosis of generalized anxiety disorder, which is a mental disorder defined in the DSM. Although the defendants claim that the court found that the plaintiffs had satisfied only the "regarded as" definitional prong under § 46a-51 (20), it is evident from the court's analysis that it found that the plaintiffs had satisfied their burden as to the "record of" prong as well.

In construing the court's judgment, we are mindful that "judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . [A] trial court opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Citation omitted; internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 428, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020), and cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

In finding that Wendy was disabled within the meaning of our state fair housing laws, the court concluded

that LaPointe's diagnosis of generalized anxiety disorder, although incomplete in some respects, constituted a record of Wendy having a mental disorder defined in the most recent edition of the DSM. To be sure, the court found that LaPointe's notes and testimony did not establish that he meticulously followed the DSM in making his diagnosis, but that does not equate to a finding that Wendy did not have a record of generalized anxiety disorder, as the defendants appear to suggest. Indeed, the court expressly rejected all of the defendants' challenges to the validity of LaPointe's diagnosis, concluding that LaPointe "was qualified by education and experience to testify as an expert within his field, including the diagnosis of 'emotional disorders, whether cognitive, affective, or behavioral' in the context of marriage and family systems" pursuant to § 7-2 of the Connecticut Code of Evidence. Although the court noted that it was free to reject LaPointe's diagnosis of generalized anxiety disorder, the court accepted his diagnosis because it was "persuaded that he made his diagnosis in good faith based on his personal observations of [Wendy] in therapy sessions." The court, however, emphasized that the accuracy of LaPointe's diagnosis was not the dispositive issue because "the definition of 'mental disability' in § 46a-51 (20) . . . includes any individual 'who has a record of, or is regarded as having one or more mental disorders,' as defined in the DSM." Although the court's final statement on this issue was that "[b]ecause the defendants treated [Wendy] as having a disability . . . the plaintiffs have proved that [Wendy] was a person with a mental disability within the meaning of § 46a-51 (20)," we will not ignore its other finding that LaPointe, in good faith, made a record of her mental disorder as defined in the DSM.

Given this analysis regarding LaPointe's diagnosis and the defendants' challenges thereto, coupled with

the court's continued references to the "record of" prong in § 46a-51 (20), we read the court's decision as finding that Wendy has a record of having generalized anxiety disorder as defined in the DSM. Although the defendants emphasize that the court did not expressly state that the plaintiffs had met their burden of establishing this fact, that conclusion is clearly implied by the court's extensive discussion and ultimate rejection of the defendants' challenges to LaPointe's testimony and diagnosis. See *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, supra, 193 Conn. App. 428. Simply put, when read in its entirety, the court's decision is not amenable to the defendants' limited construction. Consequently, we disagree that the court found only that Wendy was regarded as having a mental disability under § 46a-51 (20). Instead, we conclude that the court also found that Wendy has a record of having a mental disability. For this reason, the defendants' claim that a finding that the defendants regarded Wendy as having a disability is, without more, insufficient for the plaintiffs to establish a need for an accommodation necessarily fails.

In their reply brief, the defendants nevertheless assert that "all [of their] arguments . . . concerning a plaintiff who has a 'regarded as' disability apply with equal force to a person who has only a 'record of' a disability. In either case, the plaintiff's need for an accommodation must be decided based on whether the accommodation ameliorates or alleviates the 'regarded as' or 'record of' disability, not based on whether it ameliorates or alleviates whatever nondisabling condition the defendant may have mistaken for a disability." We are not persuaded.

To establish that a requested accommodation "may be necessary to afford such person equal opportunity to use and enjoy a dwelling"; General Statutes § 46a-64c (a) (6) (c) (ii); a plaintiff must demonstrate "that

the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." (Internal quotation marks omitted.) *Quad Enterprises Co., LLC* v. *Southold*, 369 Fed. Appx. 202, 207–208 (2d Cir. 2010); see also R. Huss, "Pups, Paperwork, and Process: Confusion and Conflict Regarding Service and Assistance Animals Under Federal Law," 20 Nev. L.J. 785, 800–801 (2020) ("[o]nly if a person has a disability *and* there is a disability-related need for the particular animal is it necessary for a housing provider to modify a no-pets policy" (emphasis in original; footnote omitted)). Thus, to prevail on a failure to accommodate claim, there must be a disability, the effects of which can be ameliorated by the requested accommodation.

We therefore agree with the defendants that a plaintiff who does not suffer from a disability cannot establish a disability related need for an accommodation based solely on a landlord's mistaken belief that the plaintiff suffered from a disability. For example, a plaintiff who was mistakenly regarded as being blind by a prospective landlord could not establish that the landlord's refusal to allow him to move in with his dog to assist him in navigating the apartment constituted an illegal failure to accommodate because there is no disability giving rise to the need for the dog. Consistent with this reasoning, the federal regulations implementing the ADA in the employment context expressly provide that an employer is "not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the 'regarded as' prong . . . ." 29 C.F.R. § 1630.9 (e) (2024). Accordingly, although the "regarded as" prong is necessary to preclude landlords from refusing to rent to prospective tenants because of perceived disabilities, a perceived

disability does not give rise to the need for a reasonable accommodation.[13]

There is a difference, though, when a prospective tenant has a record of a disability. In such a circumstance, a licensed professional has determined that the individual suffers from a disability that requires an accommodation. Indeed, the regulations implementing the ADA make clear that "[w]hether an individual has a record of an impairment . . . should not demand extensive analysis." 29 C.F.R. 1630.2 (k) (2) (2024).

In the present case, the plaintiffs established that a licensed professional not only had diagnosed Wendy with a mental disorder that is defined in the most recent edition of the DSM but also continued to provide her treatment for that disorder. Accordingly, because they established that Wendy has a record of having a mental disability, there is no distinction between the "record of" prong under § 46a-51 (20) and the "actual disability" prong under the FHA for purposes of a failure to accommodate claim.

Consequently, we conclude that the court properly found that the plaintiffs satisfied their burden of proving that Wendy has a "record of" having a mental disability

[13] The defendants argue that the "regarded as" prong requires that the landlord's belief as to the prospective tenant's disability be mistaken or incorrect. We do not agree. See, e.g., 29 C.F.R. 1630.2 (*l*) (1) (2024) ("an individual is 'regarded as having such an impairment' if the individual is subjected to a prohibited action because of an *actual* or perceived physical or mental impairment" (emphasis added)). In fact, in the employment context, the federal regulations state that if an employee is discriminated against because he is regarded as having a disability there is no need to determine whether he has a record of a disability or actually suffers from a disability. See 29 C.F.R. 1630.2 (g) (3) (2024) ("[w]here an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the 'actual disability' or 'record of' prongs"). Regardless of his actual disability status, the employee was subjected to discrimination due to the employer's subjective belief, whether or not that belief was correct.

within the meaning of § 46a-51 (20) and, therefore, properly proceeded to consider whether the plaintiffs had established the third element of their failure to accommodate claim—"that the accommodation [may be] necessary to afford the [disabled] person an equal opportunity to use and enjoy the dwelling . . . ." *Olsen* v. *Stark Homes, Inc.*, supra, 759 F.3d 156.

II

The defendants claim that the court improperly concluded that two emotional support dogs may be necessary for Wendy's equal use and enjoyment of the dwelling. They argue that the court committed a legal error by applying an improperly expansive definition of "necessary" to the plaintiffs' failure to accommodate claim.

The following additional facts, as found by the trial court, are relevant to the defendants' claim. The court found that "[t]he evidence established that the defendants had initially granted the Pizzoferratos' request and only later claimed that the approval was limited to one dog. Other evidence included [LaPointe's] note to Vintage (also supplied to Mansions) that [Wendy] needed her two canines to relieve her symptoms of anxiety. [Wendy] testified that the dogs had different personalities that helped her in different ways: Chloe, a fourteen year old dog, would recognize when [Wendy] was stressed and would cuddle up on her chest and bop her nose; Mitsie, a twelve year old dog, would try to engage [Wendy] to engage in active play when [Wendy] was distressed." (Internal quotation marks omitted.)

Relying on regulatory guidance from the Department of Housing and Urban Development (HUD) concerning emotional support animals and *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, 765 F.3d 1277 (11th Cir. 2014), the court concluded that the plaintiffs' evidence was sufficient to establish that two dogs were

necessary for Wendy's use and enjoyment of the dwelling. Specifically, the court reasoned as follows. "In a final rule published as 'Pet Ownership for the Elderly and Persons with Disabilities,' 73 Fed. Reg. 63,834-01, HUD discussed the necessity element of a reasonable accommodation claim . . . . [HUD stated that] '[h]ousing providers are entitled to verify the existence of the disability, and the need for the accommodation—if either is not readily apparent. Accordingly, persons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability. . . . [E]motional support animals do not need training to ameliorate the effects of a person's mental and emotional disabilities. Emotional support animals by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress.'

"HUD's comments . . . indicate that an emotional support animal may be considered 'necessary' for purposes of the [FHA] if the animal 'provides support that alleviates at least one of the identified symptoms or effects of the existing disability.' Its position is reflected in federal decisions involving emotional support animals. For instance, in *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1289, the [United States Court of Appeals for the] Eleventh Circuit summarized the 'necessity' element of a failure to accommodate claim involving an emotional support animal as whether the plaintiff 'offered sufficient evidence that having the dog would affirmatively enhance his quality of life by ameliorating the effects of his disability.' . . .

"[Thus] HUD considers an emotional support animal to provide a disability related benefit if it 'ameliorates' even one of the symptoms of the person's disability. . . . Federal cases are replete with instances in which . . . providers have supported a patient's need for an emotional support animal to relieve symptoms of anxiety or depression. See, e.g., *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1281 (plaintiff's treating psychiatrist provided three letters to housing provider explaining that plaintiff had 'therapeutic relationship' with his specific dog, emotional support animal that served to 'ameliorate otherwise difficult to manage day to day psychiatric symptoms'); *Warren* v. *Delvista Towers Condominium Assn., Inc.*, 49 F. Supp. 3d 1082, [1084] (S.D. Fla. 2014) (plaintiff's psychiatrist, who diagnosed plaintiff with severe depression and post-traumatic stress disorder, 'strongly recommended' that housing provider allow patient to keep emotional support animal because of the dog's 'therapeutic use and function'); [see also] *Castellano* v. *Access Premier Realty, Inc.*, 181 F. Supp. 3d 798, [805, 807] (E.D. Cal. 2016) (plaintiff's treating physician declared that plaintiff suffered from anxiety disorder and depression that would be eased by emotional support animal); *Chavez* v. *Aber*, 122 F. Supp. 3d 581, 587 (W.D. Tex. 2015) (psychiatrist for plaintiff's mentally disabled child recommended that child's treatment should include use of emotional support animal). . . .

"The plaintiffs' evidence of the necessity of two dogs is not overwhelming, but it is, all things considered, sufficient to meet their burden of proof by a fair preponderance of the evidence. As the decision in *Bhogaita* suggests, an individual's relationship with a *specific* animal can have particular benefit. In this case, [Wendy] testified that she relied on the two dogs for different types of comfort and support when she had panic

attacks. The court is persuaded that each dog ameliorated one or more of the symptoms of her anxiety disorder, and, in that sense, each was necessary for her equal use and enjoyment of the dwelling, as such necessity has been explained by HUD and by federal court decisions in reliance on HUD's guidance." (Emphasis in original.)

On appeal, the defendants argue that the court "adopted a legally incorrect definition of necessity" and "incorrectly held that the accommodation was necessary because it made [Wendy] feel better, not because without both dogs, [Wendy] could not equally use and enjoy the apartment." Specifically, they argue that the court misconstrued *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1281, "to mean that having two dogs was 'necessary' if [the dogs] did no more than provide 'comfort and support when she had panic attacks.' . . . *Bhogaita* requires more. . . . To alleviate or ameliorate the effect of a disability requires more than just making the plaintiff feel better; it requires that the accommodation alleviate the condition that makes the plaintiff disabled. . . . This is consistent with the decision the trial court rejected, *Cinnamon Hills Youth Crisis Center, Inc.* v. *Saint George City*, 685 F.3d 917 (10th Cir. 2012)." (Citations omitted.) The plaintiffs respond that, on the basis of Wendy's testimony at trial, the court properly held that both of Wendy's two assistance animals were necessary for her equal use and enjoyment of the dwelling. We conclude that the court applied an incorrect legal standard in concluding that both dogs were necessary.

Whether the court applied the correct legal standard in determining that two emotional support dogs were necessary pursuant to § 46a-64c (a) (6) (C) (ii) "presents an issue of statutory construction that raises a question of law, over which we exercise plenary review." *Lopez* v. *William Raveis Real Estate, Inc.*, supra, 343 Conn. 42.

In accordance with § 1-2z, we begin our analysis with the text of the statute, which provides in relevant part: "For purposes of this subdivision, discrimination includes . . . (ii) a refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ." General Statutes § 46a-64c (a) (6) (C) (ii).

The FHA likewise provides that housing discrimination includes, among other things, the "refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling . . . ." 42 U.S.C. § 3604 (f) (3) (B) (2024). This provision requires "that the requested modification or accommodation be reasonable and that the [denial] result . . . in so diminishing [the disabled] person's use and enjoyment of the premises as to constitute a denial of equal opportunity." *Austin* v. *Farmington*, 826 F.3d 622, 627 (2d Cir.), cert. denied, 580 U.S. 962, 137 S. Ct. 398, 196 L. Ed. 2d 297 (2016).

"A reasonable accommodation under the [FHA] may include the use of an emotional support animal in one's own home, despite the existence of a rule, policy or law prohibiting such an animal. See, e.g., *Castillo* [*Condominium Assn.*] v. *U.S.* [*Dept.*] *of Housing & Urban Dev*[*elopment*], 821 F.3d 92, 100 (1st Cir. 2016); *Anderson* v. [*Blue Ash*], 798 F.3d 338, 363 (6th Cir. 2015); *Bhogaita* v. *Altamonte Heights* [*Condominium Assn.*], *Inc.*, [supra, 765 F.3d 1289]." *Revock* v. *Cowpet Bay West Condominium Assn.*, 853 F.3d 96, 110 (3d Cir. 2017).[14]

[14] As the Michigan Court of Appeals recently observed in *Riverbrook* v. *Fabode*, 333 Mich. App. 645, 963 N.W.2d 415 (2020), aff'd in part, vacated in part, 510 Mich. 1061, 981 N.W.2d 468 (2022), "[i]n recent years, governments have allowed people with psychological disabilities to register 'Emotional Support Animals' . . . to help them navigate the world. This designation is more fluid than that of a service dog used to assist the blind or others with physical needs. And the fuzzy edges of these laws have spawned abuse. We have all heard the tales: a woman claiming a disability who tried to

Although neither this court nor our Supreme Court has considered the meaning of "necessary" in § 46a-64c (a) (6) (C) (ii), several federal appellate courts have construed the same requirement under 42 U.S.C. § 3604 (f) (3) (B). See *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 386, 870 A.2d 457 (2005) ("[i]n construing a Connecticut statute that is similar to federal law, we often turn to decisions construing the federal law for guidance"). The United States Court of Appeals for the Third Circuit conducted an extensive textual analysis of the same statutory language in *Vorchheimer* v. *Philadelphian Owners Assn.*, 903 F.3d 100, 105–109 (3d Cir. 2018). In that case, the plaintiff, a disabled resident in the defendant's building, "wanted to leave [her rolling walker] in her building's lobby. The building managers refused, but offered her four other ways to store and access her walker. She sued under the [FHA], claiming that her preferred accommodation was necessary to equally enjoy her home. The District Court dismissed her complaint, holding that she had not plausibly pleaded necessity." Id., 103.

In affirming the judgment, the Third Circuit reasoned that " '[n]ecessary' is a '[word] of limitation.' . . . As

bring an emotional support peacock in the main cabin on a flight, or the United States Department of Transportation requiring airlines to permit emotional support miniature horses on passenger airliners. Landlords have also felt the fallout from 'emotional support animal' abuses, with tenants purchasing [emotional support animal] certification online to dodge pet prohibitions in their leases." (Footnote omitted.) Id., 647–48.

The Michigan Court of Appeals emphasized that "[t]he statute does not provide that a tenant may automatically establish a handicap and a need for an [emotional support animal] with a simple letter or that the court may not delve into the accuracy or legitimacy of the diagnosing party's opinion. . . . [T]he court *must* carefully consider the reliability of the methods employed by [the medical professional], as well as her final opinion. Only then can the district and circuit courts determine if [the landlord] refused to make a reasonable accommodation for a tenant with a disability or handicap." (Emphasis in original.) Id., 659–60.

an adjective, it means '[i]ndispensable, requisite, essential, needful; that cannot be done without,' or 'absolutely required.' . . . The other sense of the adjective is causal: 'Inevitably determined or fixed by predestination or the operation of natural laws; happening or existing by an inherent necessity.' . . . So the word 'necessary,' without more, is stringent. . . . Necessities do not include conveniences and creature comforts, much as they are desirable or even helpful.

* * *

"The statute applies 'when such accommodations may be necessary,' but 'may' does not change our analysis. . . . In this statute, 'may' signals not a low probability of necessity, but rather the conditional mood. The condition, when met, makes the accommodation necessary, as in the phrase 'as the case may be.' '[W]hen such accommodations may be necessary' in [42 U.S.C.] § 3604 (f) (3) (B) is another way of saying 'whenever they are necessary' or 'as far as they are necessary.' In short, the . . . necessity element requires that an accommodation be essential, not just preferable. . . .

"Necessity tracks an underlying need or goal. . . . [Section 3604 (f) (3) (B) of title 42 of the United States Code] tells us what to look for: an 'accommodation . . . [that] may be necessary to afford [the disabled] person equal opportunity to use and enjoy a dwelling.' . . . The text pegs the necessity to the goal of providing the particular tenant with equal housing opportunity. . . . 'Think of the blind woman who obtains an exemption from a "no pets" policy for her seeing eye dog, or the paraplegic granted special permission to live on a first floor apartment because he cannot climb the stairs.' . . . The blind woman's need is a way to navigate to and around her apartment. The paraplegic's need is a way to get to his apartment. Once we identify the

particular tenant's need, we can gauge what is necessary to afford that tenant equal housing opportunity. . . .

"Giving the paraplegic a first-floor apartment is one way to give him access and thus equal opportunity to use his apartment. But an elevator would work too. That alternative would give him access to every apartment, so a first-floor apartment would no longer be necessary. The landlord has to offer at least one of the accommodations, but not both. If she does offer one of them, she has not 'refus[ed] to make reasonable accommodations . . . [that] may be necessary to afford [the tenant] equal [housing] opportunity.' . . . In that vein, food is necessary to survive. But if soup and salad are on offer, a sandwich is not necessary. Gauging necessity, then, requires considering whether another alternative on offer satisfies the goal of equal housing opportunity for that tenant.

* * *

"Of course, the proffered alternatives must still satisfy the remainder of the subsection's third element: affording equal housing opportunity. That may require more than 'just those accommodations that are absolutely necessary for the disabled individual's treatment or basic ability to function.' . . . To qualify as alternative 'reasonable accommodations,' the accommodations must afford the particular disabled person equal opportunity both to use and to enjoy her home. An accommodation that does not provide equal opportunity, or that provides equal opportunity to use but not to enjoy, will not satisfy that requirement.

"So courts must weigh whether the tenant's requested accommodation and the landlord's proposed alternative afford equal housing opportunity. Whether the accommodations do so depends on that particular tenant's

abilities and disability, which may require a fact-intensive inquiry. But all the proffered alternatives that afford equal opportunity to use and to enjoy housing bear on whether a specific accommodation is necessary." (Citations omitted; emphasis omitted.) *Vorchheimer* v. *Philadelphian Owners Assn.*, supra, 903 F.3d 105–109.

The Third Circuit also observed that "sister-circuit precedent adopts the strict sense of 'necessary.' As then-Judge Gorsuch recognized, 'necessary' in [42 U.S.C.] § 3604 (f) (3) (B) bears its ordinary meaning: 'The word implies more than something merely helpful or conducive. It suggests instead something "indispensable," "essential," something that "cannot be done without."' *Cinnamon Hills* [*Youth Crisis Center*, *Inc.* v. *Saint George City*, supra, 685 F.3d 923]. 'Put simply, the statute requires accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without.' . . .

"Other circuits make the same point using the language of causation. Necessity functions as a but-for causation requirement, tying the needed accommodation to equal housing opportunity. An accommodation is necessary if, 'without the accommodation, the plaintiff will be denied an equal opportunity to obtain [or use, or enjoy] the housing of her choice.' [*Wisconsin Community Services*, *Inc.* v.] *Milwaukee*, 465 F.3d 737, 749 (7th Cir. 2006) (en banc); accord id. . . . 754–55 ('cause-in-fact' and 'but for' cause); *Anderson* [v. *Blue Ash*, supra, 798 F.3d 361] ('but for . . . causation inquiry' . . . ); see also [*Lapid-Laurel*, *LLC* v. *Zoning Board of Adjustment*, 284 F.3d 442, 460 (3d Cir. 2002)] (quoting other circuits' cases adopting . . . 'but for . . . causation requirement'). Cf. *Bhogaita* v. *Altamonte Heights* [*Condominium Assn.*, *Inc.*, supra, 765 F.3d 1289] (upholding . . . jury verdict for plaintiff because, 'without the [emotional-support] dog [sought],

[the plaintiff's] social interactions would be so overwhelming that he would be unable to perform work of any kind' . . . ). In short, these precedents confirm our . . . reading of the plain text." *Vorchheimer* v. *Philadelphian Owners Assn.*, supra, 903 F.3d 110.

Applying this construction in *Vorchheimer*, the court concluded that the District Court properly dismissed the plaintiff's complaint, reasoning that, "[t]o enjoy her home, [the plaintiff] needed access to her walker without having to stand for minutes. She pleaded four alternatives on offer that, on their face, satisfied those needs. And she attached doctors' letters that distinguish her needs from her preferences. Because the [federal fair housing laws guarantee] her only a 'reasonable accommodation' that satisfies her needs, not the particular accommodation that she wanted, we will affirm." Id., 113.

In the present case, the trial court rejected the defendants' reliance on *Vorchheimer* v. *Philadelphian Owners Assn.*, supra, 903 F.3d 105–109, and *Cinnamon Hills Youth Crisis Center, Inc.* v. *Saint George City*, supra, 685 F.3d 917.[15] Instead, the court found persuasive the

[15] The plaintiffs contend that "[t]he [United States Courts of Appeals for the] Sixth, Seventh, Ninth, and Eleventh Circuits have [held] that a reasonable accommodation is necessary when it 'ameliorates' or 'alleviates' the effects of the disability," whereas "[t]he [United States Courts of Appeals for the] Third, Fifth, and Tenth Circuits have adopted a higher standard, holding that an accommodation is necessary when it is 'required,' 'indispensable,' or 'essential.' "

Our research, however, reveals that the Sixth and Ninth Circuits have embraced the "higher standard" for necessity, citing both *Vorchheimer* and *Cinnamon Hills Youth Crisis Center, Inc.*, with approval. See *Howard* v. *HMK Holdings, LLC*, 988 F.3d 1185, 1190 (9th Cir. 2021) ("Necessary suggests something that cannot be done without. . . . Thus, the inquiry is a causal one that examines whether the requested accommodation . . . would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive." (Citations omitted; internal quotation marks omitted.)); *Davis* v. *Echo Valley Condominium Assn.*, 945 F.3d 483, 490 (6th Cir. 2019) ("[A] total smoking ban likely was not necessary (that is, indispensable, essential, something that cannot be done without) to give [the plaintiff] the

reasoning of the Eleventh Circuit in *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1289.

In *Bhogaita*, the plaintiff, Ajit Bhogaita, was "a United States Air Force veteran who suffer[ed] from post-traumatic stress disorder (PTSD) that developed after a sexual assault he endured during his military service. In 2001, Bhogaita bought a condominium unit managed by the [defendant (Association)] and subject to its rules. Among those rules, the Association prohibited occupants from keeping dogs weighing more than twenty-five pounds. In 2008, Bhogaita acquired a dog, Kane, that exceeded the weight limit. Though no medical professional prescribed the dog initially, Bhogaita's psychiatric symptoms improved with Kane's presence, so much so that Bhogaita began to rely on the dog to help him manage his condition. He kept the dog for the next two years.

"On May 4, 2010, the Association demanded that Bhogaita remove Kane from his unit, pursuant to the weight limit. Bhogaita responded by providing the first of three letters from Dr. Shih-Tzung Li, his treating psychiatrist,

same opportunity to use and enjoy her condo as compared to a non-disabled person who dislikes the smell of smoke. . . . [T]he law does not require *more* or *better* opportunities for those with handicaps as compared to those without . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.)), cert. denied, U.S. , 141 S. Ct. 162, 207 L. Ed. 2d 1099 (2020).

We also note that the Eighth Circuit has adopted the "higher standard," explaining: "Necessity is a high standard under the FHA and the ADA. . . . Necessary means something indispensable, essential, something that cannot be done without. . . . [It] require[s] accommodations that are necessary (or indispensable or essential) to achieving the objective of equal housing opportunities between those with disabilities and those without. . . . [I]f the proposed accommodation provides no direct amelioration of a disability's effect, it cannot be said to be necessary." (Citations omitted; internal quotation marks omitted.) *One Love Housing, LLC* v. *Anoka*, 93 F.4th 424, 433 (8th Cir. 2024).

explaining that the dog was an emotional support animal. The first letter, written on May 7, read in relevant part:

"Due to mental illness, Mr. Bhogaita has certain limitations regarding social interaction and coping with stress and anxiety. In order to help alleviate these difficulties, and to enhance his ability to live independently and to fully use and enjoy the dwelling unit, I am prescribing an emotional support animal that will assist Mr. Bhogaita in coping with his disability. . . .

"In the second letter, sent days later, Dr. Li added specific information about the dog. He wrote that Bhogaita has a therapeutic relationship with this specific dog, Kane. As an emotional support animal, Kane serves to ameliorate otherwise difficult to manage day to day psychiatric symptoms in Mr. Bhogaita. . . . In July, the Association responded by sending Bhogaita its first request for additional information regarding his disability and the need for accommodation. . . .

"Bhogaita responded later that month by providing a third letter from Dr. Li, in which the doctor indicated the nature and cause of the disability for the first time: He was treating Bhogaita for [a]nxiety related to military trauma. . . . Dr. Li explained further [that] [Bhogaita's condition] limits his ability to work directly with other people, a major life activity. Currently he has been hired to perform technical support work from home. He is able to work with the assistance of his emotional support animal. Otherwise his social interactions would be so overwhelming that he would be unable to perform work of any kind. I am familiar with the therapeutic benefits of assistance animals for people with disabilities such as that experienced by Mr. Bhogaita. Upon request, I would be happy to answer other questions you may have concerning my recommendation that Mr. Bhogaita have an emotional support animal. Should you

have additional questions, please do not hesitate to contact me. . . .

"Shortly thereafter, Bhogaita also sent a response to the Association in which he answered the Association's questions in turn. Bhogaita identified his diagnosis and incorporated by reference Dr. Li's third letter to explain how his PTSD affects major life activities. . . . After receiving Dr. Li's three letters . . . the Association sent Bhogaita a second request for information on August 17, 2010. . . . Nearly two and a half months passed, during which time Bhogaita did not respond. On November 3, 2010, the Association sent a third request for information, this time requesting a sworn statement from Dr. Li to include specific facts [regarding the nature of the disability and the duration and extent of Dr. Li's treatment]. . . . That letter went on to state that Bhogaita was to respond by December 6, and if he did not, the letter would serve as the Association's formal demand for [Bhogaita] to remove any dogs over [twenty-five pounds] from [his] unit no later than December 10, 2010. . . .

"Rather than responding, Bhogaita filed a complaint with [HUD] and the Florida Commission on Human Relations . . . . He claimed that the Association's conduct amounted to a failure to make a reasonable accommodation in violation of the disability provisions of the [state and federal fair housing laws]. In January 2011, [both agencies] issued findings of cause against the Association. Accordingly, the Association agreed to allow Bhogaita to keep Kane. . . .

"In October 2011, Bhogaita brought suit. On the Association's motion, the district court dismissed Bhogaita's claim of disability discrimination brought under 42 U.S.C. § 3604 (f) (2), while his reasonable accommodation claim, under [42 U.S.C.] § 3604 (f) (3) and analogous Florida law, survived. . . .

"A two-day jury trial followed. . . . After presentation of the evidence, the jury returned a verdict in favor of Bhogaita: It found that Bhogaita was disabled and requested an accommodation for his disability, that the accommodation was necessary and reasonable, and that Bhogaita suffered damages because of the Association's refusal to accommodate." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1281–84.

The Association appealed, claiming, among other things, that Bhogaita failed to present sufficient evidence to demonstrate that the requested accommodation was necessary. Id., 1288. In rejecting that claim, the Eleventh Circuit explained that "[a] successful [reasonable] accommodation claim requires that the accommodation sought be necessary to afford [the claimant] equal opportunity to use and enjoy the relevant dwelling. . . . The word equal is a relative term that requires a comparator to have meaning. . . . Under the FHA, the comparator is a person without a disability, and an accommodation extends an equal opportunity when it addresses the needs the disability creates. . . . Thus, a necessary accommodation is one that alleviates the effects of a disability. . . . The jury was properly instructed to that effect." (Citations omitted; internal quotation marks omitted.) Id. The District Court had instructed the jury that "[t]o prove that the desired accommodation is necessary, [Bhogaita] must show, at a minimum, that the accommodation would affirmatively enhance [his] quality of life by ameliorating (or reducing) the effects of his disability." (Internal quotation marks omitted.) Id., 1290.

Notably, the Eleventh Circuit explained that "[s]ome other arrangement, such as having a lighter-weight dog permitted by the Association's policy, might similarly alleviate Bhogaita's symptoms, and evidence of such

could be relevant to the reasonableness determination, which asks whether the requested accommodation 'is both efficacious and proportional to the costs to implement it.' . . . It is not, however, relevant to the necessity determination, which asks whether the requested accommodation ameliorates the disability's effects. . . . Both necessity and reasonableness are required . . . but in this appeal, the Association does not raise the issue of reasonableness with respect to Bhogaita's requested accommodation. For that reason, we do not engage in the highly fact-specific reasonableness inquiry, which would require a balancing of the parties' needs. . . . The question we address is a different, more limited one: whether Bhogaita offered sufficient evidence that having the dog would affirmatively enhance his quality of life by ameliorating the effects of his disability." (Citations omitted.) Id., 1289.

As to that limited question, the court reasoned that "Bhogaita produced evidence from which a reasonable fact finder could conclude that his dog alleviated the effects of his [post-traumatic stress disorder]. Specifically, Dr. Li's letters said that Kane assists Bhogaita in coping with his disability . . . and ameliorate[s] Bhogaita's psychiatric symptoms . . . and that without the dog, Bhogaita's social interactions would be so overwhelming that he would be unable to perform work of any kind. . . . In sum, the letters directly support the jury's verdict: The requested accommodation was necessary to afford [Bhogaita] an opportunity to use and enjoy the dwelling." (Citations omitted; internal quotation marks omitted.) Id.

We agree with the Eleventh Circuit's reasoning in *Bhogaita* that "a necessary accommodation is one that alleviates the effects of a disability." (Internal quotation marks omitted.) Id., 1288. We disagree, however, with the court's reasoning that consideration of alternative proffered accommodations is not part of the necessity

determination. Instead, we agree with the textual analysis of the Third Circuit in *Vorchheimer* and likewise conclude that, under § 46a-64c, the plain meaning of the word "necessary" requires courts to consider "all the proffered alternatives that afford equal opportunity to use and to enjoy housing" in deciding whether a specific accommodation is necessary. *Vorchheimer* v. *Philadelphian Owners Assn.*, supra, 903 F.3d 109; see also *Wilkison* v. *Arapahoe*, 302 Neb. 968, 981–82, 926 N.W.2d 441 (2019) ("[T]he . . . necessity element requires that an accommodation be essential to the equal enjoyment from the property, not just preferable. The plain meaning of necessary requires courts to consider the alternatives on offer." (Footnote omitted; internal quotation marks omitted.)).

Accordingly, although the fair housing laws require "reasonable accommodations necessary for a disabled individual to receive the *same* enjoyment from the property as a non-disabled person would receive [and] not merely those accommodations that the disabled individual cannot function without or for which no alternative is available away from the dwelling"; (citation omitted; emphasis in original; internal quotation marks omitted) *Anderson* v. *Blue Ash*, supra, 798 F.3d 361; the plain meaning of "necessary" requires that the accommodation be *essential* to the equal enjoyment of the dwelling, "not just preferable." *Vorchheimer* v. *Philadelphian Owners Assn.*, supra, 903 F.3d 107.[16]

In the present case, this standard required the court to consider whether the available alternative offered by the defendants of allowing the Pizzoferratos to have

[16] For the same reason, we are not persuaded by the trial court's reliance on the HUD guidance. The fact that *an* emotional support animal is a necessary accommodation because it ameliorates one or more symptoms of a disability does not mean that, because several additional dogs each also ameliorates the same symptoms, *all* such dogs are necessary for that purpose.

one emotional support dog satisfied Wendy's needs and thereby afforded her an equal opportunity to use and enjoy the dwelling. The court did not engage in this specific inquiry. Instead, it relied on Wendy's testimony "that she relied on the two dogs for different types of comfort and support when she had panic attacks" to conclude that it was "persuaded that each dog ameliorated one or more of the symptoms of her anxiety disorder, and in that sense, each was necessary for her equal use and enjoyment of the dwelling, as such necessity has been explained by HUD and by federal court decisions in reliance on HUD's guidance."

The problem with the court's analysis is that there was no evidence that Wendy suffered from either different types of anxiety or different symptoms of the same anxiety that required different types of emotional support. As noted by the trial court, the only evidence regarding how Wendy's two dogs alleviated the symptoms of her generalized anxiety disorder was Wendy's testimony that one dog would engage her in play while the other would cuddle up and "bop" her on the nose. Her testimony provided some detail on the connection between her anxiety and the two dogs, explaining that, "[i]f I get—feel an anxiety coming, if I can, I try to bring my dogs around me. But actually, they notice it hopefully before I notice it. . . . [A]nimals can actually read the chemical balance. They sense that in your brain. So, if I started acting nervous or something, Chloe, which was one of my dogs, would climb up on my chest and actually give me a bop with her nose. And [Mitsie] was more of an active interactive. That's why I had two of them. She would bring a tennis ball and try to play soccer with me to take—it was to take my mind off of what was making me anxious. . . .

"[E]very dog has a different personality, and one dog was more of a I'm going to cuddle up, I'm going to bop you, I'm going to try to get you to hug me, where the

other dog would be come on, let's forget about this, let's go play, let's get active, let's go somewhere else." Consequently, the only evidence of how the dogs emotionally supported Wendy was that they both reacted to her anxiety and provided relief for the same anxiety but in different ways. There was no evidence that Chloe's hugging was at times ineffective and Mitsie's playing was required or vice versa.[17] Put another way, the court relied on the fact that both dogs could be helpful in alleviating Wendy's anxiety but never considered whether having both dogs was necessary because, for example, neither dog could be effective all of the time.

We also find it significant that LaPointe provided no meaningful evidence regarding the connection between Wendy's generalized anxiety disorder and the need for two dogs. In exhibit 1, the 2018 certification that LaPointe provided for Wendy certifying that she had a disability and required a reasonable accommodation, LaPointe wrote: "This therapist is verifying that Wendy . . . suffers from moderate anxiety and that her two canines provide relief." He did not state that the dogs were *necessary* to ameliorate her anxiety or, if an emotional support animal was necessary, why one dog would not be sufficient. Furthermore, he testified that he has no training regarding emotional support animals or other therapeutic uses of animals and that he neither prescribed nor recommended that Wendy get an emotional support animal because "[s]he already had two

[17] Wendy testified that her dog Chloe died "about two years" before the trial and that she effectively replaced Chloe with her son's cat, Ivory, which her son had left with the Pizzoferratos when he moved out of state. She explained that Ivory "thinks it's a dog," she "did some work with it," and now "it's working out pretty well." She further explained that Chloe was "the bopper that would crawl on [her] nose. And the cat's name is Ivory, and he's the one that—he crawls up and is right in [her] face." There was no evidence that LaPointe or any other licensed professional has determined that Ivory is necessary, in addition to Mitsie, to ameliorate the effects of Wendy's generalized anxiety disorder.

dogs." This evidence stands in stark contrast to the evidence presented in other cases involving emotional support animals, where courts have found sufficient evidence of necessity for the requested accommodation.

In *Bhogaita*, for example, the court observed that "Dr. Li's letters said that Kane assists Bhogaita 'in coping with his disability' . . . and 'ameliorate[s]' Bhogaita's 'psychiatric symptoms' . . . and that without the dog, Bhogaita's 'social interactions would be so overwhelming that he would be unable to perform work of any kind.' " (Citations omitted.) *Bhogaita* v. *Altamonte Heights Condominium Assn., Inc.*, supra, 765 F.3d 1289. Similarly, in *Hollandale Apartments & Health Club, LLC* v. *Bonesteel*, 173 App. Div. 3d 55, 100 N.Y.S.3d 711 (2019), the New York Supreme Court, Appellate Division, held that a tenant established that an emotional support dog was necessary under the FHA where the tenant "and his therapist testified that an emotional support dog would alleviate some of his symptoms of depression and anxiety. The therapist testified that an emotional support dog would ameliorate the loneliness and isolation of [the tenant's] life by providing him with companionship and unconditional affection. She further opined that the dog would alleviate the lack of structure in [the tenant's] life and help to move his sleep schedule toward a more normal pattern by requiring him to feed and walk the dog at regular intervals each day. The therapist noted that [the tenant] had followed a more structured schedule when he was still living in his family home, in part because he was then responsible for feeding and walking the family dogs, and that, after he moved out, he returned to the house when necessary to continue caring for and exercising the dogs until his former wife moved away. Owning a dog would require [the tenant] to engage in regular exercise, which the therapist described as 'one of the

primary behavioral treatments for depression,' and would allow him to make better use of the grounds surrounding the apartment complex. She testified that a dog's companionship could alleviate [the tenant's] social anxiety and act as a 'security blanket,' increasing his confidence and willingness to interact with other people, and would also facilitate social interaction by offering opportunities to meet other people while outdoors with the dog. The therapist opined that increased exercise and social interaction have been shown to have similar effects to antidepressant medication in alleviating depression and anxiety, and that increased energy levels arising from exercise and enhanced social interactions would improve [the tenant's] motivation to engage in various activities of daily life." Id., 66.

Considering the evidence presented to establish the necessity of one dog in those cases, the lack of evidence regarding necessity as to the second dog in the present case is readily apparent. The plaintiffs' evidence certainly demonstrated that having both of her dogs as opposed to only one was preferable, but there was no evidence to demonstrate that it was essential. In other words, proof that a requested accommodation is preferable to the plaintiff in alleviating the effects of a disability and thereby enhances her enjoyment of her dwelling is insufficient to prove that the preferred accommodation is necessary. Thus, the fact that each dog alleviated the effects of Wendy's disability, albeit in different ways, was not sufficient to demonstrate that the accommodation for a second dog was necessary, i.e., indispensable, to afford her an equal opportunity to use and enjoy the dwelling.

In sum, we conclude that the court erred in that the definition of necessary it applied was so broad as to include preference, thereby diluting the plaintiffs' burden of proof. Therefore, the court incorrectly concluded

that the plaintiffs met their burden as to the third element of their failure to accommodate claim. Furthermore, because the evidence submitted by the plaintiffs, viewed in the light most favorable to the plaintiffs, was insufficient as a matter of law to prove that both dogs were necessary to ameliorate the effects of Wendy's generalized anxiety disorder, the court should have rendered judgment for the defendants. See, e.g., *Cokic* v. *Fiore Powersports, LLC*, 222 Conn. App. 216, 231–32, 304 A.3d 179 (2023) (new hearing on defendant's motion for attorney's fees was not warranted notwithstanding court's failure to make necessary findings because defendant failed to present evidence to support required findings).

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

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## TROY LAUNDRY BUILDING, LLC *v.* BEAUTIFUL LIFE ADULT DAYCARE, LLC
## (AC 47173)

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

*Syllabus*

The defendant tenant appealed from the trial court's judgment for the plaintiff landlord in the plaintiff's summary process action. The defendant claimed, inter alia, that the court improperly denied its motion to dismiss, in which it had argued that the notice to quit was defective. *Held*:

This court dismissed the appeal as moot because, during the pendency of the appeal, the defendant vacated the property, and, having failed to demonstrate that the collateral consequences exception to the mootness doctrine applied, there was no practical relief this court could afford the defendant and, thus, the court lacked subject matter jurisdiction to entertain the defendant's claims.

Argued January 14—officially released March 4, 2025

*Procedural History*

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session at Meriden, where the court, *Riley*, *J.*, denied the defendant's motion to dismiss; thereafter, the court, *Jacobs*, *J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant appealed to this court. *Appeal dismissed.*

*David J. Baker*, with whom was *Stuart A. Margolis*, for the appellant (defendant).

*David A. Lavenburg*, for the appellee (plaintiff).

*Opinion*

MOLL, J. In this commercial summary process action, the defendant, Beautiful Life Adult Daycare, LLC, appeals from the judgment of possession rendered in favor of the plaintiff, Troy Laundry Building, LLC. On appeal, the defendant claims that the trial court erred in denying its motion to dismiss, in which it argued that the notice to quit was defective. The defendant also claims that the court erred in granting the plaintiff's motion for summary judgment because (1) there were genuine issues of material fact as to whether the defendant had materially breached the lease agreement and/or whether that breach was excused, and (2) the court impermissibly found facts regarding whether an additional security deposit was owed. We do not reach the merits of the defendant's claims because, during the pendency of this appeal, the defendant vacated the premises, and, accordingly, we dismiss this appeal as moot.

The following procedural history is relevant to our resolution of this appeal. In September, 2022, the plaintiff commenced this summary process action. On November 16, 2022, the plaintiff filed its second revised amended complaint, which alleged three grounds for

eviction: (1) the defendant's failure to pay common area maintenance (CAM) charges for lease year 2021 pursuant to the lease agreement, (2) the defendant's failure to pay a security deposit pursuant to the lease agreement, and (3) the termination of the defendant's right or privilege to occupy the premises. On December 15, 2022, the defendant moved to dismiss the action for lack of subject matter jurisdiction on the ground that the plaintiff's notice to quit was defective. On August 17, 2023, the trial court, *Riley*, *J.*, denied the motion to dismiss.

On August 22, 2023, the plaintiff filed its fourth revised amended complaint (operative complaint), essentially alleging the same grounds for eviction as the second revised amended complaint but with greater specificity. On September 28, 2023, the plaintiff filed a one page motion for summary judgment, seemingly directed to all three counts of the operative complaint, and an accompanying affidavit from its manager, Michael Tevis, who averred, inter alia, that the defendant had "fail[ed] to remit rent, i.e., CAM charges for lease year 2021" and had "failed to pay an additional security deposit in accordance with Article 13, Section 13.12, of the lease." On October 16, 2023, the defendant filed an objection, and, on November 13, 2023, the defendant filed a memorandum of law and accompanying affidavit and exhibits in opposition to the plaintiff's motion for summary judgment. The defendant argued, inter alia, that there were genuine issues of material fact as to whether the billed CAM charges were properly calculated and/or were otherwise excessive and whether the plaintiff had failed to provide requested supporting documentation as required under the lease. Furthermore, with respect to the additional security deposit claim, the defendant argued that there were genuine issues of material fact as to what amount of additional security deposit was due, when it was due,

and whether the plaintiff ever sent a proper notice of default under the lease. Additional briefing followed.

On December 4, 2023, the trial court, *Jacobs*, *J.*, issued its memorandum of decision, stating in conclusion that the plaintiff's motion was "granted" and that a judgment of possession shall be entered in its favor. Although the court did not expressly state that the plaintiff's motion was granted only as to count one, the decision as a whole supports such a reading,[1] and the parties do not disagree. See *CCI Computerworks*, *LLC* v. *Evernet Consulting*, *LLC*, 221 Conn. App. 491, 523, 302 A.3d 297 (2023) ("[w]e are mindful that [a trial court's judgment] must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding" (internal quotation marks omitted)). This appeal followed.[2]

[1] In reference to count one, the court stated: "With respect to the claim that the defendant failed to pay CAM charges as they came due . . . there are no genuine issues of material fact. It is undisputed that they were not paid. . . . [T]he lease plainly and unambiguously calls for payment of the billed estimated CAM charges in advance, subject to a refund or a 'credit for such excess against payments next thereafter to become due to [the plaintiff] on account of [the defendant's] Common Area Charge . . . .' " (Footnote omitted.) The court went on to reject the defendant's claim that its failure to pay the CAM charges should be excused (1) on the ground that the plaintiff failed to provide supporting documentation for the CAM charges as requested and/or (2) under the doctrine of equitable forfeiture. In reference to count two, the court stated, inter alia, that, "[w]ith respect to the alleged failure to pay the additional security deposit, there are genuine issues of material fact," as further explained by the court, the resolution of which required the denial of the plaintiff's motion. Finally, with regard to count three, the decision is silent.

[2] On January 2, 2025, the parties were notified to be prepared to address at oral argument before this court "whether the defendant has appealed from a final judgment given that the trial court expressly found on page eight of its December 4, 2023 memorandum of decision that 'there are genuine issues of material fact' with respect to the second count of the operative complaint alleging nonpayment of the additional security deposit. See *Meribear Productions*, *Inc.* v. *Frank*, 328 Conn. 709, 7[23]–24, [183 A.3d 1164] (2018) ('[w]hen a legally consistent theory of recovery has been litigated and has not been ruled on, there is no final judgment')." Because we dismiss this appeal as moot, we need not address the applicability of

On January 7, 2025, the plaintiff filed a motion to dismiss this appeal as moot, representing that "[s]ince the filing of this appeal, the defendant has vacated the property and the plaintiff is now in possession [of] the property, which was vacated by the defendant on December 31, 2024." On January 10, 2025, the defendant filed its memorandum of law in opposition to the motion. Relying on the collateral consequences doctrine, the defendant maintains that this appeal should not be dismissed as moot as a result of its vacating the premises. In its opposition, the defendant draws our attention to a pending collection action that the plaintiff brought against it and two individual guarantors under the lease during the pendency of this appeal. In that case, the plaintiff seeks to recover, inter alia, unpaid CAM charges for 2021. See *Troy Laundry Building, LLC* v. *Beautiful Life Adult Daycare, LLC*, Superior Court, judicial district of New Haven, Docket No. CV-24-6142710-S. The defendant contends that there is a reasonable possibility that the court's judgment as to count one in the present action may have a harmful, preclusive effect in the collection action under the doctrines of collateral estoppel and/or res judicata.

For the reasons that follow, we conclude that this appeal is moot and is not saved by the collateral consequences doctrine. Accordingly, we lack subject matter jurisdiction to entertain the defendant's claims.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the

*Meribear Productions, Inc.*, to a summary process action in which a judgment of possession is rendered on one count and another count remains without adjudication.

determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [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." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021). "We have consistently held that an appeal from a summary process judgment becomes moot [if], at the time of the appeal, the defendant is no longer in possession of the premises." (Internal quotation marks omitted.) *Iacurci* v. *Wells*, 108 Conn. App. 274, 277, 947 A.2d 1034 (2008).

The collateral consequences doctrine provides an exception to the mootness doctrine. "[F]or a litigant to invoke successfully the collateral consequences doctrine, the litigant must show that there is a reasonable possibility that prejudicial collateral consequences will occur. Accordingly, the litigant must establish these consequences by more than mere conjecture, but need not demonstrate that these consequences are more probable than not. This standard provides the necessary limitations on justiciability underlying the mootness doctrine itself. Where there is no direct practical relief available from the reversal of the judgment . . . the collateral consequences doctrine acts as a surrogate, calling for a determination whether a decision in the case can afford the litigant some practical relief in the future. The reviewing court therefore determines, based

upon the particular situation, whether the prejudicial collateral consequences are reasonably possible." *State* v. *McElveen*, 261 Conn. 198, 208, 802 A.2d 74 (2002).

Here, it is undisputed that the defendant has vacated the subject property and that the plaintiff is now in possession of the property, which renders moot the appeal from the judgment of possession in the absence of an applicable exception. See *Iacurci* v. *Wells*, supra, 108 Conn. App. 277. In determining whether there is a reasonable possibility that the defendant will suffer prejudicial collateral consequences in the collection action if the underlying judgment is left undisturbed, we construe the judgment to ascertain whether the trial court made any findings regarding whether CAM charges were properly calculated. Our review of the judgment is plenary. See *Anketell* v. *Kulldorff*, 207 Conn. App. 807, 821, 263 A.3d 972 ("[b]ecause [t]he construction of a judgment is a question of law for the court . . . our review . . . is plenary" (internal quotation marks omitted)), cert. denied, 340 Conn. 905, 263 A.3d 821 (2021).

On the basis of our review of the court's decision on the plaintiff's motion for summary judgment, we conclude that the court made no findings (and properly so) as to whether the CAM charges at issue were properly calculated. Thus, we do not perceive any prejudicial collateral consequences that the defendant may suffer in the collection action as a result of the application of collateral estoppel and/or res judicata.[3] Accordingly, because there is no practical relief that we could afford the defendant, this court lacks jurisdiction to entertain the defendant's claims on appeal. See *Rocco* v. *Shaikh*,

[3] We further note that, during oral argument before this court, the plaintiff's counsel expressly acknowledged that the trial court did not make any findings as to whether the CAM charges at issue were properly calculated and that the defendant would be free in the collection action to challenge the plaintiff's calculations.

184 Conn. App. 786, 805–806, 196 A.3d 366 (2018); *Iacurci* v. *Wells*, supra, 108 Conn. App. 283.

The appeal is dismissed.

In this opinion the other judges concurred.