IN RE C. Y.*
(AC 47852)

Alvord, Cradle and Suarez, Js.**

Syllabus

The respondent father appealed from the trial court's judgment removing him as guardian of his minor child and appointing the petitioners as coguardians of the child. The respondent claimed that the court abused its discretion in determining, pursuant to statute (§ 45a-610 (3)), that there was clear and convincing evidence to support its finding that the ground for removal of the respondent's guardianship rights had been satisfied. *Held*:

The trial court did not abuse its discretion in removing the respondent as guardian of the child, as the record contained sufficient evidence to support the court's finding that the petitioners proved by clear and convincing evidence that the statutory ground for removal of the respondent as guardian pursuant to § 45a-610 (3) and the best interests of the child standard pursuant to statute (§ 45a-605) had been satisfied.

Argued January 14—officially released March 24, 2025***

Procedural History

Petition to remove the respondent as guardian of his minor child, brought to the Superior Court in the judicial district of New London, Juvenile Matters at Waterford, and tried to the court, *Hoffman, J.*; judgment removing the respondent as guardian of his minor child and appointing the petitioner Cindy W. et al. as coguardians, from which the respondent appealed to this court. *Affirmed.*

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

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

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

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

David E. Schneider, Jr., assigned counsel, for the appellees (petitioner Cindy W. et al.).

Ellin M. Grenger, attorney for the minor child.

Opinion

SUAREZ, J. The respondent father, Carl Y., appeals from the judgment of the trial court rendered in favor of the petitioners, his sister, Cindy W. (Cindy), and her husband, Jacob W. (Jacob),[1] removing the respondent as guardian of his minor child, C. Y., and appointing the petitioners as coguardians of the child.[2] On appeal, the respondent claims that the court abused its discretion in determining that there was clear and convincing evidence to support its finding that the statutory ground for the removal of the respondent's guardianship rights had been satisfied.[3] We affirm the judgment of the court.

The record reveals the following undisputed facts and procedural history. The child was born in November, 2007, to the respondent and Chelsea C. (Chelsea), who were married at the time. The respondent and Chelsea divorced in 2010, and the respondent became the custodial parent of the child. The respondent married Kimberly Y. (Kimberly) in December, 2017, and the respondent, Kimberly, and the child began living in the same household.

In May, 2020, the respondent and Kimberly asked the petitioners to assume temporary guardianship of the child. The petitioners agreed, and the child, then age twelve, began to live with them around Mother's Day,

[1] All references herein to the petitioners are to Cindy and Jacob collectively, and we refer to them individually by first name when appropriate.

[2] The petitioners did not seek to remove the child's mother, Chelsea C., as guardian of the child, and she is not participating in this appeal. All references in this opinion to the respondent are to Carl Y. only.

[3] Pursuant to Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioners in this appeal.

2020. On May 23, 2020, the petitioners and the respondent entered into a voluntary agreement for the temporary guardianship of the child. On October 7, 2020, the Probate Court granted the petitioners temporary guardianship of the child for one year. After the expiration of the court order, the child remained in the care and custody of the petitioners. On December 31, 2021, the petitioners and the respondent entered into a second voluntary agreement concerning the temporary guardianship of the child (December 31, 2021 agreement), which, inter alia, provided for the respondent to provide the petitioners with $100 per month in child support. On February 17, 2022, the respondent filed a second application with the Probate Court to renew the petitioners' guardianship of the child, which was granted on March 15, 2022.

On March 24, 2022, the petitioners and the child were planning to travel to New Hampshire for a long weekend. The respondent initially did not object to the trip. That night, however, the respondent arrived at the petitioners' home and demanded that the child have visitation with him instead. When the child refused to go with the respondent, he handed the petitioners a notarized letter purporting to terminate their agreement for the temporary guardianship of the child. The police were summoned but would not compel the child to go with the respondent against her will. On March 25, 2022, the petitioners filed two petitions in the Probate Court: one for immediate temporary custody of the child and one for removal of the respondent as the child's guardian. The petition for removal alleged acts of parental commission or omission, pursuant to General Statutes § 45a-610 (3),[4] as the statutory basis for removal of the

[4] General Statutes § 45a-610 governs the removal of parents as guardians in probate proceedings and provides in relevant part: "If the Court of Probate finds that notice has been given or a waiver has been filed, as provided in section 45a-609, it may remove a parent as guardian, if the court finds by clear and convincing evidence one of the following: (1) The parent consents to his or her removal as guardian; or (2) the minor child has been abandoned

respondent as the child's guardian. The same day, the Probate Court granted immediate temporary custody of the child to the petitioners and scheduled a hearing on the petitioners' petition for the removal of the respondent's guardianship rights. On February 1, 2023, pursuant to General Statutes § 45a-623,[5] the respondent moved to transfer the petition for the removal of guardianship to the Superior Court. On April 25, 2024, the court, *Hoffman*, *J.*, held a hearing on the petition. On June 17, 2024, the court issued an oral decision in which it found "by clear and convincing evidence that the petitioners have proved . . . grounds for removal of [the respondent] as guardian, as to [§] 45a-610 (3) . . . ." The court further found by clear and convincing evidence "that the minor child has been denied the

by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility for the minor child's welfare; or (3) the minor child has been denied the care, guidance or control necessary for his or her physical, educational, moral or emotional well-being, as a result of acts of parental commission or omission, whether the acts are the result of the physical or mental incapability of the parent or conditions attributable to parental habits, misconduct or neglect, and the parental acts or deficiencies support the conclusion that the parent cannot exercise, or should not in the best interests of the minor child be permitted to exercise, parental rights and duties at the time; or (4) the minor child has had physical injury or injuries inflicted upon the minor child by a person responsible for such child's health, welfare or care, or by a person given access to such child by such responsible person, other than by accidental means, or has injuries which are at variance with the history given of them or is in a condition which is the result of maltreatment such as, but not limited to, malnutrition, sexual molestation, deprivation of necessities, emotional maltreatment or cruel punishment; or (5) the minor child has been found to be neglected or uncared for, as defined in section 46b-120. . . ."

[5] General Statutes § 45a-623 provides in relevant part: "Before a hearing on the merits in any case under sections 45a-603 to 45a-622, inclusive, that is contested, the Probate Court shall, on the motion of any party other than a party who applied for the removal of a parent as a guardian . . . transfer the case to the Superior Court in accordance with rules adopted by the judges of the Supreme Court. . . . If the case is transferred and venue altered, the clerk of the Probate Court shall transmit to the clerk of the Superior Court . . . to which the case was transferred, the original files and papers in the case."

care, guidance, and control necessary for her physical, educational, moral, [and] emotional well-being as [a result] of acts of parental commission or omission whether the acts are the result of physical or mental incapacity of the parent or conditions attributable to the parental habits, misconduct, or neglect, and the parental acts or deficiencies support the conclusion that the parent cannot exercise, or should not in the best interests of the minor child be permitted to exercise parental rights and duties at this time.

"So, the court's going to find that it's in the best interest of the child to do so. [The] court is basing that on the . . . review of the testimony in this matter. The court was very concerned about the allegations in . . . [Cindy's] description of [the child's] distress after she came to live with [the petitioners] concerning her studies, and the conditions which she was allowed to live under.

"And as far as the [discipline] situation was concerned, it . . . appears to the court that when [the respondent] was faced with a situation between his present wife and [the child], he chose his present wife over [the child]. And that was evident by the fact that . . . [his wife] indicated that it was her or [the child]. [The respondent] . . . recognized the abilities of the [petitioners] to be able to care for [the child].

"And [the child], in the court's opinion, is a remarkable young lady. In [the] face of everything, she was able to triumph and looks like she's doing very well in school. And the court feels that she needs to have going forward . . . some permanence in her life where she can consult with the [petitioners] as [to] her future decisions and know that they have final decision-making powers and that she is secure staying in their home." On the basis of these subordinate findings, the court

granted the petition to remove the respondent as guardian of the child and appointed the petitioners as coguardians of the child together with Chelsea. The court further ordered that the child's primary residence be with the petitioners and that the petitioners would have final decision-making authority over issues pertaining to the child. This appeal followed.

Before reaching the merits of the respondent's claim on appeal, we briefly set forth the governing legal principles. "Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute." (Internal quotation marks omitted.) *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61, 209 A.3d 690 (2019). After an application for the removal of a guardian is transferred from the Probate Court to the Superior Court, "the Superior Court sheds its status as a constitutional court of general jurisdiction and assumes the status of a statutory Probate Court of limited jurisdiction." *In re Probate Appeal of Buckingham*, 197 Conn. App. 373, 374, 231 A.3d 1261 (2020). "The court may remove a parent as guardian only if it finds by clear and convincing evidence that one or more of the grounds enumerated in . . . § 45a-610 [has] been proven by clear and convincing evidence." (Internal quotation marks omitted.) *In re Helen B.*, 50 Conn. App. 818, 827, 719 A.2d 907 (1998).

General Statutes § 45a-605 (a) provides in relevant part that "[t]he provisions of sections 45a-603 to 45a-622, inclusive, shall be liberally construed in the best interests of any minor child affected by them . . . ." This provision "is a clear statement by the legislature that in any proceeding to remove a parent as guardian the crucial issue is the best interest of the child. . . . Notably, [General Statutes] §§ 17a-112 and 45a-717, which govern the termination of parental rights, are not prefaced by such a declaration of legislative policy. . . . Thus . . . a best interests of the child analysis

. . . is relevant, and perhaps dispositive . . . in any proceeding to transfer guardianship. . . . The best interests of the child militate that the statute be interpreted as it is written, so that a parent may be removed as guardian, notwithstanding that he or she has maintained a reasonable degree of interest or concern for a minor's welfare, where the parent nonetheless has failed to maintain a reasonable degree of . . . responsibility for the minor's welfare . . . ." (Citations omitted; internal quotation marks omitted.) *Garrett's Appeal from Probate*, 44 Conn. Supp. 169, 182, 677 A.2d 1000 (1994), aff'd, 237 Conn. 233, 676 A.2d 394 (1996).

We take this opportunity to clarify our standard of review. The transfer of guardianship pursuant to § 45a-610 "is a matter within the sound discretion of the trial court. . . . We review the award to determine whether that discretion has been abused and whether the trial court, in the exercise of its discretion, has overlooked or misapplied some established principle of pertinent law." (Citations omitted; internal quotation marks omitted.) *In re Helen B.*, supra, 50 Conn. App. 827–28. We historically have reviewed for clear error both the court's subordinate factual findings and its determination by clear and convincing evidence that the statutory grounds for the removal of guardianship rights have been satisfied. See id., 827–29, 831. "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id., 829.

In *In re Shane M.*, 318 Conn. 569, 122 A.3d 1247 (2015), our Supreme Court clarified the standard of review in child protection cases. It noted that clear error historically had been the standard of review for "both the trial court's subordinate factual findings and

its determination that a parent has failed to rehabilitate," and it "remain[ed] convinced that clear error review is appropriate for the trial court's subordinate factual findings . . . ." (Emphasis omitted.) Id., 587. However, it also recognized that "[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 relevant statutory requirements. (Emphasis in original.) Id. Our Supreme Court determined that "the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]." (Internal quotation marks omitted.) Id., 588. We recognize that the appeal in *In re Shane M.* was from a judgment terminating a respondent's parental rights pursuant to § 17a-112 and was not an appeal of a judgment granting a removal of guardianship pursuant to § 45a-610. Because the court's ultimate determination is similarly drawn from both its factual findings and its weighing of the facts to assess whether the relevant statutory requirements are satisfied, the standard articulated in *In re Shane M.* is equally applicable to actions pursuant to § 45a-610.

"Under [the evidentiary sufficiency standard of review], the inquiry 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 do] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . In our

review of the record for evidentiary sufficiency, we are mindful that, as a reviewing court, [w]e cannot retry the facts or pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Citation omitted; internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 348–49, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

With that standard of review in mind, we now turn to the respondent's claim that the evidence was insufficient to support the court's conclusion. Specifically, the respondent argues that the court only relied on Cindy's hearsay testimony, which was admitted without objection and described statements made by the child and Kimberly regarding events that occurred in May, 2020. The petitioners counter that "there was ample evidence [in the record] to support the . . . court's finding that the [respondent] should be removed as guardian . . . ." We agree with the petitioners.

It is well settled that "[e]vidence admitted without objection remains evidence in the case subject to any infirmities due to any inherent weaknesses. . . . A failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence. . . . If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of the rational persuasive power it may have." (Citation omitted; internal quotation marks omitted.) *Dufresne* v. *Dufresne*, 191 Conn. App. 532, 546–47, 215 A.3d 1259 (2019). The weight to be given to such evidence "is solely within the province of the trial court." *Cotton* v. *Cotton*, 11 Conn. App. 189, 194, 526 A.2d 547 (1987). In the present case, the respondent did not object to the relevant portions of Cindy's hearsay testimony. The

court, therefore, in its discretion was entitled to rely on this evidence to the extent it deemed it persuasive.

In the present case, Cindy testified that the respondent and Kimberly had asked her and Jacob to assume temporary guardianship of the child in early May, 2020, and that they "said that they did not want [the child] back, that she was a liar, that . . . her behavior was awful. [The child] was constantly talking back to them and . . . Kim[berly] specifically said that if we take her, we are taking her until she is eighteen and that she is not allowed to come back to the house." Cindy further testified that the child did not begin to live with her until a few weeks later when the child and the respondent arrived at the petitioners' home after an argument with Kimberly. Cindy testified that, after their arrival, the respondent told her "that the argument was about [the child] and that Kim[berly] [could] no longer stand her in the home, and that it was either [Kimberly] or [the child] but it had to end. [The child] had to be removed."

Moreover, Cindy testified that, shortly after the child first came to stay with her, the child told her that "[s]he'd talked back to Kim[berly], and she was made to stand in the corner. And she would get up in the morning, and she would stand in the corner. They would eat breakfast. Once they were done, she could come out and eat breakfast. Then she would have to go stand back in the corner. And this repeated throughout the whole day for . . . each meal. And she said that went on for two to three weeks."

Cindy further testified that the respondent had only "[o]ccasionally," "[s]poradically," and "inconsistently" visited the child since the temporary guardianship began and stated that the respondent was invited to the child's eighth grade graduation ceremony, but he did not attend. Cindy further indicated that, despite the

December 31, 2021 agreement, the respondent, from the time that the child came to live with the petitioners until the hearing, gave the petitioners between only $400 and $600 in child support.

In addition, Cindy testified that, prior to the temporary guardianship, the child was seeing a counselor that "she loved and adored, and because of that fact, [the respondent] spoke to her and said she is not allowed to have somebody that she is comfortable with because she won't get what she needs out of it and switched her" to a different counselor. Cindy also testified that, in February, 2022, the child participated in an intake interview with Megan Renshaw, another counselor, and "at the intake [the respondent] and Kim[berly] were very adamant about being present in the room with [the child] while the counselor spoke to her. . . . [T]he counselor said no, initially, that she wanted to speak with [the child]. [The respondent and Kimberly] seemed very upset about that. [The respondent and Kimberly] also wanted [the child's] MyChart information,[6] and [the child] refused to give that to them. They got very upset about that as well." (Footnote added.) Cindy testified that when the petitioners tried to collaborate with the respondent on medical appointments, the respondent "would cancel them and set his own, so it was very difficult." In addition, the respondent would "[change] doctors" without informing the petitioners or consulting with the petitioners with respect to whether the child had a need for such an appointment.

Moreover, the court heard testimony from Aimee Arrowsmith, an investigator for the Department of Children and Families, who prepared an updated removal of guardianship study, dated May 11, 2023. In her study,

[6] MyChart is a patient portal system that allows for sending messages between a medical provider and a patient. See, e.g., *Schenarts* v. *Greenwich Hospital*, Docket No. CV-22-6114979-S, 2024 WL 3771530, *9 (Conn. Super. August 9, 2024).

Arrowsmith stated that, since the petitioners had assumed temporary guardianship of the child, the respondent had engaged in visitation "inconsistently." Arrowsmith further stated that while the child was still living with the respondent, the respondent had engaged in "discipline [that] was not appropriate for [the child], given her age at that time." Arrowsmith opined that "[i]t is unreasonable to make [the child] ([then age fifteen]) leave the home where she has had some stability in her life including school and in the community." Finally, Arrowsmith testified that the child "would like to remain where she is. She is doing very well there and is comfortable and feels safe there . . . ."

The court also heard testimony from the respondent. The respondent admitted that, since the temporary guardianship began in 2020, he had been arrested twice: once in April, 2021, which resulted in charges for breach of the peace in the second degree and threatening in the second degree, and again in August, 2022, for disorderly conduct. Additionally, when asked whether he was aware that temporary guardianships are supposed to last approximately one year, and expire accordingly, with the hope of reunification after, and whether he thought it was appropriate for the temporary guardianship to continue until the child reached the age of majority, the respondent said yes.

Construing the evidence in the manner most favorable to sustaining the judgment of the court, as we must, we conclude that the record contains sufficient evidence to support the court's finding that the petitioners proved by clear and convincing evidence that the statutory ground for removal of the respondent as guardian pursuant to § 45a-610 (3), as well as the best interests of the child standard of § 45a-605, had been satisfied. Accordingly, we conclude that the court did not abuse its discretion in removing the respondent as

guardian of the child and appointing the petitioners coguardians of the child.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE ISABELLA S.*
(AC 47764)

Bright, C. J., and Alvord and Westbrook, Js.**

Syllabus

The respondent parents appealed from the trial court's denial of their application for a declaratory judgment and a writ of mandamus, in which they sought to compel the Department of Children and Families to place their minor child in a residential treatment setting to address her mental health needs. The respondents claimed, inter alia, that the court had misinterpreted the meaning and the finality of the underlying decision by a hearing officer for the department, which had ordered the department to explore appropriate residential care for the child, who previously had been committed to the care and custody of the petitioner, the Commissioner of Children and Families. *Held*:

The trial court properly denied the respondents' application for a declaratory judgment and a writ of mandamus, as the hearing officer's decision contained no language expressly requiring the department to place the child in a residential treatment program but, rather, ordered the department to revise its existing treatment plan for the child and to explore the possibility of placing her in a residential treatment program, if such a placement was appropriate to achieving her reunification with the respondents.

The trial court did not abuse its discretion in determining that the extraordinary remedy of mandamus was inappropriate under the circumstances at issue, as the hearing officer's decision did not create a clear right in the respondents to the remedy they sought but, rather, granted them the right to have the department devise a new treatment plan and to continue to look into the possibility of residential placement for the child, after which the

---

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

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

respondents could pursue further relief from the department if they remained unsatisfied with its efforts.

Argued January 15—officially released March 24, 2025***

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Litchfield, Juvenile Matters at Torrington, where the court, *Aaron*, *J.*, rendered judgment adjudicating the minor child uncared for and committed her to the custody of the petitioner; thereafter, the court, *Lobo*, *J.*, denied the respondents' application for a writ of mandamus to compel the petitioner to place the minor child in a residential treatment setting, and the respondents appealed to this court. *Affirmed.*

Lisa M. Vincent, with whom was *Ani A. Desilets*, for the appellants (respondents).

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

Eric J. Palladino, for the minor child.

Opinion

WESTBROOK, J. In this child protection matter, the respondent parents, Billie Jean S. and Panyiotis S., appeal from the denial of their application for a writ of mandamus, in which they argued that the Department of Children and Families (department) was not providing their minor child, Isabella S., with appropriate mental health care.[1] They sought an order requiring the

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

[1] Our Supreme Court has held that a ruling on an application for a writ of mandamus is an immediately appealable final judgment irrespective of whether the application is brought as an independent action or in the course of ongoing litigation. See *Wardell* v. *Killingly*, 96 Conn. 718, 115 A. 539 (1921) (relying in part on General Statutes (1918 Rev.) § 6065, now General Statutes § 52-493).

department to place Isabella in an appropriate residential treatment setting in accordance with a March 15, 2024 decision issued by a department hearing officer. The respondents claim on appeal that the court (1) misinterpreted the meaning and the finality of the March 15, 2024 decision and (2) improperly concluded that a writ of mandamus was not the proper mechanism for seeking enforcement of the hearing officer's decision.[2] For the reasons that follow, we affirm the judgment of the court.[3]

The record reveals the following facts and procedural history. Isabella was adopted by the respondents in 2012 at the age of eighteen months following the termination of her biological parents' parental rights. Isabella has a history of significant mental health issues that include diagnoses of reactive attachment disorder, disruptive mood dysregulation disorder, oppositional defiant disorder, conduct disorder, traumatic stress disorder, developmental trauma, unspecified anxiety disorder and depressive disorder. She has exhibited serious disruptive behaviors including escalating anger, destruction of property, and physical and verbal aggression toward family members, particularly the respondent mother. The respondents have sought various treatments and services for Isabella. Due to her having repeatedly

[2] In accordance with Practice Book § 67-13, the attorney for the minor child filed a statement adopting the brief of the petitioner, the Commissioner of Children and Families.

[3] We note that the respondents filed a motion to strike portions of the brief and accompanying appendix of the petitioner, the Commissioner of Children and Families, specifically, "all references to the status of the child, her treatment, and the parents' role in that treatment that postdate the [May 29, 2024] decision being appealed on grounds that the material is irrelevant, improper and prejudicial to the interests of the child and [the respondents]." We conclude that no action is necessary on the motion because we have not relied on the disputed materials in resolving the issues on appeal, and, to the extent that the brief or appendix contains "improper matter"; see Practice Book § 60-2 (3); the panel has not considered it.

engaged in disruptive and violent behavior, she has required hospitalization on a number of occasions.

In April, 2023, Isabella, then twelve years old, was hospitalized overnight after she threatened to harm the respondent mother. When the hospital contacted the respondents to inform them that Isabella could return home, they refused to take her home. The department was contacted and invoked a ninety-six hour hold pursuant to General Statutes § 17a-101g (f). The court, *Lobo*, *J.*, thereafter granted a motion filed by the petitioner, the Commissioner of Children and Families, for an order of temporary custody and placed Isabella in the petitioner's care and custody. In April, 2023, the petitioner filed a neglect petition in the Superior Court, and, in August, 2023, the court, *Aaron*, *J.*, adjudicated Isabella as uncared for.

Following her commitment to the custody of the petitioner, Isabella again required hospitalization and was placed in multiple foster homes, none of which proved to be a viable option. The respondents and the department met in July, 2023, to discuss potential residential placements for Isabella. In November, 2023, the respondents filed with the court a "motion for emergency relief," in which they argued that the department was denying Isabella access to appropriate mental health care.[4] The court denied the respondents' motion, noting on the papers: "exhaust administrative remedies first."

[4] Specifically, the respondents stated in their motion: "Isabella is currently endangered in the department's care, as she is being denied access to the level of mental health care that has been recommended for her, she is unable to maintain stability and has been through over ten foster placements since May, 2023, and the [department] has no plan in place for what to do next, as [Isabella] was denied admittance to [Solnit South, a state administered psychiatric facility for children with residential treatment facilities] as of October 18, 2023, because her needs are too complex. The parents seek an order that [the department] immediately identify a treatment plan that meets [Isabella's] needs and further seek court oversight of the child's treatment until her needs are met."

On December 1, 2023, the respondents requested a treatment plan hearing with the department's administrative hearings unit in accordance with General Statutes § 17a-15 (c).[5] They sought an order that the department "take immediate steps to place the child into an attachment focused residential treatment setting." The hearing officer, Attorney Mary Elizabeth Satran, conducted hearings via videoconference on January 5, 12, 19 and 26, and February 23, 2024. On March 15, 2024, the hearing officer issued a decision in which she found that the department's current service plan failed to meet Isabella's needs and directed the department to "explore appropriate residential care that is directly aimed at addressing the child's primary disability, reactive attachment disorder, as well as her other diagnoses and behavioral struggles, and provide an appropriate plan and placement directed at the permanency plan of reunification." The hearing officer directed the department to first focus on in-state placements and programs and then to consider out-of-state options if there was

[5] General Statutes § 17a-15 provides in relevant part: "(a) The commissioner shall prepare and maintain a written case plan for care, treatment and permanent placement of every child under the commissioner's supervision, which shall include, but not be limited to, a diagnosis of the problems of each child, the proposed plan of treatment services and temporary placement and a goal for permanent placement of the child . . . . The child's health and safety shall be the paramount concern in formulating the plan.

"(b) The commissioner shall at least every six months, review the written case plan of each child under the commissioner's supervision for the purpose of determining whether such plan is appropriate and make any appropriate modifications to such plan. . . .

"(c) Any child or the parent or guardian of such child aggrieved by any provision of a plan prepared under subsection (a) of this section, or by the commissioner's decision upon review under subsection (b) of this section, or any child or the parent or guardian of such child aggrieved by a refusal of any other service from the commissioner to which the child is entitled, shall be provided a hearing within thirty days following a written request for the same directed to the commissioner. . . .

"(e) Any hearing held pursuant to a request made under subsection (c) . . . shall be conducted as a contested case in accordance with [the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.] . . . ."

no appropriate in-state option. The hearing officer concluded that "the department's case plan is not appropriate to meet the child's needs and shall be revised as set forth in this decision to provide for placement and services addressing the child's significant attachment issues and which is directed toward the goal of reunification, consistent with the permanency plan." The hearing officer's decision did not direct the department to place Isabella into a residential treatment setting or require that it do so as sought by the respondents.

On May 8, 2024, the respondents filed the application for a writ of mandamus and declaratory relief that is the subject of the present appeal. In the application, the respondents alleged in relevant part that they had "exercised their administrative procedural rights as it pertained to the care and treatment of their minor child, and they have secured an administrative treatment decision in their favor"; since the hearing, they did not believe the department was "taking steps to secure appropriate treatment for [Isabella]," and "[the department's] current efforts do not run toward placement of [Isabella] but rather run toward keeping [her] out of the residential treatment program that was ordered"; "without consulting the family or the family therapist, [the department] has conducted [its] own new assessment of [Isabella] and concluded that [she] does not qualify for a congregate care placement"; the department's "actions and inactions . . . threaten, interfere with and impair the legal rights of [Isabella] to receive proper care and treatment" and "the legal rights of the [respondents] to have reasonable efforts made to return their child to their own care and custody"; the department failed to appeal from the hearing officer's decision or ask for reconsideration; "the action of placing the child into an appropriate treatment facility is a ministerial act, requiring no exercise of a public officer's judgment or discretion, as the discretionary question has

already been decided upon a full evidentiary record"; and the respondents "have no other means to secure their legal rights and those of their minor child than to turn to [the Superior Court] for orders of enforcement of the administrative hearing decision." The respondents asked the court to issue an order directing the department to place Isabella "into an appropriate treatment facility for her primary mental health condition in accordance with the March 15, 2024 administrative hearing decision and to declare that the provision of this treatment for this child is not discretionary."

The petitioner filed a response to the respondents' application, arguing that the court should deny the application. According to the petitioner, the respondents were not entitled to a declaratory judgment because they had failed to exhaust their administrative remedies with the department pursuant to the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq.[6] Moreover, the petitioner asserted that the department had been complying with the March 15, 2024 decision by exploring in-state placements and programs, including "timely preparing a Commissioner

[6] Although the petitioner did not identify in her pleading what additional administrative remedies were available to the respondents, the petitioner's counsel indicated, at the hearing on the mandamus application and in the petitioner's brief on appeal, that, if the respondents believe that the department is not following the directions of the hearing officer by altering its case plan and exploring whether there are appropriate in-state or out-of-state residential treatment options for Isabella, the respondents could seek another case plan hearing under § 17a-15, which contains no express limitations on the number of such hearings a parent may request. Moreover, to the extent that the respondents seek specific declaratory relief requiring the department to place Isabella in a residential treatment program, the petitioner contends that the respondents can follow the procedures set forth in General Statutes § 4-176 and request such relief from the department. If they are aggrieved following either procedure, they could then file an administrative appeal with the Superior Court. See General Statutes §§ 4-176 (h) and 17a-15 (e). Because, in resolving whether the court properly denied the application for a writ of mandamus, we do not reach the issue of whether the respondents have other legal remedies available to them, we do not opine on the propriety or adequacy of such procedures.

Memo to request consideration of a residential treatment program (QRTP) and submitting a Child and Adolescent Needs (CANS) to Carelon Behavioral Health to determine the level of care based on medical necessity."[7] The department purportedly also had "reach[ed] out to Wellspring, an in-state residential treatment program that is not contracted with [the department], to determine the suitability of Isabella for their program." The petitioner stated that, on April 10, 2024, the department was "informed [that] the CANS for Isabella was not approved for a higher level of care, including therapeutic group homes or any congregate care placement based on her current assessment of needs and functioning." The petitioner also stated that, contrary to the respondents' representations in their pleading, the department had "shared information with [the respondents'] counsel about the steps [the department] has taken to explore in-state placements and programs that [are] aimed at addressing the child's needs." (Emphasis omitted.) Finally, the petitioner argued that placing a child into an appropriate treatment facility is not a ministerial act, as alleged by the respondents, but requires the department to exercise its discretion "to ethically explore a treatment facility that will address the child's disability, diagnoses, current level of need, and is in her best interests."

On May 29, 2024, following a hearing on the application, the court, *Lobo*, *J.*, issued an oral decision denying the application for a writ of mandamus.[8] According

[7] According to the petitioner, Carelon Behavioral Health's role is to match a child to an appropriate in-state QRTP treatment program.

[8] The court's oral ruling provides in relevant part: "The way . . . the court sees it, I think there's a couple of things that are going on, okay. One is, there's the decision itself. The administrative hearings officer . . . *didn't specifically commit to any placement in the decision* . . . that language being *to explore*. . . .

"As I read this [decision] . . . it doesn't direct any specific placement. The child needs to have appropriate care, but the way the decision is written, I think . . . the hearings officer was very appropriate—was very careful, shall I say, and not directing that but is ordering the department to explore other avenues because the current [plan] was not appropriate. . . .

to the court, it did not interpret the hearing officer's decision as *requiring* the department to identify a residential treatment facility and to place Isabella therein but, rather, as ordering the department to *explore options* for such a placement, and the court found that the department was complying with its obligations under the hearing officer's decision. The court also stated that it lacked jurisdiction to order any specific placement and concluded that the writ of mandamus was an inappropriate procedural vehicle for the respondents to pursue the relief they sought. Although the court further stated that it did not know the proper legal mechanism for the respondents to employ, it noted the possibility of seeking another administrative hearing before the department. This appeal followed.[9]

"The court doesn't feel that the writ is the appropriate vehicle to challenge what you perceive as the department not meeting the child's needs. If it were . . . if the writ were to be ordered pursuant to the administrative decision, it would just be to make sure that the department is exploring all these other options. . . .

"So, the court is going to deny the application for the writ of mandamus." (Emphasis added.)

[9] The petitioner in her appellee's brief and the respondents in their reply brief raise potential jurisdictional issues that we briefly address and reject. See *Deutsche Bank National Trust Co.* v. *Fritzell*, 185 Conn. App. 777, 782, 198 A.3d 642 (2018) (this court ordinarily is required to address jurisdictional issues before considering merits of appeal), cert. denied, 330 Conn. 963, 199 A.3d 1080 (2019). The petitioner argues in her appellee's brief that this court lacks jurisdiction over the present appeal because the respondents purportedly failed to exhaust their administrative remedies before filing their application for a writ of mandamus with the trial court. The petitioner's argument, however, appears to conflate the subject matter jurisdiction of the trial court with the subject matter jurisdiction of this court. "It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before *the Superior Court* will obtain jurisdiction to act in the matter. . . . [E]xhaustion of remedies serves dual functions: it protects the courts from becoming unnecessarily burdened with administrative appeals and it ensures the integrity of the agency's role in administering its statutory responsibilities." (Emphasis added; internal quotation marks omitted.) *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 310 Conn. 797, 808, 82 A.3d 602 (2014). "Questions related to a trial court's jurisdiction over a case, [however], normally can, and should, be treated as analytically distinct from questions related to

The respondents raise two claims on appeal. First, they claim that the court misinterpreted "the meaning and the finality" of the hearing officer's March 15, 2024 decision. Second, they claim that the court improperly

appellate jurisdiction. . . . They spring from different sources and, in most contexts, are not coterminous. Generally, the Appellate Court has jurisdiction to review final judgments of the Superior Court . . . even when the question at issue is whether the trial court properly dismissed the case for lack of jurisdiction." (Citations omitted.) *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 375 n.9, 260 A.3d 1187 (2021). Moreover, the matter underlying this appeal was not an administrative appeal but an application for a writ of mandamus. Although the availability of other remedies—administrative or otherwise—is a consideration for a court determining whether to grant or deny an application for a writ of mandamus; see *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 827, 222 A.3d 1000 (2019) (granting of writ is proper only if, inter alia, no other specific, adequate remedy is available), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020); that inquiry is substantively different from the exhaustion of administrative remedies doctrine. The present appeal meets all prerequisites for appellate jurisdiction in accordance with General Statutes § 52-263—the respondents petitioned for the writ of mandamus in the trial court, received a final disposition of their application by virtue of the trial court's denial, and are aggrieved by that denial for purposes of appeal.

We also reject any suggestion that the present appeal should be dismissed as moot. In their reply brief, the respondents reference the petitioner's argument in her appellee's brief that the trial court properly denied the application for a writ of mandamus because the hearing officer's March 15, 2024 decision was based on information about the child that is now "stale." The respondents construe this argument as a mootness challenge. It is axiomatic "that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal." (Internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 12, 287 A.3d 557 (2023). The petitioner's stale information argument is directed, however, to the propriety of the trial court's decision and not to whether this court can grant the respondents practical relief by deciding this appeal in their favor. If this court were to agree with the respondents, it necessarily would reject the petitioner's stale information argument and determine that the respondents are entitled to enforcement of the hearing officer's March 15, 2024 decision against the department via a writ of mandamus, thus providing the respondents with practical relief. Accordingly, we are not persuaded that the present appeal is moot.

concluded that a writ of mandamus was not the proper mechanism for seeking enforcement of the hearing officer's decision. Because our resolution of the first claim is also dispositive of the second claim, we will address them together.

We begin with applicable principles of law, including our standard of review. "The requirements for the issuance of a writ of mandamus are well settled. Mandamus is an extraordinary remedy, available in limited circumstances for limited purposes. . . . It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law. . . . That discretion will be exercised in favor of issuing the writ only [if the party seeking the writ] has a clear legal right to have done that which he seeks. . . . The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." (Internal quotation marks omitted.) *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 827, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020).

The proponent of the writ must ensure that all three prongs of this test are satisfied, and the failure to satisfy any one of them will be dispositive. See *Greenfield* v. *Reynolds*, 122 Conn. App. 465, 473, 1 A.3d 125, cert. denied, 298 Conn. 922, 4 A.3d 1226 (2010). "Even satisfaction of this demanding [three-pronged] test does not, however, automatically compel issuance of the requested writ of mandamus. . . . In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity. . . . We review the trial court's decision, therefore, to determine

whether it abused its discretion in denying the writ. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . Nevertheless, this court will overturn a lower court's judgment if it has committed a clear error or misconceived the law." (Citations omitted; internal quotation marks omitted.) *Cooke* v. *Commissioner of Correction*, supra, 194 Conn. App. 827–28.

Because our review of the respondents' claims requires us to review the trial court's interpretation of the hearing officer's decision, we note that, like the construction of any judgment, this presents a question of law over which our review is plenary. See *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 373, 254 A.3d 330 (2021). "As a general rule, 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. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) Id.

The respondents' first claim is that, in rejecting their application for a writ of mandamus, the court misinterpreted the meaning and the finality of the hearing officer's March 15, 2024 decision. The respondents argue in their brief that the issue before the hearing officer was "whether [Isabella] required a residential placement to meet her complex needs" and that "[t]he purpose of the hearing itself and the purpose of the written final decision was to resolve that question with finality." Thus, according to the respondents, it follows that the only reasonable interpretation of the hearing officer's decision was that it legally obligated the department

both to identify an appropriate residential placement for Isabella and, once such a placement was identified, to actually place her into that appropriate care facility. We disagree with the respondents' interpretation of the hearing officer's March 15, 2024 decision.

We conclude that, reading the decision as a whole, the hearing officer's March 15, 2024 decision cannot reasonably be construed as an order requiring the department to place Isabella into a residential treatment program. The hearing officer clearly agreed with the respondents that the department's existing case plan was not adequately meeting Isabella's needs. Nevertheless, the decision contains no language expressly directing the department to place Isabella into a residential treatment facility. Instead, the hearing officer ordered the department to revise the existing treatment plan and to "*explore* appropriate residential care that is directly aimed at addressing the child's primary disability, reactive attachment disorder, as well as her other diagnoses and behavioral struggles, and provide an appropriate plan and placement directed at the permanency plan of reunification." (Emphasis added.) In interpreting a written instrument, judgment, or order, we will afford the language used its ordinary and plain meaning. Here, the hearing officer's direction to the department was to "explore" residential treatment options for Isabella. Consistent with our interpretation of this directive, Merriam-Webster's Collegiate Dictionary defines the word "explore" as meaning "to investigate, study, or analyze: look into." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 441. We agree with the trial court's assessment that, if the hearing officer's decision reasonably can be construed as mandating any particular action by the department, it is that the department revise its treatment plan, including by further investigating the possibility of placing Isabella in a residential treatment program if the department determined that such a placement was appropriate to achieving reunification with the respondents.

Our construction of the hearing officer's decision is also dispositive of the respondents' second claim on appeal, namely, that the court improperly concluded that a writ of mandamus was not the proper mechanism for seeking enforcement of the hearing officer's decision. Under the second prong of the three-pronged test for determining if a writ of mandamus will lie, the party applying for the writ must establish that he or she has "a clear legal right" to the performance of a mandatory duty. The respondents suggest that the hearing officer's decision established this "clear legal right." Given our interpretation of the hearing officer's decision, however, the respondents cannot satisfy prong two because, as we have explained, the March 15, 2024 decision does not mandate that the department place Isabella into a residential treatment program or any other specific placement. At most, the hearing officer's decision granted the respondents the right to have the department devise a new treatment plan and continue to look into the possibility of a residential placement, a duty that the court found the department was meeting. Stated succinctly, the hearing officer's decision did not create a "clear legal right" in the respondents to the remedy they sought by way of mandamus. Accordingly, we cannot conclude that the court abused its discretion when it concluded that the extraordinary remedy of mandamus was inappropriate under the circumstances before it.[10] If the respondents remain unsatisfied with the department's efforts, they are not precluded from pursuing further relief from the department. See footnote 6 of this opinion.

The judgment is affirmed.

In this opinion the other judges concurred.

[10] Because we conclude that the respondents have not satisfied the second prong of the applicable test, we do not decide whether the requirements of prongs one and three of the test are met in the present case or whether other equitable considerations would militate against issuing a writ of mandamus.

J. XAVIER PRYOR *v.* TIMOTHY BRIGNOLE ET AL.

(AC 44253)

(AC 44254)

Elgo, Moll and Cradle, Js.*

Syllabus

The plaintiff sought to recover damages for breach of a contractual nondisparagement clause in connection with anonymous letters detailing criminal charges that had been brought against the plaintiff that the defendant B allegedly sent to various news outlets. The trial court denied the defendants' special motions to dismiss, filed pursuant to the anti-SLAPP statute (§ 52-196a), and the defendants separately appealed. This court dismissed the appeals for lack of a final judgment. On the granting of certification, the defendants appealed to our Supreme Court, which held that the trial court's denials of the special motions to dismiss constituted appealable final judgments, and it reversed the judgment of this court and remanded the case to this court for further proceedings. *Held*:

This court established a bright-line rule that clarified that a moving party, to satisfy its burden under the first prong of § 52-196a (e) (3), must demonstrate that the allegations of the complaint, counterclaim or cross claim in question are predicated on conduct that implicates its right to free speech, its right to petition the government, or its right of association in connection with a matter of public concern, and the focus of that inquiry should be on the substance of those allegations as set forth in the pleadings and not on an admission or denial of those allegations by the moving party.

The trial court improperly construed the first prong of § 52-196a (e) (3) to require a moving party to admit to engaging in the conduct alleged in the operative complaint and, thus, the court improperly denied the special motions to dismiss filed by the defendants on that basis.

The plaintiff could not prevail on his claim that the trial court properly dismissed the defendants' special motions to dismiss on the basis that the conduct alleged in his complaint, which referenced the plaintiff's criminal charges, did not involve a matter of public concern.

The plaintiff could not prevail on his claim that the defendants waived their ability to file special motions to dismiss because the motions were untimely

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

filed, as the trial court implicitly granted the defendants' motions for extensions of time and the plaintiff expressly invited the court to address the merits of the special motions to dismiss.

Argued October 23, 2024—officially released April 1, 2025

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, denied the defendants' special motions to dismiss, from which the defendants filed separate appeals with this court, which granted the plaintiff's motions to dismiss the appeals; thereafter, the defendants, on the granting of certification, appealed to our Supreme Court, which consolidated the appeals and reversed this court's judgments and remanded the case to this court for further proceedings. *Reversed*; *further proceedings*.

Mario K. Cerame, for the appellant in Docket No. AC 44253 (named defendant).

Sarah F. D'Addabbo, for the appellant in Docket No. AC 44254 (defendant Brignole, Bush & Lewis, LLC).

J. Xavier Pryor, self-represented, the appellee in Docket Nos. AC 44253 and AC 44254 (plaintiff).

Opinion

ELGO, J. These appeals involve a novel issue of statutory interpretation regarding a legal standard for which neither the language of the statute nor its legislative history provides clear resolution. It thus falls to this court to divine, as best we can, the proper construction of that statutory standard, ever mindful that it is the prerogative of our General Assembly to modify, alter, and amend the laws of this state.

In these related appeals, the defendants, Timothy Brignole and the law firm of Brignole, Bush & Lewis,

LLC (law firm), appeal from the judgments of the trial court denying their special motions to dismiss filed pursuant to Connecticut's anti-SLAPP statute,[1] General Statutes § 52-196a, in this breach of contract action brought by the self-represented plaintiff, J. Xavier Pryor.[2] On appeal, the defendants claim that the court improperly construed § 52-196a (e) (3)[3] to require a moving party, as part of its initial burden under the first prong of that statute, to admit to engaging in the conduct alleged in the plaintiff's complaint. In response, the plaintiff argues that the alleged conduct did not involve a matter of public concern, as required by § 52-196a (e) (3), and that the defendants waived their ability to file special motions to dismiss because those motions were untimely. We agree with the defendants that the court improperly interpreted § 52-196a (e) (3) and, accordingly, reverse the judgments of the trial court.

We begin by noting that § 52-196a constitutes a "special statutory benefit"; *Lafferty* v. *Jones*, 336 Conn. 332,

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

[2] The appeal in Docket No. AC 44253 is brought by Brignole in his individual capacity, while the appeal in Docket No. AC 44254 is brought by the law firm. Both appeals involve similar claims and briefing by the parties regarding the propriety of the court's denial of their special motions to dismiss. For that reason, we discuss them interrelatedly in this opinion.

[3] General Statutes § 52-196a (e) (3) provides: "The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim."

372, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021); that "provides a moving party with the opportunity to have [a] lawsuit dismissed early in the proceeding and stays all discovery, pending the trial court's resolution of the special motion to dismiss." *Priore* v. *Haig*, 344 Conn. 636, 659, 280 A.3d 402 (2022). "A special motion to dismiss filed pursuant to § 52-196a . . . is not a traditional motion to dismiss based on a jurisdictional ground. It is, instead, a truncated evidentiary procedure enacted by our legislature in order to achieve a legitimate policy objective, namely, to provide for a prompt remedy." *Elder* v. *Kauffman*, 204 Conn. App. 818, 824, 254 A.3d 1001 (2021); see also *Smith* v. *Supple*, 346 Conn. 928, 965, 293 A.3d 851 (2023) (*D'Auria*, *J.*, dissenting) ("[o]n an expedited basis and on a quickly assembled record, a trial judge serves as a gatekeeper, promptly weeding out and dismissing lawsuits that plainly have been filed for [an] illegitimate purpose"); *Barry* v. *State Bar of California*, 2 Cal. 5th 318, 328, 386 P.3d 788, 212 Cal. Rptr. 3d 124 (2017) (noting "the anti-SLAPP statute's central purpose of preventing SLAPPs by ending them early and without great cost to the SLAPP target" (internal quotation marks omitted)).

Section 52-196a (e) (2) instructs that, "[w]hen ruling on a special motion to dismiss, the court shall consider pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based."[4] Our recitation of the relevant facts is gleaned from such materials in the record before us.

[4] Neither the plaintiff nor the defendants filed affidavits in support of or in opposition to the special motions to dismiss. On January 13, 2020, Brignole filed an affidavit in support of his motion for an extension of time to file a responsive pleading, which pertained only to the issue of precisely when he "discovered a copy of the summons and complaint . . . taped to a decorative door to [his] home . . . ."

At all relevant times, Brignole was the owner, manager, and principal of the law firm, which previously employed the plaintiff as an associate attorney. In 2015, the law firm brought a civil action against the plaintiff and another entity. In March, 2018, the plaintiff and the law firm resolved that action by executing a settlement agreement pursuant to which the plaintiff paid the law firm $45,000 in exchange for a general release of all causes of action. The settlement agreement also included a nondisparagement clause, under which the defendants agreed "to not disparage or criticize [the plaintiff] and to not do or say anything that could harm the [plaintiff's] interests or reputation . . . ."

On June 10, 2018, the plaintiff was arrested and charged with assault in the third degree in violation of General Statutes § 53a-61 and risk of injury to a child in violation of General Statutes § 53-21, a fact memorialized on the Judicial Branch website.[5] In his complaint, the plaintiff alleged that, on or about June 20, 2018, Brignole sent or caused to be sent to "various news outlets and persons" an anonymous letter bearing the headline "Attorney Beats Wife In Front of Child," which set forth the factual basis for the charges against the plaintiff, identified the plaintiff by his name, date of birth, and office address, and opined that his conduct was a matter of "public concern" because it implicated his fitness to practice law and that the judicial system was likely to cover up the matter due to his status as an attorney.[6] The plaintiff further alleged that Brignole

[5] A copy of the plaintiff's criminal case detail published on the Judicial Branch website was appended to Brignole's special motion to dismiss as an exhibit.

[6] The anonymous letter states in relevant part: "To Whom It May Concern:

"On June 10, 2018 [the plaintiff] ([o]ffice, 525 Windsor [Avenue], Windsor, CT) was arrested in West Hartford . . . on charges of [a]ssault [in the third] [d]egree 'with intent to cause grave physical injury' and [r]isk of [i]njury to a [m]inor, a [c]lass C [f]elony. While driving a car in West Hartford with his young child in the back seat, [the plaintiff] got in an argument with his wife and he punched her in the face. When he stopped the car, she fled to an

specified the plaintiff's law office as the return address on each correspondence to make it "appear that the information came from the plaintiff's staff."

The plaintiff commenced the present action on September 29, 2019.[7] His complaint contained two counts

adjacent store and called [the] police. The police observed [that] she had a swollen eye from being punched.

"Under [rule 8.4 of the] Connecticut Rules of Professional Conduct . . . it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the fitness of a lawyer. Commentary: [l]awyers are subject to discipline when they violate these rules and 'offenses involving violence, dishonesty and breach of trust are in that category.'

"I bring this to your attention out of public concern and under your watchful eye of enforcing the rules and public mandates. The fact that [the plaintiff] is a lawyer going around assaulting people reflects badly on the legal community as a whole. As a lawyer in the Hartford [c]ourts he is held to a high standard of public trust. His [w]ife and [c]hild are real victims and he needs to be held accountable. Just because he is a lawyer the system will try to cover this up. You are our [v]ictims' [a]dvocates. Help us please."

[7] Approximately three months later, the plaintiff filed a request for leave to amend his complaint. Although plaintiffs normally are permitted to seek amendment of their complaints in accordance with our rules of practice, it is unclear how that precept operates when a special motion to dismiss has been filed pursuant to § 52-196a. As we have noted, the "special statutory benefit" provided by § 52-196a; *Lafferty* v. *Jones*, supra, 336 Conn. 372; is intended to provide "a prompt remedy"; *Elder* v. *Kauffman*, supra, 204 Conn. App. 824; and to minimize expense for moving parties. For that reason, one Connecticut court recently held that "[a] plaintiff cannot avoid a special motion to dismiss by seeking leave to amend its complaint. To allow a plaintiff to do so would undermine the policy objective of providing a prompt remedy for those sued because of their exercise of their first amendment rights." *Birch Hill Recovery Center, LLC* v. *High Watch Recovery Center, Inc.*, Superior Court, judicial district of Litchfield, Docket No. CV-23-6034689-S (February 23, 2024).

In so concluding, the court relied on California precedent, which has provided guidance to the courts of this state in interpreting our anti-SLAPP statute; see, e.g., *Pryor* v. *Brignole*, 346 Conn. 534, 546 n.9, 292 A.3d 701 (2023); *Sicignano* v. *Pearce*, 228 Conn. App. 664, 686, 325 A.3d 1127 (2024), cert. denied, 351 Conn. 908, A.3d (2025); and stated: "California courts generally refuse to allow plaintiffs to amend their complaints to avoid a special motion to dismiss, finding it being antithetical to the purpose of an anti-SLAPP statute." *Birch Hill Recovery Center, LLC* v. *High Watch Recovery Center, Inc.*, supra, Superior Court, Docket No. CV-23-6034689-S. The court then cited a decision of the California Court of Appeal, which states: "Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from . . . [the] quick dismissal remedy. *Instead of having to show a probability of*

sounding in breach of contract. In count one, the plaintiff alleged that Brignole's actions in sending the anonymous letter constituted a breach of the nondisparagement provision of the settlement agreement, which caused him to suffer $55,533.33 in economic damages and deprived him of the benefit of the agreement. Count two incorporated by reference the allegations of count one and further alleged that Brignole "committed the

success on the merits, the SLAPP plaintiff would be able to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading. This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend. By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent. . . . Such a plaintiff would accomplish indirectly what could not be accomplished directly, i.e., depleting the defendant's energy and draining his or her resources. . . . This would totally frustrate the [l]egislature's objective of providing a quick and inexpensive method for unmasking and dismissing such suits." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Sylmar Air Conditioning* v. *Pueblo Contracting Services, Inc.*, 122 Cal. App. 4th 1049, 1055–56, 18 Cal. Rptr. 3d 882 (2004).

We need not resolve the novel question of whether, as a matter of Connecticut law, a party is entitled to amend their complaint following the filing of a special motion to dismiss pursuant to § 52-196a. In the present case, Brignole's counsel noted at the hearing on the special motions to dismiss that the plaintiff had recently filed a request to amend his complaint and expressed uncertainty as to how that procedural vehicle operates in the context of special motions to dismiss. Counsel then argued that his client should have an opportunity to respond to the substance of the plaintiff's request for leave to amend and—in the event that the request was granted—"to respond to [the] amended complaint with a special motion to dismiss as well." Counsel opined that "the special motion to dismiss, I think, has its own operation by statute. It's not like a normal motion to dismiss." He also volunteered to prepare "a second motion to dismiss" later that afternoon in response to the plaintiff's amended complaint "if it would help the court . . . ." Counsel further observed that the scenario in which a nonmoving party seeks to amend its complaint following the filing of a special motion to dismiss was "something that's not contemplated in the statute" and concluded by stating, "honestly, however the court sees fit to deal with it, as long as everybody's heard." In response, the court stated: "[J]ust so . . . we're clear, I'm going to deal with the pleadings as they are." The plaintiff thereafter expressed his agreement with that approach, stating: "[W]ith regard to the amended complaint, it has not been granted yet. . . . I'll concede that the amended complaint is a nullity because it hasn't been granted yet." In this appeal, the propriety of the court's decision to defer consideration of the plaintiff's request for leave to amend his complaint is not at issue.

aforementioned breach of contract in his official capacity as manager, owner, and principal" of the law firm.

On November 12, 2019, the law firm filed a motion for an extension of up to thirty days to file a responsive pleading to the complaint; Brignole filed a similar request seven days later. On November 22, 2019, Brignole, acting in a self-represented capacity,[8] filed two motions with the court. The first was a motion seeking the court's permission to extend the time to file a special motion to dismiss in accordance with § 52-196a (c).[9] The second was a special motion to dismiss the plaintiff's action pursuant to § 52-196a. At the outset of that pleading, Brignole averred that the allegations in the plaintiff's complaint were "baseless." He then stated that, "for sake of the motion, [he] takes well-pleaded facts as though they are true." With respect to the first prong of § 52-196a (e) (3), Brignole argued that the speech alleged in the plaintiff's complaint was "presumptively protected" under the first amendment and that it "falls within the aegis of § 52-196a" because criminal prosecutions are a matter of public concern. He also argued that the plaintiff could not meet his burden under the second prong of § 52-196a (e) (3), which requires the plaintiff to establish probable cause that he will prevail on the merits of his complaint.[10]

[8] On December 12, 2019, Attorney Mario K. Cerame filed an appearance on behalf of Brignole, who at all times thereafter has been represented by counsel.

[9] General Statutes § 52-196a (c) provides: "Any party filing a special motion to dismiss shall file such motion not later than thirty days after the return date of the complaint, or the filing of a counterclaim or cross claim described in subsection (b) of this section. The court, upon a showing of good cause by a party seeking to file a special motion to dismiss, may extend the time to file a special motion to dismiss." The return date in this case was October 15, 2019.

[10] As exhibits to his special motion to dismiss, Brignole appended copies of (1) an attorney grievance complaint that the plaintiff filed against Brignole, (2) the anonymous letter in question, (3) the plaintiff's criminal case detail from the Judicial Branch website, and (4) the written dismissal of the plaintiff's attorney grievance against Brignole issued by the "Grievance Panel for [Geographical Area Thirteen] and the Town of Hartford" on May 2, 2019.

The law firm filed a separate special motion to dismiss the plaintiff's complaint on November 27, 2019, which is similar to Brignole's special motion in all material respects. The law firm first noted that, "as a preliminary matter, [the law firm] denies the allegations in the complaint." It then argued, "taking the allegations as true," that the anonymous letter allegedly sent by Brignole constituted an exercise of his right to free speech on a matter of public concern and that the plaintiff could not meet his burden of showing probable cause that he will succeed on the merits of his breach of contract claim.

On December 6, 2019, the plaintiff filed an objection to the law firm's special motion to dismiss, claiming that it was untimely under § 52-196a (c), as it was filed more than thirty days after the return date of the complaint. Curiously, the plaintiff then stated: "In spite of the foregoing, should the court deem it appropriate, the plaintiff wishes to have [the law firm's] special motion to dismiss decided on the merits, thereby making the court's ruling the law of the case. [The law firm] has waived any claimed first amendment rights to free speech as it relates to this matter [by virtue of the nondisparagement clause of the separation agreement]. . . . [The law firm's] motion should be *denied* on the merits." (Emphasis in original.) Three weeks later, the plaintiff filed an objection to Brignole's special motion to dismiss, claiming that it was untimely under § 52-196a (c) and that Brignole had waived any claimed first amendment rights by virtue of the nondisparagement clause of the separation agreement. The plaintiff thus argued that Brignole's special motion to dismiss should be denied.

The court heard argument on the special motions to dismiss on January 13, 2020. At that time, the court

That written dismissal notes that Brignole denied the factual allegations set forth in the plaintiff's attorney grievance complaint.

invited the parties to submit supplemental briefs on the issue of whether speech that allegedly violated a nondisparagement clause could fall within the ambit of an anti-SLAPP statute.[11] Both defendants filed supplemental briefs in accordance with that directive.

In its subsequent memorandum of decision, the court rejected the defendants' argument that circulation of the anonymous letter constituted an exercise of free speech on a matter of public concern entitled to the protections of § 52-196a. The court stated that the "problem" with that contention was that Brignole, as manager, owner, and principal of the law firm, "denie[d] sending the letters at issue and, thus, denie[d] engaging in any speech at all, protected or not." The court emphasized that the defendants had "submitted no facts whatsoever from which the court can determine that . . . Brignole was exercising his free speech rights. Indeed, [the] pleadings affirmatively state that [Brignole] did not make the statements attributed to him by the complaint." The court rejected the defendants' argument that, for purposes of analyzing a moving party's burden under the first prong of § 52-196a (e) (3), a court may assume the truth of the allegations of the complaint. Rather, the court reasoned that, to properly invoke the special statutory benefit provided by § 52-196a, a moving party must make a threshold showing, by a preponderance of the evidence, that it has been sued for exercising its first amendment rights. The court concluded that the defendants had failed to meet that burden and, accordingly, denied their special motions to dismiss.[12]

[11] At the hearing, the court noted that § 52-196a was "relatively new" and that "there are other states that have similar statutes that are older." The court thus offered the parties an opportunity to file simultaneous supplemental briefs on the issue of whether there are any cases from other states applying their anti-SLAPP statutes in a factual scenario similar to the present case.

[12] Although the plaintiff argued that § 52-196a does not apply to speech that violates a nondisparagement clause between the parties, the trial court did not address that issue. As our Supreme Court has noted, that issue of contractual waiver "more properly [is] considered under the second [prong]

From those judgments, the defendants filed separate appeals with this court. The plaintiff thereafter filed motions to dismiss those appeals for lack of an appealable final judgment, which this court granted. The defendants appealed the propriety of that determination to our Supreme Court, which, in a divided opinion, concluded that a trial court's denial of a colorable special motion to dismiss filed pursuant to § 52-196a is an appealable final judgment under *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). See *Pryor* v. *Brignole*, 346 Conn. 534, 538, 292 A.3d 701 (2023).[13] The court thus remanded the appeals to this court "for further proceedings according to law." Id., 546. In accordance with that directive, we now consider the claims presented by the parties in these appeals.

of § 52-196a (e) (3)." *Pryor* v. *Brignole*, 346 Conn. 534, 546 n.9, 292 A.3d 701 (2023); accord *Thompson* v. *Inglewood Unified School District*, Docket No. B264151, 2016 WL 5462850, *5 n.4 (Cal. App. September 29, 2016) (explaining that "[t]he mere existence of the non-disparagement clause does not defeat defendants' ability to meet their burden" under step one of California's anti-SLAPP statute and that, "[w]hether [the] speech violated the non-disparagement clause is an issue more appropriately addressed in the step [two] probability of prevailing on the claims analysis"); *Lowes* v. *Thompson*, 331 Or. App. 406, 411, 546 P.3d 311 ("unchallenged evidence of a waiver of the rights protected by the anti-SLAPP statute can satisfy a plaintiff's burden to defeat an anti-SLAPP motion once a defendant has satisfied [its] burden at the first step"), review allowed, 372 Or. 560, 551 P.3d 398 (2024). In this appeal, the plaintiff has not raised that contractual waiver issue as an alternative ground of affirmance pursuant to Practice Book § 63-4 (a) (1), and the parties have not briefed it. Accordingly, it is not properly before us.

In addition, we note that the trial court did not explicitly rule on the timeliness objection raised by the plaintiff, which we discuss in part III of this opinion. The court also did not reach the issue of whether the plaintiff satisfied his burden under the second prong of § 52-196a (e) (3) to establish probable cause that he will prevail on the merits of his complaint. That issue, which encompasses the contractual waiver claim raised by the plaintiff in its objections to the special motions to dismiss; see *Pryor* v. *Brignole*, supra, 346 Conn. 546 n.9; is a matter for the court to resolve on remand.

[13] Our Supreme Court likewise was divided in two companion cases released the same day as *Pryor* v. *Brignole*, supra, 346 Conn. 534. See *Robinson* v. *V. D.*, 346 Conn. 1002, 293 A.3d 345 (2023); *Smith* v. *Supple*, supra, 346 Conn. 928.

I

On appeal, the defendants claim that the court improperly concluded that they could not meet their initial burden under § 52-196a (e) (3) of demonstrating that the plaintiff's complaint was based on Brignole's exercise of the right to free speech in light of their denial that Brignole engaged in the conduct alleged therein—namely, sending the anonymous letter regarding the plaintiff's June 10, 2018 arrest to various news outlets and persons. The defendants submit that the pertinent inquiry under the first prong of § 52-196a (e) (3) focuses on the allegations of the complaint, counterclaim or cross claim and does not require a moving party to admit to any facts. That claim presents a question of first impression in this state.[14]

The defendants' claim involves an issue of statutory interpretation, over which our review is plenary. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2020). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall

[14] The plaintiff did not address the defendants' claim regarding the proper interpretation of § 52-196a (e) (3) in his appellate briefs or at oral argument before this court. The burden nonetheless remains on the defendants, as appellants, to establish reversible error on the part of the trial court. See *Jalbert* v. *Mulligan*, 153 Conn. App. 124, 145, 101 A.3d 279, cert. denied, 315 Conn. 901, 104 A.3d 107 (2014).

not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Vitti* v. *Milford*, 336 Conn. 654, 660, 249 A.3d 726 (2020).

A

Our analysis, as always, begins with the language of the statute, which ''affords a defendant a substantive right to avoid litigation on the merits that can be costly and burdensome''; *Smith* v. *Supple*, supra, 346 Conn. 949; through ''the dismissal of a SLAPP suit.'' Id., 935. The statutory right to seek such a dismissal is memorialized in § 52-196a (b), which provides: ''In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim.''[15] The subsections that follow set forth the procedure that governs the exercise of that right. See, e.g., General Statutes § 52-196a (c) (setting deadline to file

[15] General Statutes § 52-196a (a) (2) defines '' '[r]ight of free speech' '' as ''communicating, or conduct furthering communication, in a public forum on a matter of public concern . . . .''

General Statutes § 52-196a (a) (3) defines '' '[r]ight to petition the government' '' as ''(A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body, (B) communication that is reasonably likely to encourage consideration or review of a matter of public concern by a legislative, executive, administrative, judicial or other governmental body, or (C) communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial or other governmental body . . . .''

special motion to dismiss); General Statutes § 52-196a (d) (providing for stay of discovery upon filing of special motion to dismiss); General Statutes § 52-196a (f) (providing for award of costs and attorney's fees to prevailing party).

Section 52-196a (e) pertains to the conduct of the court in acting on a special motion to dismiss. See General Statutes § 52-196a (e) (1) (requiring court to hold expedited hearing on special motion to dismiss); General Statutes § 52-196a (e) (2) (requiring court to consider pleadings and affidavits of parties in ruling on special motion to dismiss); General Statutes § 52-196a (e) (4) (requiring court to rule on special motion to dismiss "as soon as practicable"). The subdivision at issue here, § 52-196a (e) (3), specifies the legal standard to be applied by the trial court in ruling on a special motion to dismiss. It provides: "The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence,[16] that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government,

General Statutes § 52-196a (a) (4) defines " '[r]ight of association' " as "communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ."

[16] To be clear, although § 52-196a (e) (3) references the preponderance of the evidence standard, the statutory scheme does not provide for an evidentiary hearing of any kind. Rather, the court is obligated to hold an expedited hearing on the special motion to dismiss and thereafter render a ruling in light of the "pleadings and supporting and opposing affidavits of the parties attesting to the facts upon which liability or a defense, as the case may be, is based." General Statutes § 52-196a (e) (2). We note in this regard that, during the legislative debate on the bill that became § 52-196a, Representative Doug Dubitsky inquired as to whether it contemplated "an evidentiary hearing that would take place . . . ." 60 H.R. Proc., Pt. 16, 2017 Sess., p. 6888. In response, Representative William Tong explained: "I think it contemplates that the court will certainly conduct a hearing. It doesn't contemplate that a specific evidentiary hearing so docketed would occur but it provides that there will be a hearing on the evidence presented, the pleading, supporting and opposing affidavits . . . ." Id., p. 6889.

or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim."[17] (Footnote added.) General Statutes § 52-196a (e) (3).

"[I]n deciding a special motion to dismiss under § 52-196a (e) (3), Connecticut courts must undertake a two-pronged, burden shifting analysis." *Smith* v. *Supple*, supra, 346 Conn. 933. "Pursuant to § 52-196a (e) (3), a party that files a special motion to dismiss bears the initial burden of demonstrating, by a preponderance of the evidence, that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association . . . in connection with a matter of public concern . . . . If that burden is met, the burden shifts to the party that brought the complaint to demonstrate that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint . . . . For a special motion to dismiss to be granted, the court must resolve both prongs in favor of the moving party." (Citation omitted; internal quotation marks omitted.) *Mulvihill* v. *Spinnato*, 228 Conn. App. 781, 787–88, 326 A.3d 251, cert. denied, 350 Conn. 926, 326 A.3d 248 (2024). In the present case, the court concluded that the defendants had not met their burden under the first prong of § 52-196a (e) (3) and

[17] Section 52-196a (g) provides that any findings or determinations made by the court pursuant to § 52-196a (e) "shall not be admitted into evidence at any later stage of the proceeding or in any subsequent action."

therefore did not consider whether the plaintiff satisfied his corresponding burden under its second prong.

Our analysis, therefore, focuses on the first prong of § 52-196a (e) (3), which obligates the moving party to establish "that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association" under the federal or state constitutions.[18] In construing that language, the defendants emphasize that it centers on the nature of the complaint at issue. They contend that the salient question under the first prong is whether a fair reading of the complaint indicates that it pertains to alleged conduct that may be considered an exercise of first amendment rights. In their view, whether or not the moving party admits or denies those allegations is irrelevant to that threshold inquiry. The defendants further argue that a contrary construction would deprive defendants of protection for anonymous speech and situations in which a plaintiff patently lies about a defendant's speech or conduct. Moreover, because the second prong of § 52-196a (e) (3) involves a merits based analysis to determine whether the plaintiff has established probable cause of prevailing on the complaint, the defendants argue that the moving party's admission or denial of the material allegations more properly is considered as part of that secondary analysis.

In its memorandum of decision, the trial court adopted a different construction. Because § 52-196a (b) and (e) (3) explicitly require proof that a complaint is based on the moving party's *exercise* of its first amendment rights, the court concluded that a party may avail

[18] We note that § 52-196a (b), which memorializes the statutory right to seek a prompt dismissal of a SLAPP suit at the outset of litigation, contains largely identical language.

itself of the special motion to dismiss procedure authorized by § 52-196a—and meet its statutory burden under the first prong of § 52-196a (e) (3)—only when it acknowledges that it has exercised those rights as alleged in the complaint. In this regard, we note that Connecticut's anti-SLAPP statute was enacted "to address situations in which people have spoken out on matters of public concern" and thereafter were subjected to abusive litigation. (Internal quotation marks omitted.) *Lafferty* v. *Jones*, supra, 336 Conn. 382 n.36; see also *Smith* v. *Supple*, supra, 346 Conn. 944 n.13 (§ 52-196a is intended to provide "a mechanism that can save money for defendants that are wrongly targeted for simply *exercising* their rights . . . on the [first] [a]mendment and other matters of public concern" (emphasis added; internal quotation marks omitted)). When a moving party pursuing a special motion to dismiss denies exercising its first amendment rights, the protections provided by § 52-196a arguably have no application. See *Pryor* v. *Brignole*, supra, 346 Conn. 552 (*D'Auria*, *J.*, dissenting).

Under our rules of statutory construction, ambiguity arises whenever statutory language is subject to more than one plausible interpretation. See, e.g., *Redding* v. *Georgetown Land Development Co., LLC*, 337 Conn. 75, 84 n.9, 251 A.3d 980 (2020) ("[o]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation" (internal quotation marks omitted)); *Commissioner of Correction* v. *Freedom of Information Commission*, 307 Conn. 53, 68, 52 A.3d 636 (2012) ("[b]ecause we believe that both of these interpretations are plausible, we conclude that the language [in question] is ambiguous"). In our view, it is plausible that the legislature intended the inquiry under the first prong of § 52-196a (e) (3) to focus exclusively on the allegations of the complaint to determine whether they

allege conduct that implicates the moving party's first amendment rights, particularly because the second prong of § 52-196a (e) (3) entails a merits based determination. At the same time, it is equally plausible that the legislature's repeated use of the phrase "based on the moving party's exercise" of its first amendment rights in § 52-196a (b) and (e) (3) was a deliberate attempt to confine the protections of our anti-SLAPP statute to parties that had, in fact, exercised those rights. Under that scenario, the first prong of § 52-196a (e) (3) would require the moving party, as part of its initial burden, to demonstrate that it had engaged in the exercise of first amendment rights. We therefore conclude that the statutory language in question is subject to more than one plausible interpretation. For that reason, § 52-196a (e) (3) is ambiguous as applied to the facts of this case. Accordingly, resort to extratextual materials is warranted. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 17, 981 A.2d 427 (2009).

B

The legislative history of § 52-196a provides important context for the present discussion.[19] It nevertheless does not resolve the novel question before us.

In 2017, the legislature passed No. 17-71 of the 2017 Public Acts (P.A. 17-71), which became effective on January 1, 2018, joining dozens of states that already had enacted anti-SLAPP statutes. The legislative history of P.A. 17-71, §1, indicates that it was modeled after anti-SLAPP statutes from other states. See 60 S. Proc., Pt. 6, 2017 Sess., p. 2236, remarks of Senator John A. Kissel (explaining that P.A. 17-71 "is a compilation of some of the best laws . . . from throughout the United States"); 60 H.R. Proc., Pt. 16, 2017 Sess., p. 6884, remarks of Representative William Tong (noting that

[19] Neither the plaintiff nor the defendants discuss the legislative history of § 52-196a in any manner in their respective appellate briefs.

"twenty-nine other states have adopted . . . legislation very similar to the construct we have here"). As Klarn DePalma, vice president and general manager at WFSB-TV 3, testified at the hearing on P.A. 17-71, the language of the proposed bill was "similar to [existing anti-SLAPP statutes in] California, Oregon, Texas and Washington." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602.

The legislative history also indicates that, in enacting P.A. 17-71, our General Assembly sought to balance a defendant's first amendment rights with a plaintiff's right to pursue a claim in our courts, a right guaranteed by our state constitution.[20] As DePalma testified, P.A. 17-71 "would protect individuals and organizations that speak, petition the government, and associate with others on [a] matter of public [concern] from lengthy, expensive litigation, while preserving the ability of people and businesses to file meritorious lawsuits." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602. Eric Parker, an investigative reporter, testified similarly that P.A. 17-71 "gives defendants a way to short circuit litigation that's only designed to harass, threaten and intimidate. It sets up a clear test. If the complaint shows a bare minimum of validity, it moves forward. If it does not, the defendant can end the litigation quickly and without the months of delays and expenses that come with it. It doesn't mean valid lawsuits won't get prosecuted. Those claims do exist and they should be allowed to move forward. The plaintiffs deserve every ounce of the rights the courts give them. But when a lawsuit aims to just silence free speech, especially on a matter of public concern, this bill establishes a special motion to dismiss." Conn.

[20] The constitution of Connecticut, article first, § 10, provides in relevant part: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law . . . ."

Joint Standing Committee Hearings, Judiciary, Pt. 9, 2017 Sess., pp. 4779–80.

The legislative debate on P.A. 17-71 also demonstrates that the General Assembly was keenly aware of the need to balance those constitutional interests. As Representative Rosa C. Rebimbas noted: "[T]his legislation does provide for an expedited hearing and the purpose . . . [strikes] a gentle balance between free speech by being able to resolve any issues once it's brought before the court's attention . . . ." 60 H.R. Proc., supra, pp. 6881–82. Representative Tong, who sponsored the bill in the House of Representatives, likewise recognized that a plaintiff who files suit "has generally a right to have his or her claims heard . . . ." Id., p. 6909; accord *Palazzo* v. *Alves*, 944 A.2d 144, 150 n.11 (R.I. 2008) (anti-SLAPP statutes "pit two sets of fundamental constitutional rights against each other: (1) defendants' rights of free speech and petition and (2) plaintiffs' rights of access to the judicial system and rights to non-falsely maligned reputations" (internal quotation marks omitted)). The proper construction of § 52-196a, therefore, must be cognizant of those constitutional interests.

Unfortunately, the legislative history is silent on the precise question before us, which is whether a moving party may satisfy its initial burden under the first prong of § 52-196a (e) (3) without admitting to engaging in an exercise of a first amendment right. Moreover, the legislative history contains statements that support the competing constructions advanced by the defendants and the trial court.

The trial court construed the first prong of § 52-196a (e) (3) as requiring the moving party to demonstrate, as part of its initial burden, that it had engaged in the exercise of a first amendment right. That interpretation is supported by several statements in the legislative

history that suggest that § 52-196a was enacted to protect parties who had, in fact, exercised those rights. As Representative Tong stated: "[T]he statute contemplates that the person [who brings a special motion to dismiss] is exercising their right of free speech, their right of petition, their right of association . . . ." 60 H.R. Proc., supra, p. 6895. Tong similarly stated that P.A. 17-71 "provides for a special motion to dismiss so that early in the process *somebody who's speaking and exercised their constitutional right* can try to dismiss a frivolous or abusive claim that has no merit . . . ." (Emphasis added.) Id., p. 6879. Tong later remarked that "the purpose of the statute and the way that it operates is to provide that a [party] can dismiss a claim . . . because they're exercising their constitutional right to free speech." Id., p. 6950; see also Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602 (statement of DePalma that P.A. 17-71 "would protect individuals and organizations that speak, petition the government, and associate with others on [a] matter of public [concern]"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2017 Sess., p. 4917 (letter from Michael P. Ryan, president of the Connecticut Broadcasters Association, explaining that "anti-SLAPP laws were enacted [in other states] to help private citizens who spoke out at public hearings"); id., p. 4929 (letter from Motion Picture Association of America noting that "SLAPP suits are baseless lawsuits brought for the purpose of silencing those who exercise their [f]irst [a]mendment rights" and expressing support for anti-SLAPP statutes, "which provide a means for those sued for [the] exercise of their [f]irst [a]mendment rights on public issues"); id., p. 4922 (letter from David McGuire, executive director of American Civil Liberties Union of Connecticut, stating that "a SLAPP suit . . . is a civil lawsuit or counterclaim filed against individuals or organizations who speak out on issues of public interest or concern").

At the same time, the legislative history contains other statements that may be read to support the defendants' contention the legislature intended the inquiry under the first prong of § 52-196a (e) (3) to focus exclusively on the allegations of the complaint to determine whether they allege conduct that implicates the moving party's first amendment rights, thereby permitting the moving party to deny or assume the truth of the allegations for purposes of that analysis. During the debate in the House of Representatives, Representative Richard A. Smith raised a question on the "section [of P.A. 17-71] that gives the [trial court] some guidance to decide on how or whether or not to grant this type of motion?" 60 H.R. Proc., supra, p. 6902. In response, Representative Tong referenced the provision of P.A. 17-71 that set forth "the relative burdens among the parties" and explained that it required the moving party "to make . . . a competent showing before the court that in fact *a claim implicates* the exercise of a constitutional right . . . ." (Emphasis added.) Id. Later in that debate, Representative Arthur J. O'Neill remarked: "I thought that . . . the person filing a special motion to dismiss . . . had to show [that] the subject matter of the lawsuit was a matter of public concern or a right to freedom of speech or a right to petition the government and a right of association, which is given a definition; and if that's what is in effect being targeted—*one of those rights is the target of the underlying lawsuit*." (Emphasis added.) Id., p. 6938; cf. 60 S. Proc., supra, p. 2235, remarks of Senator Paul R. Doyle ("the real intent of the legislation is to assist people that are sued on their free speech rights to have a means to quickly get rid of frivolous lawsuits").

Although legislative history can be illuminating when it documents a clear intention on the part of legislators in enacting a given statute, it provides little guidance when it contains conflicting statements or a clouded

reflection of legislative deliberation. See, e.g., *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 568, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) ("[L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become . . . an exercise in looking over a crowd and picking out your friends." (Internal quotation marks omitted.)); *Washington Alliance of Technology Workers* v. *Dept. of Homeland Security*, 50 F.4th 164, 203 n.10 (D.C. Cir. 2022) (Henderson, J., concurring) (noting "the danger of using legislative history" when it contains "conflicting legislative history"), cert. denied, U.S. , 144 S. Ct. 78, 217 L. Ed. 2d 14 (2023); *Gaylor* v. *Mnuchin*, 919 F.3d 420, 431 (7th Cir. 2019) ("[c]onflicting statements among members of Congress . . . reveal the unreliability of this legislative history"); *Little* v. *Shell Exploration & Production Co.*, 690 F.3d 282, 291 (5th Cir. 2012) ("[t]he divergent messages that can be obtained from legislative history render [it] prone to selective use"); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) ("[o]ften there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize"); *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 451–52, 988 A.2d 351 (2010) (concluding that, because "[t]he legislative history surrounding [General Statutes] § 52-249a is murky" and "[c]ertain portions of the legislative history support the claims of each party," "[t]he legislative history of § 52-249a plainly is not a clear and unequivocal expression of intent"). Given the murky, and at times contradictory, nature of the legislative history of § 52-196a, we cannot resolve the interpretive question before us on that basis alone.

C

As our Supreme Court has observed, § 52-196a "affords a defendant a substantive right to avoid litigation on the merits that can be costly and burdensome

. . . .” *Smith* v. *Supple*, supra, 346 Conn. 949. The defendants thus argue that § 52-196a must be broadly construed in favor of parties that file special motions to dismiss, consistent with the maxim that remedial statutes are to be “liberally construed in favor of those whom the legislature intended to benefit.” (Internal quotation marks omitted.) *Larsen Chelsey Realty Co.* v. *Larsen*, 232 Conn. 480, 492, 656 A.2d 1009 (1995).

We perceive several problems with the defendants’ contention. Although the aim of § 52-196a undoubtedly is salutary, the scant legislative history on this point suggests that the General Assembly intended its application to be narrow, rather than far-reaching, in scope. See 60 S. Proc., supra, p. 2237, remarks of Senator Kissel (explaining that legislature “worked very closely with the Connecticut Trial Lawyers Association to make sure that it was not overly broad” and that “it is narrowly tailored for these [SLAPP] suits which have . . . a chilling effect on first amendment rights”); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2017 Sess., p. 4922 (letter from American Civil Liberties Union of Connecticut expressing support for “a carefully calibrated anti-SLAPP legislation”).

Moreover, had the legislature intended to mandate a broad interpretation of § 52-196a, it certainly knew how to do so; see *Genesky* v. *East Lyme*, 275 Conn. 246, 258, 881 A.2d 114 (2005); as it expressly has done in other contexts. See, e.g., General Statutes § 9-368o (“[a]ny provision of the general statutes . . . relating to the right to vote shall be construed liberally”); General Statutes § 10a-109p (“[§§] 10a-109a to 10a-109y, inclusive, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes thereof”); General Statutes § 38a-861 (“[§§] 38a-858 to 38a-875, inclusive, shall be liberally construed to effect the purpose under [§] 38a-859”);

General Statutes § 45a-468 (b) ("[§§] 45a-468 to 45a-468m, inclusive, and [§] 45a-369 shall be liberally construed and applied to promote its underlying purposes"). The legislature did not include such a directive in our anti-SLAPP statute. Contra Cal. Civ. Proc. Code § 425.16 (a) (Deering Supp. 2021) (California anti-SLAPP statute "shall be construed broadly"); Kan. Stat. Ann. § 60-5320 (k) (2016) ("[t]he provisions of the [Kansas anti-SLAPP statute] shall be applied and construed liberally to effectuate its general purposes"); Or. Rev. Stat. Ann. § 31.152 (6) (West 2017) (Oregon anti-SLAPP statute "to be liberally construed in favor of the exercise" of first amendment rights).

In addition, the legislative history plainly indicates that the General Assembly, in enacting § 52-196a, was cognizant of the need to carefully balance a defendant's first amendment rights with a plaintiff's right to pursue a claim in our courts, a right secured under article first, § 10, of our state constitution. See 60 H.R. Proc., supra, pp. 6881–82, remarks of Representative Rebimbas ("this legislation does provide for an expedited hearing and the purpose . . . [strikes] a gentle balance between free speech by being able to resolve any issues once it's brought before the court's attention"); id., p. 6909, remarks of Representative Tong (explaining that plaintiff who files lawsuit "has generally a right to have his or her claims heard"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2017 Sess., p. 4780, testimony of Eric Parker ("valid lawsuits" should "be allowed to move forward" and plaintiffs who bring them "deserve every ounce of the rights the courts give them"); see also *Smith* v. *Supple*, supra, 346 Conn. 967 (*D'Auria*, *J.*, dissenting) (legislative history of § 52-196a indicates that "the legislature balanced the rights of plaintiffs who claim damages to pursue legal action in our courts . . . and the rights of defendants who claim that the action is nothing more than retaliation for exercising

their protected constitutional rights" (citation omitted; footnote omitted)). Because the legislature expressly acknowledged the competing constitutional interests at stake and delicately balanced them in crafting § 52-196a, we are hesitant to mandate a liberal construction of that statute in favor of moving parties, as urged by the defendants. Indeed, in the seven years since it was enacted, neither our Supreme Court nor any Connecticut court has applied that maxim of statutory interpretation to § 52-196a. We decline the defendants' invitation to do so now.

D

The legislative history of § 52-196a also indicates that it was predicated on, and borrowed heavily from, anti-SLAPP statutes enacted in other states.[21] See 60 S. Proc., Pt. 6, 2017 Sess., p. 2236, remarks of Senator Kissel; Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602, remarks of Klarn DePalma; see also *Smith* v. *Supple*, supra, 346 Conn. 953 n.22 ("[a]n examination of . . . sister state case law is particularly instructive . . . because the legislative history of our anti-SLAPP statute signifies that it was modeled after anti-SLAPP statutes that came before it in other states"). For that reason, a review of relevant authority from sibling states is pertinent to the present inquiry.

We begin with a case from Texas, whose anti-SLAPP statute served as a model for § 52-196a. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602, remarks of Klarn DePalma. Like § 52-196a, the Texas anti-SLAPP statute "provides a procedure for expeditiously dismissing a non-meritorious

[21] As one court noted, "[o]ver thirty states now have anti-SLAPP statutes in place, and while the particular language varies, the stated purpose of anti-SLAPP legislation is consistent." *Nandigam Neurology, PLC* v. *Beavers*, 639 S.W.3d 651, 659 (Tenn. App. 2021).

legal action that is based on, relates to, or is in response to the party's exercise of . . . the right of free speech . . . defined as a communication made in connection with a matter of public concern." (Footnote omitted; internal quotation marks omitted.) *Hersh* v. *Tatum*, 526 S.W.3d 462, 463 (Tex. 2017). Moreover, like § 52-196a (e) (3), the legal standard articulated in the Texas anti-SLAPP statute contains two prongs that impose reciprocal burdens on parties. See Tex. Civil Code Ann. § 27.005 (West 2019). Under its first prong, a party may move to dismiss a civil action if that action "is based on, relates to, or is in response to a party's exercise of . . . the right of free speech . . . the right to petition; or . . . the right of association . . . ." Tex. Civil Code Ann. § 27.005 (b) (1) (West 2019). As with Connecticut's anti-SLAPP statute; see General Statutes § 52-196a (e) (2); the Texas anti-SLAPP statute directs its courts to consider, inter alia, "the pleadings" and the "supporting and opposing affidavits stating the facts on which the liability or defense is based."[22] Tex. Civil Code Ann. § 27.006 (West 2019).

In *Hersh* v. *Tatum*, supra, 526 S.W.3d 463, the Texas Supreme Court confronted the precise question now before this court—whether "a defendant [may] obtain dismissal of a suit [under the first prong of Tex. Civil Code Ann. § 27.005] alleging such a communication if she denies making it?" The defendant in that case denied making the statements in question; in response,

[22] Like other jurisdictions, Texas has seen a proliferation of appellate litigation since adopting its anti-SLAPP statute. As one commentator notes: "Since being enacted in 2011, the Texas Anti-SLAPP statute is by far the subject of more appeals than any other topic. Texas courts of appeals have issued already over 350 opinions concerning the statute's reach, while dozens more await rulings. At least 15 anti-SLAPP cases are now pending in the Texas Supreme Court. No one should be surprised to learn that more than one in ten of the opinions now coming out of the appellate courts of Texas concern anti-SLAPP." D. Felton, "Avoid the SLAPP Trap," 57 Houston Law. 22 (2019).

the plaintiffs "argued that [the defendant] cannot invoke the [anti-SLAPP statute] while continuing to deny . . . the communication that is the basis of their complaint." Id., 465. After the trial court granted the defendant's motion to dismiss, the Texas Court of Appeals—like the trial court in the present case—concluded that "a defendant who denies making the communication alleged [in the plaintiff's complaint] cannot invoke" the protections of the anti-SLAPP statute. Id.

On appeal, the Texas Supreme Court disagreed with that determination. In so doing, it emphasized that the anti-SLAPP statute obligates the trial court, in ruling on a special motion to dismiss, to consider the pleadings, and the complaint in particular. As it stated: "Indeed, it would be impossible to determine the basis of a legal action, and thus the applicability of the [anti-SLAPP statute], *without* considering the plaintiff's petition. . . . [T]he plaintiff's petition . . . is the best and all-sufficient evidence of the nature of the action. . . . The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations." (Emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 467. The court thus reasoned that, "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the [anti-SLAPP statute], the defendant need show no more [under the first prong of the legal standard set forth therein]. . . . [A] defendant moving for dismissal need show only that the plaintiff's 'legal action is based on, relates to, or is in response to the [defendant's] exercise of . . . the right of free speech' . . . that is, 'a communication made in connection with a matter of public concern' . . . not that the communication actually occurred." (Footnotes omitted.) Id. Accordingly, the Texas Supreme Court concluded that the defendant had satisfied her burden under the first prong of the anti-SLAPP

statute "[b]y relying on the language used" in the plaintiffs' complaint. Id., 468.

The Supreme Court of Nevada reached a similar result in *Spirtos* v. *Yemenidjian*, 137 Nev. 711, 499 P.3d 611 (2021). As our Supreme Court has observed, Nevada's anti-SLAPP statute is "similarly worded" to § 52-196a. *Pryor* v. *Brignole*, supra, 346 Conn. 544. Like § 52-196a (e) (3), Nevada's anti-SLAPP statute mandates that, "[u]nder step one of the anti-SLAPP evaluation, the [trial] court must '[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.' " *Spirtos* v. *Yemenidjian*, supra, 711. The question presented in *Spirtos* was "how a [trial] court at step one of the anti-SLAPP evaluation should proceed when the moving party denies making the alleged communication." Id. Because that first prong centers on the "claim" asserted against a defendant, the court reasoned that the trial court "should evaluate the statement forming the basis of the plaintiff's complaint, which, in this case was the version of the statement that [the plaintiff] alleged [that the defendant] made." Id., 715. The court explained that, "at step one of the anti-SLAPP analysis, a [trial] court and this court must evaluate the communication as it is alleged in the plaintiff's complaint and in any of the plaintiff's clarifying declarations." Id. For that reason, the Supreme Court of Nevada concluded that "a moving party's denial that he or she made the alleged statements has no relevance at step one of the anti-SLAPP evaluation." Id., 720.

Also germane to the inquiry before us is a decision of the Court of Appeals of Kansas. In *T & T Financial of Kansas City, LLC* v. *Taylor*, 2017 WL 6546634, *1

(Kan. App. December 22, 2017) (unpublished opinion),[23] the trial court denied a motion to dismiss a defamation action pursuant to the Kansas anti-SLAPP statute "for the sole reason that [the defendant] denied making some of the communications identified" in the plaintiff's complaint; id., *4; the same basis on which the trial court denied the special motion to dismiss in the present case. In reviewing the propriety of that legal determination, the Court of Appeals of Kansas first noted that the anti-SLAPP statute, Kan. Stat. Ann. § 60-5320 (d),[24] "requires a two-step analysis for the [trial] court to determine if the motion to strike should be granted. First, a party bringing the motion to strike has the initial burden of showing that the claim against which the motion is based concerns a party's exercise of the right of free speech, the right to petition, or the right of association. Second, if the moving party meets this initial burden, the burden then shifts to the responding party to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case." Id.

Like the trial court in the present case, the plaintiff in *T & T Financial of Kansas City, LLC*, focused on

[23] *T & T Financial of Kansas City, LLC*, was not designated for publication. Its reasoning nonetheless was adopted by the Court of Appeals of Kansas in the subsequent decision of *Doe* v. *Kansas State University*, 61 Kan. App. 2d 128, 143, 499 P.3d 1136 (2021).

[24] The legal standard set forth in Kansas' anti-SLAPP statute is similar to that contained in § 52-196a (e) (3). It provides in relevant part: "A party may bring a motion to strike the claim if a claim is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association. A party bringing the motion to strike has the initial burden of making a prima facie case showing the claim against which the motion is based concerns a party's exercise of the right of free speech, right to petition or right of association. If the moving party meets the burden, the burden shifts to the responding party to establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case. If the responding party meets the burden, the court shall deny the motion. . . ." Kan. Stat. Ann. § 60-5320 (d) (2016).

the language in the anti-SLAPP statute that requires the moving party to demonstrate, as part of its initial burden, that the opposing party's claim concerns the moving party's *exercise* of a first amendment right. As the Court of Appeals of Kansas explained, the plaintiff "contends that this language requires [the defendant] to admit to the allegations in question before filing a motion to strike. [The plaintiff] asserts that since [the defendant] denies making the allegedly defamatory statements, she could not have engaged in the exercise of free speech; thus, she should not be afforded the protection of the statute." Id., *5. The Court of Appeals of Kansas disagreed, stating: "[W]e conclude that whether a party may properly bring a motion to strike turns solely on the contents of the plaintiff's claims. [The anti-SLAPP statute] provides that a party may bring a motion to strike if *a claim* is based on a party's exercise of a protected right. Moreover, a party bringing the motion to strike has the initial burden of showing that *the claim* against which the motion is based concerns a party's exercise of a protected right. Put simply, step one of the analysis under [the anti-SLAPP statute] only concerns the content of the claims. As a result, whether [the defendant] later admits or denies the allegations is not relevant regarding step one [of the] analysis because the district court should only consider the contents of the claims in the petition." (Emphasis in original.) Id. For that reason, the court concluded that the trial court "erred by denying the motion to strike based solely on the reason that [the defendant] denied making some of the communications in question. We interpret [the anti-SLAPP statute] to mean that a party bringing a motion to strike has the initial burden of showing that the claims in the plaintiff's petition implicate a protected right under the statute, and it is irrelevant whether the defendant admits or denies making the statements in question." Id., *6.

The Court of Appeals of Kansas further observed that "[t]he fact that [the defendant] denied making some of the statements in question may have a bearing on the second step in the analysis under [the anti-SLAPP statute], but the [trial] court never reached the second step in the case herein." Id. That precept is consistent with California law, which consistently has held that "merits based arguments have no place in [the] threshold analysis of whether plaintiffs' causes of action arise from protected activity" under the first prong of the anti-SLAPP analysis. *Freeman* v. *Schack*, 154 Cal. App. 4th 719, 733, 64 Cal. Rptr. 3d 867 (2007); accord *Navellier* v. *Sletten*, 29 Cal. 4th 82, 94, 52 P.3d 703, 124 Cal. Rptr. 2d 530 (2002) (courts cannot add proof of validity requirement to first prong of anti-SLAPP analysis and any claimed illegitimacy of defendant's acts is only relevant to second prong); *Malin* v. *Singer*, 217 Cal. App. 4th 1283, 1304, 159 Cal. Rptr. 3d 292 (2013) (defendants' denial of plaintiff's allegations irrelevant to first prong and "is more suited to the second step of an anti-SLAPP motion" (internal quotation marks omitted)); *Costa Mesa* v. *D'Alessio Investments, LLC*, 214 Cal. App. 4th 358, 371, 154 Cal. Rptr. 3d 698 (2013) ("[t]he merits of [the plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis"); *Coretronic Corp.* v. *Cozen O'Connor*, 192 Cal. App. 4th 1381, 1388, 121 Cal. Rptr. 3d 254 (2011) ("[a]rguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis"); *Fox Searchlight Pictures, Inc.* v. *Paladino*, 89 Cal. App. 4th 294, 305, 106 Cal. Rptr. 2d 906 (2001) (threshold question of whether anti-SLAPP statute applies is distinct from question of whether plaintiff has established probability of success).

In our view, the foregoing authority is well reasoned and convincing. It also is consonant with the policies and purposes of Connecticut's anti-SLAPP statute, as

articulated in the legislative history before us. Furthermore, our research has not disclosed controlling authority from any jurisdiction that obligates a moving party, under the first prong of an anti-SLAPP analysis, to admit the truth of an opposing party's allegations. To conclude otherwise would deny parties the protections of § 52-196a when a complaint contains false allegations about their conduct. For that reason, we join those jurisdictions that have held that the merits of a complaint—and the moving party's corresponding admission or denial of the allegations therein—have no bearing on the threshold inquiry under § 52-196a (e) (3) as to whether the moving party has made "an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern . . . ."

E

Our conclusion today establishes a bright-line rule that provides clarity to both litigants and the judges of this state in applying our anti-SLAPP statute. It bears emphasis that the special motion to dismiss codified in § 52-196a is "a truncated evidentiary procedure enacted by our legislature in order to . . . provide for a prompt remedy." *Elder* v. *Kauffman*, supra, 204 Conn. App. 824; see also General Statutes § 52-196a (e) (1) (requiring court to conduct "an expedited hearing" on special motion to dismiss); *Smith* v. *Supple*, supra, 346 Conn. 947 n.16 (§ 52-196a "provides an 'expedited off-ramp' for a party to avoid further litigation); *Priore* v. *Haig*, supra, 344 Conn. 659 (§ 52-196a "provides a moving party with the opportunity to have [a] lawsuit dismissed

early in the proceeding"). In our view, a clear demarcation of the respective burdens of the parties is necessary to effectuate that expeditious intent.

To satisfy its burden under the first prong of § 52-196a (e) (3), a moving party therefore must demonstrate that the allegations of the complaint, counterclaim or cross claim in question are predicated on conduct that implicates its right to free speech, its right to petition the government, or its right of association in connection with a matter of public concern. The focus of that initial inquiry is on the substance of those allegations, as set forth in the pleadings and any supplemental affidavits submitted by the nonmoving party; see General Statutes § 52-196a (e) (2); and *not* on an admission or denial of those allegations by the moving party. Any denial of the pertinent allegations by a moving party or indication that it was not engaged in the exercise of a first amendment right remains relevant to the inquiry under the second prong of § 52-196a (e) (3), which requires a nonmoving party to establish probable cause that it will prevail on the merits of its complaint.[25]

[25] Our courts must be "mindful that anti-SLAPP motions to dismiss are designed to weed out meritless claims at an early stage of litigation . . . and that, with respect to the second prong of § 52-196a (e) (3), they are governed by a minimal legal standard." (Citation omitted.) *Mulvihill* v. *Spinnato*, supra, 228 Conn. App. 801; see also *Elder* v. *Kauffman*, supra, 204 Conn. App. 825 ("[p]roof of probable cause is not as demanding as proof by a preponderance of the evidence"); *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 442, 39 A.3d 1139 (2012) (noting "the very low burden of proof required in a probable cause hearing"); cf. *Mindys Cosmetics, Inc.* v. *Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) ("the second step of the anti-SLAPP inquiry is often called the 'minimal merit' prong"); *Priore* v. *Haig*, supra, 344 Conn. 670 (*D'Auria, J.*, concurring) ("the special motion to dismiss permitted under § 52-196a is easily defeated under a probable cause standard"). Moreover, because the procedural mechanism embodied in that second prong is "similar to a motion for summary judgment"; *Elder* v. *Kauffman*, supra, 824; "when disputed issues of fact arise in the context of a special motion to dismiss, [Connecticut courts must] view the pleadings and affidavits of the parties in the light most favorable to the nonmoving party" in determining whether the nonmoving party has established probable cause under the second prong of § 52-196a (e) (3). *Mulvihill* v. *Spinnato*, supra, 797, 802.

In light of the foregoing, we conclude that the trial court improperly construed the first prong of § 52-196a (e) (3) to require a moving party to admit to engaging in the conduct alleged in the operative complaint. It, therefore, improperly denied the special motions to dismiss filed by the defendants on that basis.

II

Despite that infirmity, the plaintiff contends that the court properly denied the special motions to dismiss under the first prong of § 52-196a (e) (3) because the conduct alleged in his complaint did not involve a matter of public concern. That claim requires little discussion.

As part of its initial burden under § 52-196a (e) (3), a moving party must demonstrate that the allegations of the complaint, counterclaim or cross claim in question are premised on conduct that implicates its first amendment rights "in connection with a matter of public concern . . . ." " 'Matter of public concern' " is defined in § 52-196a (a) (1) as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ."[26]

[26] The proper scope of matters of public concern, as that terminology is used in § 52-196a, remains an unanswered question, and one that ultimately must be resolved by either the legislature or the courts of this state. Although the statute defines " '[m]atter of public concern' " in part as "an issue related to . . . community well-being"; see General Statutes § 52-196a (a) (1) (B); "community well-being" is not defined in our anti-SLAPP statute. As we recently noted, community well-being "is a nebulous, broadly worded, and potentially far-reaching term. If the defendant here is correct that a real estate agent's conduct is a matter of community concern sufficient to preclude actions regarding defamatory statements, is the same not true for the conduct of other licensed professionals in the community, such as teachers, child care providers, or plumbers? Broadly construed, a matter of 'community well-being' may pertain to the conduct of any business establishment that is open to the public." *Mulvihill* v. *Spinnato*, supra, 228 Conn. App. 789 n.14. In his appellate reply brief, Brignole acknowledges that § 52-196a (a) (1) "provides a sweepingly broad definition of 'matter of public concern' "

In his complaint, the plaintiff alleges that Brignole sent an anonymous letter regarding the plaintiff's June 10, 2018 arrest to "various news outlets and persons" that bore the headline "Attorney Beats Wife In Front of Child" and stated in relevant part that the plaintiff had been arrested and charged with the crimes of "[a]ssault [in the third] [d]egree 'with intent to cause grave physical injury' and [r]isk of [i]njury to a [m]inor, a [c]lass C [f]elony. . . ." See footnote 6 of this opinion. In addition, the anonymous letter specified the "criminal docket" number assigned by the Judicial Branch in connection with those offenses. As our Supreme Court has observed, "[i]t is well established that [t]he commission of crime [and] prosecutions resulting from it . . . are without question events of legitimate concern to the public . . . . Indeed, [p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern." (Citation omitted; internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 415, 125 A.3d 920 (2015); see also *Squeglia* v. *Squeglia*, 234 Conn. 259, 266 n.6, 661 A.2d 1007 (1995) ("the perpetration of a crime by a parent upon a child is a matter of public concern"). Bound by that authority, we conclude that the conduct alleged in the plaintiff's complaint involved a matter of public concern for purposes of § 52-196a (e) (3).[27]

and argues that the defendant's arrest for the crime of assault concerns a matter of community well-being.

[27] The plaintiff also argues that the defendants cannot satisfy their burden under the first prong of § 52-196a (e) (3) to demonstrate that the conduct in question constitutes speech on a matter of public concern, as opposed to a matter of purely private significance, because "the record is absent *any* evidence that [anonymous] letters . . . were sent to or received by" anyone other than the plaintiff. (Emphasis in original.) He is mistaken. As we explained in part I of this opinion, the applicable analysis under the first prong of § 52-196a (e) (3) focuses on the substance of the allegations set forth in the pleadings. Here, the plaintiff specifically alleged in his complaint that Brignole sent the anonymous letters "to various news outlets and persons . . . ." For purposes of satisfying the defendants' initial burden under § 52-196a (e) (3), that allegation suffices.

III

The plaintiff also claims that the defendants waived their ability to file special motions to dismiss because they "failed to obtain the court's permission to file a late special motion to dismiss," rendering their motions untimely. Our review of the court's memorandum of decision, considered in light of the existing record, convinces us that the court implicitly granted the defendants' motions to extend the time to file their special motions to dismiss.

The plaintiff's claim requires us to construe the judgment rendered by the court in the present case, as articulated in its memorandum of decision. "The construction of a judgment is a question of law with the determinative factor being the intent of the court as gathered from all parts of the judgment. . . . As a general rule, the court should construe [a] judgment as it would construe any document or written contract in evidence before it. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . If [f]aced with . . . an ambiguity, we construe the court's decision to support, rather than to undermine, its judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances." (Internal quotation marks omitted.) *White* v. *FCW Law Offices*, 228 Conn. App. 1, 8, 323 A.3d 406, cert. granted, 350 Conn. 928, 326 A.3d 250 (2024).

We begin by noting that our anti-SLAPP statute requires a party to file a special motion to dismiss within thirty days of the return date of a complaint. See General Statutes § 52-196a (c). It further provides that "[t]he court, upon a showing of good cause by a party seeking to file a special motion to dismiss, may extend the time

to file a special motion to dismiss." General Statutes § 52-196a (c). Whether to extend that time period, therefore, is a matter entrusted to the discretion of the trial court. See, e.g., *7 Germantown Road, LLC* v. *Danbury*, 351 Conn. 169, 182, 329 A.3d 927 (2025) (statute providing that "[t]he court may extend the [filing] period for good cause" confers discretion on trial court "to extend [the deadline]" (internal quotation marks omitted)); *DeFonce Construction Corp.* v. *Leslie & Elliot Co.*, 21 Conn. App. 545, 548, 574 A.2d 1321 (1990) (use of permissive "may" in rule authorizing court to extend filing period "for good cause shown . . . indicates that the granting or denial of a motion for extension of time within which to file [that motion] is a matter of judicial discretion" (citation omitted; internal quotation marks omitted)).

The following additional facts are relevant to the plaintiff's claim. The return date on the complaint was October 15, 2019, which obligated the defendants to file any special motions to dismiss by November 14, 2019. It is undisputed that they did not do so. At the same time, it also is undisputed that, on November 12, 2019, the law firm filed a motion for an extension of up to thirty days to file a responsive pleading; Brignole filed a similar request seven days later. On November 21, 2019, the plaintiff filed an objection to Brignole's extension request. The next day, Brignole filed a motion for permission to extend the time to file a special motion to dismiss in accordance with § 52-196a (c), which was accompanied by his special motion to dismiss. The plaintiff filed an objection thereto on November 25, 2019.

The law firm filed a separate special motion to dismiss the plaintiff's complaint on November 27, 2019. On December 6, 2019, the plaintiff filed an objection to the law firm's special motion to dismiss, claiming that it was untimely under § 52-196a (c), as it was filed more

than thirty days after the return date of the complaint. Curiously, the plaintiff then stated: "In spite of the foregoing, should the court deem it appropriate, the plaintiff wishes to have [the law firm's] special motion to dismiss decided on the merits, thereby making the court's ruling the law of the case. [The law firm] has waived any claimed first amendment rights to free speech as it relates to this matter [by virtue of the nondisparagement clause of the separation agreement]. . . . [The law firm's] motion should be *denied* on the merits." (Emphasis in original.) The plaintiff thereafter filed an objection to Brignole's special motion to dismiss, in which he similarly claimed that it was untimely and that Brignole had waived any first amendment rights by virtue of the nondisparagement clause. The plaintiff thus argued that Brignole's special motion to dismiss should be denied. On January 10, 2020, the defendants filed separate replies to the plaintiff's objections to their respective motions to dismiss, in which they argued that good cause existed for the court to exercise its discretion to extend the thirty day deadline pursuant to § 52-196a (c).

While those various motions for extension, special motions to dismiss, and objections thereto were pending, the plaintiff filed a request for leave to file an amended complaint on December 19, 2019. The court thereafter deferred consideration of that request, and the plaintiff on appeal concedes that his September pleading constitutes the operative complaint in this case. See footnote 7 of this opinion. On appeal, the defendants nevertheless submit that the plaintiff's filing of that request to amend his complaint further complicated the question of timeliness pursuant to § 52-196a (c) with respect to their special motions to dismiss.[28]

[28] The defendants' position, in short, is that the filing of an amended complaint gives rise to a new thirty day response period pursuant to § 52-196a (c).

The court held an expedited hearing on the special motions to dismiss on January 13, 2020, in accordance with § 52-196a (e) (1).[29] At that time, Brignole's counsel engaged in a lengthy discussion of "the issue of timeliness" with the trial court. Noting that Brignole had filed his special motion to dismiss eight days beyond the deadline set forth in § 52-196a (c), the court inquired as to the basis for Brignole's claim of good cause. In response, counsel noted that (1) because service of process was left on a decorative door at Brignole's home that is never used, he did not discover the summons and complaint until October 21, 2019;[30] (2) Brignole, an attorney, was on trial during the time period in question; and (3) because the anti-SLAPP statute was "a relatively new cause of action . . . [Brignole] didn't realize he had these rights because he didn't have enough time to . . . take a good look at the issue."[31] In addition, counsel noted that the plaintiff had recently requested permission to file an amended complaint and argued that Brignole should "be allowed to respond to [that pleading] with a special motion to dismiss as well." See footnote 28 of this opinion. Counsel for the law firm similarly argued with respect to the timeliness issue that "the statute allows the court some discretion" and that there was no prejudice to the plaintiff in extending the time to file special motions to dismiss by approximately one week.

[29] General Statutes § 52-196a (e) (1) provides in relevant part: "The court shall conduct an expedited hearing on a special motion to dismiss. The expedited hearing shall be held not later than sixty days after the date of filing of such special motion to dismiss . . . ."

[30] Brignole's representation that he first discovered service of process on "a decorative door that is never used" on October 21, 2019, was supported by a sworn affidavit that he filed with the court.

[31] Our anti-SLAPP statute became effective on January 1, 2018. The plaintiff commenced the present action on September 29, 2019. The first appellate decision in this state discussing § 52-196a in any manner was decided by our Supreme Court ten months later in July, 2020. See *Lafferty* v. *Jones*, supra, 336 Conn. 332.

When the plaintiff raised the timeliness issue in his argument, the court asked him how he had been prejudiced by the defendants' attempt to file their special motions to dismiss. The plaintiff responded that the statute did not require him to demonstrate prejudice. At the conclusion of the hearing, the court stated: "[A]gain, just so the record is clear, are you claiming that you were prejudiced [by the defendants' tardy filing of their special motions to dismiss]? . . . [I]f you were prejudiced . . . you should tell me now." The plaintiff replied, "No, I'm not arguing prejudice."

At no time thereafter did the court rule on the defendants' motions for extensions of time. In its memorandum of decision, the court likewise did not address the timeliness of the defendants' special motions to dismiss in any manner. Instead, it considered the merits of those special motions and concluded that the defendants had not satisfied their initial burden under the first prong of § 52-196a (e) (3). The court then denied the special motions to dismiss.

On appeal, the plaintiff claims that the defendants waived their ability to file special motions to dismiss because they "failed to obtain the court's permission to file a late special motion to dismiss," rendering their motions untimely. We recognize that the record before us does not contain any explicit ruling on the defendants' motions for extensions of time. As the same time, we are guided by the familiar maxim that the appellate courts of this state "do not presume error [on the part of the trial court]. The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 132, 74 A.3d 1225 (2013); see also *S. C.* v. *J. C.*, 227 Conn. App. 326, 334, 321 A.3d 427 (2024) ("[t]his court does not presume error on the part of the trial court; error must be demonstrated by an appellant on the basis of

an adequate record" (internal quotation marks omitted)). At no time has the plaintiff sought an articulation from the trial court on whether it determined that good cause existed to extend the filing period of § 52-196a (c) or an explicit ruling on the defendants' extension motions.

Our review of the court's memorandum of decision, considered in light of the existing record, convinces us that the court implicitly granted the defendants' motions to extend the time to file their special motions to dismiss. Although the plaintiff pressed a timeliness objection in his pleadings and at oral argument, the court did not conclude that the special motions to dismiss were untimely filed without good cause. If it had, the court would have dismissed, rather than denied, those motions. Moreover, the transcript of the January 13, 2020 hearing contains ample discussion of the timeliness issue raised by the plaintiff and the defendants' corresponding claims of good cause pursuant to § 52-196a (c) and indicates that the court appreciated the parties' respective arguments thereon. In its memorandum of decision, the court nonetheless proceeded directly to a consideration of the merits of the special motions to dismiss. In light of the admittedly tardy filing of those special motions, the court could not have done so in accordance with § 52-196a (c) unless it had determined that the defendants demonstrated good cause therefor.

In Connecticut, in the absence of a showing to the contrary, "we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." *S & S Tobacco & Candy Co.* v. *Greater New York Mutual Ins. Co.*, 224 Conn. 313, 322, 617 A.2d 1388 (1992); see also *DiBella* v. *Widlitz*, 207 Conn. 194, 203–204, 541 A.2d 91 (1988) ("we presume that the trial court correctly analyzed the law and the facts in rendering its judgment"). Because this court does not presume error, and mindful that the plaintiff has not sought an articulation from the trial court on this

issue, we presume, consistent with the record before us, that the court implicitly concluded that good cause justified an extension of the filing period of § 52-196a (c).

That presumption is particularly warranted under the specific facts of this case, as the plaintiff expressly invited the court to address the merits of the special motions to dismiss. Significantly, after claiming that the law firm's special motion was untimely under § 52-196a (c), the plaintiff stated: "In spite of the foregoing, should the court deem it appropriate, the plaintiff wishes to have [the law firm's] special motion to dismiss decided on the merits, thereby making the court's ruling the law of the case. [The law firm] has waived any claimed first amendment rights to free speech as it relates to this matter [by virtue of the nondisparagement clause of the separation agreement]. . . . [The law firm's] motion should be *denied* on the merits."[32] (Emphasis in original.) In light of that averment by the plaintiff, it is not surprising that the court reached the merits of the special motions to dismiss. Having invited the court to look past the timeliness issue to address the merits of those special motions, the plaintiff's procedural challenge on appeal rings hollow. For all of these reasons, we reject his claim that the defendants waived their ability to file special motions to dismiss.

In accordance with the remand we are ordering in this case, we direct the trial court to address the additional arguments that the defendants made in support of their special motions to dismiss and the additional grounds raised in opposition by the plaintiff.

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

In this opinion the other judges concurred.

[32] The plaintiff subsequently filed an objection to Brignole's special motion to dismiss, in which he likewise argued that it "should be denied . . . ."

STATE OF CONNECTICUT *v.* EDWIN B.*
(AC 46412)

Bright, C. J., and Westbrook and Prescott, Js.**

Syllabus

Convicted of manslaughter in the second degree and risk of injury to a child in connection with the death of his seven week old daughter, the defendant appealed. He claimed that the trial court's failure to give specific unanimity instructions as to both counts against him violated his right to jury unanimity under the sixth amendment to the United States constitution. *Held*:

The trial court's failure to give a specific unanimity instruction with respect to the count charging the defendant with manslaughter violated his sixth amendment right to jury unanimity, as that count was duplicitous because the state alleged two, separate instances of conduct, shaking the victim and delaying seeking medical intervention for the victim, that could have constituted individual bases for the manslaughter conviction, and there was a risk that the jurors were not unanimous with respect to which instance of conduct the defendant engaged in when finding him guilty.

The trial court's failure to give a specific unanimity instruction as to the count against the defendant charging him with risk of injury to a child violated his sixth amendment right to jury unanimity, as that count was duplicitous because the state presented evidence of two, separate instances of conduct, shaking the victim and delaying seeking medical attention for the victim, that constituted individual violations of the statute (§ 53-21 (a) (1)) governing risk of injury to a child, which the state concedes, and the state's argument that the defendant was not prejudiced by the duplicitous nature of this count and reversal of his conviction was not required was premised on an assumption rejected by this court with respect to the manslaughter charge, namely, that the jury unanimously found the defendant guilty of manslaughter on the basis of shaking the victim.

Argued December 9, 2024—officially released April 1, 2025

Procedural History

Substitute information charging the defendant with the crimes of manslaughter in the first degree and risk

* In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

of injury to a child, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; verdict and judgment of guilty of the lesser included offense of manslaughter in the second degree and of risk of injury to a child, from which the defendant appealed to this court. *Reversed*; *new trial.*

Hope J. Estrella, deputy assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Emily Trudeau*, senior assistant state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The defendant, Edwin B., appeals from the judgment of conviction, rendered after a jury trial, of manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1)[1] and risk of injury to a child in violation of General Statutes § 53-21 (a) (1).[2] He claims that the court's failure to give specific unanimity instructions as to counts one and two violated his right to jury unanimity under the sixth amendment to the United States constitution.[3] We agree with

[1] General Statutes § 53a-56 provides in relevant part: "(a) A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person . . . ."

[2] General Statutes § 53-21 provides in relevant part: "(a) Any person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony . . . ."

[3] The defendant additionally claims that the court improperly (1) denied his request to instruct the jury that it should carefully consider the interrogation tactics used by the police in considering the defendant's statements to the police, (2) failed to instruct the jury on all elements of risk of injury, and (3) instructed the jury on the recklessness element of manslaughter in the second degree. Because we reverse the judgment of the court on the ground that the trial court's failure to give a specific unanimity instruction

the defendant that the court's failure to give specific unanimity instructions violated his right to jury unanimity. Accordingly, we reverse the judgment of conviction and remand for a new trial.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. The victim and her twin sister were born to the defendant and A in April, 2018. On May 24, 2018, around 3 a.m., the victim, who was diagnosed with colic, started crying. The defendant attempted to feed her, but she would not eat, so he took her into the bathroom to wash her face. From the bedroom, A heard the defendant tell the victim to "shut up," "calm down," and "quiet down," and she heard the victim choking and coughing. She also heard a noise that sounded like a "thud" or something, such as a shampoo bottle, hitting the sink. When the victim stopped crying, the defendant returned to the bedroom and handed the victim to A. A noticed that the victim was sleepy and her breathing was different. The defendant, who has an associate's degree in nursing, also noticed that the victim appeared injured. A then placed the victim in her crib, and she and the defendant went to sleep.

Around 6 a.m. on the same day, the victim's twin sister woke up for feeding, but the victim did not. A tried to feed, change, and bathe the victim, but, although the victim was moving and breathing, she did not fully wake up. A called the pediatrician's office, but no

as to counts one and two violated his right to jury unanimity, we need not reach these additional claims. Nevertheless, because the issue could arise on remand, we note that we agree with the state that the defendant's proposed instruction on interrogation tactics was argumentative and not a correct statement of the law. To the extent the defendant seeks such an instruction at a retrial, our Supreme Court in *State* v. *Griffin*, 339 Conn. 631, 693 n.29, 262 A.3d 44 (2021), cert. denied, U.S. , 142 S. Ct. 873, 211 L. Ed. 2d 575 (2022), set forth, with apparent approval, the trial court's instruction on how the jury should evaluate "the likelihood that particular interrogation tactics render a confession unreliable." Id., 693.

appointments were available until the afternoon. A and the defendant then decided to take the victim to the hospital.

The defendant and A arrived at the hospital with the victim around 10:30 a.m. After the emergency department personnel conducted a CAT scan and X-rays of the victim, Rebecca Moles, a child abuse pediatrician, informed the defendant that the victim had broken ribs, a broken collarbone, bleeding in and around her brain, and an injury to her brain. The victim also had bruising on both of her arms and her abdomen. Moles determined that the victim's injuries were consistent with squeezing of the ribcage and a forceful back and forth motion. She also determined that the injuries could not have resulted from a fall of four feet or less or from the victim's own activity. Moles therefore concluded that the victim's injuries indicated child abuse.

The Hartford Police Department dispatched officers to the hospital to investigate the circumstances of the victim's injuries. An officer spoke with the defendant, who did not offer any explanation for the victim's injuries. At the same time, another officer spoke with A, who stated that she did not cause the victim's injuries and agreed to go to the police station to give a statement. At the station, A told the officers that she brought the victim to the hospital because the victim was not eating or responding. She denied harming the victim.

The defendant also agreed to go to the station, where officers questioned him for approximately eight hours. Detective Ivette Berrios and Detective Tanya Ortiz, who both speak Spanish, assisted Detective James Newell in interrogating the defendant. Before the interrogation began, Berrios provided the defendant with *Miranda* warnings,[4] and the defendant signed a written waiver of his rights.

[4] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Throughout the interrogation, which was recorded, the defendant's story was inconsistent. He initially told the officers that he did not harm the victim, but he did not tell them that A had harmed her. After the officers pressed the defendant, however, he said that he saw A shake the victim. The officers continued interrogating the defendant, and Ortiz, trying to prompt the defendant to confess to harming the victim, told him that she believed the victim's injuries were an accident. Ortiz also told the defendant that he and A would both be charged if he did not tell the officers what happened. The defendant thereafter told the officers that he had dropped the victim, and he agreed to give a written statement.

The defendant's written statement provides in relevant part: "On May 24, 2018, at approximately 3 a.m. . . . [the victim] woke up. . . . [A] picked her up and gave her to me. I held her and tried to [console] her. I was standing when I had [the victim] in my arms, by my shoulder. When I tried to switch [the victim] to my other shoulder, [she slid] out from my arms. [The victim] hit the crib rail with her abdomen. Before she hit the floor, the back of her head hit the bed frame . . . . [The victim] [stopped] crying when she hit the floor. I became nervous, picked her up and took her to the bathroom. With my hands, I wet her face with water. [The victim] took a deep breath, her eyes [were] half open, and looked [as] if she was druggy. [Her] body was [limp] but she had movement [in] her legs and arms. After I dried her face with [a] towel, I took her to her crib. I spoke to her, but she did not react. I woke up [A] and told her that [the victim] was not okay and needed to go to the hospital. [A] told me to wait for the pediatrician. . . . I said to [A] that I was not going to wait. . . . We arrived at the [hospital] at approximately [6 a.m.] . . . . When I was being interviewed by the detectives, I was scared. I did not say to them

that [the victim] fell from my arms. I blamed [A] because I was scared and insecure. I [had] never seen [A] hitting or mistreating [the victim] . . . .”[5]

On May 25, 2018, the state obtained an arrest warrant and filed an information charging the defendant with assault in the first degree in violation of General Statutes § 53a-59 (a) (1),[6] risk of injury to a child in violation of § 53-21 (a) (1), and intentional cruelty to persons in violation of General Statutes § 53-20 (a) (1).[7] A few days later, on May 28, 2018, the victim died in the hospital. The medical examiner determined that the cause of death was “[a]cute and [c]hronic [b]lunt [i]njuries with [s]ubdural and [s]ubarachnoid [h]emorrhages and [r]ib [f]ractures.” She certified the manner of the victim’s death as homicide. On June 8, 2018, the state filed a substitute information charging the defendant with manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3),[8] assault in the first degree in violation of § 53a-59 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (1).

On November 8, 2019, A signed an “Agreement Concerning Prosecution” (cooperation agreement) in which

[5] The defendant provided this statement to the police in Spanish, which Berrios typed in Spanish and subsequently translated into English.

[6] General Statutes § 53a-59 provides in relevant part: “(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument . . . .”

[7] General Statutes § 53-20 provides in relevant part: “(a) (1) Any person who intentionally tortures, torments or cruelly or unlawfully punishes another person or intentionally deprives another person of necessary food, clothing, shelter or proper physical care shall be guilty of a class D felony. . . .”

[8] General Statutes § 53a-55 provides in relevant part: “(a) A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person. . . .”

she agreed to plead guilty to charges of risk of injury to a child in violation of § 53-21 (a) (1) and criminally negligent homicide in violation of General Statutes § 53a-58[9] for the death of the victim. The cooperation agreement further provided that A would "truthfully testify at any trial or other court proceeding with respect to any matters about which . . . the investigating police agency may request her testimony including at the trial of [the defendant]."

On September 12, 2022, the state filed another substitute information against the defendant, charging him with two counts. Count one of the information charged the defendant with manslaughter in the first degree in violation of § 53a-55 (a) (3), alleging that, "under circumstances evincing an extreme indifference to human life, [the defendant] recklessly engaged in conduct which created a grave risk of death to another person, and thereby caused the death of another person, to wit: [the victim], a seven week old infant." Count two of the information charged the defendant with risk of injury to a child in violation of § 53-21 (a) (1), alleging that "the defendant wilfully and unlawfully caused a child under the age of sixteen years to be placed in such a situation that the life and limb of such child was endangered, the health of such child was likely to be injured, and committed an act likely to impair the health of such child, to wit: [the victim], a seven week old infant."

The case was tried to a jury. Following the presentation of evidence and closing arguments of counsel, the court, *D'Addabbo*, *J.*, charged the jury on, inter alia, the elements of the charged offenses of manslaughter in the first degree and risk of injury to a child, as well

[9] General Statutes § 53a-58 provides in relevant part: "(a) A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person, except where the defendant caused such death by a motor vehicle. . . ."

as the lesser included offenses of manslaughter in the second degree and criminally negligent homicide. That same day, the jury returned verdicts of not guilty on the charge of manslaughter in the first degree and guilty on the lesser included offense of manslaughter in the second degree and on the charge of risk of injury to a child. The court sentenced the defendant to a total effective sentence of twenty years of incarceration, execution suspended after fifteen years, followed by five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the court's failure to give a specific unanimity instruction as to count one violated his sixth amendment right to jury unanimity.[10] He argues that count one was duplicitous

[10] The defendant acknowledges that he did not preserve this claim, and he seeks review pursuant to the bypass rule set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Pursuant to *Golding*, a [defendant] can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [defendant] of a fair trial; and (4) if subject to harmless error analysis, the [state] has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, [whereas] the last two steps involve the merits of the claim." (Emphasis in original; internal quotation marks omitted.) *State* v. *Daniels*, 228 Conn. App. 321, 342, 324 A.3d 820, cert. denied, 350 Conn. 926, 326 A.3d 248 (2024). The first two prongs of *Golding* are satisfied because the record is adequate for review and the defendant's claim is of constitutional magnitude. See *State* v. *Marcelino S.*, 118 Conn. App. 589, 594, 984 A.2d 1148 (2009) (claim that duplicitous charge violated defendant's right to jury unanimity satisfied first two prongs of *Golding*), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010). For the reasons set forth hereinafter, we also conclude that the defendant is entitled to prevail under the third and fourth prongs of *Golding*.

Additionally, the defendant acknowledges that the relevant rules governing claims of lack of unanimity were articulated in *State* v. *Douglas C.*, 345 Conn. 421, 435, 285 A.3d 1067 (2022), and *State* v. *Joseph V.*, 345 Conn. 516,

because the state alleged two separate instances of conduct—shaking the victim and a delay in seeking medical intervention—that could have constituted individual bases for the manslaughter conviction. He further argues that the duplicity was not cured by a specific unanimity instruction and that he was prejudiced because there is a risk that the jurors were not unanimous with respect to which instance of conduct he engaged in when finding him guilty of manslaughter in the second degree.[11] We agree with the defendant.

529–31, 285 A.3d 1018 (2022), shortly after the defendant was sentenced. He argues that the rules announced in those cases apply retroactively as new constitutional rules announced during the pendency of direct review. Because the Supreme Court of the United States has stated that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"; *Griffith* v. *Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987); we agree with the defendant that *Douglas C.* and *Joseph V.* apply retroactively to the present matter. See also *State* v. *Velasquez-Mattos*, 347 Conn. 817, 849, 300 A.3d 583 (2023) (applying *Douglas C.* and *Joseph V.* retroactively because "all defendants whose cases [are] still pending on direct appeal at the time of [a law changing] decision should be entitled to invoke the new rule" (internal quotation marks omitted)).

[11] We note that the defendant did not request that the trial court give the jury a specific unanimity instruction. Further, the defendant did not object to the proposed charge or take an exception after the charge was given. The state has not argued on appeal that the defendant's failure to request a specific unanimity instruction constitutes an implicit waiver of this claim under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), despite the fact that our Supreme Court has held that "[r]eview of the defendant's duplicity claim under *Golding*, and particularly whether the failure to provide a specific unanimity instruction requires reversal, turns on whether defense counsel's failure to object to the jury charge means that the defendant implicitly waived his right to an unanimity instruction pursuant to *Kitchens*." (Footnote omitted.) *State* v. *Velasquez-Mattos*, 347 Conn. 817, 846, 300 A.3d 583 (2023).

The state's decision not to argue that the defendant waived his right to a unanimity instruction is understandable. "[W]aiver is an intentional relinquishment or abandonment of a known right or privilege. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy." (Internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 469. "Among the rights that may be waived by the action of counsel in a criminal trial is the right of a defendant to correct jury instructions, even when fundamental rights are at issue." *State* v. *Velasquez-Mattos*, supra, 347 Conn. 847.

The following additional facts are relevant to this claim. At trial, the state presented evidence that the defendant caused the victim's death by shaking her. It also presented evidence that the victim's injuries were worsened by the defendant's failure to seek timely medical attention. For example, Moles testified as follows: "So, with brain injury, there is what we call primary brain injury and secondary brain injury. So, primary brain injury is the actual trauma to the brain from the event—you know, from the shaking or the movement of the brain. And then, the brain doesn't like to get injured. So when it's injured, it swells . . . . And then, there can be additional injury to the brain because it swelled up and it gets squished. . . . And then . . .

"[B]ecause the waiver of a constitutional challenge to jury instructions is implied rather than express, it arises from an inference that the defendant knowingly and voluntarily relinquished the right in question. . . . Nevertheless, when the law governing a defendant's constitutional claim has changed after the defendant's trial, counsel acting under binding precedent in effect at the time of the trial cannot make a knowing and intelligent waiver of rights affected by the later decision changing the law." (Citations omitted; internal quotation marks omitted.) Id., 848–49.

In *Velasquez-Mattos*, the defendant had already been sentenced when our Supreme Court decided *Douglas C.* and *Joseph V.*, but the matter was still pending direct review. See id., 847–48. Our Supreme Court explained that "[it] recognized for the first time [in *Douglas C.*] that a duplicitous information may yield two distinct and separate kinds of unanimity claims, and [it] adopted the federal test for claims of unanimity as to instances of conduct." Id., 850. Additionally, "[it] concluded for the first time [in *Joseph V.*] that the sexual assault statute . . . with which the defendant . . . was charged, does not criminalize a continuing course of conduct." Id., 851. The court therefore held that, "in light of the recent and significant change in our case law that occurred after the completion of the defendant's trial . . . defense counsel did not make a knowing and intelligent waiver of the right to unanimity as to instances of conduct pursuant to *Kitchens*" by failing to request a specific unanimity instruction. Id.

The present case is similar to *Velasquez-Mattos* in that *Douglas C.* and *Joseph V.* were decided while this case was pending direct review. Although neither *Douglas C.* nor *Joseph V.* expressly changed the case law regarding manslaughter, we are persuaded that the new test articulated for claims of lack of unanimity as to instances of conduct is a sufficiently significant change in our case law such that the defendant's failure to request a specific unanimity instruction did not constitute a knowing and intelligent waiver of the right to unanimity as to instances of conduct under *Kitchens*.

the brain also can have seizures, where the electrical impulses fire. And that can also cause injury to the brain. And all of those things can decrease the ability of the baby to breathe effectively, which then has even less oxygen to the brain. So, it's kind of a cycle. So, when a baby comes into the, someplace like the intensive care unit, part of, a big thing that the doctors are trying to do is break that cycle—so, stop that cycling; give medicines to try to stop the brain from getting continually injured . . . as a result of trying to stop those secondary injuries. So, the symptoms that a family or that a parent will see often are those initial symptoms. And then, they may see worsening of those symptoms or different symptoms as the secondary brain injury starts."

The defendant's theory of defense was that A shook the victim causing her primary injuries and was responsible for not seeking prompt medical treatment. The defendant testified that he saw A shake the victim and, when he attempted to intervene and take the victim from A, she would not release the victim until the defendant promised that he would not leave A. He further testified that, although he wanted to seek immediate medical attention for the victim, he did not do so because he did not want to further upset A. Because there were no other witnesses to what happened to the victim, the jury was left to decide whether they believed the defendant or A as to who shook the baby and who was responsible for the delay in seeking medical treatment.

During closing arguments, the prosecutor stated: "[W]ith manslaughter in the first degree, if you credit [A's] testimony—if you find that it was [the defendant] that was holding that baby in the bathroom at the time when the hysterical crying came to an abrupt end—then you can find that this defendant engaged in conduct that created a grave risk of death to another." She also

stated: "You know the risk. He engaged in the conduct. And he did nothing. It wasn't intentional, but it was reckless, and it demonstrated an extreme indifference to human life. When we look at the time frame in this case . . . 3 a.m., incident happens. Baby crying [and then] no crying. Four a.m., no medical treatment [and] no intervention. Five a.m., nope. . . . Ten-thirty [a.m.], that baby gets to the hospital. Ten-thirty [a.m.], that baby gets intervention and medical treatment. That's seven and [one-half] hours. Extreme indifference to human life. *And it caused* [*the victim's*] *death—that, we know for certain*." (Emphasis added.) Furthermore, the prosecutor argued: "[The defendant's] nursing degree failed. I've seen videos of four year olds call the police when their parents are in distress. . . . Police rush to the house. There's medical intervention. He has a nursing degree. He testified to that. Yep. He failed." Finally, the prosecutor reiterated to the jury that "[the victim] deserved someone to step up and say—as that baby, [the victim], sat there hanging on for life—someone to say, 'Hey, I shook her. She got shaken. It was an accident. Can you fix it?' Dr. Moles talked about, it's about relieving pressure and swelling. And there's a few things that they do. That didn't happen."

With respect to count one, the court charged the jury with the elements of manslaughter in the first degree and the elements of the lesser included offense of manslaughter in the second degree. The court did not marshal any of the evidence to a specific count or specific elements of a crime. The jury thereafter found the defendant not guilty of the charged offense of manslaughter in the first degree and guilty of the lesser included offense of manslaughter in the second degree.

We now turn to the defendant's claim that the court's failure to provide a specific unanimity instruction as to count one violated his right to jury unanimity. "The defendant's right to jury unanimity under the sixth

amendment to the United States constitution ensures that a jury cannot convict unless it unanimously finds that the [g]overnment has proved each element of the charged crime. . . . [Our Supreme Court has] recognized that a duplicitous information may raise two distinct and separate kinds of unanimity claims: (1) unanimity as to a crime's elements, which occurs when a defendant is charged in a single count with having violated multiple statutory provisions, subsections, or clauses, and thus the court must determine whether the statutory provisions, subsections, or clauses constitute separate elements of the statute, thereby requiring jury unanimity, or alternative means of committing a single element, which do not require jury unanimity; and (2) unanimity as to instances of conduct, also known as a multiple acts or multiple offense claim, which occurs when a defendant is charged in a single count with having violated a single statutory provision, subsection, or clause on multiple, separate occasions. . . . [D]ifferent tests apply to a claim of unanimity as to elements and a claim of unanimity as to instances of conduct." (Citations omitted; internal quotation marks omitted.) *State* v. *Joseph V.*, 345 Conn. 516, 529–31, 285 A.3d 1018 (2022). "[B]ecause this claim is premised on an alleged infringement of the defendant's constitutional rights, our review is plenary." *State* v. *Douglas C.*, 345 Conn. 421, 435, 285 A.3d 1067 (2022).

In the present case, the defendant argues that count one was duplicitous because the state charged two, separate instances of *conduct* as the basis for a single violation of § 53a-56 (a) (1). Additionally, he argues that the court did not provide a specific unanimity instruction requiring the jury to agree on which act formed the basis for the conviction, creating a risk that the verdict was not unanimous as to a single course of conduct. Our Supreme Court, in *Douglas C.*, adopted the following three-pronged test to determine whether

a duplicitous charge violated a defendant's right to jury unanimity as to instances of conduct: "(1) Considering the allegations in the information and the evidence admitted at trial, does a single count charge the defendant with violating a single statute in multiple, separate instances? (2) If so, then does each instance of conduct establish a separate violation of the statute? If the statute contemplates criminalizing a continuing course of conduct, then each instance of conduct is not a separate violation of the statute but a single, continuing violation. To determine whether the statute contemplates criminalizing a continuing course of conduct, we employ our well established principles of statutory interpretation. Only if each instance of conduct constitutes a separate violation of the statute is a count duplicitous. And (3) if duplicitous, was the duplicity cured by a bill of particulars or a specific unanimity instruction? If yes, then there is no unanimity issue. If not, then a duplicitous count violates a defendant's right to jury unanimity but reversal of the defendant's conviction is required only if the defendant establishes prejudice."[12] Id., 448.

Under the first prong of *Douglas C.*, the defendant argues that count one charged him with violating § 53a-55 (a) (3) in two separate instances because the state presented evidence that he caused the victim's death by (1) shaking her and (2) failing to seek timely medical attention for her. We agree.

A person commits manslaughter in the first degree pursuant to § 53a-55 (a) (3) when, "under circumstances

[12] The defendant filed no request for a bill of particulars. "The purpose of a bill of particulars is to inform the defendant of the charges against him with sufficient precision to enable him to prepare his defense and avoid prejudicial surprise. . . . A bill of particulars limits the state to proving that the defendant has committed the offense in substantially the manner described." (Internal quotation marks omitted.) *State* v. *Marcelino S.*, 118 Conn. App. 589, 593–94, 984 A.2d 1148 (2009), cert. denied, 295 Conn. 904, 988 A.2d 879 (2010).

evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." The information, which alleges that, "on or about May 25, 2018, at approximately 3 a.m. . . . the defendant did commit the crime of manslaughter," does not specify which conduct violated § 53a-55 (a) (3). Although the reference to the approximate time of the crime occurring at 3 a.m. suggests that the focus of the charge was the shaking of victim, at trial, the jury heard Moles testify that the victim suffered a primary brain injury from being shaken and secondary injuries that continued to damage her brain until she received medical treatment. Additionally, the prosecutor, during her closing argument, emphasized the fact that the defendant delayed seeking medical attention for the victim for seven and one-half hours and that, by doing so, he caused the victim's death. Thus, the jury heard evidence and argument that the defendant's conduct of shaking the victim and/or failing to seek timely medical attention for her evinced recklessness and caused the victim's death.

In *Douglas C.*, the state presented evidence that the defendant touched the victim in a sexual and indecent manner multiple times in a single evening and that such conduct constituted a single violation of the risk of injury statute. *State* v. *Douglas C.*, supra, 345 Conn. 471. Our Supreme Court determined that "the jury reasonably could have interpreted the evidence admitted in only one of two ways. Although the length of time is unclear, the testimony of [the victim] shows that this touching occurred during the course of a single evening. From this evidence, the jury reasonably could have found that these acts constituted a single criminal episode of relatively brief, temporal duration and thus did not constitute multiple, separate incidents of conduct

under the first prong of the applicable test. Alternatively, from this evidence . . . the jury [reasonably could have] found under prong one of the applicable test that there was enough time between each act for the acts to constitute multiple, separate incidents of conduct . . . .'' Id., 471–72.

Similarly, in the present matter, although the shaking and the initial decision not to seek medical attention occurred in close temporal proximity, the jury had independent bases to find the defendant guilty of manslaughter in the second degree. Jurors reasonably could have found that the defendant shook the victim causing the primary injuries that led to her death. Alternatively, one or more of the jurors reasonably could have concluded that the state failed to prove beyond a reasonable doubt that the defendant shook the baby but that the defendant's failure to seek prompt medical attention for her evinced recklessness and ultimately proximately caused the victim's death. Moreover, the act of shaking the victim was brief, but the decision not to seek medical attention continued for seven and one-half hours. From the evidence presented, the jury reasonably could have found that the shaking and the delay in seeking medical attention constituted multiple, separate incidents of conduct, rather than a single criminal episode.

The state maintains that the evidence that the defendant delayed seeking medical attention for the victim was not offered as the reckless conduct supporting the manslaughter charge or the lesser included offenses on which the jury was charged. Rather, the state argues that evidence of the delay was offered only to prove that he acted with extreme indifference to human life, which is a separate element of the offense of manslaughter in the first degree. We are not persuaded.

The prosecutor, during her closing argument to the jury, stated that the defendant's decision not to seek

medical attention after shaking the victim was both reckless *and* demonstrated extreme indifference to human life. In addition, her statement, immediately after detailing the defendant's delay in seeking medical treatment, that "it caused [the victim's] death—that, we know for certain" reasonably could have been understood by the jury as arguing that the failure to seek medical treatment was the cause of the victim's death. Such an understanding by jurors would have been particularly reasonable given Moles' testimony about secondary injuries and A's testimony that she pleaded guilty to negligent homicide for her failure to seek prompt medical treatment for the victim. Thus, as the case was presented to the jury, count one was premised on evidence of two, separate incidents of conduct, leading to the possibility that some jurors may have concluded that the defendant was guilty of manslaughter because he shook the victim, while others may have found him guilty because he did not seek prompt medical treatment for the victim.

Additionally, the second prong of *Douglas C.* is satisfied because the state does not argue that it charged count one under a theory that shaking the victim and delaying seeking medical attention constituted a continuing course of conduct. Rather, the state maintains that "count one was premised on a single instance of allegedly reckless homicidal conduct—shaking the victim violently enough to cause blood vessels in her brain to tear, hemorrhage, and result in her death." Because the state presented evidence of two, separate instances of conduct but did not present a continuing course of conduct theory, the jurors reasonably could have found the defendant guilty under count one for engaging in *either* instance of conduct, and their decision as to each may not have been unanimous. Thus, count one was duplicitous.

The third prong of *Douglas C.* is satisfied because the court did not give a specific unanimity instruction and, therefore, the duplicity of count one violated the defendant's right to jury unanimity. Still, "reversal of the defendant's conviction is required only if the defendant establishes prejudice, namely, that the duplicity created the genuine possibility that the conviction resulted from different jurors concluding that the defendant committed different acts." *State* v. *Douglas C.*, supra, 345 Conn. 447. The defendant argues that the duplicity of count one "severely prejudiced [him] because there was a substantial risk of a nonunanimous verdict based on the evidence in the case and the arguments advanced by the state . . . [upon which] separate jurors may have found that the defendant engaged in entirely separate instances of conduct." (Citation omitted.) Therefore, the defendant argues, reversal of his conviction under count one is required. We agree.

As we have discussed, the state presented evidence that the victim's brain injuries, which ultimately resulted in her death, were caused primarily by the shaking and secondarily by the delay in medical intervention. The state argued to the jury that both instances of conduct were reckless. On the basis of the evidence and how it was presented, jurors reasonably could have found the defendant guilty of manslaughter in the second degree because he shook the baby, delayed seeking medical attention for her, or both. Consequently, there is a real possibility that the jury was not unanimous in finding the defendant guilty of a *single* instance of conduct and, therefore, the defendant has established that he was prejudiced by the duplicity of count one. Accordingly, reversal of the defendant's conviction under count one is required.

II

We next address the defendant's claim that the court's failure to give a specific unanimity instruction as to

count two violated his sixth amendment right to jury unanimity. The defendant argues that count two is duplicitous because the state presented evidence of two separate instances of conduct—shaking the victim and delaying seeking medical attention—that constitute individual violations of § 53-21 (a) (1).[13] We agree.

The state concedes that count two satisfies all three prongs of *Douglas C.* because the jury reasonably "could have found the defendant guilty of violating § 53-21 (a) (1) based on either instance of conduct, or both," and it further concedes that the duplicity was not cured by a specific unanimity instruction. The state argues, however, that the defendant was not prejudiced by the duplicitous nature of count two and, therefore, reversal of his risk of injury conviction is not required. Specifically, the state argues that the defendant was not prejudiced because "in finding the defendant guilty under count one of manslaughter in the second degree, the jury necessarily and unanimously found that he engaged in the conduct of shaking the victim and thereby caused her death . . . [which was] presented to the jury as one of two independent bases to support a finding of guilty under the situation prong of the risk of injury statute . . . ."

At oral argument before this court, counsel for the state conceded that its lack of prejudice argument hinges on the validity of the defendant's manslaughter conviction such that, if count one is reversed, count two must be reversed as well. Indeed, the state's argument that the defendant was not prejudiced by the duplicity of count two is premised on an assumption

[13] The defendant also argues that count two is duplicitous as to its elements because the state charged him, pursuant to § 53-21 (a) (1), with "plac[ing] [a child] in such a situation that the life or limb of such child was endangered" as well as "committ[ing] an act likely to impair the health [or morals] of such child . . . ." In light of our conclusion in part II of this opinion, we do not reach this argument.

that the jury unanimously found the defendant guilty of count one on the basis of shaking the victim. In part I of this opinion, however, we concluded that reversal of count one is required because there is a real possibility that the jury was not unanimous in finding the defendant guilty of manslaughter in the second degree for shaking the victim. Therefore, the state's lack of prejudice argument fails, and we conclude that reversal of the defendant's conviction under count two is required.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

BETHEL BASEBALL ASSOCIATION, INC. *v.* KURT R. DYER (AC 46590)

Bright, C. J., and Clark and Westbrook, Js.*

Syllabus

The defendant appealed from the trial court's judgment for the plaintiff on its counts alleging conversion and statutory theft. He claimed, inter alia, that the court erred in concluding that he had committed conversion and statutory theft. *Held*:

The trial court did not err in finding that the defendant committed conversion and statutory theft, as ample evidence in the record, unchallenged by the defendant, supported the court's conclusion that the defendant engaged in the unauthorized withdrawal of the plaintiff's funds and that he intended to deprive the plaintiff of its property.

This court declined to review the defendant's unpreserved claim that the trial court abused its discretion by failing to address various discovery disputes arising from the plaintiff's alleged noncompliance with the defendant's discovery requests.

Argued October 17, 2024—officially released April 1, 2025

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Shaban*, *J.*; judgment in part for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Kurt R. Dyer, self-represented, the appellant (defendant).

Christopher G. Winans, for the appellee (plaintiff).

Opinion

BRIGHT, C. J. The self-represented defendant, Kurt R. Dyer, appeals from the judgment, rendered after a court trial, in favor of the plaintiff, Bethel Baseball Association, Inc., on its counts alleging conversion and statutory theft. On appeal, the defendant claims that the court (1) erroneously concluded that he had committed conversion and statutory theft and (2) abused its discretion by not addressing the plaintiff's failures to properly respond to his discovery requests. We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The plaintiff is an incorporated Little League baseball organization for groups of children ages five to twelve and thirteen to fifteen years old. The plaintiff has an executive board consisting of a president, a vice president for each age group, a secretary, and a treasurer. The duties of the treasurer included filing tax returns, reconciling the bills and income of the organization, maintaining the books and records, and handling any necessary payments that needed to be made by signing checks or making payments through cash, credit, or debit. The treasurer also was responsible for giving treasurer's reports to the executive board,

which specified the total amount deposited in and withdrawn from the accounts for each month and included detail as to the individual deposits and withdrawals for the month. To pay expenses, the plaintiff maintained both a checking account and a savings account. A debit card also was available to the treasurer to use pursuant to his duties.

Jay Waterman served as the plaintiff's treasurer for nearly twenty years until 2017, when he became ill and was unable to continue his duties. Justin Fern briefly served as interim treasurer until October, 2017. In October, 2017, as the defendant's term as president was expiring, the executive board voted to elect the defendant as treasurer. The defendant served as treasurer from November 1, 2017, until October 31, 2018. After his tenure, Linda Tran briefly served as treasurer until Scott Beverly took over the position, starting in May, 2019. In early 2019, Beverly also became part of the finance committee, which was created to help the treasurer plan for the flow of income and expenses and to oversee the plaintiff's finances.

Upon assuming his duties, Beverly reviewed several bank statements from the period when the defendant served as treasurer and noticed several irregularities. Beverly observed that the statements showed a significant loss of funds, however, they did not show any significant individual expenditures that would have accounted for the irregularities he observed. Beverly compared the bank statements to the treasurer's reports and noticed significant variances between what had been reported by the defendant and what the bank statements actually showed. The defendant typically had reported that the plaintiff was running a positive balance. After examining the reports, Beverly noticed that "[o]ften the amount reported by the defendant in the monthly [treasurer's] reports as to what was in the

[plaintiff's] accounts was more than what was eventually shown on the bank statements."

"After [the plaintiff] attempted to do an initial reconciliation of the defendant's treasurer's reports and the corresponding bank account statements, [the plaintiff found] a negative variance of $35,000. . . . After a more complete reconciliation covering the defendant's term as treasurer from November, 2017, through October, 2018, which showed cash withdrawals over each month, the negative variance grew to approximately $69,000. The balance in the savings account went from $66,000 down to $10,000 during this time." (Citations omitted.)

The record of purchases made with the plaintiff's debit card showed further discrepancies. Many of the items purchased appeared to be unrelated to the plaintiff's ordinary expenses. Additionally, it appeared that several purchases were made with the debit card and returned for a cash refund. The records did not show any amount of cash being returned to the account. Of these debit card purchases, $2317.49 were for expenses unrelated to the plaintiff's ordinary expenses. The plaintiff's bank informed Beverly that the only individuals authorized to use the card between November, 2014, and November, 2018, were Waterman, who was ill and no longer able to perform his duties, and the defendant. Beverly notified the executive board of the irregularities, and the executive board then hired an accounting firm to review the plaintiff's financial statements and records. After the accounting firm's review, it was determined that many of the items purchased with the plaintiff's debit card were not related to the plaintiff's activities or purposes. A specific summary of the items purchased with the card and several receipts showed that these purchases totaled approximately $25,000. The accounting firm recommended that the plaintiff file

a complaint with the Bethel Police Department, which it did.

"As part of its investigation, the police interviewed several individuals, including Craig Carlson, a former president and treasurer of the [plaintiff]. Carlson was unaware of the investigation until he was contacted by the police. The interest of the police in Carlson stemmed from an accusation by the defendant's attorney[1] that Carlson had often requested and received money from the defendant, ostensibly to pay the umpires, but that Carlson had used it for his own purposes. At no time during Carlson's tenure as president or treasurer . . . did the defendant ever accuse Carlson of misuse of [the plaintiff's] funds. It was not until the police began its investigation that the defendant's attorney leveled the accusation against him. Carlson met with the police three times and provided them with documents relevant to the investigation. No action was ever taken by the police against Carlson." (Footnote added.)

During the defendant's tenure as treasurer, Carlson and the defendant coordinated the payment of umpires. Umpires were typically paid in cash by a member of the plaintiff at each game. The treasurer was responsible for withdrawing the cash from the plaintiff's savings account at the bank. Carlson typically communicated requests for cash to the defendant by email or phone.

"Tom Martin, a former vice president of the [plaintiff], had expressed concerns to the defendant during the defendant's term as president and treasurer that Carlson's requests were sometimes out of line with what the schedule of games showed and therefore suggested that Carlson not be given any more money. However, Martin also acknowledged that any discrepancy from

[1] During the police investigation, the defendant was represented by an attorney. The defendant was self-represented at trial and remains so on appeal.

his perspective amounted to only approximately $190.10. At one point, in a text message between Martin and the defendant, they discussed whether or not they should ask Carlson to resign from the executive board. . . . Despite the concerns raised, neither Martin nor the defendant ever asked the executive board to consider seeking Carlson's resignation or to investigate him. . . . In his testimony . . . Martin acknowledged that, following the finance committee's completion of its look into the issue of the loss of funds, and the audit investigation having been done, he did not believe that Carlson had taken any funds for his own use." (Citations omitted; footnotes omitted.)

"In August and September of 2018, there was a series of text messages and emails between . . . Fern and the defendant. . . . In those messages, the defendant indicated to Fern that [the plaintiff] was running low on cash. Fern responded that this was impossible as at the time he turned over the treasurer's duties, accounts, and records to the defendant, [the plaintiff] had approximately $75,000 in its accounts. . . . In response, the defendant provided Fern with his written explanation of the withdrawals. . . . The defendant believed that Carlson's requests for funds for the umpires was an issue. Fern had serious concerns about Carlson's requests for funds and thought that he should be removed from the executive board and that, if he remained, he would 'bankrupt the league.' Fern suggested to the defendant that an audit of the finances and requests be done, but the defendant did not want to do so. . . . Despite Fern's concerns about Carlson, he never brought any of those concerns to the attention of the executive board." (Citations omitted.)

"The audit turned over to the police department found that at one point there was a deficit of approximately $60,000 in the accounts of the [plaintiff] and it appeared to be due in part to cash withdrawals having

been made from the account." The finance committee emailed the defendant a list of the cash withdrawals made during his tenure that remained unaccounted for and requested further information about them. "The defendant responded that the withdrawals were for the payment of the umpires. Although the defendant attempted to be cooperative in answering the questions posed, he did not provide any receipts or documentation for the period during which he acted as treasurer."

The finance committee reviewed the records of umpire payments requested compared to the withdrawals from the plaintiff's accounts and found that, of the fifty-six cash withdrawals made, only five matched the amount requested. Moreover, it was determined that the amount of money identified as being withdrawn to pay the umpires by the defendant was far more than historically had occurred. Based on the number of games played and the umpires required, "it would have been mathematically impossible to pay out the amount of cash that was reportedly withdrawn for that purpose. Although the defendant claimed that he withdrew only the amount requested by Carlson, there was no notation in any treasurer reports of such requests." Further, "Carlson's requests for funds for the umpires in 2017 and 2018 were approximately $30,000 each year, which [were] consistent with cash requests from prior years."

In the years after the defendant's term as treasurer, 2019 through 2021, the income and expenses of the plaintiff returned to the levels they had been prior to his tenure.

"Upon completion of its investigation, the police arrested the defendant. He was charged with larceny in the first degree and conspiracy to commit larceny in the first degree. As to the charges, the defendant filed an application for accelerated rehabilitation which was granted by the court. As part of the condition of

participation in the program, the defendant was required to, and did, make payment of $25,313 to the [plaintiff]." (Citations omitted.) This amount addressed the questionable purchases made by the defendant with the plaintiff's debit card but did not address the approximately $60,000 in questionable cash withdrawals made by the defendant.

The plaintiff commenced the underlying action on November 12, 2020. In its amended complaint, filed on April 7, 2021, the plaintiff asserted claims of conversion and statutory theft in violation of General Statutes § 52-564,[2] predicated on the allegation that the defendant withdrew thousands of dollars from the plaintiff's accounts for his own personal uses.[3] On May 21, 2021, the defendant filed an answer in which he admitted to serving as president and then treasurer during the relevant periods but denied or left the plaintiff to its proof as to the remaining factual allegations.

The matter was tried to the court, *Shaban*, *J.*, on February 23 and 24, 2023. At trial, the court heard testimony from Beverly, Fern, Martin, and Carlson and admitted several exhibits into evidence. The defendant elected not to testify pursuant to his right under the fifth amendment to the United States constitution.

On May 23, 2023, the court rendered judgment for the plaintiff on the counts alleging statutory theft and conversion; see footnote 3 of this opinion; concluding that the plaintiff had proven by a preponderance of the

[2] General Statutes § 52-564 provides: "Any person who steals any property of another, or knowingly receives and conceals stolen property, shall pay the owner treble his damages."

[3] The plaintiff also alleged in a separate count that the defendant breached his fiduciary duty to the plaintiff by misappropriating the funds. The court rendered judgment for the defendant on that count, concluding that the plaintiff failed to establish that the defendant owed it a fiduciary duty while acting as treasurer, and the plaintiff did not file a cross appeal to challenge the court's judgment.

evidence that the defendant converted the plaintiff's funds to his own use and thereby committed statutory theft. In its memorandum of decision, the court stated that, "[b]ased on the cumulative testimony and the properly admitted exhibits, there is sufficient direct and circumstantial evidence, coupled with the adverse inference from the defendant's election not to testify on his own behalf, to find that the plaintiff has met its burden of establishing by a preponderance of the evidence that the defendant converted the [plaintiff's] funds to his own use. . . . Also, although there is more circumstantial than direct evidence of conversion and theft, the credible testimony of the witnesses and the admitted exhibits are of sufficient weight to establish . . . that the defendant engaged in the unauthorized withdrawal of the plaintiff's funds and, therefore, committed an intentional deprivation of property." (Citations omitted.) The court found that the plaintiff had suffered compensatory damages of $69,040 as a result of the defendant's conversion and theft. The court, pursuant to § 52-564, then trebled those damages and rendered judgment for the plaintiff in the amount of $207,120. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

On appeal, the defendant claims that the court erroneously concluded that the defendant had committed conversion and statutory theft.[4] According to the defendant,

[4] The defendant also requests that this court take judicial notice of the plaintiff's 2018 federal tax return, which he claims demonstrates that the plaintiff "did not experience an unexplained increase in expenses but rather a deficit due to a decrease in [its] revenue" and, therefore, conversion did not occur. (Emphasis omitted.) We decline to take judicial notice of the 2018 federal tax return because "the trial court, rather than an appellate court, finds facts." *State* v. *Edwards*, 314 Conn. 465, 480, 102 A.3d 52 (2014). The tax return was not offered as evidence at trial and therefore is not a part of the record in the present case. Moreover, while this appeal was pending, the defendant filed a motion to open the judgment in the trial court asserting that the tax return was newly discovered evidence that disproved the plaintiff's allegations that money had been misappropriated. The trial

"[t]he trial court's memorandum of decision is riddled with significant factual errors, each one a glaring contradiction to the evidence cited within those pages. The cumulative effect of these inaccuracies cannot be overstated. . . . Given that every one of these inaccuracies favor the plaintiff, [the defendant] asserts that undoubtedly these errors unfairly influenced the court's conclusions, ultimately resulting in a clearly erroneous determination." (Emphasis omitted.) In essence, the defendant claims that the court's erroneous findings of facts led it to incorrectly conclude that he engaged in conversion and statutory theft. For its part, the plaintiff contends that the trial court's findings of fact were supported by the evidence, and, to the extent the court erred in any of its subsidiary findings, the court's ultimate conclusions were adequately supported by the evidence presented. We agree with the plaintiff.

We begin by setting forth the applicable standard of review and relevant legal principles. "It is well established that [a]ppellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate

court denied the motion after a hearing, and the defendant has not challenged that ruling either by amending this appeal pursuant to Practice Book § 61-9 or by filing a new appeal. Accordingly, we will not consider the 2018 federal tax return. See id., 478 ("we cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal").

confidence in the court's [fact-finding] process, a new hearing is required. . . . In a civil case, [t]he harmless error standard . . . is whether the improper ruling would likely affect the result." (Citations omitted; internal quotation marks omitted.) *Rader* v. *Valeri*, 223 Conn. App. 243, 260, 308 A.3d 66, cert. denied, 348 Conn. 959, 312 A.3d 37 (2024).

"The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights. . . . Thus, [c]onversion is some unauthorized act which deprives another of his property permanently or for an indefinite time; some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm. . . . Conversion can be distinguished from statutory theft as established by [General Statutes] § 53a-119 in two ways. First, statutory theft requires an intent to deprive another of his property; second, conversion requires the owner to be harmed by a defendant's conduct. Therefore, statutory theft requires a plaintiff to prove the additional element of intent over and above what he or she must demonstrate to prove conversion." (Internal quotation marks omitted.) *AAA Advantage Carting & Demolition Services, LLC* v. *Capone*, 221 Conn. App. 256, 289, 301 A.3d 1111, cert. denied, 348 Conn. 924, 304 A.3d 442 (2023), and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023).

In its memorandum of decision, the court found that these elements had been satisfied. Specifically, the court found that "[t]he evidence is sufficient to establish that the defendant, without authorization, assumed and exercised ownership over funds belonging to the [plaintiff] to its exclusion. . . . There is little question that the [plaintiff] was harmed as a result of the defendant's

unauthorized acts. . . . The court finds that the defendant intended to exercise dominion and control over those funds. . . . [T]he credible testimony of the witnesses and the admitted exhibits are of sufficient weight to establish by a preponderance of the evidence that the defendant engaged in the unauthorized withdrawal of the plaintiff's funds and, therefore, committed an intentional deprivation of property." (Citations omitted.)

The court "[found] particularly credible the testimony of Beverly regarding the audit, its results, the limited access of others to [the plaintiff's] accounts during the defendant's tenure as treasurer, the consistent history of income and expenses of the [plaintiff] except for the period of time [that the] defendant was treasurer, as well as Beverly's own work along with that of the finance committee in investigating the precipitous drop in income without any other identifiable variable accounting for such a drop. That testimony was supported by the credible testimony of both Fern and Martin." The court also considered the involvement of Carlson and concluded that, based on the testimony of Fern, Martin, and Carlson himself, "[t]here was little to indicate that Carlson's involvement would have led to such a large loss during the period of time in question. . . . Consistent with this conclusion is the police department's taking no action against Carlson and its arrest of the defendant." The court also noted that, although "the granting of his accelerated rehabilitation application relative to the larceny charges is not any sort of admission of guilt . . . the $25,313 payment to the [plaintiff] as a condition of the defendant's participation in that program can be considered as an informal acknowledgment of the defendant's responsibility from a civil perspective."

In support of its findings, the court had before it the following relevant testimony and documentary evidence. Beverly testified as to the finance committee's

investigation into the plaintiff's loss of funds. He testified that the finance committee reviewed the plaintiff's savings and checking account statements, admitted into evidence as exhibits 11 through 25 and 30, and observed a significant decrease in funds over the course of the defendant's tenure as treasurer. He testified that the finance committee compared the bank statements with the treasurer's reports, which were admitted into evidence as exhibit 4. Beverly testified that the figures reported by the defendant in the treasurer's reports did not align with the corresponding bank statements, and, in fact, the treasurer's reports often indicated that there was more money in the plaintiff's accounts than reflected by the bank statements. Beverly testified that the finance committee's review of the treasurer's reports and the plaintiff's bank statements revealed an "unexplained hole of cash of over [$60,000]." The finance committee created a summary of the increases and decreases of the plaintiff's checking and savings accounts compared to the amount represented on the treasurer's reports. This summary, admitted into evidence as exhibit 9, provided for a variance of $34,718 from the treasurer's reports and a total loss of $58,099 from the plaintiff's accounts between September, 2017, and February, 2019. Beverly testified that the finance committee concluded that the decrease in funds was primarily attributed to numerous cash withdrawals from the accounts. During his testimony, Beverly referenced exhibit 7, which included emails from Carlson to the defendant requesting funds for umpire payments and a summary of the finance committee's attempt to match the requests for payments to the withdrawals. Beverly further testified that, of the fifty-six withdrawals from the plaintiff's accounts, only five withdrawals matched the amount requested by Carlson, with the other fifty-one withdrawals exceeding the amount requested. Beverly also testified that, on February 2, 2019, the finance

committee sent their summary of unaccounted for cash withdrawals, admitted into evidence as exhibit 31, to the defendant for additional information on the withdrawals. The explanations the defendant provided, admitted into evidence as exhibit 32, primarily attributed the withdrawals to umpire fees. Beverly testified that the amount of money classified as umpire payments was far higher than what the plaintiff historically had spent. Exhibit 33 includes, inter alia, a summary of Carlson's requests to the defendant for umpire payments during the fall of 2017 and spring of 2018. In the fall of 2017, Carlson requested $5435 for umpire payments. In the spring of 2018, he requested $31,420. Additionally, an estimate of umpire fees for the 2018 year, admitted into evidence as exhibit 34, projected a total of $26,225 in umpire payments. Beverly testified that both the records of umpire payments as well as the estimate demonstrated that the amount withdrawn was significantly higher than the amount the plaintiff would expect to spend on umpires in any particular season. On the basis of the finance committee's work investigating the loss of funds, Beverly testified that the unaccounted for cash withdrawals totaled $69,000. This testimony is supported by exhibit 10, a summary of "Missing [Plaintiff] Cash," which provides $69,040 as the total amount of money the plaintiff lost.[5]

Beverly further testified that there were numerous transactions made at stores with the plaintiff's debit card, either for goods unrelated to the association or goods purchased and then returned for cash, with no

[5] Exhibit 10 provides a calculation of the total missing cash. The summary provides for $87,683 as total cash withdrawals between October, 2017, and November, 2018. It also includes $1288 as accounting firm fees and $8000 as "C. Winan Fees," presumably referring to the plaintiff's counsel, both incurred in "2019/2020." The summary also includes $27,930 as "normal cash spend." The defendant does not raise any challenge as to the court's findings relating to the amount of funds withdrawn from the plaintiff's accounts or the damages awarded to the plaintiff by the court.

corresponding deposit in the plaintiff's accounts. During his testimony, Beverly referenced exhibit 5, a summary of bank statements documenting the questionable transactions; exhibits 36, 37, and 38, receipts obtained by the Bethel Police Department; and exhibit 35, a summary of the transactions on the debit card, reflecting a total $25,205.52 in purchases that were fraudulent or returned for unaccounted for cash. Beverly further testified that the defendant's restitution payment to the plaintiff as part of his accelerated rehabilitation application in the criminal case represented the funds lost due to the defendant's misuse of the plaintiff's debit card.

Beverly testified that there was limited access to the plaintiff's accounts during the relevant period. Exhibit 6, a correspondence between the financial committee and the plaintiff's bank, established that, during the relevant period, the only people with authorized access to the plaintiff's banks accounts were Waterman, who was incapacitated,[6] and the defendant. The correspondence with the bank further showed that the defendant was the only person issued a debit card during that time. Although the defendant attempted to establish at trial that Carlson was responsible for the loss of funds, Beverly, Fern, and Carlson all testified that Carlson did not have any access to the plaintiff's accounts or funds beyond receiving cash from the defendant to pay the umpires during the relevant period.

Notwithstanding all of this evidence, the defendant claims that the court made various subsidiary findings of fact that were clearly erroneous, undermining its ultimate conclusion that the defendant's liability had been established by a preponderance of the evidence. We address each in turn.

[6] The trial court found that, "by 2017, Waterman had become ill and no longer was able to perform his duties, leaving the defendant as the sole individual with access to the card." The defendant does not challenge this finding.

First, the defendant argues that the court's finding that "often the amount reported by the defendant in the monthly [treasurer's] reports as to what was in the [plaintiff's] accounts was more than what was eventually shown on the bank statements" is clearly erroneous as "[t]he plaintiff did not present any evidence to support this claim . . . [and] [the defendant] never reported balances, and it was not in the [plaintiff's] practice to do so." He argues that "[t]hese instances represent substantial errors in the court's factual findings, which inaccurately depict [the defendant] as intentionally disseminating misleading information to the plaintiff regarding the [plaintiff's] financial state." The problem with the defendant's argument is that the court's finding did not refer to account balances. Instead, the court referred to the monthly cash flow reported by the defendant in the treasurer's reports. The evidence indicated that the reports submitted by the defendant set forth the amounts deposited to and withdrawn from the accounts for each month and that those figures did not align with the corresponding bank statements for the plaintiff's accounts. Consequently, we cannot conclude that the court's finding is clearly erroneous.

Second, the defendant argues that the court's finding that "the audit turned over to the police department found that, at one point, there was a deficit of approximately $60,000 in the accounts of the [plaintiff] and it appeared to be due in part to cash withdrawals having been made from the account" was clearly erroneous. He argues that it is significant that exhibit 46, on which the court relied, "is not an 'audit' . . . and more importantly, it does not mention a 'deficit of approximately $60,000' *or any sum close to that amount* . . . ." (Citation omitted; emphasis in original.) Although the defendant is correct that exhibit 46 is a compilation rather than an audit,[7] and does not reference a shortfall of

[7] "Broadly speaking, auditors can provide three different types of accounting services: compilations, reviews, and audits. A compilation is the lowest

$60,000, the court had ample other evidence that proved the amount of the plaintiff's loss. Specifically, Beverly, whom the court found to be a credible witness, testified that the finance committee's review of the treasurer's reports and the plaintiff's bank statements revealed an "unexplained hole of cash of over [$60,000]." In addition, exhibit 10 reflects a total of $87,683 in cash withdrawals from October, 2017, through November, 2018. The summary refers to $27,930 as "normal cash spend" during that period. Exhibit 7, which summarizes check requests and cash withdrawals from the plaintiff's savings and checking accounts, states that a total of $57,888 was "[o]ver withdrawn" between September, 2017, and October, 2018. Further, exhibit 9, which summarizes the increases and decreases of the plaintiff's checking and savings accounts, represents a total loss of $58,099 from the plaintiff's accounts between September, 2017, and February, 2019. Thus, although exhibit 46 does not support the specific finding challenged by the defendant, the record contains an abundance of other evidence establishing that approximately $60,000 remained unaccounted for after the finance committee reviewed the plaintiff's accounts.[8]

level of assurance regarding an entity's financial statements. . . . It expresses neither an opinion nor any level of assurance. . . . When performing a compilation, an accountant need not verify or corroborate the financial statement information provided by the client. . . . In an audit, which provides the highest level of assurance on financial statements, the accountant provides verification of the financial statements' claims and assertions and expresses an opinion on the entity's financials." (Citations omitted; internal quotation marks omitted.) *Otto* v. *Pennsylvania State Education Assn.-NEA*, 330 F.3d 125, 133 (3d Cir.), cert. denied sub nom. *Shaler Area Education Assn.* v. *Emory*, 540 U.S. 982, 124 S. Ct. 466, 157 L. Ed. 2d 372 (2003), and cert. denied, 540 U.S. 982, 124 S. Ct. 467, 157 L. Ed. 2d 372 (2003).

[8] Although the defendant challenges the accuracy of the court's description of the audit report, we again note that he does not raise any challenge as to the court's findings relating to the amount of funds withdrawn from the plaintiff's accounts or the damages awarded to the plaintiff by the court. See footnote 5 of this opinion.

Third, the defendant argues that the court's finding that, after the plaintiff asked for information about what the cash withdrawals were for, "[t]he defendant responded that they were for the payment of umpires" is clearly erroneous. The defendant argues that the court referenced exhibit 32 in relation to this finding, which demonstrates that several of the payments were indicated by the defendant to have been for expenses other than umpires, and "[n]owhere is it evidenced that [the defendant] indicated that all of these withdrawals were for umpires, as this statement implies." We see no such implication in the court's finding. The evidence at trial was clear that the defendant's principal focus when explaining the discrepancies revolved around the payment of umpires. Exhibit 32 reflects that the defendant claimed that the primary justification for cash expenses was the payment of umpires. Similarly, the court heard testimony that the payment of umpires was the defendant's regular explanation when he was questioned about cash expenditures. For example, when describing the defendant's explanations for the withdrawals, Beverly testified that "[m]ost of them, primarily, being umpire spent." Similarly, when asked at trial if he knew what misappropriated funds were at issue, Carlson replied, "It was brought to my attention that they're talking about umpire funds that were put on the spreadsheet that [they] said were not used for umpires." Consequently, the defendant's argument is without merit.

Fourth, the defendant argues that the court's finding that, "although the defendant attempted to be cooperative in answering the questions posed, he did not provide any receipts or documentation for the period during which he acted as treasurer" is clearly erroneous because it is contradicted by exhibit C, which the court cited to in support of that finding. We disagree with the defendant's interpretation of the court's finding. Specifically, the challenged finding refers to questions

posed by the plaintiff to the defendant regarding the basis for certain cash withdrawals, which the defendant claimed "were for the payment of the umpires." Exhibit C is comprised of several email exchanges from 2018 and 2019 between the defendant, Martin, Carlson, and Fern, some of which are exchanges between the defendant and Carlson, discussing umpire payments in 2018 during the defendant's tenure as treasurer. Exhibit C also includes emails in which the defendant forwarded several of his email exchanges with Carlson to Martin on March 2, 2019.[9] Exhibit C does not, however, include any receipts or other documentation to substantiate that the amount withdrawn matched the amount requested for umpire payments.

It is clear from a reading of the memorandum of decision that the court did not view the email exchanges in exhibit C as constituting "receipts or documentation." In particular, the court found that, "[a]lthough the defendant claimed that he withdrew only what he was asked for by Carlson, there was no notation in any treasurer reports of such requests." Moreover, the challenged finding is supported by Beverly's testimony. On cross-examination of Beverly, the defendant attempted to establish his own cooperation in the finance committee's investigation by asking Beverly whether he provided information as requested, to which Beverly replied, "You didn't provide any receipts or documentation for the time period in question. That's why we're here."

Fifth, the defendant argues that the court's finding that the defendant provided "written explanations of the withdrawals" to Fern is clearly erroneous as there is no evidence in the record to support it. The defendant relatedly argues that exhibit 11, referenced by the court,

[9] We note that, although during trial the defendant refers to exhibit C as additionally containing text messages, the exhibit itself contains emails only.

does not support this finding. The defendant overlooks that the evidence in the record supports that the defendant, in exhibit 32, provided written explanations of the cash withdrawals to the finance committee at its request. Consequently, even if the court erred in referring to Fern instead of the finance committee and mistakenly referred to exhibit 11 instead of exhibit 32, such errors were harmless. See *Rader* v. *Valeri*, supra, 223 Conn. App. 261.

Sixth, the defendant argues that the court's finding that "Fern suggested to the defendant that an audit of the finances and requests be done, but the defendant did not want to do so" is clearly erroneous, as this fact is not supported by exhibit C, referenced by the court in relation to this finding, and, moreover, exhibit D demonstrates that the defendant was advocating for the audit, not opposing it. We are not persuaded.

Exhibit D[10] is a series of emails between the defendant, Martin, and Fern. In an email from Fern to both the defendant and Martin on September 21, 2018, Fern detailed his view of Carlson's ability as a board member and his management of funds. In the email, Fern stated, "And now [Carlson] knows [Martin is] double checking him which is probably why he went bananas when [the defendant] told him that he wanted an audit." Were this the only evidence before the court, the defendant's argument might have merit. The court heard conflicting evidence, however, as to whom, between Fern and the defendant, wanted an audit. At trial, Fern directly refuted the statements contained in exhibit D in the

[10] Although exhibit D does not appear on the electronic exhibit list on the Judicial Branch website, the court's list of exhibits indicates that it was admitted as a full exhibit. The trial court transcript similarly reflects that the defendant offered exhibit D into evidence and that the court admitted it as a full exhibit. We also note that, although the trial court, in its memorandum of decision, refers to exhibits "D-1" and "D-2," exhibit D consists of one singular exhibit.

following exchange between himself and the defendant, who, on direct examination, asked Fern to read portions of the email exchange aloud.

"[Fern]: . . . which is probably why he went bananas when [the defendant] told him that he wanted an audit."

"[The Defendant]: I'm sorry. Who wanted the audit?

"[Fern]: I wanted the audit, but I told you to tell him.

"[The Defendant]: Can you please read the email?

"[Fern]: This says when [the defendant] told him that he wanted an audit, but—

"[The Defendant]: So, this clearly states that [the defendant] wanted an audit.

"[Fern]: [The defendant] did not want an audit. [The defendant] did not want an audit.

* * *

"[The Defendant]: Is that not written in the email that you—

"[Fern]: It is, but I was the one—

"[The Defendant]: Okay. Thank you.

"[Fern]: —that wanted the audit.

* * *

"[Fern]: Well, I thought the first option was for me to look at the statements, which you didn't want me to do. . . . [T]he second option was to get an audit, which you didn't want to do.

* * *

"[The Defendant]: Who didn't want that?

"[Fern]: You.

"[The Defendant]: I didn't want—okay. . . . [A]nd how did we have communication?

"[Fern]: Directly.

"[The Defendant]: Face-to-face?

"[Fern]: Yep."

On cross-examination by the plaintiff's counsel, Fern further stated that he, not the defendant, wanted the audit.

"[The Plaintiff's Counsel]: I think you said you suggested to [the defendant] that there be an audit.

"[Fern]: Oh. Absolutely, yeah.

"[The Plaintiff's Counsel]: And he wasn't interested in that.

"[Fern]: Was not interested in that."

The court, as the trier of fact, was free to weigh the evidence as it deemed appropriate. *Palkimas* v. *Fernandez*, 159 Conn. App. 129, 133, 122 A.3d 704 (2015) ("it 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" (emphasis omitted; internal quotation marks omitted)). The court was not required to accept the defendant's interpretation of exhibit D over Fern's testimony, which the court found to be credible. Because it was supported by Fern's testimony, the court's finding that Fern suggested an audit, which the defendant did not want, was not clearly erroneous.[11]

[11] The defendant also challenges several of the court's findings based on the treasurer's reports and a corresponding summary, which were admitted into evidence as exhibits 4 and 9, respectively. Exhibit 4 contains eight treasurer's reports submitted by the defendant to the plaintiff in 2018. The defendant argues that exhibits 4 and 9 omitted two reports for June, 2018, and October, 2018, in which the defendant reported a negative balance. In support of that contention, the defendant relies on his proposed exhibit F, which was not admitted into evidence at trial. Although the defendant included exhibit F on his list of proposed exhibits before the trial court,

In sum, we conclude that the specific factual findings challenged by the defendant either were not clear error or that any error was harmless. We therefore reject the defendant's claim that "these errors unfairly influenced the court's conclusions, ultimately resulting in a clearly erroneous determination." (Emphasis omitted.) As discussed previously, there was ample evidence in the record, unchallenged by the defendant, supporting the trial court's ultimate conclusion that the defendant engaged in the unauthorized withdrawal of the plaintiff's funds and that he intended to deprive the plaintiff of its property. Accordingly, we conclude that the trial court did not err when it found that the defendant committed conversion and statutory theft.

II

The defendant next claims that the trial court abused its discretion by failing to address various discovery disputes arising from the plaintiff's alleged noncompliance with the defendant's discovery requests. The plaintiff argues that this claim is not reviewable because the defendant did not properly raise it before the trial court. We agree with the plaintiff.

The following additional procedural history is relevant to this claim. On August 1, 2022, the defendant filed a motion to compel the plaintiff to respond to eleven requests for production that he had propounded on July 26, 2022. On August 5, 2022, the plaintiff opposed the motion as premature under Practice Book § 13-10.[12]

the transcript reveals that exhibit F neither was offered by the defendant nor admitted into evidence by the court at trial. Accordingly, we decline to review these claims. See *In re Jah'za G.*, 141 Conn. App. 15, 27 n.8, 60 A.3d 392 (declining to review claim predicated on evidence not in record), cert. denied, 308 Conn. 926, 64 A.3d 329 (2013).

[12] Practice Book § 13-10 provides in relevant part: "(a) The party to whom the request is directed or such party's attorney shall serve a written response, which may be in electronic format, within sixty days after the date of certification of service . . . ."

On August 30, 2022, the plaintiff filed objections to three of the defendant's requests for production. Specifically, the plaintiff objected to the defendant's requests for production of (1) the minutes of the plaintiff's meetings between 2014 and 2019, (2) contact information for umpires hired in 2017 and 2018, and records related to umpire fees, and (3) all records relating to any transactions by the defendant from the plaintiff's accounts between 2014 and 2019. On October 31, 2022, the defendant filed a motion for an order of compliance seeking to compel the plaintiff to produce responsive documents. The defendant claimed that the plaintiff had not only failed to produce documents as to which an objection had been made but had failed to produce any responsive documents for requests as to which there were no objections. The defendant asked the court to compel "immediate compliance as the trial is less than five weeks away." In response, the plaintiff filed a notice of compliance on November 4, 2022, stating that, pursuant to Practice Book § 13-10, it had complied with the defendant's request for production dated July 26, 2022. On November 4, 2022, the defendant filed a caseflow request seeking a hearing on his motion for an order of compliance. The plaintiff filed an objection to this request on November 7, 2022. The trial court, *Shaban*, *J.*, denied the request on the ground that the plaintiff had filed a notice of compliance with the defendant's requests. On November 9, 2022, the defendant filed an objection to the plaintiff's notice of compliance and responses to the defendant's requests for production in which he asserted that the plaintiff's responses were inadequate in several respects as well as a caseflow request seeking consideration of his objection to the plaintiff's notice of compliance. On November 18, 2022, the defendant filed a memorandum in support of his objection to the plaintiff's notice of compliance. On November 22, 2022, the court issued an order stating

that "[a]ny issue regarding compliance with discovery will be addressed at the commencement of trial on November 30, 2022."

Thereafter, both parties requested and were granted continuances of the trial. In the defendant's motion for continuance, he explained, "I am respectfully requesting a continuance as I have just received nearly 200 pages of evidence from the plaintiff. Late Monday, [November 21, 2022], I received several emails from [the plaintiff's counsel] with large files attached to each email totaling nearly 200 pages of evidence from the plaintiff. This discovery was sent in response to my request from [July]. I need to gain access to the law library, which has been closed since early last week due to Thanksgiving." Thereafter, the court granted the defendant's motion and rescheduled the trial to begin on February 23, 2023.

Following his motion for a continuance, the defendant did not file any further motions seeking an order for compliance by the plaintiff with his requests for production prior to trial. On February 15, 2023, the court ordered each party to submit a trial management report identifying proposed exhibits they intended to offer into evidence and witnesses they intended to call. In his trial management report, the defendant contended that "[the plaintiff] has possession and control of [the defendant's] relinquished records and receipts, evidence necessary to disprove [the plaintiff's] allegations, yet [the plaintiff] now denies the existence of such records and therefore would not release them to [the defendant] in discovery. [The plaintiff] is alleging [that the defendant] misused its funds and has the very records needed to prove otherwise as a result of the [defendant] voluntarily turning them over to the organization upon his departure at the end of his term. Yet [the plaintiff] now denies possession of said documents despite the fact that the defendant can document that these items were turned over to the plaintiff. . . . The

plaintiff now controls this very evidence needed to document the purpose for the alleged 'unexplained, unnecessary and unusual' withdrawals. [The defendant] is prepared to present evidence to the contrary and will document that he did share this information with the plaintiff upon his voluntary departure from the organization."

On February 23, 2023, prior to the commencement of trial, the defendant did not raise any discovery issues with the court; rather, when asked by the court, "[A]re you ready to proceed today?" the defendant responded, "Yes, I am." At trial, during his cross-examination of the plaintiff's rebuttal witness, Beverly, the defendant contended that the plaintiff had removed its meeting minutes from its website and had failed to produce them to the defendant. The following exchange took place:

"[The Defendant]: . . . why would it be necessary to pull the minutes down for past years going back—because folks that were there in 2015 and [2016] were not subject to scrutiny by the media, so why would you feel the need to pull them down?

"[Beverly]: We changed a lot of procedures when you left, first off. Right? There's a lot of things that happened that shouldn't happen. So, all of those are available to all of our board members, and whoever requests them, we are happy to provide minutes. We provided minutes to you in discovery as well.

"[The Defendant]: Was I provided 2015 and 2016 minutes?

"[Beverly]: For the associated part of this case—

"[The Defendant]: Yes.

"[Beverly]: —which is 2017 and 2018?

"[The Defendant]: Was I—

"[The Plaintiff's Counsel]: They were objected to, Your Honor, [on] relevance grounds.

"The Court: That's all right. Just go ahead and answer the question as best you can, Mr. Beverly.

"[Beverly]: No.

"[The Defendant]: I was not. Was there a particular reason for that?

"[Beverly]: No.

* * *

"[The Defendant]: Why would minutes be down now, three years after the [arrest in 2020]?

"[The Plaintiff's Counsel]: . . . objection, relevance, Your Honor.

"[The Defendant]: No, [it] speaks to the transparency of the organization.

"The Court: Hold on. Hold on. So, the issue . . . is relevancy. I'm not sure what the relevancy is after—well after the fact . . . but I'm still going to allow the question. And again, what weight I give it is another issue."

In his closing argument before the trial court, the defendant, referencing financial documents he possessed when he was treasurer, stated, "I had turned everything over that I had. And now we're in a position to where much of those items have disappeared. Yet there was enough information to substantiate, to bring a case against me, but when asked in discovery for those items, I was told that they don't exist. And these are items such as receipts. These are all things that were provided to the [plaintiff]. I have to question the intent of the [plaintiff] when it looks like . . . transparency is not a primary focus anymore."

On appeal, the defendant argues that the minutes and missing financial records that he referenced during trial were the subject of his discovery requests to the plaintiff and that the court's failure to order the plaintiff to comply with the discovery requests prejudiced his ability to present his defense. Because the defendant did not properly preserve this claim in the trial court, we do not reach it.

"Our rules of practice provide that we are not bound to consider a claim unless it was distinctly raised at trial or arose subsequent to the trial. . . . A claim is distinctly raised if it is so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . A claim briefly suggested is not distinctly raised. . . . Our rules of procedure [also] do not allow a [party] to pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him. . . . To rule otherwise would permit trial by ambuscade." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *A & R Enterprises, LLC* v. *Sentinel Ins. Co., Ltd.*, 202 Conn. App. 224, 229, 244 A.3d 660, cert. denied, 336 Conn. 921, 246 A.3d 2 (2021).

In the present case, the record clearly establishes that the defendant did not raise the issue of the plaintiff's alleged discovery noncompliance to the trial court following his motion for a continuance of trial on November 22, 2022, in which he indicated to the court that the plaintiff *had* responded to his July 26, 2022 request for production. Given that the defendant's previous motion for compliance and objection to the plaintiff's notice of compliance both concerned the defendant's July 26, 2022 request for production, the plaintiff's production on November 21, 2022, seemingly resolved any remaining compliance issues without any need for involvement by the court. Significantly, at the commencement of trial, when asked by the court if he

was ready to proceed, the defendant responded affirmatively, without raising any discovery issues.

The few references the defendant made in his trial management report and during trial to the plaintiff's failure to provide him with relevant documents cannot be construed as having distinctly raised a claim that the plaintiff had failed to comply with its discovery obligations and that this alleged failure prejudiced the defendant. In his trial management report, although the defendant contended that the plaintiff "denie[d] the existence" of "records and receipts" that he had turned over to the plaintiff, presumably when he ended his term as treasurer, the defendant did not specify the records to which he was referring, identify a request for production to which the plaintiff had failed to respond, or request any action by the trial court. Other than his assertion that he "can document that these [records] were turned over to the plaintiff," nothing in the defendant's trial management report alerted the trial court that he was requesting any relief before the trial began. See *A & R Enterprises, LLC* v. *Sentinel Ins. Co., Ltd.*, supra, 202 Conn. App. 229.

Further, although the defendant contends that he "addressed the issue of the relevant records he had requested but was inexplicably denied during the discovery process in his examination of the witnesses," the defendant characterized the purpose of his questioning during trial as "speak[ing] to the transparency of the organization." Similarly, in his closing argument, the defendant again mentioned the alleged discovery noncompliance and stated, "I have to question the intent of the [plaintiff] when it looks like . . . transparency is not a primary focus anymore." The defendant, thus, used the plaintiff's lack of transparency as a reason for the court not to credit the plaintiff's evidence. Certainly, the defendant's few questions to witnesses regarding the plaintiff's failure to produce documents did not distinctly raise a claim that the plaintiff had violated

its discovery obligations and should either be sanctioned or ordered to produce additional documents so that the defendant could properly present his case. Consequently, because the defendant raises this distinct claim for the first time on appeal, it was not properly preserved for this court to consider.[13] Accordingly, we decline to address this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

EASTERN CONNECTICUT SAVINGS BANK *v.* VENUS DEVELOPMENTS, LLC, ET AL.
(AC 47204)

Bright, C. J., and Alvord and Prescott, Js.*

Syllabus

The defendant property owner appealed from the judgment of the trial court denying its motion to open and vacate the judgment of foreclosure. The defendant claimed, inter alia, that the court erred in denying its motion to

[13] The defendant argues, for the first time in his reply brief, that his claim is reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Specifically, the defendant claims that the trial court's failure to address various discovery disputes infringed on his right to due process and to a fair trial. Other than a bald assertion that "the right to discovery is protected under the due process clause of the fourteenth amendment to the United States constitution," the defendant has provided no analysis as to why this garden variety discovery dispute is of constitutional magnitude or how the court deprived him of due process when he never alerted the court to the fact that he had not received the discovery he sought. See *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487, 189 A.3d 1232 (2018) ("[a]lthough we recognize and adhere to the well-founded policy to accord leeway to self-represented parties in the appeal process, our deference is not unlimited; nor is a litigant on appeal relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court"). His claim, therefore, is inadequately briefed and, accordingly, we decline to review his claim. "We will not engage in *Golding* . . . review on the basis of . . . an inadequate brief." (Internal quotation marks omitted.) *State* v. *Abramovich*, 229 Conn. App. 213, 219, 326 A.3d 593 (2024).

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

open because the plaintiff failed to comply with the notice requirements pursuant to the rule of practice (§ 17-22). *Held*:

There was no merit to the defendant's claim that the trial court abused its discretion in denying the motion to open because the plaintiff lacked standing, as the plaintiff had been the holder of the note at the time of the commencement of the foreclosure action.

The trial court acted within its discretion in denying the defendant's motion to open the foreclosure judgment with respect to the issue of whether the amount of the debt had been properly proven, as the defendant failed to challenge the amount of the debt in an appeal from the foreclosure judgment and the issue of the amount of the debt attacked the merits of the underlying foreclosure judgment.

The trial court abused its discretion in denying the motion to open because the plaintiff failed to comply with the notice requirements of Practice Book § 17-22, having failed to provide proper notice of the foreclosure judgment to two defendants.

Argued January 6—officially released April 1, 2025

Procedural History

Action, inter alia, to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the named defendant et al. was defaulted for failure to appear and the defendant Hillview Estates, LLC, was defaulted for failure to plead; thereafter, the court, *Wilkerson Brillant*, *J.*, granted the plaintiff's motion for an order allowing the plaintiff to consolidate the amounts due under first and secondary promissory notes and the amount paid to resolve a mechanic's lien; subsequently, the action was withdrawn as to the defendant MacClain Construction, LLC; thereafter, the court, *Wilkerson Brillant*, *J.*, rendered judgment of foreclosure by sale; subsequently, the named defendant filed an appearance; thereafter, the court, *Gordon*, *J.*, denied the named defendant's motion to open and vacate the judgment of foreclosure, and the named defendant appealed to this court. *Reversed*; *further proceedings*.

James Chen Tsui, filed a brief for the appellant (named defendant).

Michael S. Bonnano, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this mortgage foreclosure action, the defendant Venus Developments, LLC,[1] appeals from the judgment of the trial court rendered in favor of the plaintiff, Eastern Connecticut Savings Bank, denying its motion to open the court's judgment of foreclosure by sale. On appeal, the defendant[2] claims that the court abused its discretion in denying the motion to open because (1) the plaintiff lacked standing to commence the foreclosure action, (2) the foreclosure judgment improperly included the debt from a second promissory note, which was not part of the complaint and not properly proven, and (3) the plaintiff failed to comply with the notice requirements in Practice Book § 17-22. We agree with the defendant's third claim and, accordingly, reverse the judgment of the trial court.

[1] Because only Venus Developments, LLC, has appealed, we refer to it as the defendant in this opinion. See footnote 2 of this opinion. The other defendants named in the complaint are referred to by name when necessary.

[2] The complaint also named as defendants Bingfang Tu, Gloria Shao, Guorong Wang, MacClain Construction, LLC, also known as MacClain Construction Company, LLC (MacClain), and Hillview Estates, LLC, also known as Highview Estates, LLC (Hillview Estates). Additionally, the plaintiff also named itself as a defendant in the complaint because it held a second mortgage granted to it by the defendant. That mortgage secured a second promissory note in the original amount of $2,000,000. The second promissory note was modified to reduce the loan amount to $1,500,000. The court granted the plaintiff's motion for default for failure to plead as to Hillview Estates and its motion for default for failure to appear as to Wang. The plaintiff filed motions for default for failure to appear as to Tu and Shao, and the court granted those motions on October 6, 2022.

MacClain filed an answer and special defenses, claiming that a mechanic's lien it had filed against the property had priority over the plaintiff's mortgage. The plaintiff subsequently satisfied the amount secured by MacClain's mechanic's lien and entered into a stipulation with MacClain whereby MacClain agreed to withdraw its answer and special defenses. The action was then withdrawn as to MacClain.

The record reveals the following relevant facts and procedural history. On July 14, 2022, the plaintiff commenced this foreclosure action against the defendant alleging that the defendant had defaulted on its payment obligations due on a $500,000 revolving commercial loan (first promissory note) that was modified on June 9, 2021, to increase the principal sum of the loan to $1,000,000. The first promissory note was secured by a mortgage on real property located at 67 Anthony Road in Tolland and a guaranty. In its three count complaint, the plaintiff sought to recover the sums due on the first promissory note, to enforce the guaranty, and to foreclose on the mortgage.

The defendant did not file an appearance, and, on September 23, 2022, the plaintiff filed a motion for default for failure to appear pursuant to Practice Book § 17-20. The motion was granted on October 6, 2022.

On August 4, 2023, the plaintiff filed a motion for order seeking to recover not just the amount due under the first promissory note, but also the amount due under a second promissory note,[3] as well as the amount it had paid or intended to pay to another defendant named in the complaint, MacClain Construction, LLC, also known as MacClain Construction Company, LLC, to resolve a dispute regarding priorities "into one debt for the purposes of judgment and bidding at a foreclosure sale, if one is ordered."[4] There was no objection to this motion. On August 16, 2023, the court, *Wilkerson Brillant, J.*, granted the motion.

On July 3, 2023, the plaintiff filed a motion for a judgment of strict foreclosure. On August 16, 2023, the court rendered a judgment of foreclosure by sale, found the fair market value of the property to be $3,367,000,

[3] The second promissory note was secured by a second mortgage on the property, but the plaintiff did not seek to foreclose on the second mortgage.

[4] See footnote 2 of this opinion.

the total debt to be $2,340,576.31, and set a sale date of October 21, 2023. The court subsequently opened the foreclosure judgment on October 12, 2023, and set a new sale date of December 16, 2023, in order to give additional time for the appraisal of the property.

On December 7, 2023, the defendant appeared for the first time[5] and filed a motion to open and vacate the judgment of foreclosure. In that motion, it claimed that (1) the plaintiff lacked standing to bring the foreclosure action because the first promissory note, which was submitted as an exhibit to the complaint and which was attached to an affidavit of debt filed by the plaintiff, contained an allonge payable to ECS Mortgage Services Corporation (ECS) that made ECS, not the plaintiff, the holder of the first promissory note when the foreclosure action was commenced; (2) the foreclosure judgment, which included the debt from both the first and second promissory notes, was improper because the complaint sought to foreclose only on the first mortgage securing the first promissory note and did not seek to foreclose on the subsequent mortgage securing the second promissory note; and (3) the plaintiff failed to give proper notice of the October 12, 2023 judgment, as mandated by Practice Book § 17-22, to the defendants Bingfang Tu and Gloria Shao.

In response, the plaintiff filed an objection arguing that (1) it had standing to commence the action because ECS reassigned the first promissory note back to the plaintiff; (2) the complaint identified the debt owed by

[5] Despite having been served with the complaint, the defendant elected not to file an appearance and was defaulted for failure to appear. It was only after the judgment of foreclosure was rendered that the defendant chose to appear and filed a motion to open that judgment. In an affidavit attached to the motion to open, Wang states that he is the sole member of the defendant and that the defendant had not hired an attorney or otherwise contested the foreclosure because, in Wang's view, he mistakenly believed that the foreclosure "was in order."

the defendant under both of the promissory notes, and it had successfully obtained, without any objection from the defendant, an order combining the amounts due on the first and second mortgage debts; and (3) it served the notice of the August 16, 2023 foreclosure judgment on all nonappearing defendants and that the defendant was "clearly aware" of the court's modified judgment on October 12, 2023, which did not affect the defendant's rights in the property beyond the extension of the sale date.

On December 14, 2023, following a hearing, the court, *Gordon, J.*, denied the motion to open. The foreclosure sale occurred on December 16, 2023, with the plaintiff as the successful bidder. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin with the following general legal principles. "Generally, an appeal must be filed within twenty days of the date notice of the judgment or decision is given. Practice Book § 63-1 (a). In the context of an appeal from the denial of a motion to open judgment, [i]t is well established in our jurisprudence that [if] an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper. . . . [If] a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment. . . . This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time for appeal." (Citation omitted; internal quotation marks

omitted.) *USA Bank* v. *Schulz*, 143 Conn. App. 412, 416–17, 70 A.3d 164 (2013). "This court must make every reasonable presumption in favor of the trial court's decision when reviewing a claim of abuse of discretion. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Internal quotation marks omitted.) *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 761, 966 A.2d 239 (2009).

In the present case, there is no dispute that the defendant failed to file an appeal or a motion to open within twenty days of the court's rendering of the judgment of foreclosure by sale. Accordingly, we review the defendant's claims under an abuse of discretion standard and do not address the underlying merits of the judgment of foreclosure by sale.

I

The defendant first claims that the court abused its discretion in denying the motion to open because the plaintiff lacked standing to commence the foreclosure action. We disagree.

"The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [If] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question

of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time. . . . [T]he plaintiff ultimately bears the burden of establishing standing.

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 488, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, 579 U.S. 903, 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

The defendant argues on appeal that the plaintiff lacked standing to commence the foreclosure action. It contends that, "[b]ecause the [first promissory] note was specifically endorsed to [ECS], it appeared to be the holder of the note when this action was commenced and the only party with standing."

The following additional facts and procedural history are relevant to this claim. The plaintiff filed exhibits to the complaint on August 16, 2022, which included the first promissory note, which was a revolving commercial loan issued by the plaintiff to the defendant, and an allonge attached to the first promissory note assigning it to ECS. After the August 16, 2023 judgment of foreclosure and in response to the defendant's December 7, 2023 motion to open the judgment of foreclosure which, inter alia, questioned the plaintiff's standing, the plaintiff, without objection, filed a supplemental complaint exhibit on December 15, 2023. That exhibit reflected a reassignment of the first promissory note from ECS back to the plaintiff on June 10, 2022, a date prior to the commencement of the action. The plaintiff, therefore, had standing to commence the foreclosure action

because it was the holder of the first promissory note when the action was commenced on July 14, 2022.

The defendant, however, takes issue with the timing of the plaintiff's submission of the evidence of the reassignment and argues that the plaintiff had not proven standing prior to the rendering of the judgment of foreclosure by sale because the reassignment was not submitted as an exhibit until the defendant sought to open that judgment. This argument lacks merit.

Prior to the foreclosure judgment, the plaintiff produced the first promissory note that it had issued to the defendant. That the attached allonge may have raised a question of standing[6] does not compel a conclusion that the court abused its discretion in denying the motion to open. Once the defendant raised the question of standing in its motion to open, the plaintiff submitted, as a supplemental complaint exhibit, the reassignment of the first promissory note from ECS back to the plaintiff on a date that preceded the commencement of the foreclosure action. If the defendant wanted to challenge the plaintiff's standing based on the assignment of the first promissory note as evidenced by the allonge, it could have done so previously by raising the issue in a motion to dismiss. Because the plaintiff was the holder of the note at the time of the commencement of the foreclosure action, the court did not abuse its discretion in denying the motion to open for lack of standing.

II

The defendant next claims that the court abused its discretion in denying its motion to open because, in its view, the foreclosure judgment improperly included the debt arising from the second promissory note, which

[6] The plaintiff also argues in its appellate brief that it has always been the holder of the note because it wholly owns the servicing company, ECS.

it argues was not a subject of the complaint. We are not persuaded.

As previously stated in this opinion, it is well established "that [w]here an appeal has been taken from the denial of a motion to open, but the appeal period has run with respect to the underlying judgment, [this court] ha[s] refused to entertain issues relating to the merits of the underlying case and ha[s] limited our consideration to whether the denial of the motion to open was proper." (Internal quotation marks omitted.) *USA Bank* v. *Schulz*, supra, 143 Conn. App. 417. The issue of whether the debt was properly proven attacks the merits of the underlying foreclosure judgment.[7]

Notice of the foreclosure judgment issued on August 22, 2023, and the defendant filed its motion to open and vacate the judgment on December 7, 2023, well after the twenty day appeal period set forth in Practice Book § 63-1 (a). The defendant could have challenged the amount of the debt on an appeal from the foreclosure judgment but did not do so. For this reason alone, the trial court acted within its discretion in denying the motion to open the foreclosure judgment. See id., 419. "Because opening a judgment is a matter of discretion, the trial court [is] not required to open the judgment to consider a claim not previously raised. The exercise

[7] We note briefly that the complaint sought to foreclose only on the first promissory note and that the plaintiff's motion for order to include the debt under the second promissory note was granted without objection. Even if we were to reach the merits of this claim, we conclude that, given the equitable nature of foreclosure actions, it was within the purview of the trial court to decide to include the amount of debt due under the second promissory note. See, e.g., *TD Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322, 326, 71 A.3d 541 (2013) ("[B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Internal quotation marks omitted.)).

of equitable authority is vested in the discretion of the trial court and is subject only to limited review on appeal." (Internal quotation marks omitted.) *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 849, 158 A.3d 405 (2017). The defendant has not demonstrated that the court abused its discretion in denying the motion to open in this regard.

III

The defendant finally claims that the court abused its discretion in denying the motion to open because the plaintiff failed to comply with the notice requirements in Practice Book § 17-22. We agree.

Practice Book § 17-22 provides in relevant part: "A notice of . . . [a] judgment after default for failure to enter an appearance, which notice includes the terms of the judgment, shall be sent by mail or electronic delivery within ten days of the entry of judgment by counsel of the prevailing party to the party against whom it is directed and a copy of such notice shall be filed with the clerk's office. Proof of service shall be in accordance with Section 10-14."

The defendant argues that the plaintiff did not give notice of the court's October 12, 2023 judgment to Tu and Shao, nonappearing defendants who were holders of junior mortgages. Although the plaintiff concedes that it failed to send notice of the October 12, 2023 judgment, it counters that it sent Tu and Shao notice of the original August 16, 2023 judgment of foreclosure. That, however, is not sufficient to satisfy Practice Book § 17-22. The plain language of § 17-22 requires that notice of the terms of the judgment "shall be sent . . . by counsel of the prevailing party to the party against whom it is directed . . . ." The record reflects that the plaintiff's counsel did not give proper notice of the October 12, 2023 judgment to Tu and Shao pursuant to § 17-22. It is possible that, if proper notice had been

given pursuant to § 17-22, Tu or Shao could have been the successful bidder at the December 16, 2023 foreclosure sale at a price higher than the successful bid submitted by the plaintiff, which could have benefitted the defendant. Accordingly, we conclude that the court abused its discretion in denying the motion to open as to the defendant's § 17-22 claim.

Because notice was not sent in accordance with Practice Book § 17-22, we must remand the case. We note, however, that our remand does not affect the judgment of foreclosure by sale or any other aspects of the judgment. Rather, in the absence of proper notice, we remand the case for the sole purpose of setting a new sale date.

The judgment denying the defendant's motion to open is reversed and the case is remanded with direction to open the judgment, vacate the sale, and set a new sale date.

In this opinion the other judges concurred.

REVERSE MORTGAGE SOLUTIONS, INC. *v.* WIDOW(ER), HEIR(S) AND/OR CREDITORS OF THE ESTATE OF BERYL E. ROWLAND ET AL.

(AC 47141)

Bright, C. J., and Moll and Seeley, Js.*

Syllabus

The defendants A and T, the sole heirs of the estate of their grandmother, the decedent, appealed from the trial court's judgment denying their motion to open the judgment of foreclosure by sale rendered for the plaintiff on certain real property owned by the decedent. The defendants claimed that

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

the trial court abused its discretion by denying their motion to open without holding a hearing. *Held*:

The defendants had standing to appeal to this court from the trial court's denial of their motion to open, as, although they were not named individually in the foreclosure action, the plaintiff designated the heirs of the decedent as party defendants to the foreclosure action and, therefore, the defendants were parties to the underlying action pursuant to statute (§ 52-69).

The trial court did not abuse its discretion by denying the motion to open without holding a hearing, the defendants having failed to assert that a good defense existed at the time the judgment of foreclosure by sale was rendered as required by statute (§ 52-212) and failed to comply with the mandate of § 52-212 (c) that the motion to open be verified by the oath of the complainant or the complainant's attorney.

Argued November 18, 2024—officially released April 1, 2025

Procedural History

Action to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the named defendant et al. were defaulted for failure to appear; thereafter, Mortgage Assets Management, LLC, was substituted as the party plaintiff; subsequently, the court, *Shaban*, *J.*, granted the plaintiff's motion for a judgment of foreclosure by sale and rendered judgment thereon; thereafter, the court, *Fox*, *J.*, denied the motion to open filed by the defendant Trinity Tatiana Pylypczuk et al., from which the defendant Trinity Tatiana Pylypczuk et al. appealed to this court. *Affirmed*.

Jonathan W. Fazzino, with whom were *Patricia C. Sullivan* and, on the brief, *Alexander Copp*, for the appellants (defendant Trinity Tatiana Pylypczuk et al.).

Benjamin Staskiewicz, with whom, on the brief, was *Geoffrey K. Milne*, for the appellee (substitute plaintiff).

Opinion

BRIGHT, C. J. In this action to foreclose a reverse mortgage on real property owned by Beryl E. Rowland (decedent), Trinity Tatiana Pylypczuk and Andrew

Bryce Pylypczuk (heirs), who are the decedent's grandchildren, appeal from the judgment of the trial court denying their motion to open the judgment of foreclosure by sale rendered by the court in favor of the plaintiff, Mortgage Assets Management, LLC, formerly known as Reverse Mortgage Solutions, Inc.[1] On appeal, the heirs claim that the court abused its discretion by denying their motion to open without a hearing. We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On March 11, 2015, the decedent executed a home equity conversion note and mortgage, granting the plaintiff a mortgage on her property located at 211 Long Ridge Road in Danbury (property) to secure future advances on a loan not to exceed $367,500. Pursuant to the note and mortgage, the decedent's death was the maturity event that allowed the plaintiff to demand immediate payment of all outstanding principal and interest due under the loan. After the decedent died on December 20, 2020, the plaintiff, pursuant to the terms of the note, accelerated payment of the debt and commenced the underlying foreclosure action in October, 2021. The plaintiff named as defendants "the widow(er), heir(s), and/or creditors of the Estate of Beryl E. Rowland" (unknown defendants) and Andrew Pylypczuk (Andrew), the decedent's son and the father of the heirs.[2] In the two count complaint, the plaintiff sought

[1] The original plaintiff, Reverse Mortgage Solutions, Inc., merged with and into Mortgage Assets Management, LLC, on December 31, 2021. The court subsequently granted a motion to substitute "Mortgage Assets Management, LLC f/k/a Reverse Mortgage Solutions, Inc.," as the plaintiff in November, 2022. In the interest of simplicity, we refer to both entities as the plaintiff in this opinion.

[2] The plaintiff also named the following additional defendants: the Secretary of Housing and Urban Development; the State of Connecticut, Department of Revenue Services; and the State of Connecticut, Judicial Branch. These additional defendants were defaulted for failing to appear, and they are not involved in this appeal.

foreclosure of the mortgage on the property (count one) and reformation of the mortgage to correct an error in the property description (count two). The plaintiff alleged that, as of August 26, 2021, the amount due and owing on the note was $50,921.19, plus interest, fees, and collection costs.

Appended to the summons was a "first order of notice in foreclosure action" form, which reflected that the court had found that the addresses of the unknown defendants were unknown and had ordered the plaintiff to provide notice by publication on the Judicial Branch legal notices website for fourteen days, beginning on or before November 2, 2021. The state marshal's return of service provided that, on October 22, 2021, the marshal served (1) the unknown defendants by online publication in accordance with the court's order of notice and (2) Andrew by leaving a true and attested copy of the writ of summons and complaint with the Secretary of the State and by sending a copy thereof, by certified mail, return receipt requested, to a residential address in Baltimore, Maryland. See General Statutes § 52-69 (notice to creditors, widow or widower, and heirs of deceased person); General Statutes § 52-68 (notice to nonresident interested parties); see also General Statutes § 52-59b (c) ("any process in any civil action brought against the nonresident individual . . . may be served upon the Secretary of the State and shall have the same validity as if served upon the nonresident individual . . . personally").

On June 28, 2022, the plaintiff filed an affidavit of online publication of legal notice and a motion for a finding that no further notice was required as to the unknown defendants. In that motion, the plaintiff's counsel represented that the plaintiff had provided notice of the action by publication on the Judicial Branch website from October 22 through November 5, 2021, pursuant to the court's order of notice. The court,

Shaban, *J.*, granted the motion on July 11, 2022. On July 26, 2022, the plaintiff filed a supplemental marshal's return of service dated December 15, 2021, which provided that the certified letter she had sent to Andrew in Baltimore had been returned to the marshal by the postal service and had been marked as " 'Unable to Forward/For Review' and 'Return to Sender, Not Deliverable as Addressed, Unable to Forward.' " On August 31, 2022, the court granted the plaintiff's motions for default for failure to appear against the unknown defendants and Andrew.[3]

On February 3, 2023, the plaintiff filed a motion for judgment of strict foreclosure and a finding of entitlement of possession, requesting that the court reform the mortgage to incorporate the correct description of the property and make a finding that the plaintiff is entitled to possession of the property. The plaintiff later filed appraisals,[4] foreclosure worksheets, and the required foreclosure affidavits. On April 19, 2023, the plaintiff filed the operative amended complaint, which did not alter the substance of the original complaint.[5] On July 24, 2023, after reviewing the updated affidavit of debt filed on July 21, 2023, the court, *Shaban*, *J.*, rendered a judgment of foreclosure by sale. The court (1) found that the outstanding debt, including attorney's fees, was $82,668.91 and that the fair market value of the property was $393,000; (2) appointed a foreclosure committee (committee); (3) set a sale date for November 11, 2023; and (4) ordered that notice of the sale be

[3] In its orders, the court stated that, if any of the specifically named defendants—but not the unknown defendants—filed an appearance before judgment was entered, then the default would be automatically set aside.

[4] The plaintiff filed an appraisal on February 3, 2023, which valued the property at $385,000 as of January 6, 2023, and it filed a second appraisal on June 30, 2023, which valued the property at $393,000 as of June 1, 2023.

[5] The complaint was amended to allege that Reverse Mortgage Solutions, Inc., merged with and into Mortgage Assets Management, LLC, on December 31, 2021. See footnote 1 of this opinion.

published in the Danbury News Times on November 3 and 10, 2023. On August 9, 2023, the plaintiff filed a notice of entry of judgment of foreclosure by sale, notifying all nonappearing defendants of the judgment and scheduled sale of the property.

On November 8, 2023, three days before the sale, the heirs appeared through counsel and filed a "motion to open and vacate judgment or, in the alternative, open and extend sale date" (motion to open) and a caseflow request for "an emergency hearing" on their motion to open before the sale date. In their motion to open, they represented that the decedent's only child, Andrew, "died in the state of Maryland in 2021, on information and belief prior to the institution of this action," leaving the heirs as the sole living heirs of the decedent. They also represented that they did not receive notice of the foreclosure action until November 6, 2023. They stated that, "[b]ecause the only named defendant ([Andrew]) in this action is deceased, and the [heirs] only recently received notice of it, the [heirs] request that the court open and vacate the judgment, or, in the alternative, open and extend the sale day for a period of four months so that the [heirs] can arrange for a private sale of the [property] or payment of the subject mortgage. . . . Because there is significant equity in the [property], the plaintiff will not be prejudiced by the granting of this motion." The heirs also filed a motion to intervene as defendants and a suggestion of death as to Andrew, representing that they are the natural children of Andrew and thus the sole living heirs of the decedent.

On November 9, 2023, the plaintiff filed an objection to the heirs' motion to open and request for a hearing, arguing that, "[e]ven if the sale occurs, the motion [could] be heard after the sale, since the defendant's right to redeem would only be foreclosed out by the approval of the sale, not the occurrence of the sale itself." It further argued that the heirs failed to show

good cause to open the judgment and that "allowing the sale to proceed (especially [when] the vast majority of the costs for [the sale had] been incurred) would be equitable as it may give the court and the parties more information to ensure a correct resolution, while canceling the sale would have the opposite effect—nullifying those expenses and efforts for a potential benefit that [may] not be achieved based on information not currently known."

That same day, the court, *Fox*, *J.*, without a hearing, denied the motion to open and declined to extend the sale date. The court further ordered that "the committee may conduct the sale, but any motion to approve the sale [must] not be filed until after the expiration of the appeal period . . . ." A third party was the successful bidder at the ensuing foreclosure sale on November 11, 2023, and the heirs filed the present appeal on November 28, 2023.

On February 23, 2024, the plaintiff filed a motion to terminate the appellate stay pursuant to Practice Book § 61-11 (e), arguing that the appeal was taken solely for the purpose of delay and that the due administration of justice required that the stay be terminated. It argued that it is unlikely that the heirs would prevail on appeal because they failed to "present [any] cause to open the judgment" and because it appeared that the heirs lacked standing to appeal because the court did not rule on their motion to intervene. The heirs filed an opposition to the motion to terminate stay on March 6, 2024, representing that the decedent "executed a 2014 will . . . leaving the residue of her estate to Andrew (75 percent) and [the heirs] (25 percent)." They argued that the foreclosure action was void ab initio as brought against a deceased person because Andrew had died before this action was commenced. The Office of the Appellate Clerk forwarded the motion and opposition to the trial court, and the court held a hearing on the motion on

March 11, 2024. At the hearing, the heirs submitted a copy of a death certificate for Andrew, which provided that he died on November 24, 2021, in Baltimore, Maryland. On April 2, 2024, the court granted the motion to terminate stay, and the heirs subsequently filed a motion for review of that decision with this court.

While the motion for review was pending before this court, the plaintiff filed a motion to dismiss the heirs' appeal, arguing that they lack standing to appeal. The heirs filed an opposition to the motion to dismiss, claiming that, as the decedent's heirs, they have standing pursuant to § 52-69. On July 10, 2024, this court granted the motion for review, vacated the order terminating the appellate stay, and ordered that any proceeding on the confirmation of the sale be stayed pending final disposition of the heirs' appeal. On that same date, we denied the plaintiff's motion to dismiss without prejudice to the panel considering the merits of the appeal determining the issue of standing. We also ordered, sua sponte, that the parties file supplemental memoranda addressing whether the heirs are parties to the underlying action pursuant to § 52-69. The parties filed their supplemental memoranda on July 31, 2024.

I

We begin, as we must, with the threshold issue of whether the heirs are parties to the underlying action pursuant to § 52-69. See *M.U.N. Capital, LLC* v. *National Hall Properties, LLC*, 163 Conn. App. 372, 374, 136 A.3d 665 (whether appellant is proper party to appeal is "threshold inquiry" that implicates this court's subject matter jurisdiction (internal quotation marks omitted)), cert. denied, 321 Conn. 902, 136 A.3d 1272 (2016).

Appellate jurisdiction is governed by General Statutes § 52-263, which provides in relevant part that, "if *either party* is aggrieved by the decision of the court . . . he

may appeal to the court having jurisdiction from the final judgment of the court . . . .'' (Emphasis added.) The statute thus requires an appellant to establish that ''(1) [the appellant] was a party to the underlying action; (2) [the appellant] was aggrieved by the trial court decision; and (3) the appeal is from a final judgment.'' *State* v. *Salmon*, 250 Conn. 147, 163, 735 A.2d 333 (1999). In the present case, we are concerned only with the first requirement, as there is no dispute that the denial of the motion to open is a final judgment and that the heirs are aggrieved by that decision. See, e.g., *Finance of America Reverse, LLC* v. *Henry*, 222 Conn. App. 810, 820, 307 A.3d 300 (2023) (''the denial of a motion to open a judgment of foreclosure by sale is also an appealable final judgment'').

Our Supreme Court has ''interpreted the party requirement of § 52-263 . . . to mean a party to the underlying action. . . . Ordinarily, the word party has a technical legal meaning, referring to those by or against whom a legal suit is brought . . . the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons. . . . This definition of party . . . includes only those who are parties to the underlying action.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Salmon*, supra, 250 Conn. 153–54.

In its supplemental memorandum, the plaintiff claims that § 52-69 ''is a notice statute and does not give rise to a right to appear through a class of individuals [who] may have an interest in the real property of the deceased. . . . The way to properly appear and defend [pursuant to the statute] is seeking to be made a party defendant through a motion to intervene or similar motion in which that party details their specific interest and the trial court accepts their appearance after granting their motion.'' In contrast, the heirs claim that, although they filed a motion to intervene ''out of [an]

abundance of caution, there was no need to seek court permission to intervene because the heirs of the [decedent's] estate were *already* parties to the action at the time [they] appeared." (Emphasis in original.) We agree with the heirs.

Whether the heirs are parties to the foreclosure action pursuant to § 52-69 raises an issue of statutory interpretation, which is a question of law subject to our plenary review. See *Civic Mind, LLC* v. *Hartford*, 229 Conn. App. 615, 637, 328 A.3d 225 (2024). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . It is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation." (Internal quotation marks omitted.) Id., 637–38.

Our analysis begins with the text of § 52-69, which provides in relevant part: "[I]f an action for equitable relief is brought relating to any interest in real property belonging to or claimed by the widow, widower or heirs of any deceased person, and the plaintiff or his attorney attach to the complaint in the action an affidavit stating that the plaintiff does not know who the widow, widower or heirs, or some of them, are, or where they or any of them reside, and, in the process to the action, describes as parties defendant 'the widow and heirs', 'the widower and heirs' or 'the heirs', as the case may be, of the deceased person, without further describing the names or residences of any such parties whose

names and residences may be unknown to him, the court to which the action is brought making 'representatives and creditors', 'the widow and heirs', 'the widower and heirs', or 'the heirs' parties defendant, or the clerk, assistant clerk or any judge thereof, may make such order relative to the notice to be given as the court, clerk, assistant clerk or judge deems reasonable. Notice having been given according to the order and duly proved, the court may proceed to a hearing of the action. Any executor or administrator who may be appointed or qualified pending such proceedings, or any other person claiming as creditor, widow, widower or heir of the deceased person, may appear and defend in the action. All creditors and representatives of the deceased person shall be forever concluded by the judgment or decree rendered in the action."[6]

The meaning of § 52-69 is plain and unambiguous and does not yield absurd or unworkable results. The statute expressly provides that a plaintiff may designate "as *parties defendant* . . . 'the heirs' . . . of the deceased person" and that "any . . . person claiming as . . . heir of the deceased person, *may appear and defend in the action*." (Emphasis added.) General Statutes § 52-69. The designation of such defendants in a foreclosure action is necessary because "title to real estate vests immediately at death in a deceased's heirs, or in devisees upon the admission of the will to probate. . . . The recording of a probate certificate of devise or descent is necessary only to perfect marketable title." (Citations omitted; internal quotation marks omitted.) *Santa Fuel, Inc.* v. *Varga*, 77 Conn. App. 474, 487, 823 A.2d 1249, cert. denied, 265 Conn. 907, 831 A.2d 251 (2003).

[6] General Statutes § 47-33 (b), which also applies to actions to foreclose a mortgage on real estate after the mortgagor has died, provides in relevant part that "[t]he term 'heirs', as used in designating defendants pursuant to section 52-69, includes the heirs at law, legatees and devisees of the deceased, and all persons who might claim under them . . . ."

In the present case, in accordance with § 52-69, the plaintiff designated "the widow(er), heir(s), and/or creditors of the Estate of Beryl E. Rowland" as party defendants to the foreclosure action, and the heirs appeared, claiming to be among that class of unknown defendants by virtue of their status as the sole living heirs of the decedent.[7] Section 52-69 is clear that the heirs are parties to the underlying action, and recognizing those individuals against whom an action is brought as parties to that action does not lead to absurd or unworkable results. Indeed, this status is necessary because "[a]ll creditors and representatives of the deceased person shall be forever concluded by the judgment or decree rendered in the action." General Statutes § 52-69. Although the plaintiff suggests that a motion to intervene or a similar motion is required when a designated defendant seeks to appear and defend in an action pursuant to § 52-69, the plain statutory text provides no support for such an interpretation.[8] Accordingly, we conclude that the heirs are parties to the underlying action pursuant to § 52-69 and that we therefore have jurisdiction over their appeal.

II

As to the merits, the heirs claim that the court abused its discretion by denying their motion to open without a hearing. We disagree.

"The standard of review of [a denial of a motion to open] a judgment of foreclosure by sale . . . is whether the trial court abused its discretion. . . . A foreclosure action is an equitable proceeding. . . . The

[7] Despite its position as to the heirs' standing under § 52-69, the plaintiff does not dispute the heirs' factual assertion that they are the sole living heirs of the decedent.

[8] Notably, the trial court declined to act on the heirs' motion to intervene in the present case and denied—rather than dismissed—their motion to open, which indicates that the court considered the heirs to be parties to the underlying action.

determination of what equity requires is a matter for the discretion of the trial court. . . . In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Crossing Condominium Assn., Inc.* v. *Miller*, 228 Conn. App. 431, 439, 325 A.3d 326 (2024).

A motion to open a judgment upon default is governed by General Statutes § 52-212 and Practice Book § 17-43,[9] pursuant to which "the movant must make a two part showing that (1) a good defense existed at the time an adverse judgment was rendered; and (2) the defense was not at that time raised by reason of mistake, accident or other reasonable cause. . . . The party moving to open a default judgment must not only allege, but also make a showing sufficient to satisfy the two-pronged test [governing the opening of default judgments]. . . . [B]ecause the movant must satisfy both prongs of this analysis, failure to meet either prong is fatal to its motion." (Internal quotation marks omitted.)

[9] General Statutes § 52-212 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default . . . may be set aside, within four months following the date on which the notice of judgment . . . was sent . . . upon the . . . written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment . . . and that the . . . defendant was prevented by mistake, accident or other reasonable cause from . . . making the defense. . . .

"(c) The . . . written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the . . . defense and shall particularly set forth the reason why the . . . defendant failed to appear. . . ."

Practice Book § 17-43 (a) mirrors § 52-212 and imposes the same requirements.

Nationstar Mortgage, LLC v. *Giacomi*, 226 Conn. App. 467, 479, 319 A.3d 794 (2024).

On appeal, the heirs argue that the motion to open "raised two main issues: the [heirs] did not have notice of the action and the judgment was potentially improper as to [Andrew], who passed away in 2021. . . . Both issues raised in the motion depended on disputed issues of fact requiring a trial-like hearing." As to their own lack of notice, the heirs argue that they would have presented "evidence that: (1) they received no actual notice of the action, (2) their identities and addresses were easily obtainable from public record[s] and they should not have been served via publication, and (3) [although] compliance with an order of notice is prima facie evidence that no further reason for delay exists, the presumption would have been rebutted, and the [heirs] should have been given the chance to argue for an extension of the sale date." (Footnote omitted.) As to the "potentially improper" service of process for Andrew, the heirs argue that they "would have presented evidence that the address at which service was sent . . . was not [Andrew's] usual place of abode, and thus the action was not properly commenced prior to his death."

The plaintiff responds that the heirs waived any claim as to improper service of process by filing an appearance without filing a timely motion to dismiss and that the motion to open failed to comply with § 52-212 because it failed to "set forth a defense to the action, given that service of process was waived." In their reply brief, the heirs claim that they properly raised their lack of notice in the motion to open rather than in a motion to dismiss and that the plaintiff waived the heirs' alleged failure to comply with § 52-212 by not raising that argument in its objection to the motion to open. They argue that "the fact that the [heirs] raised a jurisdictional claim implicates due process rights that are not subject

to abatement by the procedural requirements in . . . § 52-212." We conclude that the court did not abuse its discretion by denying the motion to open.

As an initial matter, we reject the heirs' claim that the plaintiff waived its objection to their alleged failure to comply with § 52-212 by not raising that argument in its objection to the motion to open. In its objection, the plaintiff specifically argued that it objected "to the substance of the motion because the [heirs'] motion does not present any cause to open the judgment. . . . While the motion represents that the [heirs] became aware of the action on November 6, 2023, such late realization does not present good cause to open the judgment." Thus, the plaintiff specifically referenced the good cause requirement set forth in § 52-212 (a) in its objection to the motion to open. The fact that the plaintiff did not expressly mention § 52-212 is of no moment in light of our standard of review, which requires that we "make every reasonable presumption in favor of the correctness of [the court's] action." (Internal quotation marks omitted.) *Crossing Condominium Assn., Inc.* v. *Miller*, supra, 228 Conn. App. 439. Moreover, when, as in the present case, the trial court does not state the factual and legal basis for its decision, and the appellant fails to seek an articulation of that decision pursuant to Practice Book § 66-5, "we presume that the court applied the law correctly; we read the record with an eye to support rather than to undermine the [judgment]." *Stratford* v. *LeBlanc*, 175 Conn. App. 362, 367, 167 A.3d 1015 (2017); see also *Acadia Ins. Co.* v. *O'Reilly*, 138 Conn. App. 413, 419, 53 A.3d 1026 (2012) ("[a]bsent any indication of the factual and legal basis of the court's decision, we cannot conclude that the court abused its ample discretion in denying the defendants' motion to open the default judgment"), cert. denied, 308 Conn. 904, 61 A.3d 1097 (2013). Accordingly, because the heirs sought to open

and vacate a judgment rendered upon a default, § 52-212 applies to their motion to open.

We also are not persuaded that the heirs raised a jurisdictional claim in their motion to open that would obviate the need to comply with the procedural requirements in § 52-212. In support of their argument to the contrary, the heirs cite *Weinstein & Wisser, P.C.* v. *Cornelius*, 151 Conn. App. 174, 94 A.3d 700 (2014), in which this court held that, "because the defendant's motion to open raised a jurisdictional claim, the court erred in analyzing it solely under § 52-212 (a) . . . ." Id., 181. The plaintiff's reliance on that case is misplaced, as it is readily distinguishable from the present matter.

In *Weinstein & Wisser, P.C.*, more than five years after the court rendered judgment for the plaintiff upon the defendant's default for failing to enter an appearance, the defendant filed a motion to dismiss for lack of personal jurisdiction due to insufficient service of process. Id., 176. "The defendant attached an affidavit to his motion in which he averred that he had not resided at . . . the address at which service had been made, at any time on or before the date of purported service of process." Id. "[T]he defendant also filed a motion to open the default judgment 'on the ground that the court did not have jurisdiction over [the defendant] due to insufficiency of service of process (Practice Book § 10-31 [a] [5]) for the reasons articulated in his motion to dismiss.' " Id., 177. The trial court denied the motion to open on the ground that the defendant failed to show that a good defense existed at the time judgment was rendered, and it "denied the motion to dismiss, on the ground that the case would have to be opened before it could consider the motion to dismiss." Id., 177–78.

On appeal to this court, the defendant claimed that "the court erred in treating his motion to open as a

standard motion to [open] and in analyzing his claim solely under § 52-212 (a) and Practice Book § 17-43 (a)" when he relied "on a common-law jurisdictional argument." (Internal quotation marks omitted.) Id., 179–80. This court agreed with the defendant and reversed the judgment of the trial court, reasoning that "a court always has the inherent authority to open a default judgment, irrespective of the four month rule and the valid defense and good cause requirement in Practice Book § 17-43 and . . . § 52-212 (a), if the judgment was rendered without jurisdiction of the parties or of the subject matter." (Internal quotation marks omitted.) Id., 181.

In the present case, by contrast, the heirs neither filed a motion to dismiss to challenge the court's jurisdiction nor sought dismissal of the action in their motion to open. See Practice Book § 10-30 (b) ("[a] defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance"). In addition, unlike the defendant in *Weinstein & Wisser, P.C.* v. *Cornelius*, supra, 151 Conn. App. 174, who filed an affidavit in support of his motion to dismiss disputing his usual place of abode at the time of service; see id., 182–83; the heirs provided no sworn statements in support of their motion to open. For these reasons, *Weinstein & Wisser, P.C.*, is inapposite, and it does not restrict the application of § 52-212 in the present case.

Turning to the merits of the motion to open, we conclude that the heirs failed to assert that a good defense existed at the time that judgment was rendered. Although the heirs argue on appeal that "they should not have been served via publication" because "their identities and addresses were easily obtainable from public record[s]," that allegation is absent from their motion to open. Also absent from their motion to open is any allegation that notice had not been sent to Andrew's

usual place of abode. Instead, the heirs stated that they "did not receive notice of the institution of this action until two days ago, on November 6, 2023," and that Andrew "died in the state of Maryland in 2021, on information and belief prior to the institution of this action." Neither of these statements constitute a good defense to the court's jurisdiction. Thus, the court reasonably could have concluded that the motion to open failed to satisfy the first prong under § 52-212 (a) and properly denied it on that basis. The court also could have denied the motion to open due to the heirs' failure to comply with the mandate in § 52-212 (c) that the motion to open "be verified by the oath of the complainant or [their] attorney . . . ." See, e.g., *Commissioner of Labor* v. *Walnut Tire Shop, LLC*, 201 Conn. App. 492, 496, 242 A.3d 1079 (2020) ("The motion to open . . . was not verified under oath by either the defendants or their attorney. On that basis alone, the trial court was entitled to deny the defendants' motion."). Consequently, because the court reasonably could have concluded that the motion to open failed to comply with § 52-212 due to either of these deficiencies, the court did not abuse its discretion by denying it without a hearing.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

[10] We note that the court's judgment ordering a foreclosure by sale does not extinguish the heirs' claimed right of redemption, and thus the heirs still may exercise their claimed right to redeem as the sole living heirs of the decedent despite the denial of their motion to open that judgment. "Only after a sale has been confirmed and ratified by the court does it become complete. . . . [T]he court's approval of a sale extinguishes the rights of redemption of other parties [but] . . . does not automatically vest title with the purchaser. . . . Instead, as set forth in General Statutes § 49-26, after a sale has been ratified or confirmed by the court, a conveyance of the property sold shall be executed by the person appointed to make the sale, which conveyance shall vest in the purchaser the same estate that would have vested in the mortgagee or lienholder if the mortgage or lien had been foreclosed by strict foreclosure . . . ." (Citations omitted; internal quota-

U.S. BANK TRUST, N.A., TRUSTEE *v.* MARK E. O'BRIEN ET AL.
(AC 47391)

Moll, Westbrook and Prescott, Js.

Syllabus

The defendant property owner appealed from the trial court's judgment granting the plaintiff's application for execution of ejectment after the court had previously rendered a judgment of strict foreclosure on certain real property. The defendant claimed, inter alia, that the court erroneously ordered the execution of ejectment because title had not yet vested in the plaintiff. *Held*:

The trial court erroneously granted the plaintiff's application for execution of ejectment, as, although the court had previously issued an order granting the plaintiff's motion to terminate a then existing appellate stay, the court did not clearly indicate an intent to prospectively terminate future automatic appellate stays and, therefore, an automatic appellate stay pursuant to the rule of practice (§ 61-11) was in effect following the defendant's filing of his previous appeal, the law days had passed without legal effect, and absolute title to the property had not yet vested in the plaintiff at the time the court ordered the execution of ejectment.

Argued February 14—officially released April 1, 2025

Procedural History

Action to foreclose a mortgage on certain real property, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the defendant Kathleen M. O'Brien et al. were defaulted for failure to appear; thereafter, the matter was tried to the court, *Hon. John W. Pickard*, judge trial referee; judgment of strict foreclosure; subsequently, the court, *Lynch, J.*, granted the plaintiff's motion to substitute U.S. Bank, National Association, as Legal Title Trustee for Truman 2016 SC6 Title Trust as party plaintiff; thereafter, the named defendant appealed to this court, *Keller*, *Bright* and *Bishop*, *Js.*, which affirmed the judgment of the trial court; subsequently, the court, *Roraback, J.*, granted the

tion marks omitted.) *Quicken Loans, Inc.* v. *Rodriguez*, 227 Conn. App. 806, 819–20, 324 A.3d 167 (2024), cert. denied, 351 Conn. 905, 330 A.3d 133 (2025).

substitute plaintiff's motion for execution of ejectment, from which the named defendant appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

Mark E. O'Brien, self-represented, the appellant (named defendant).

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

Opinion

WESTBROOK, J. In this mortgage foreclosure action, the defendant Mark E. O'Brien[1] appeals from the judgment of the trial court ordering an execution of ejectment with regard to the foreclosed property.[2] The court concluded that the execution of ejectment could issue because all law days had passed during the pendency of the defendant's prior appeal in this matter and no appellate stay was in effect at that time due to a prior trial court order that purportedly had prospectively terminated any existing and future automatic appellate stays in this matter. Therefore, the court determined that title to the foreclosed property and the right of possession had vested in the substitute plaintiff, U.S. Bank, National Association, as Legal Title Trustee for

[1] The complaint named as additional defendants Kathleen M. O'Brien, Thomas J. O'Brien, and the State of Connecticut, Department of Revenue Services. These additional defendants did not appear before the trial court or participate in the present appeal. Accordingly, all references to the defendant are to Mark E. O'Brien only.

[2] An appeal ordinarily will not lie from an execution of ejectment once a possessory right to property has been conclusively established, whether through summary process eviction or by way of foreclosure, because such an execution merely effectuates a final judgment of possession. In the present case, however, the execution of ejectment was ordered by a court in the context of proceedings in which the issue of whether title had passed by operation of law remained a contested issue. Given that unique procedural posture, this appeal is properly before us. See *Cathedral Green, Inc.* v. *Hughes*, 174 Conn. App. 608, 610 n.2, 166 A.3d 873 (2017).

Truman 2016 SC6 Title Trust.[3] The defendant claims that the court misconstrued the prior trial court's order terminating the appellate stay; an appellate stay was in effect when the latest law days passed; and, accordingly, title never vested in the substitute plaintiff, and the execution of ejectment was premature and violated his right to due process. For the reasons that follow, we agree with the defendant, reverse the judgment of the court, and remand the case with direction to vacate the execution of ejectment and to set new law days.[4]

The record reveals the following relevant facts and procedural history. The original plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, commenced the present action in October, 2016, to foreclose a mortgage on real property in Winsted that the defendant and other heirs had inherited following the death of Caroline S. O'Brien, who executed the mortgage at issue. The defendant filed an appearance as a self-represented party and an answer and a counterclaim. In December, 2017, the court, *Hon. John W. Pickard*, judge trial referee, granted the original plaintiff's motion for summary judgment as to the counterclaim. Thereafter, on May 20, 2019, following a trial on the foreclosure complaint, the court rendered a judgment of strict foreclosure. The defendant appealed from the judgment of strict foreclosure, and, on March 10, 2020, this court issued a memorandum decision affirming the judgment and remanding the case for the purpose of setting new law days, which had passed during the

[3] The original plaintiff, U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, assigned the subject mortgage to the substitute plaintiff in October, 2021, and the court granted a motion to substitute the substitute plaintiff as the party plaintiff on February 23, 2022.

[4] Because we reverse the judgment of the court on this basis, we decline to address the defendant's additional claims that, even if there were an order prospectively terminating all existing and future appellate stays, the court lacked the authority to issue such an order and the order was improper because it was not issued by the judge who initially tried this matter.

pendency of the appeal. See *U.S. Bank Trust, N.A.* v. *O'Brien*, 196 Conn. App. 903, 225 A.3d 1250, cert. denied, 335 Conn. 922, 233 A.3d 1090 (2020), cert. denied, U.S. , 141 S. Ct. 1514, 209 L. Ed. 2d 253 (2021).

As previously noted, in February, 2022, the court granted the original plaintiff's motion to substitute party plaintiff. See footnote 3 of this opinion. The substitute plaintiff then moved for an order modifying the judgment of foreclosure and resetting the law days, which the court, *J. Moore*, *J.*, granted on April 25, 2022. The court set the law days to commence on June 6, 2022.

On May 6, 2022, the defendant filed a motion asking the court to open the judgment of foreclosure, dismiss the complaint, and extend the law days (motion to open). According to the defendant, both the original and substitute plaintiffs lacked standing to prosecute the foreclosure action, and the mortgage servicers improperly had interfered with the defendant's efforts to modify the mortgage. The substitute plaintiff filed a memorandum in opposition to the motion to open. The court denied the motion to open on June 6, 2022, but stated in its order that it was extending the law days to June 27, 2022, "to provide the [defendant] with the twenty day appellate period . . . ."

The defendant timely filed his second appeal in this matter on June 22, 2022, challenging the denial of his motion to open. That appeal gave rise to an automatic stay that prevented the June 27, 2022 law days from passing.

On June 27, 2022, the substitute plaintiff timely filed a motion to dismiss the second appeal as frivolous. The substitute plaintiff also filed a motion asking the trial court to terminate the existing appellate stay and "any future automatic stays on appeal." The defendant filed a memorandum in opposition to the motion to terminate stay.

On August 1, 2022, following a remote hearing, the court issued an order generically stating that the substitute plaintiff's motion to terminate stay was granted "for the reasons set forth on the record" and that the signed transcript of its decision shall constitute the court's memorandum of decision on the motion. The transcript reflects that the court did not clearly indicate during the hearing whether it intended to grant the motion only with respect to the then existing appellate stay or also as to any future appeals, stating in relevant part: "So, in balancing the equities, the court reaches the conclusion that [the] due administration [of] justice does require the court to grant the motion to terminate the appellate stay *in this case*." (Emphasis added.) Neither party asked the court for clarification of its August 1, 2022 order granting the motion to terminate stay or filed a motion for review of that order with this court. See Practice Book §§ 61-14 and 66-6. On September 7, 2022, this court granted the substitute plaintiff's motion and dismissed the defendant's second appeal as frivolous.[5]

Following our dismissal of the second appeal, the substitute plaintiff filed a motion asking the trial court to again reset the law days and to award additional attorney's fees. The trial court, *Roraback*, *J.*, granted that motion on March 20, 2023, ordering law days to commence on May 1, 2023.

On March 23, 2023, the defendant filed his third appeal in this matter. The substitute plaintiff once again filed a motion to dismiss the appeal, and this court

[5] The defendant did file a motion asking this court to "issue a stay of proceedings in the Superior Court until this appeal has been weighed on the merits." That motion did not address the appropriateness of a prospective termination of the appellate stay in future appeals, presumably because the defendant did not construe the court's order as encompassing future appeals. At the time this court dismissed the second appeal as frivolous, it ordered no action necessary on the defendant's motion for a stay.

granted the motion and dismissed the appeal as frivolous by order dated April 26, 2023. The defendant filed a petition for certification to appeal with our Supreme Court, which denied certification on September 26, 2023.

On December 26, 2023, the substitute plaintiff filed a motion once again asking the trial court to set new law days. Two days later, however, the substitute plaintiff withdrew that motion, and, on January 3, 2024, it filed an application for an execution of ejectment regarding the subject property.[6] The defendant filed a memorandum in opposition to the proposed execution of ejectment, arguing that the law days that had been set to commence on May 1, 2023, were stayed by the filing of his third appeal and, as a result, passed without legal effect. Consequently, the defendant argued, title to the subject property could not have vested in the substitute plaintiff. On February 8, 2024, the substitute plaintiff filed a memorandum in support of the proposed execution of ejectment, arguing that the trial court, on August 1, 2022, previously had granted the substitute plaintiff's motion for a prospective termination of any future appellate stays. Also on February 8, 2024, the defendant filed a motion to open and vacate the foreclosure judgment.

Judge Roraback conducted a hearing concerning the proposed execution of ejectment on February 9, 2024. After hearing argument from the parties, the court concluded that title to the property had vested in the substitute plaintiff and that the execution of ejectment should issue. On February 14, 2024, the court issued orders denying the defendant's motion to open and vacate the foreclosure judgment and granting the proposed execution of ejectment, stating: "The court orders that

[6] The application listed November 6, 2023, as the "[d]ate titled was transferred."

the ejectment be stayed until May 1, 2024. No further extensions of the execution of ejectment shall be granted absent extraordinary and unforeseeable circumstances." This appeal followed.[7]

The defendant claims on appeal that the trial court misconstrued the August 1, 2022 order granting the substitute plaintiff's motion to terminate the appellate stay "in this case" as having terminated prospectively all future appellate stays in this matter. Thus, according to the defendant, and contrary to the conclusion of the court, an appellate stay was in full force and effect when the most recent law days in this matter passed, and, accordingly, title never vested in the substitute plaintiff. We agree with the defendant and, therefore, also agree that the court improperly determined that the execution of ejectment could issue.

We begin by setting forth governing principles of law and our standard of review. "In Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests absolute title in the encumbrancer." *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 375, 260 A.3d 1187 (2021). Provided that an automatic appellate stay of execution is in effect; see Practice Book § 61-11; "[l]aw days are ineffective while the appeal period is pending. To conclude otherwise would be tantamount to depriving a party of judicial review and, therefore, of due process of law." *Continental Capital Corp.* v. *Lazarte*, 57 Conn. App. 271, 273–74, 749 A.2d 646 (2000). A trial court's determination of

[7] The substitute plaintiff timely moved to dismiss the present appeal as frivolous. It argued that the trial court carried out a ministerial act by issuing an execution of ejectment. The defendant objected to the motion to dismiss, arguing that there is a good faith dispute as to whether title to the property vested in the substitute plaintiff. This court denied the motion to dismiss and further ordered sua sponte that the trial court's February 14, 2024 orders were automatically stayed pursuant to Practice Book § 61-11 (a).

whether an appellate stay was in effect raises a question of law over which we exercise plenary review. See *Quicken Loans, Inc.* v. *Rodriguez*, 227 Conn. App. 806, 817, 324 A.3d 167 (2024), cert. denied, 351 Conn. 905, 330 A.3d 133 (2025).

Moreover, to the extent that our review also requires us to construe the meaning of a prior judgment or order of the court, this also presents an issue over which our review is plenary. See *Cunningham* v. *Cunningham*, 204 Conn. App. 366, 373, 254 A.3d 330 (2021). "As a general rule, 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. . . . The interpretation of a judgment may involve the circumstances surrounding the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) Id.

Having carefully reviewed the transcript of the August 1, 2022 hearing, which the trial court indicated in its order granting the substitute plaintiff's motion to terminate the appellate stay contained the reasoning for that ruling, we conclude that the court's statements during the hearing do not clearly convey whether the court intended to terminate only the appellate stay then in effect or to terminate any and all appellate stays, including those that might arise in the future. At the hearing, the trial court stated only that it had balanced the equities involved and determined that the due administration of justice required it "to grant the motion to terminate the appellate stay *in this case*." (Emphasis added.) The trial court's language, particularly its use of the phrase "in this case," is, at best, ambiguous as to whether the court meant to eliminate only the existing stay or the possibility of a stay in the event of

a future appeal. Nothing in the court's discussion during the hearing indicates that it even contemplated whether granting prospective relief from a future stay was necessary or justified under the circumstances.

The termination of any appellate stay can have significant consequences for litigants, but this is particularly true in foreclosure matters in which the effect of lifting a stay can result in an effectively irreversible divestiture of title to real property. See, e.g., General Statutes § 49-15 (generally limiting court's authority to alter judgment of strict foreclosure after title has become absolute in any encumbrancer). If the law days pass before appellate review of the defendant's claims can occur, the appeal will likely become moot because title has passed irrevocably and an appeals court may not grant the defendant any further relief except in rare circumstances. See *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 375. Indeed, the prospective termination of the appellate stay arising in all future appeals is an extraordinary remedy because it necessarily presumes that any challenge to future orders of the court would be meritless despite the lack of present knowledge regarding whether the orders might have any basis in law or fact.

In light of these concerns, if a court concludes that the due administration of justice warrants prospectively terminating any and all future stays, it must do so expressly and with unequivocal language. This requirement will ensure that a defendant is on notice that he must seek further relief from this court to avoid the running of the law days before his appellate claims can be adjudicated. Moreover, it will facilitate our review, if requested, of the court's decision to provide a plaintiff with relief from an appellate stay. See Practice Book § 61-14. Given the equitable nature of foreclosure proceedings, any ambiguity in the court's decision to terminate prospectively appellate stays in future appeals

should be resolved in favor of the default rule that an automatic stay of execution arises from the filing of a timely appeal. Because the court did not clearly indicate an intent to grant fully the relief sought by the substitute plaintiff in its motion, we are compelled to conclude that the court's order did not prospectively terminate future automatic appellate stays.

Given that conclusion, it follows that an automatic appellate stay was in effect following the court's March 20, 2023 decision modifying the judgment of strict foreclosure and setting law days to commence on May 1, 2023. See Practice Book § 61-11 (a). The appellate stay continued in effect following the defendant's filing of his third appeal on March 24, 2023; see Practice Book § 61-11 (a); through this court's dismissal of the third appeal as frivolous on April 26, 2023; see Practice Book § 61-11 (a); and until our Supreme Court's September 26, 2023 denial of the defendant's petition for certification to appeal. At that point, the May 1, 2023 law days had passed without legal effect, necessitating the need for the setting of new law days before title to the property could pass to the substitute plaintiff. Because absolute title to the property has not yet vested in the substitute plaintiff, an execution of ejectment was premature, and the court's ruling to the contrary cannot stand.

The judgment is reversed and the case is remanded with direction to vacate the execution of ejectment and to set new law days.

In this opinion the other judges concurred.