GREENWICH RETAIL, LLC *v.* TOWN OF GREENWICH (AC 46825)

Moll, Suarez and Prescott, Js.

Syllabus

Pursuant to statute ((Rev. to 2019) § 12-63c (a) and (d)), in determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the town's assessor may require the submission of certain information regarding such property "on a form provided by the assessor" and any property owner who fails to submit such information "shall be subject to a penalty . . . ."

The plaintiff property owner appealed from the trial court's judgment rendered for the defendant town upholding a municipal tax assessment of a penalty imposed pursuant to § 12-63c (a) and (d). The plaintiff claimed, inter alia, that the court incorrectly determined that the word "provided" in § 12-63c (a) does not require that an income and expense form actually be received by the property owner and/or its agent. *Held*:

The trial court properly determined that the word "provided" in § 12-63c (a) does not require that an income and expense form actually be received by the property owner and/or its agent, as the term is plain and unambiguous and simply means to be made available, there having been no indication that it was intended to impose specific requirements on assessors with respect to how they must make the income and expense forms available to property owners, and, in light of the legislature's comprehensive statutory

tax scheme, this court declined to add any such requirements onto the clear statutory language.

The trial court properly determined that the mailing of the income and expense form by the defendant's assessor to the plaintiff's last known address satisfied the requirements of § 12-63c (a), as the court deemed the evidence presented regarding the plaintiff having taken reasonable measures to ensure that the assessor had an up-to-date mailing address to be uncertain and speculative, the evidence presented at trial with respect to the procedures that the defendant followed in sending a bulk mailing demonstrated that they were consistent with the statutory and regulatory taxing scheme, and the assessor provided the form pursuant to § 12-63c (a) by making it available to the plaintiff using the most current information that she had concerning the plaintiff's mailing address, the unambiguous language of § 12-63c having required nothing further.

Argued October 7, 2024—officially released June 10, 2025

Procedural History

Appeal from the decision of the defendant's board of assessment appeals imposing a penalty on the plaintiff for failing to timely file a certain form, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Kenneth B. Povodator*, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

James R. Fogarty, with whom was *Andrew P. Nemiroff*, for the appellant (plaintiff).

Owen T. Weaver, with whom were *Barbara M. Schellenberg*, and, on the brief, *Dennis J. Kokenos*, for the appellee (defendant).

Opinion

SUAREZ, J. The principal issue in this municipal tax appeal is whether the requirement of General Statutes (Rev. to 2019) § 12-63c (a)[1] that a municipal tax assessor

[1] General Statutes (Rev. to 2019) § 12-63c provides in relevant part: "(a) In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor . . . may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method . . . that the owner of such property annually submit to the assessor not later than the first day of June, *on a form provided by the assessor* not later than forty-five days before said

"provide" an owner of real property that generates rental income with a form on which to submit income and expense information is satisfied when that form is timely mailed to, but not actually received by, the property owner and/or its agent. The plaintiff, Greenwich Retail, LLC, appeals from the judgment of the trial court rendered in favor of the defendant, the town of Greenwich, challenging a municipal tax assessment of a penalty pursuant to General Statutes §§ 12-117a and 12-119.[2]

On appeal, the plaintiff first claims that the court incorrectly determined that the word "provided" in § 12-63c (a) does not require that an income and expense form actually be received by the property owner and/or its agent. The plaintiff argues, to the extent that the word "provided" is ambiguous, the court should have

first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. . . .

"(d) Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) or who submits information in incomplete or false form with intent to defraud, shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. . . ." (Emphasis added.)

We note that the legislature recently has amended § 12-63c. See Public Acts 2023, No. 23-152, § 1; see also part I of this opinion. For the sake of convenience, unless otherwise stated, all references to § 12-63c in this opinion are to the 2019 revision of the statute.

[2] See General Statutes § 12-117a (a) (1) ("[a]ny person . . . claiming to be aggrieved by the action of . . . the board of assessment appeals . . . in any town or city may make application . . . in the nature of an appeal therefrom to the superior court for the judicial district in which such town or city is situated"); General Statutes § 12-119 ("[w]hen it is claimed that . . . a tax laid on property was computed on an assessment which, under all the circumstances, was manifestly excessive and could not have been arrived at except by disregarding the provisions of the statutes for determining the valuation of such property, the owner thereof . . . may, in addition to the other remedies provided by law, make application for relief to the superior court for the judicial district in which such town or city is situated").

strictly construed the statute in its favor. The plaintiff also claims that the trial court erred in concluding that the mailing of the form to the plaintiff by the defendant's assessor (assessor) to its last known address satisfied § 12-63c (a). We disagree and affirm the judgment of the court.

The following facts, which either were found by the trial court or are otherwise undisputed in the record, and procedural history are relevant to our resolution of this appeal. The plaintiff, a Delaware limited liability company, owns certain real property located at 310 Greenwich Avenue in Greenwich (property). The administration of the property, including tax matters, is handled by ESRT Management TRS, LLC (ESRT), the plaintiff's representative property manager.

It is undisputed that the plaintiff's property, as a leased commercial property, falls within the scope of § 12-63c, which governs the submission of income and expense information applicable to certain real properties that generate rental income. Specifically, under § 12-63c, a municipal assessor may require an owner of real property that generates rental income "annually [to] submit to the assessor not later than the first day of June, on a form *provided* by the assessor not later than forty-five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property," which information is to be used in the assessor's determination of the "present true and actual value . . . of real property used primarily for purposes of producing rental income . . . ."[3]

[3] Because the statutory deadline under § 12-63c (a) to submit income and expense information is June 1, the form must be "provided" to the property owner by mid-April to meet the forty-five day notice requirement. Section 12-63c (d) provides that, if a property owner does not submit the required income and expense information by the statutory deadline, the property owner shall be subject to a 10 percent increase in the assessed value of such property. In 2020, due to the COVID-19 pandemic, Governor Lamont issued Executive Order No. 7S, § 10, which extended the deadline for submit-

(Emphasis added.) General Statutes (Rev. to 2019) § 12-63c (a).

On or about April 15, 2020, the defendant's assessor bulk mailed notices, along with income and expense forms pursuant to § 12-63c, to all applicable property owners (April, 2020 notice and form). With respect to the plaintiff, however, the court noted that the April, 2020 notice and form "was sent to what the plaintiff contend[ed] was an outdated address. Although no documentary evidence was available to verify it, [ESRT] reported that its address . . . had changed a few years earlier ([in] 2016), and that it had sent out notices to that effect, with the implication that the . . . assessor had been sent such a notification. . . .

"After the required § 12-63c notice and form had been mailed to [ESRT's] 'old' address, [ESRT] took steps to correct the address . . . on file with the assessor. This appears to have been prompted by the forwarding of a tax bill in late June from the 'old' address to ESRT at its new/current address. As a result, when the assessor prepared for mailing a reminder notice [and form] to the taxpayers who had not responded to the original mailing, the correct (current) address was used. The assessor provided credible evidence . . . that there had been a follow-up notice [and form] sent out on or about August 3, 2020 (as a lesser bulk mailing), sent to owners who had not yet provided the required . . . information.[4] The plaintiff provided testimony that the

ting the income and expense forms to August 15, 2020. Because August 15, 2020, fell on a Saturday, the deadline was further extended with respect to applicable properties to August 17, 2020.

[4] In its principal appellate brief, the plaintiff also claimed that the trial court correctly concluded that the "reminder" mailing from the assessor directed to the plaintiff at ESRT's updated address on August 3, 2020, did not satisfy § 12-63c. At oral argument before this court, the plaintiff's counsel acknowledged that this purported claim is not a claim of error. We agree and, therefore, need not address its merits. See, e.g., *Doyle* v. *Aspen Dental of Southern CT, PC*, 179 Conn. App. 485, 488 n.5, 179 A.3d 249 (2018).

follow-up mailing was first identified as having been received on August 24, 2020, after the August 17 deadline for the submission of the required information. . . .

"[A]n effort was made to expedite preparation," and, on September 1, 2020, the plaintiff mailed to the assessor a completed form, but "delivery of the required information . . . was too late." (Footnote added; footnote omitted.) On January 28, 2021, the assessor imposed a penalty on the plaintiff equal to a 10 percent increase in the assessed value of the property for the October 1, 2020 grand list pursuant to § 12-63c (d), for its failure to comply with the statute. The plaintiff appealed to the Board of Assessment Appeals of the Town of Greenwich (board), which upheld the assessor's imposition of a penalty.

Thereafter, the plaintiff appealed from the board's decision to the Superior Court, "claiming that the statutory requirements for imposition of the penalty," specifically, "the requirement of [forty-five] days in which to comply—triggered by the assessor providing a suitable form—ha[d] not been satisfied" because, under a strict construction of the statute, actual receipt was required for the form to be "provided," and the plaintiff, through ESRT, did not actually receive the form until after the extended deadline. The parties filed cross motions for summary judgment, which the court, *Hon. Edward T. Krumeich II*, judge trial referee, denied.

Following the subsequent court trial, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment in favor of the defendant. In its memorandum of decision, the court rejected the plaintiff's argument that § 12-63c should be strictly construed in its favor, reasoning that this rule of construction was "primarily focused on interpreting claimed ambiguities in a statute," and that *Wilton Campus 1691, LLC* v. *Wilton*, 191

Conn. App. 712, 725, 216 A.3d 653 (2019), aff'd, 339 Conn. 157, 260 A.3d 464 (2021), on which the plaintiff had relied, involved the imposition of a tax, not a penalty. Furthermore, the court noted that our Supreme Court, in *Wilton Campus 1691, LLC* v. *Wilton*, 339 Conn. 157, 177 n.10, 260 A.3d 464 (2021), determined that General Statutes § 12-55, which governs the publication of grand lists for assessors' respective municipalities, was not ambiguous with respect to the issue before it and explicitly had reserved opining on whether the strict construction rule applied to tax penalties.

The court also rejected the plaintiff's argument that the defendant failed to comply with § 12-63c in the present case. The plaintiff argued that, on June 29, 2020, the assessor had received notice of ESRT's new address. The court concluded, however, that the proper focus was on the "assessor's records, on the date that the *original request* . . . with the accompanying form had been sent out [in April, 2020]." (Emphasis added.) The court stated that it was the obligation of the property owner, not of the town, to ensure that the assessor had current information as to its correct mailing address. The court found that the "mailing evidence presented by the [defendant] sufficed to establish, [by] a preponderance of the evidence . . . that [the assessor] had mailed the materials to the [plaintiff] at its last known address . . . ."[5] The court concluded that the

[5] In connection with its second claim, the plaintiff states that "the uncontroverted evidence shows that [the April, 2020 correspondence was] not mailed to *the plaintiff's last known address*—[*ESRT's*] *new office*—but mailed, instead, to [ESRT's] old office . . . ." (Emphasis altered.) This assertion contradicts the court's determination that the plaintiff's last known address, as far as the defendant was aware, was ESRT's old office, located on 42nd Street in New York, New York. The plaintiff does not actually claim on appeal, however, that the court erred in concluding that it failed to prove that the defendant had learned of ESRT's new address prior to April, 2020. Therefore, like the trial court, we refer in this opinion to ESRT's last known address as the "old" address.

assessor sent the required form sufficiently in advance of the submission deadline and that the "actual failure of the [plaintiff] to receive the demand and form was due to its failure to take reasonable measures to ensure that the assessor had an accurate up-to-date mailing address." The court rendered judgment in favor of the defendant. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that, to the extent that the word "provided" in § 12-63c (a) is ambiguous, the court should have construed the statute strictly in its favor. The plaintiff contends that the phrase "on a form provided by the assessor" requires that the income and expense form actually be received by the property owner. General Statutes (Rev. to 2019) § 12-63c (a).[6] The defendant counters that the term "provided" should not be interpreted to require a property owner's actual receipt of the required form and that the plaintiff's interpretation of § 12-63c (a) is untenable because it would "[result] in an interpretation of the statute that is both absurd and unworkable." We agree with the defendant.

Our resolution of this claim requires that we interpret § 12-63c (a), which "presents a legal question over which our review . . . is plenary. . . . When construing a statute, [o]ur fundamental objective is to ascertain

[6] The only authorities cited by the plaintiff in support of its claim that the income and expense form must actually be received by a property owner under § 12-63c are two Superior Court decisions. First, in *Baker Middletown, LLC* v. *Middletown*, Docket No. CV-22-6073647-S, 2011 WL 6413674, *1 (Conn. Super. September 22, 2023), the court concluded that a taxpayer must actually receive the form for the assessor to have "provided" the form. For the reasons set forth in this opinion, we disagree with that conclusion as a matter of law. Second, *Redding Life Care, LLC* v. *Redding*, Docket No. CV-10-6006338-S, 2011 WL 6413764, *1 (Conn. Super. November 30, 2011), is factually distinguishable from the present case because the form in *Redding* was not sent to the taxpayer's last known address but, rather, to an entirely incorrect address unrelated to the property owner.

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." (Citation omitted; internal quotation marks omitted.) *Rubin* v. *Brodie*, 228 Conn. App. 617, 637, 325 A.3d 1096 (2024).

We begin our analysis with the statute's plain language "to determine whether, when read in context, it is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Wilton Campus 1691, LLC* v. *Wilton*, supra, 339 Conn. 171. Applying these principles to § 12-63c, and for the reasons that follow, we conclude that the plaintiff's interpretation of § 12-63c is not consistent with the plain language of the statute because the word "provided" in § 12-63c (a) simply means supplied or made available, and does not impose any specific requirement, contrary to the plaintiff's assertions, that assessors must either mail the income and expense forms in a prescribed manner or assure actual receipt by some other method.

Section 12-63c establishes the procedures by which a municipal tax assessor may require an owner of certain property that is used primarily for the purpose of producing rental income to submit income and expense information for the purpose of conducting a valuation of that property. Section 12-63c (a) provides in relevant part: "In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor, which term

whenever used in this section shall include assessor or board of assessors, may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in section 12-63b, that the owner of such property annually submit to the assessor not later than the first day of June, *on a form provided by the assessor* not later than forty-five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. . . .'' (Emphasis added.) General Statutes (Rev. to 2019) § 12-63c (a). Section 12-63c (d) further provides in relevant part that any property owner ''required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) or who submits information in incomplete or false form with intent to defraud, shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. . . .'' General Statutes (Rev. to 2019) § 12-63c (d). The key issue in the present appeal, therefore, is the meaning of the phrase ''on a form provided by the assessor . . . .'' General Statutes (Rev. to 2019) § 12-63c (a).[7]

The term ''provided'' is not defined in § 12-63c. ''In the absence of a statutory definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term.'' (Internal quotation marks omitted.) *Rubin* v. *Brodie*, supra, 228 Conn. App. 638–39; see also General Statutes § 1-1 (a). ''We may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme.'' (Internal quotation marks omitted.) *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, 227 Conn.

[7] See footnote 1 of this opinion.

App. 347, 398, 322 A.3d 331 (2024), cert. denied, 351 Conn. 907, 330 A.3d 881 (2025), and cert. denied, 351 Conn. 907, 330 A.3d 882 (2025).

The term "provide" is commonly defined as, inter alia, "to supply or make available," and "to make something available to . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1001. "[A]vailable" is defined as "accessible, obtainable . . . ."[8] Id., p. 84. The term "provide" was defined similarly in dictionaries at and near the time that § 12-63c was amended in 2000[9] to add the relevant language that the form containing income and expense information must be "provided by the assessor . . . ."[10] See Public Acts 2000, No. 00-215, § 2; see also, e.g., *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 697, 258 A.3d 1268 (2021) ("in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage").

[8] "[A]ccessible" is defined as "capable of being reached . . . capable of being used or seen . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 7. "[O]btain" is defined as "to gain or attain . . . ." Id., 857. The suffix "-able" is defined as "capable of, fit for, or worthy of . . . ." Id., 3. Reading the definitions of "obtain" and "-able" together, "obtainable" may be defined as *capable* of being obtained, gained, or attained.

[9] Prior to June 1, 2000, General Statutes (Rev. to 1999) § 12-63c provided that a property owner shall submit income and expense information to the assessor "on a form prescribed by the Secretary of the Office of Policy and Management or approved in accordance with section 12-61 . . . ." That language was removed, and § 12-63c was amended to include the "on a form provided by the assessor" language at issue in this appeal. Public Acts 2000, No. 00-215, § 2. Thus, the statutory language was amended to allow an assessor to "provide" to a property owner whatever form the assessor deemed necessary and appropriate, rather than requiring an assessor to use a specific form "prescribed" by the Secretary of the Office of Policy and Management.

[10] See American Heritage Dictionary of the English Language (3rd Ed. 1992) p. 1458 (defining term "provide" as "[t]o furnish; supply," and "[t]o make available; afford"); Merriam-Webster's Collegiate Dictionary (10th Ed. 1993) p. 940 (defining "provide" as "to supply or make available," and "to make something available to"); Oxford American Dictionary and Language Guide (1999) p. 802 (defining term "provide" as to "supply; furnish").

Our review of the statutory scheme does not reveal any indication that the legislature intended for the term "provided" to have any special or technical meaning in the municipal taxing scheme. See, e.g., *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, supra, 227 Conn. App. 400 ("[i]n the absence of any indication that the term defense as used in [the applicable statute] was intended to have a technical or special meaning . . . we see no reason to depart from our regular practice of looking to the common usage of a term as defined in dictionaries" (citation omitted; internal quotation marks omitted)). Thus, in the absence of any indication that the word "provided" was intended to impose specific requirements on assessors with respect to *how* they must make the income and expense forms available to property owners, we decline to add any such requirements onto the clear statutory language.

The fact that the assessor has discretion with respect to the manner in which it may provide the income and expense forms does not render the term "provided" ambiguous because it is not plausible, given that word's ordinary meaning, that the term "provided" encompasses the distinct concepts of actual delivery and/or receipt. See Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1038 (defining "receive" as "to come into *possession* of; acquire" (emphasis added)); see also, e.g., *Ajdini* v. *Frank Lill & Son, Inc.*, 349 Conn. 1, 3, 5–7, 312 A.3d 579 (2024) (concluding that term "file" in General Statutes § 31-294c (b) unambiguously meant to "deliver," which required actual "receipt" and, therefore, employer did not meet its statutory obligation to "file" notice of intention to contest liability to pay compensation for employee's workers' compensation claim by placing notice in mail within statutory period). Although assessors may choose to provide such forms by means other than by a regular mailing, such as by

certified mail, return receipt requested, the text of § 12-63c "does not command that level of specificity." *Rubin* v. *Brodie*, supra, 228 Conn. App. 639–40.

It is not for this court to add provisions to a statute. See, e.g., *Cochran* v. *Dept. of Transportation*, 350 Conn. 844, 865–66, 327 A.3d 901 (2024) ("[i]t is not the role of this court to engraft additional requirements onto clear statutory language" (internal quotation marks omitted)); *High Watch Recovery Center, Inc.* v. *Dept. of Public Health*, 347 Conn. 317, 333, 297 A.3d 531 (2023) ("[i]n the absence of express language in [a statute] mandating that [a] request . . . take a particular form or include certain talismanic language, we will not read any such requirement into the statute"). Indeed, courts "must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 143, 252 A.3d 317 (2020). Accordingly, we decline to add to the statute the requirement that an income and expense form "provided by the assessor" must be received by the property owner. Rather, we assume that, if the legislature intended that an assessor be required to demonstrate that an income and expense information form was, in fact, actually delivered to and/or received by a property owner under § 12-63c, it would have stated that requirement expressly.[11] See, e.g., *Costanzo* v. *Plainfield*, 344 Conn.

[11] We note that, after our Supreme Court released its decision in *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 78, 282 A.3d 1253 (2022), in which it concluded that the term "submit," in reference to a property owner's duty to submit income and expense information to their municipal tax assessor within the statutory deadline, was not satisfied when that information was postmarked but not delivered by that date, our legislature amended § 12-63c to add subsection (e), which provides: "Any income and expense disclosure form described in subsection (a) of this section received by the

86, 108, 277 A.3d 772 (2022) ("[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (internal quotation marks omitted)).

Furthermore, our review of related statutes supports our conclusion that the term "provided" in § 12-63c (a) should not be equated to actual receipt. "[I]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *9 Pettipaug, LLC* v. *Planning & Zoning Commission*, 349 Conn. 268, 289, 316 A.3d 318 (2024). Section 12-63c is part of chapter 203 of the General Statutes, which governs property tax assessments. Chapter 203 is, in turn, part of title 12 of the General Statutes, our legislature's pervasive statutory tax scheme; see, e.g., *Danbury* v. *Dana Investment Corp.*, 249 Conn. 1, 20, 730 A.2d 1128 (1999) (citing

assessor to which such form is due that is in an envelope bearing a postmark, as defined in section 1-2a, showing a date within the allowed filing period, shall not be deemed delinquent." General Statutes § 12-63c (e), codifying Public Acts 2023, No. 23-152, § 1. By doing so, our legislature has now stated that a property owner's posting of an income and expense form within the allowed filing period, as evidenced by a postmark, is sufficient if the form does not arrive to the assessor by the statutory deadline.

Notably, however, the legislature has maintained, consistent with our Supreme Court's holding in *Seramonte Associates, LLC*, that the income and expense disclosure form must in fact be "*received* by the assessor . . . ." (Emphasis added.) General Statutes § 12-63c (e). Moreover, in amending § 12-63c in this regard, the legislature did not also amend subsection (a) in a way relevant here or change the language at issue in the present case. "[W]hen changes have been introduced by amendment to a statute, the presumed change does not go any further than that which is expressly declared or necessarily implied. . . . We cannot impute to the legislature . . . in the absence of an intent clearly expressed in the [statute], [an intent] to enact [a statute that] involves a departure from existing statutory law." (Internal quotation marks omitted.) *Gaida* v. *Planning & Zoning Commission*, 108 Conn. App. 19, 25, 947 A.2d 361, cert. denied, 289 Conn. 922, 958 A.2d 150 (2008), and cert. denied, 289 Conn. 923, 958 A.2d 151 (2008).

§ 12-63c in support of proposition that process by which plaintiff city assesses real estate is authorized and regulated by "pervasive statutory scheme" and stating that procedures by which taxpayer may challenge those assessments are set forth by statutory scheme that carefully balances procedural and substantive remedies); pursuant to which the duties of assessors are "prescribed with particularity. The manner in which real estate is to be described and assessed is explicitly set out." *Empire Estates, Inc.* v. *Stamford*, 147 Conn. 262, 264, 159 A.2d 812 (1960). Assessors' activities also are heavily regulated. See generally §§ 12-62f-1 through 12-62f-6 of the Regulations of Connecticut State Agencies.

In light of this comprehensive scheme, we decline to read into § 12-63c any specific requirement that assessors actually *deliver*, rather than provide or make available, income and expense forms to property owners. Moreover, we note that General Statutes § 12-39bb[12] provides in relevant part that "[r]ecords of the Department of Revenue Services may be *provided* in the form of written documents, reproductions of such documents, films or photoimpressions, or electronically produced tapes, disks or records, or by *any other mode or means which the commissioner determines necessary or appropriate*. . . ." (Emphasis added.) Our reading of the term "provided" in § 12-63c (a) is consistent with the statutory requirements of § 12-39bb.

In several other taxing statutes, however, the legislature has required municipal assessors to send relevant information to taxpayers by certified mail, return receipt requested, by mail, or by other specified methods. See, e.g., General Statutes § 12-53 (c) (1) (assessor may perform audit by giving notice in writing to owner

[12] Section 12-39bb, which is contained within chapter 202 of the General Statutes, titled "Collection of State Taxes," governs the collection of state taxes, and specifically delineates the ways in which the Department of Revenue Services may "provide" its records.

that "shall be placed in the hands of such person or left at such person's usual place of residence or business or shall be sent to such person by registered or certified mail at the last-known place of residence"). Moreover, in some situations, it has evinced its expectation of actual delivery. See, e.g., General Statutes § 12-120b (b) ("A claimant negatively affected by a decision of the Secretary of the Office of Policy and Management . . . may appeal such decision . . . . The date of any notice sent by the secretary pursuant to this section shall be deemed to be the date the notice is *delivered* to the claimant." (Emphasis added.)). The legislature has not done so in the present case, which suggests its intent that actual delivery or receipt is not required. See, e.g., *State* v. *Cody M.*, 337 Conn. 92, 103, 259 A.3d 576 (2020) ("[when] a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" (internal quotation marks omitted)).

In the present case, the plaintiff argues that we should not construe § 12-63c as allowing for the mailing of forms to a property owner's last known address to be an acceptable manner for an assessor to meet its burden to provide the relevant forms. We disagree. Section 12-63c does not require that an assessor use the United States mail to provide the required forms. Indeed, if the legislature wanted to mandate that the assessor mail the form under § 12-63c, it would have so specified. See, e.g., General Statutes § 12-53a (e) (upon receipt of notice from assessor, tax collector of town shall, if such notice is received after normal billing date, within thirty days thereafter "*mail* or hand a bill to the owner" (emphasis added)); General Statutes § 12-233 (a) (2) ("[a] notice of deficiency assessment may be *mailed* to the taxpayer at any time" in case of failure to file return or deficiency due to fraud (emphasis added)).

Instead, we view such statutes as providing procedural protections in favor of taxpayers who are obligated to send information or documents to state and municipal tax authorities. For example, General Statutes § 12-41 (f) allows for the imposition of a penalty if a taxpayer fails to file a declaration of personal property but provides that any declaration of personal property "received by the municipality to which it is due that is in an envelope bearing a postmark . . . showing a date within the allowed filing period shall not be deemed to be delinquent." See also General Statutes § 12-42 (a) (declaration or extension request may be *filed or postmarked* next business day following submission deadline); General Statutes § 12-146 (no tax shall be construed to be delinquent if such tax was paid through municipal electronic payment service within time allowed by statute or if envelope containing amount due, "as received by the tax collector of the municipality to which such tax is payable, bears a postmark showing a date within the time allowed by statute"). Thus, if the legislature intended to require assessors to provide the income and expense forms in a specific manner, it would have stated that requirement expressly. See, e.g., *Stone* v. *East Coast Swappers, LLC*, 337 Conn. 589, 606, 255 A.3d 851 (2020) ("when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes" (internal quotation marks omitted)).

Moreover, we agree with the defendant that the plaintiff's interpretation would yield absurd or unworkable results. Our Supreme Court has interpreted § 1-2z to "instruct Connecticut's courts, when construing statutory language, to eschew those interpretations that, although not literally impossible to effectuate, would be so bizarre, impracticable, or contrary to common sense that one cannot reasonably assume that they

reflect the considered intent of the legislature." *NEMS, PLLC* v. *Harvard Pilgrim Health Care of Connecticut, Inc.*, 350 Conn. 525, 546, 325 A.3d 196 (2024); see also *Cohen* v. *Rossi*, 346 Conn. 642, 700, 295 A.3d 75 (2023) (*Ecker*, *J.*, concurring in part and concurring in the judgment) ("the threshold ambiguity analysis under § 1-2z should and must take into account . . . common-sense, practical considerations regarding how the statutory scheme will operate in the real world"). Under the plaintiff's interpretation, a municipal assessor would be tasked with making sure a rental property owner's address is correct in each assessment period—769 properties in the present case—which would present a nearly impossible administrative burden for municipalities. See part II of this opinion.

A construction of the term "provided" as meaning made available, but not necessarily actually received, properly requires an eligible property owner, who is in the best position to know its current mailing address, to update its mailing address with the relevant tax assessor to avoid a penalty under § 12-63c, which is consistent with the allocation of that affirmative burden in our case law. See *PJM & Associates, LC* v. *Bridgeport*, 292 Conn. 125, 142–43, 971 A.2d 24 (2009) (placing burden on property owner to provide or make available information). We therefore decline to conclude that the assessor should shoulder the burden of verifying each property owner's address. Cf., e.g., *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 434, 692 A.2d 742 (1997) ("It is well settled that it is the responsibility of the taxpayer to provide the assessor with sufficient facts to value personal property for tax purposes. . . . It is a self-reporting system by practical necessity, because it simply would be too burdensome on municipal assessors to locate, identify and value all of the taxable personal property in their environs." (Citation

omitted; internal quotation marks omitted.)). As property owners are the parties with the greatest ability to prevent the risk of a miscommunication regarding an address change, we conclude that the burden lies appropriately with property owners to provide the relevant municipality with information regarding their most up-to-date addresses. This is particularly so when property owners rely on property managers, whose addresses also may change, for the administration of their tax obligations.

Our conclusion is consistent with the overall statutory scheme. Section 12-63c (a) has granted assessors the express power to require the submission of income and expense forms by property owners by "provid[ing]" such forms, and they necessarily have been conferred certain secondary, implied powers with respect to the exact method by which the relevant forms are "provided." See *United Illuminating Co.* v. *New Haven*, supra, 240 Conn. 439, 458 (explaining that, although municipality only has powers of taxation expressly granted to it by legislature, assessors have implied powers as public officials that are necessary to proper execution of duties because, "[w]hen a general power is given to a municipal officer, whatever is necessary for effective exercise of that power is, in the absence of express authority, conferred by implication" (internal quotation marks omitted)).

As previously stated, if the legislature wanted to add an explicit requirement of actual receipt into § 12-63c (a), it would have done so. Because it has not, we decline to read into the statute words that are not stated therein. Accordingly, because we conclude that the term "provided" in § 12-63c (a) is plain and unambiguous and simply means to be made available, and because the plaintiff's interpretation would yield absurd and unworkable results, we decline to consult extratextual sources of legislative intent, consistent with § 1-2z. The

plaintiff's claim that the statute is ambiguous, therefore, is unavailing.[13]

II

The plaintiff's second claim is that the trial court incorrectly determined that the April, 2020 notice and form mailed to the plaintiff by the assessor satisfied § 12-63c (a). Specifically, the plaintiff argues, inter alia, that the court (1) incorrectly determined that the plaintiff failed to take reasonable measures to ensure that the assessor had an up-to-date mailing address, and (2) improperly read into § 12-63c a provision that an assessor's request and form for income and expense information "may properly be mailed to a property owner's last known address . . . ."[14] (Emphasis omitted.) The defendant counters that the trial court properly rejected the notion that § 12-63c requires actual receipt of income and expense forms by the taxpayer.[15] We

[13] Consistent with our Supreme Court's recent decision in *Wilton Campus 1691, LLC* v. *Wilton*, supra, 339 Conn. 177 n.10, because we conclude that the term "provided" in § 12-63c (a) is unambiguous, we do not consider "whether the maxim that this court resolves any ambiguities . . . in favor of the taxpayer applies . . . ."

[14] In support of its second claim, the plaintiff again argues that the court should have determined that the term "provided" requires actual receipt by the property owner. In part I of this opinion, we have rejected the plaintiff's contention that the assessor's obligation under § 12-63c (a) to provide the form requires that a property owner actually receive it. As stated previously in this opinion, the fact that the plaintiff did not actually receive the form does not negate the statutory sufficiency of the assessor's April 15, 2020 mailing. We need not revisit that issue again here.

[15] The defendant further argues that "the trial court properly applied the mailbox rule . . . ." Although we agree that the court properly construed § 12-63c, we disagree with the defendant that this case implicates the mailbox rule. Indeed, the court did not apply the mailbox rule in its memorandum of decision. The mailbox rule is a common-law rebuttable presumption providing that, "if a letter is mailed to the correct address with the correct postage, it is presumed it was received." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 3.8.1, p. 133. Such presumptions may be rebutted, however, with substantial countervailing evidence, namely, evidence that the letter was not, in fact, received. Id.

In the present case, the court found that the plaintiff did not receive the April, 2020 mailing containing the appropriate statutory forms. The court

conclude that the court correctly determined that the way in which the assessor provided the forms to the plaintiff in the present case complied with § 12-63c (a).

The following additional facts are relevant to our resolution of this claim. In 2016, ESRT moved its offices from 42nd Street to 33rd Street in New York, New York. With respect to the address change, Rodney Gomes, senior vice president and chief controller of ESRT, testified: "I'm assuming that, in 2016, when we alerted all of our lenders, and *I can't give you a copy of anything*, but that this would've been one of our vendors, would've been in our database, and we would've sent a notice changing the address back then." (Emphasis added.) At trial, the defendant offered into evidence an affidavit of Eric Hyland, a mailing specialist with Quality Data Service, Inc. (QDS), in which he averred that QDS had been contracted to prepare and mail demands for annual statements of income and expenses pursuant to § 12-63c. He averred that the assessor's mailing list provided to QDS for the October 1, 2020 grand list contained 769 properties, and that QDS delivered the bulk mailing to the United States Postal Service on April 14, 2020. Along with Hyland's affidavit, proof of the bulk mailing, including the mailing to the plaintiff's last known address, was admitted into evidence.

The court found that, "[*a*]*lthough no documentary evidence was available to verify it*, the property manager [had testified] that [ESRT's] address (mailing

stated: "[T]he court finds that the assessor did send out the required demand for [income and expense] information and associated form sufficiently in advance of the due date . . . but that the *actual failure* of the taxpayer to receive the demand and form was due to its failure to take reasonable measures to ensure that the assessor had an accurate, up-to-date mailing address." (Emphasis added.) Our determination that the mailbox rule does not apply to the facts of this case, however, is not dispositive of our holding that the assessor complied with § 12-63c, because, as we stated in part I of this opinion, actual receipt of the "form provided by the assessor" is not required by § 12-63c (a).

address) had changed a few years earlier ([in] 2016), and that [ESRT] had sent out notices to that effect, with the implication that the . . . assessor had been sent such a notification." (Emphasis added.) The court noted that there was evidence that there had been a "universal" mailing to everyone associated with ESRT to provide notification of the 2016 address change. The court found, however, that, "[a]bsent documentation and absent testimony providing details of the documentation sent out, there is an *inherent uncertainty* of the level of specificity in such a broad mailing as might be needed for this particular situation." (Emphasis added.) The court further noted that, although a universal notification may be sufficient for "bilateral relationships between ESRT and others," when acting as a representative of a third party, such as the plaintiff in the present case, "a more detailed recitation likely would be needed, to ensure that the recipient of the notice is made aware that the communication is intended to inform the recipient of a change of contact information for a principal."

The court found that the evidence presented by the assessor of its mailing established that she had mailed the materials to the plaintiff at its last known address. The court ultimately concluded that the plaintiff had the obligation to provide an accurate address to the assessor and declined to credit the plaintiff's evidence claiming to the contrary.

We apply plenary review to the question of whether the trial court correctly determined that the April, 2020 mailing satisfied § 12-63c. "Once we ascertain the meaning of the statute, the application of that standard to the undisputed historical facts in determining whether the town complied with the statutory requirements is a mixed question of fact and law, over which our review is plenary." (Internal quotation marks omitted.) *9 Pettipaug, LLC* v. *Planning & Zoning Commission*, supra, 349 Conn. 278.

We address the plaintiff's arguments in turn. First, the plaintiff asserts that the court incorrectly determined that the plaintiff failed to take reasonable measures to ensure that the assessor had an up-to-date mailing address. Although the plaintiff's counsel stated at oral argument before this court that the question of "what is meant by the word provided" was a "pure question of law," the plaintiff asserts in its brief that the court's finding that the plaintiff "failed to take reasonable measures to ensure that the assessor had an up-to-date mailing address" is "both factually incorrect and legally without basis." The plaintiff does not cite to any legal authority in support of its argument. The plaintiff has attempted to recast this claim as a legal challenge to the defendant's compliance with § 12-63c; however, it is "essentially attacking the underlying factual findings made by the [court]." *Generation Partners, L.P.* v. *Mandell*, 148 Conn. App. 294, 301, 85 A.3d 49 (2014). Although the plaintiff has pointed to the testimony of its witnesses that notice of its new address was "provided in a massive mailing to all of its vendors, tenants and anyone with which it did business or required a filing," the trial court deemed that evidence to be uncertain and speculative, and we will not revisit the court's determinations regarding the weight of that evidence. See, e.g., *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 346 Conn. 391, 413–14, 291 A.3d 64 (2023) ("[b]ecause it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings" (internal quotation marks omitted)).

In part I of this opinion, we have concluded that the assessor "provided" the form to the property owner within the meaning of § 12-63c through its bulk mailing. The plaintiff has not challenged the court's finding that the assessor mailed the forms to all applicable property owners, including the plaintiff, albeit to ESRT's old

address, on April 15, 2020. As the assessor "provided" the forms upon mailing, the court correctly determined that the assessor's April 15, 2020 bulk mailing satisfied the requirements of § 12-63c (a).

Moreover, the evidence presented at trial with respect to the procedures that the defendant followed in sending the "bulk mailing" demonstrated that they were consistent with the statutory and regulatory taxing scheme. General Statutes § 12-64 (a) provides in relevant part: "Any interest in real estate shall be set by the assessors in the list of the person in whose name the title to such interest stands *on the land records*. . . ." (Emphasis added.) General Statutes § 12-62f (b) provides in relevant part that the secretary of the Office of Policy and Management shall develop "minimum standards for the certification of a computer-assisted mass appraisal system and adopt regulations . . . setting minimum computer-assisted mass appraisal revaluation standards and computerized administrative standards. . . ." Accordingly, §§ 12-62f-1 through 12-62f-6 of the Regulations of Connecticut State Agencies comprehensively regulate and define the minimum standards for computer assisted mass appraisals and charge municipalities with having the capacity to allow for inquiries and updating of real estate records, including addresses.[16] These regulations have the same force and

[16] See, e.g., Regs., Conn. State Agencies § 12-62f-3 (a) (1) (providing for maintenance of data management module that shall contain, with respect to real property, current property owner and mailing address); Regs., Conn. State Agencies § 12-62f-5 (providing for assessment administration module, pursuant to which assessors must have ability to allow inquiries and updating of real estate records); Regs., Conn. State Agencies § 12-62f-6 (providing that assessor's tax collection module shall have ability to process new owner and address changes prior to tax billing); see also Regs., Conn. State Agencies § 12-728 (b)-1 (a) ("A notice of deficiency shall set forth the reason for the proposed assessment, and shall be mailed to the taxpayer's last known address, as shown in the records of the [d]epartment. *It is the responsibility of the taxpayer, or of the taxpayer's legal representative, to give written notification to the* [*c*]*ommissioner of any change of address, status or circumstances*, and such notification shall be received by the [c]ommissioner prior to the date of any notice of deficiency." (Emphasis added.)).

effect of law as the taxing statutes and they reinforce the statute's plain language. See, e.g., *PJM & Associates* v. *Bridgeport*, supra, 292 Conn. 135–36 (concluding that § 12-62i-4 (a) of Regulations of Connecticut State Agencies supported plain meaning of § 12-63c (a), which grants assessors power to require submission of income and expense reports in years in which there was no revaluation of properties). Thus, although assessors are charged with maintaining systems that comply with this statutory and regulatory scheme, they are not obligated to update proactively the addresses of every property owner within the purview of § 12-63c, in the absence of being notified of such a change by the owner. Such basic information is part and parcel of a taxpayer's duty to "furnish the facts [on] which valuations may be based. . . . If he fails to do so, the assessors are only required to act [on] the best information [they] can obtain . . . and the taxpayer cannot justly complain if the assessors, acting in good faith, make an error in judgment in listing and valuing his property." (Citations omitted; internal quotation marks omitted.) *Northeast Datacom, Inc.* v. *Wallingford*, 212 Conn. 639, 649, 563 A.2d 688 (1989); see also *Xerox Corp.* v. *Board of Tax Review*, 240 Conn. 192, 205, 690 A.2d 389 (1997) (taxpayer bears burden of supplying information that provides "the facts [on] which valuations may be based" (emphasis omitted; internal quotation marks omitted)).

Second, the plaintiff argues that the court improperly read into § 12-63c a provision that an assessor's request and form for income and expense information "may properly be mailed to a property owner's last known address . . . ." (Emphasis omitted.) Relying on the fact that other statutes require that information must be sent to a taxpayer's "last known address," the plaintiff asserts that, because § 12-63c does not contain language requiring that the income and expense form be mailed to a property owner's last known address, the assessor

could not rely on the plaintiff's last known address and, instead, should have ensured that the plaintiff actually received the form. To the contrary, we read such statutes as being in the nature of a procedural shield to protect taxpayers to ensure that relevant notices are sent to their most recently updated addresses. See, e.g., General Statutes § 12-55 (in case of any increase in valuation of property, assessor or board of assessors "shall mail a written notice of assessment increase to the last-known address of the owner of the property the valuation of which has increased"); General Statutes § 12-60 (written notice of increase shall be sent to person's last known address); General Statutes § 12-89 (upon denial of exemption, assessor shall mail written notice of such denial to last known address of taxpayer or organization); General Statutes § 12-115 (board of assessment appeals shall mail to owner at "last-known address of the owner, postage paid . . . a written or printed notice to appear"). The absence of this language from § 12-63c, however, does not support an inference that it was impermissible for the assessor to provide the form by mailing it to the plaintiff's last known address. By doing so, the assessor "provided" the form pursuant to § 12-63c (a) by making it available to the plaintiff using the most current information that she had concerning the plaintiff's mailing address. As stated in part I of this opinion, the unambiguous language of § 12-63c (a) requires nothing further. Accordingly, we conclude that the court correctly determined that the mailing by the defendant's assessor, which was sent at least forty-five days before the statutory deadline to the plaintiff's last known address, satisfied the requirements of § 12-63c (a).

The judgment is affirmed.

In this opinion the other judges concurred.

CITY OF WATERBURY *v.* TOWN OF WATERTOWN (AC 46784)

Elgo, Moll and Westbrook, Js.

Syllabus

The defendant town appealed from the trial court's judgment for the plaintiff city with respect to the plaintiff's action to collect certain unpaid fees for the use of its water and sewer services. The defendant claimed, inter alia, that the court improperly concluded that, in the absence of a contractual agreement, the plaintiff was authorized by statute (§§ 7-239 and 7-255) to set the rates it charged properties located in the defendant municipality for the continued use of its water and sewer services. *Held*:

The trial court properly construed §§ 7-239 and 7-255 as authorizing the plaintiff to set just and equitable rates for the continued use of its water and sewer systems by properties located in the defendant municipality following the expiration of contracts between the parties relating to such use.

The trial court properly concluded that, pursuant to statute (§§ 7-239, 7-255 and 7-258), the plaintiff was permitted to bring an action against the defendant to recover unpaid water and sewer service charges incurred by properties within the defendant municipality because the defendant had elected to collect payment for such charges.

The trial court's finding that the rates set by the plaintiff for water and sewer services were reasonable and equitable was not clearly erroneous.

Argued January 8—officially released June 10, 2025

Procedural History

Action for the collection of certain unpaid fees for water and sewer services provided by the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Cordani, J.*; judgment for the plaintiff, from which the defendant appealed to this court. *Affirmed.*

Daniel J. Krisch, with whom, on the brief, were *David P. Friedman* and *Lorey C. Leddy*, for the appellant (defendant).

Joseph A. Mengacci, corporation counsel, with whom was *Daniel J. Foster*, corporation counsel, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, the town of Watertown, appeals from the judgment of the trial court, rendered after a bench trial, in favor of the plaintiff, the city of Waterbury. On appeal, the defendant claims that the court improperly (1) concluded that, in the absence of a contractual agreement, General Statutes §§ 7-239[1] and 7-255[2] authorize the plaintiff to set the rates it charges properties located in the defendant municipality for the continued use of its water and sewer services, (2) concluded that those statutes impliedly authorize the plaintiff to sue the defendant to collect unpaid water and sewer service charges incurred by those properties, and (3) found the plaintiff's water and sewer service rates to be reasonable and equitable. We affirm the judgment of the trial court.

The plaintiff is authorized, by special act of the General Assembly, to obtain water from outside its borders; see 11 Spec. Acts 322, No. 252, § 1 (1893); and to contract to supply water to any municipality through which its water supply mains run. See 18 Spec. Acts 904, No. 391 (1921).[3] The plaintiff also is statutorily authorized to contract to provide sewer services to adjoining municipalities. See General Statutes § 7-273.[4] Pursuant

[1] Although § 7-239 has been amended by the legislature since the events underlying this case; see Public Acts 2021, No. 21-143, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[2] Although § 7-255 has been amended by the legislature since the events underlying this case; see, e.g., Public Acts, Spec. Sess., June, 2021, No. 21-2, § 164; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[3] That special act provides in relevant part that the plaintiff "is authorized and empowered . . . to contract to supply water for domestic purposes and fire protection to any municipality, borough or fire district, through which, or contiguous to which the water supply mains of said city are or shall be laid . . . ." 18 Spec. Acts 904, No. 391 (1921).

[4] General Statutes § 7-273 provides: "Any town, city, borough or fire or sewer district, maintaining a sewerage system, may contract with any adjoining town or property owner therein for connection with and the use of such sewerage system."

to that authority, the plaintiff contracted to supply water and sewer services to the defendant for more than sixty years. This case involves an action to collect unpaid charges for water and sewer services.

In its memorandum of decision, the court found the following relevant facts. The plaintiff first supplied water services to the defendant in 1939 and sewer services to the defendant in 1951. "Starting on or about June 29, 1988, [the plaintiff] provided water and sewer services to [the defendant] pursuant to written agreements between the parties with terms of twenty-five years. During [those contractual periods], [the plaintiff] charged, and [the defendant] paid . . . rates [that] were less than the rates that [the plaintiff] charged to its own residents. . . .

"In conjunction with the expiration of the foregoing agreements, the parties negotiated and abided by new subsequent agreements, which started in 2013 and terminated five years later, on June 30, 2018. These 2013 water and sewer agreements applied flat rates for water and sewer service[s] and applied an escalator to those rates at 2 percent per year."[5] (Footnotes omitted.)

The court further found that, "[i]n advance of the termination of their 2013–2018 agreements, the parties attempted to negotiate a further agreement but failed to reach an agreement. Accordingly, as of June 30, 2018, no agreement existed between the parties concerning the provision of water and sewer services, and there

[5] The court also found that "[t]he negotiations for the 2013–2018 agreements [between the parties] began in 2012. During these negotiations, the [plaintiff's mayor] informed [the defendant] that [the plaintiff] would seek to impose the [plaintiff's] resident standard rates on [the defendant] after these 2013 contracts expired in five years, and that the 2 percent per year escalator, as applied to the flat rates in the agreements, was a start in that direction. Accordingly, [the defendant] had substantial notice of [the plaintiff's] intent concerning pricing, which notice preceded the 2015 public meetings which set the prices at issue."

was no agreement concerning the rates to be charged. Despite there being no agreement between the parties, [the plaintiff] continued to provide, and [the defendant] continued to consume, water and sewer services. . . . [The plaintiff] deployed good faith efforts to achieve new agreements, or amended 2013 agreements, but, despite those good faith efforts, no agreement arose after the expiration of the 2013 agreements on June 30, 2018. . . .

"In December of 2017, [the plaintiff] again firmly advised [the defendant] that, in the absence of a negotiated agreement, [the plaintiff] would charge [the defendant] the same rates for water and sewer service that it charged [its own] residents, plus a 10 percent municipal system benefit charge on the water rates. Ultimately, [the plaintiff] further informed [the defendant] of its position in a letter dated June 8, 2018. . . .

"[The plaintiff's] independent water and sewer consultants conducted studies in 2014 to make recommendations to [the plaintiff] for water and sewer rates for the period from 2015 through 2019, and made the following findings and recommendations: (a) [the plaintiff's] water and sewer rates had been insufficient to support the short and long-term financial needs of [the plaintiff's] systems, and [the plaintiff] had been funding deficits through other means, including the use of reserves; (b) there had been underinvestment by [the plaintiff] in its aging water and sewer systems over the years and that underinvestment [necessitated] substantial capital expenditures in the near-term coming years; (c) [the plaintiff] needed to build a capital reserve to plan for required capital investments; (d) the annual cost of operating [the plaintiff's] water system [was] expected to increase from under $12 million in 2015 to $13.7 million in 2019, a 3.4 percent per year increase, and $35 million in capital improvements to the water system

were required over the coming five years; (e) [the plaintiff's] water and sewer charges to its customers were substantially lower than other comparable Connecticut suppliers; [and] (f) the rate recommendations made by [the consultants] were designed on a break-even basis for [the plaintiff's] operations, but [the plaintiff] chose lower rates and increases than those recommended by [the consultants]. Accordingly, [the plaintiff's] rates for 2015 through 2019 still did not produce break-even operations. . . .

"[S]tarting in 2015, pursuant to [§] 7-239, [the plaintiff] established rates to be charged for persons or entities being supplied water by the [plaintiff's] waterworks. The rate set was $2.31 per hundred cubic feet of water for 2015, $2.43 for 2016, $2.47 for 2017, and $2.52 for 2018 through 2021. . . . In 2022, the rate was increased to $2.65 per hundred cubic feet of water. The foregoing rates were set after publication and public hearings as required in the statute. These rates were adopted by [the plaintiff's] Board of Aldermen. . . . The court found no credible evidence of any irregularity in the procedures used by [the plaintiff] to set its rates. . . .

"[S]tarting in 2015, pursuant to [§] 7-255, [the plaintiff] established rates to be charged for persons or entities using the [plaintiff's] sewer system. The rate was set at $2.472 per hundred cubic feet for 2019 through 2022. . . . The foregoing rate remains in effect today. [That] rate was set after publication and public hearings as required in the statute . . . [and was] adopted by [the plaintiff's] Board of Public Works. . . . The court found no credible evidence of any irregularity in the procedures used by [the plaintiff] to set its rates. . . .

"The rates adopted by [the plaintiff] in 2015 for water and sewer [services] were less than the rates recommended by [the plaintiff's] independent water and sewer consultant. Further, the rates adopted in 2015

by [the plaintiff] . . . were not sufficient to make the [plaintiff's] water and sewer enterprises self-sufficient. [The plaintiff] adopted these low 2015 rates in an effort to slowly bring its water and sewer enterprises up to self-sufficiency without overwhelming its citizens. . . .

"The rates for water and sewer [services] adopted by [the plaintiff] in 2015 were charged to [all of the plaintiff's] residents and businesses regardless of size, location . . . and usage. [The plaintiff] also applied these rates to the towns of Naugatuck, Cheshire, Middlebury and Prospect. All municipalities currently acquiring water from [the plaintiff] pay 110 percent of [the plaintiff's] standard rate for water, and all municipalities, other than Wolcott, which use [the plaintiff's] sewer services pay 100 percent of [the plaintiff's] standard rate. It was reasonable for [the plaintiff] to adopt a uniform system of pricing, particularly since [the plaintiff's] accounting system did not support accurate costing of distinctions or classes. . . .

"Prior to the expiration of the 2013 agreements with [the defendant], [the plaintiff] notified [the defendant] that, starting July 1, 2018, [the plaintiff] would begin charging [the defendant] at [the plaintiff's] standard resident rate plus 10 percent for water [services] and at [the plaintiff's] standard resident rate for sewer service. . . . [On] July 1, 2018, [the plaintiff] began charging [the defendant] $2.52 per hundred cubic feet of water plus an additional 10 percent municipal system benefit charge and $2.472 per hundred cubic feet of sewage plus a capital recovery charge of $1.481 per hundred cubic feet of sewage. These rates were the rates charged by [the plaintiff] to its residents and other surrounding [municipalities], but were higher than the contractual rates previously charged to [the defendant] pursuant to the previously expired contracts. . . . [The defendant] has not paid the foregoing rates and has

short paid the invoices issued by [the plaintiff] for the period beginning on July 1, 2018.[6] . . .

"During the foregoing time periods, [the plaintiff] has charged municipalities other than [the defendant] the rates that [the plaintiff] established pursuant to §§ 7-239 and 7-255 . . . . Commencing on July 1, 2018, [the plaintiff] began charging [the defendant] interest at the rate of 18 percent per year on the amounts [the plaintiff] claimed were due because of [the defendant's] practice of short paying [the plaintiff's] invoices. . . .

"[The defendant] directly charges its residents for water and sewer services and, thus, bears the cost and burden of collection. [The defendant] also owns the pipes and other equipment located within [its] borders (except for certain supply and collection stations and the primary supply pipes), which are used to distribute water and sewer services within [the defendant municipality] to [its] residents.

* * *

"In 2013, while negotiating the 2013 agreements, [the plaintiff's mayor, Neil O'Leary] informed [the defendant's counsel] that the rates and [the 2 percent per year] escalator in the 2013 agreements were meant to transition [the defendant] to [the plaintiff's normal] resident rates for water and sewer service and that, after the 2013 agreements expired in 2018, [the plaintiff] would charge [the defendant] 110 percent of [the plaintiff's normal] resident rate for water and 100 percent of [its normal] resident rate for sewer services.[7] . . .

[6] In its memorandum of decision, the court found that the rates for water and sewer service proposed by the defendant "were unreasonable in the extreme and should have been known as such by [the defendant] and its experts." The court further noted that "[t]hese extremely unreasonable rate proposals [by the defendant] cause the court to question whether they were arrived at and suggested in good faith."

[7] In its memorandum of decision, the court found Mayor O'Leary's testimony "to be reliable and credible."

"Over the years, federal regulatory mandates have made it substantially more costly for [the plaintiff] to operate its water and sewer systems. When the . . . water and sewer contracts [between the parties] expired in 2018, Mayor O'Leary, on behalf of [the plaintiff], did not cut off water and sewer service to [the defendant] because he understood that doing so would give rise to catastrophic problems for [the defendant's] residents and he did not think that to be an appropriate manner in which to treat neighbors. . . . Other sources for the supply of water to [the defendant] would be substantially more expensive than the rates charged by [the plaintiff] to its residents and now to [the defendant]." (Citations omitted; footnotes added; footnotes omitted.)

The court also found that the defendant was "a direct and indirect user" of the plaintiff's water and sewer services. As the court stated: "[The defendant] acts on behalf of and stands in the shoes of the residents and property owners of [the defendant municipality] whose property is connected to and who use [the plaintiff's] waterworks. . . . The [properties in the defendant municipality] are connected to [the plaintiff's] water delivery and sewer systems, albeit initially through pipes owned by [the defendant]. Further, [the defendant] itself is a property owner whose properties are connected to and serviced by [the plaintiff's] water and sewer systems, making [the defendant] itself a direct user and property owner connected to [the plaintiff's] systems."

When the defendant refused to pay for water and sewer services provided to properties in the defendant municipality at the rates that became effective on July 1, 2018, the plaintiff commenced the present action. The plaintiff filed an amended complaint on January 27, 2020, in which it sought to collect unpaid water fees pursuant to § 7-239 and unpaid sewer fees pursuant

to General Statutes §§ 7-255 and 7-258. The defendant thereafter filed an answer and eight special defenses, which the plaintiff denied in their entirety.[8]

A four day bench trial was held in May, 2023, at which both parties presented documentary and testimonial evidence. On July 28, 2023, the court issued its memorandum of decision. The court found that "[the defendant] has short paid [the plaintiff's] invoices for water and sewer service since July 1, 2018. [The plaintiff] billed $23,455,544.42 in aggregate principal for water and sewer service from July 1, 2018, through April 25, 2023. . . . Because of [the defendant's] practice of short paying invoices, [the plaintiff] has applied interest at 18 percent per year on unpaid amounts, which results in an aggregate interest charge of $4,637,784.58 over the period from July 1, 2018, through April 25, 2023."[9] (Footnote omitted.) In addition, the court found that

[8] In its special defenses, the defendant alleged in relevant part that (1) the "statutory rate scheme [invoked by the plaintiff] is inapplicable"; (2) the doctrine of municipal estoppel applied; (3) the plaintiff failed to comply with "a mandatory presuit mediation provision" contained in the parties' most recent contract; (4) the defendant maintained its own water and sewer infrastructure and, therefore, "should not pay water or sewer rates that include [the plaintiff's] full infrastructure costs"; (5) the water and sewer rates charged by the plaintiff "are not fair and reasonable or just and equitable under Connecticut law"; (6) the water and sewer rates charged by the plaintiff "were set in an arbitrary and capricious manner"; (7) the water and sewer rates charged by the plaintiff "were not the subject of a mandatory published legal notice and public hearing"; and (8) the water and sewer rates charged by the plaintiff "include capital expenses for which [the defendant] has been paying its fair share . . . ."

After the close of pleadings, the plaintiff filed a motion for summary judgment. The trial court denied that motion, concluding that genuine issues of material fact existed as to whether the rates set by the plaintiff for water and sewer services were reasonable and whether the doctrine of municipal estoppel applied.

[9] Pursuant to §§ 7-239 (b) and 7-258 (a), unpaid water and sewer service charges bear interest at the same statutory rate as unpaid taxes. See General Statutes § 12-146 ("the delinquent portion of the principal of any tax shall be subject to interest at the rate of eighteen per cent per annum from the time when it became due and payable until the same is paid").

the defendant had not proven any of its special defenses. The court thus rendered judgment in favor of the plaintiff in the amount of $18,800,445.37 for "unpaid principal and interest for water and sewer services" for the period from July 1, 2018, to April 25, 2023. From that judgment, the defendant now appeals.

I

On appeal, the defendant claims that the court improperly concluded that, in the absence of a contractual agreement, §§ 7-239 and 7-255 authorize the plaintiff to set the rates it charges properties located in the defendant municipality for the continued use of its water and sewer services. We disagree.

As the defendant notes in its principal appellate brief, its claim requires this court to consider "the meaning of the statutory language as applied to the facts of [the] case . . . ." (Internal quotation marks omitted.) *Dept. of Transportation* v. *White Oak Corp.*, 332 Conn. 776, 782, 213 A.3d 459 (2019). For that reason, we begin by noting what is not at issue in this appeal. This case is not about whether the plaintiff may enter into a contract with other municipalities to provide water and sewer services; it is statutorily authorized to do so. See 18 Spec. Acts 904, No. 391; see also General Statutes § 7-273. This case also is not about whether the plaintiff is authorized to set unilaterally the rates it charges for water and sewer services provided to properties in a municipality with which it had no prior contractual relationship. It is undisputed that the parties in the present case contracted for such services for more than sixty years.

Rather, the question presented in this appeal concerns the scenario in which (1) a contractual relationship existed between the plaintiff and the defendant and (2) during that contractual time period, the plaintiff set new rates for the continued use of its water and

sewer services by properties located in the defendant municipality following the expiration of that contractual period. On appeal, the defendant contends that the plaintiff lacked authority to do so.

The defendant's 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, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

In addition, we note that, "as a creation of the state, a municipality has no inherent powers of its own. . . . A municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes." (Citations omitted; internal quotation marks omitted.) *Wright* v. *Woodridge Lake Sewer District*, 218 Conn. 144, 148, 588 A.2d 176 (1991).

A

We first consider the applicability of § 7-239, which concerns rates for water services provided by municipalities. Section 7-239 (a) provides in relevant part: "The

legislative body [of the municipality] shall establish just and equitable rates or charges for the use of the waterworks system authorized in this subsection, to be paid by the owner of each lot or building which is connected with and uses such system, and may change such rates or charges from time to time. . . . No such rate or charge shall be established until after a public hearing at which all the users of the waterworks system and the owners of property served or to be served and others interested shall have an opportunity to be heard concerning such proposed rate or charge. . . . The rates or charges so established for any class of users or property served shall be extended to cover any additional premises thereafter served which are within the same class, without the necessity of a hearing thereon. . . .''

By its plain language, the first sentence of § 7-239 (a) authorizes the plaintiff to set ''just and equitable rates or charges for the use of [its] waterworks system'' and to ''change such rates or charges from time to time.'' That provision broadly and unambiguously applies to ''each lot or building which *is connected with and uses* such system . . . .'' (Emphasis added.) General Statutes § 7-239 (a). Had the legislature intended to limit the applicability of that grant of authority only to properties located within the municipality that owned the waterworks system, it certainly knew how to do so. See *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 (''it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so'' (citation omitted)), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012). The plaintiff's statutory authority to set rates for the use of its waterworks system pursuant to § 7-239 plainly is not confined to properties located within its geographical boundaries

but, rather, extends to any property that is connected with and uses the waterworks system.[10] See General Statutes § 7-239 (a).

In its principal appellate brief, the defendant appears to concede as much. Because § 7-239 (a) provides that such rates shall be "paid by the owner of each lot or building which is connected with and uses [the waterworks] system," the defendant submits that "[*p*]*roperty owners that use a municipal waterworks system* must pay 'just and equitable rates' to the municipality that owns it . . . ." (Emphasis altered.) That averment provides further support for a construction of § 7-239 (a) that authorizes the plaintiff to set rates for all properties that use its waterworks system, including those in the defendant municipality that are owned by the defendant.[11]

The aforementioned provisions of subsection (a) also must be read in context of the entire statute. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 408, 999 A.2d 682 (2010) (statutory provision cannot be "interpreted in a vacuum, without reference to the statute's other provisions"); *Board of Education* v. *State Board of Labor Relations*, 217 Conn. 110, 116, 584 A.2d 1172 (1991) ("[w]e construe a statute as a whole and read its subsections concurrently in order to reach

[10] Although 18 Spec. Acts 904, No. 391, permits the plaintiff to enter into contractual agreements with other municipalities regarding the procurement of water services; see footnote 3 of this opinion; it neither obligates the plaintiff to do so nor precludes the plaintiff from providing such services to properties in other municipalities at rates established pursuant to § 7-239 in the absence of a contractual agreement. See *Fredette* v. *Connecticut Air National Guard*, 283 Conn. 813, 836, 930 A.2d 666 (2007) (courts "read statutes to be consistent, rather than to conflict, with each other"); see also General Statutes § 7-148 (c) (4) (granting municipalities "the power" to "(G) [p]rovide for the furnishing of water, *by contract or otherwise*" (emphasis added)).

[11] The court found, and the defendant does not dispute, that the defendant "itself is a property owner whose properties are connected to and serviced by the [plaintiff's] water and sewer systems . . . ."

a reasonable overall interpretation"). Section 7-239 (a) also mandates that "[n]o such rate or charge shall be established until after a public hearing at which all the users of the waterworks system and the owners of property served or to be served and others interested shall have an opportunity to be heard concerning such proposed rate or charge. . . ." It further provides in relevant part that "[t]he rates or charges so *established for any class of users or property served* shall be extended to cover any additional premises thereafter served which are within the same class, without the necessity of a hearing thereon. . . ." (Emphasis added.) General Statutes § 7-239 (a). Those provisions expressly and unambiguously require notice of rate changes to "all the users of the waterworks system and the owners of property served" and indicate that such rates may be established "for any class of users or property served . . . ." General Statutes § 7-239 (a). Moreover, § 7-239 (j) provides in relevant part that, in a civil action to collect unpaid charges, "[t]he municipality shall be subject to the same rates or charges under the same conditions *as other users of such waterworks system*." (Emphasis added.) Read together, those various provisions compel the conclusion that § 7-239 authorizes the plaintiff to set rates for all properties that use its waterworks system.

In construing § 7-239, we also are mindful that "common sense must be used in statutory interpretation, and courts will assume that the legislature intended to accomplish a reasonable and rational result." (Internal quotation marks omitted.) *Cannata* v. *Dept. of Environmental Protection*, 239 Conn. 124, 141, 680 A.2d 1329 (1996). Furthermore, it is a "well established canon of statutory construction that those who promulgate statutes . . . do not intend to promulgate [ones] . . . that lead to absurd consequences or bizarre results." (Internal quotation marks omitted.) *Modzelewski's Towing & Recovery, Inc.* v. *Commissioner of Motor*

Vehicles, 322 Conn. 20, 36, 139 A.3d 594 (2016), cert. denied, 580 U.S. 1216, 137 S. Ct. 1396, 197 L. Ed. 2d 554 (2017). The defendant contends that construing § 7-239 as authorizing the plaintiff, in the absence of a contract, to set rates for users of its waterworks system in other municipalities creates an absurd result by "giving the plaintiff nearly unfettered power to charge [those users] whatever it wants for water." For two reasons, we disagree.

First, § 7-239 contains a critical limitation on a municipality's ability to set rates for water services. Pursuant to § 7-239 (a), any rates or charges established for the use of a municipal waterworks system must be "just and equitable . . . ." That statutory requirement serves as a formidable check on municipal authority to set rates and belies the defendant's claim of the plaintiff's "unfettered power" to impose rates that are unjust or inequitable. The statute also provides a barometer by which the reasonableness of such rates may be measured, providing in relevant part that "[s]uch rates or charges shall be sufficient in each year for the payment of the expense of operation, repair, replacements and maintenance of such system and for the payment of the sums in this subsection required to be paid into the sinking fund. . . ." General Statutes § 7-239 (a). In the present case, the court found, and the evidence in the record confirms, that the plaintiff "adhered to" that statutory imperative and established "rates that [were] lower than required to fund the short and long-term needs of the [waterworks system]."

Second, we reiterate the particular factual scenario presented in this appeal, wherein a contractual relationship for the provision of water services previously existed between the parties and, during that contractual time period, the plaintiff set new rates for the continued use of its water services following the expiration of that contractual period. In that context, the defendant's

"unfettered power" argument rings hollow in light of the undisputed facts that (1) the defendant was provided ample notice of the plaintiff's intention to increase the rate for properties in the defendant municipality that used its waterworks system,[12] (2) the defendant was under no obligation to continue procuring water service from the plaintiff once their contractual relationship concluded in 2018, and (3) the defendant, at that time, was free to contract with other water service providers.[13]

In our view, the defendant's construction of § 7-239 is predicated on a faulty premise—namely, that if a municipality is authorized to set the rate that it charges for the use of its waterworks system by properties located in other municipalities, those properties are left with no choice but to pay that rate.[14] The defendant has provided no legal authority or evidentiary basis for that assertion. Moreover, the record before us contains evidence that the defendant can obtain water services from alternative providers and was not obligated to continue its relationship with the plaintiff. At trial, Mayor O'Leary testified that the defendant had the option of procuring water services from the Connecticut Water Company and Aquarion Water Company, two alternative providers, albeit at rates higher than those charged by the plaintiff.[15] In its memorandum of decision, the court found Mayor O'Leary's testimony "to be reliable and credible."

[12] As the court found, the defendant "was clearly forewarned in 2013 that, when the 2013 agreements expired in 2018, [the defendant] would be treated uniformly with [the plaintiff's] other customers and charged the rates . . . charged to [the plaintiff's] residents."

[13] In its memorandum of decision, the court specifically found that "[o]ther sources for the supply of water" to properties in the defendant municipality existed, but that they "would be substantially more expensive than the rates charged by [the plaintiff] . . . ."

[14] At oral argument before this court, the defendant's counsel characterized the defendant as a "captive customer" of the plaintiff.

[15] Mayor O'Leary further testified that, after negotiations between the parties failed to produce an agreement in 2018, the plaintiff informed the

In addition, it bears emphasis that, at the time that the rates in question were set by the plaintiff in 2015, the defendant was a user of the plaintiff's waterworks system, both as an owner of property that is connected to and serviced by the plaintiff's water system; see footnote 11 of this opinion; and as the entity that delivered water services from the plaintiff to properties in the defendant municipality and collected payment from their owners.[16] Following the increase in rates that became effective on July 1, 2018, the defendant elected to continue its use of the plaintiff's waterworks system and declined to secure water services from alternative providers.[17]

Given that context, we agree with the trial court that the defendant's construction of § 7-239 would create an absurd and unworkable result. As the court observed: "[The defendant's] position that [the plaintiff] can only

defendant that it would have to find "alternative sources" for water and sewer services and that he "encouraged" the defendant to do so. When the defendant elected to continue utilizing the plaintiff's water and sewer services following the expiration of the parties' contractual agreements, Mayor O'Leary testified that the plaintiff was left with "only . . . one option," which was "[t]o shut the water off [to the defendant] and stop taking [the defendant's sewage]." When asked why he did not "direct that particular course of conduct to take place," Mayor O'Leary replied: "Because I didn't think it was right for the people of [the defendant municipality] or any municipality to do—I couldn't fathom doing that to a neighboring community."

[16] As the court found, the defendant "directly charges its residents for water and sewer services and, thus, bears the cost and burden of collection. [The defendant] also owns the pipes and other equipment, located within [its] borders . . . which are used to distribute water and sewer services within [the defendant municipality] to [its] residents."

[17] The court found, and the record indicates, that the defendant "continued to consume water and sewer services" provided by the plaintiff following the expiration of their contractual agreements. The court also found that the defendant partially paid for water and sewer services provided by the plaintiff from July 1, 2018, through April 25, 2023, "at the rates provided for in the [expired contractual] agreements despite the fact that [the defendant] acknowledges that those agreements expired . . . on June 30, 2018, and were of no effect in establishing rates thereafter."

charge [the defendant] for water and sewer pursuant to an agreement of the parties places [the plaintiff] in an untenable position. Since [the defendant] can refuse, and has unilaterally refused, to agree on price, [the plaintiff] would be forced to either cease the supply of water and sewer services to [the defendant], thereby allowing catastrophic issues to unfold for [the defendant's] residents, or capitulate to [the defendant's] price demands causing [the plaintiff] to supply [water and sewer services] at rates that are shockingly below [its] cost." We do not believe that the legislature reasonably could have intended such a result. In light of the plain mandate of § 7-239—which empowers municipalities like the plaintiff to set rates for the use of its waterworks system that are sufficient to satisfy its operation, repair, replacement and maintenance expenses, so long as they are "just and equitable," and to apply those rates to all users connected to the waterworks system—we conclude that the court properly construed § 7-239 as authorizing the plaintiff to set rates for the continued use of its waterworks system by properties located in the defendant municipality following the expiration of the contract between the parties in 2018.

B

The foregoing analysis applies equally to § 7-255, which concerns charges for sewer services.[18] Section

[18] General Statutes § 7-255 (a) provides in relevant part: "[A municipality's] water pollution control authority may establish and revise fair and reasonable charges for connection with and for the use of a sewerage system. The owner of property against which any such connection or use charge is levied shall be liable for the payment thereof. Municipally-owned . . . property which uses the sewerage system shall be subject to such charges under the same conditions as are the owners of other property . . . . No charge for connection with or for the use of a sewerage system shall be established or revised until after a public hearing before the water pollution control authority at which the owner of property against which the charges are to be levied shall have an opportunity to be heard concerning the proposed charges. . . . In establishing or revising such charges the water pollution control authority may classify the property connected or to be connected with the sewer system and the users of such system, including categories

7-255 (a) plainly and unambiguously authorizes a municipality to set "fair and reasonable charges" for the use of its sewerage system. Like § 7-239 (a), that provision broadly applies to all properties that are connected with and use that system. Nothing in § 7-255 confines its applicability to properties that are located within the municipality that owns the sewerage system.[19] If the legislature intended to impose such a limitation, it would have expressly done so. See *Ulbrich* v. *Groth*, 310 Conn. 375, 449, 78 A.3d 76 (2013); *State* v. *Payme*, 240 Conn. 766, 776, 695 A.2d 525 (1997), overruled in part on other grounds by *State* v. *Romero*, 269 Conn. 481, 849 A.2d 760 (2004).

For the same reasons articulated in part I A of this opinion, we reject the construction of § 7-255 advanced by the defendant and its related contention regarding absurd or unworkable results.[20] It would serve no useful purpose to repeat that discussion. We therefore conclude that the court properly determined that § 7-255 authorized the plaintiff to set rates for the continued use of its sewerage system by properties located in the defendant municipality following the expiration of the contract between the parties in 2018.

of industrial users, and . . . [m]ay give consideration to any factors relating to the kind, quality or extent of use of any such property or classification of property or users . . . . Any person aggrieved by any charge for connection with or for the use of a sewerage system may appeal to the superior court . . . ."

[19] Moreover, although § 7-273 provides that any municipality "may contract with any adjoining town or property owner therein for connection with and the use of [its] sewerage system," it does not obligate a municipality to do so. Cf. General Statutes § 7-148 (c) (4) (granting municipalities "the power" to "(H) [p]rovide for or regulate the collection and disposal of . . . waste material . . . *by contract or otherwise*" (emphasis added)).

[20] In its principal appellate brief, the defendant argues that "[s]imilar considerations establish that the trial court improperly construed § 7-255" and repeats its assertion that the court's interpretation creates an absurd result by providing "the plaintiff nearly unfettered power to charge its neighbors whatever it wants for sewer services."

II

The defendant also claims that the court improperly concluded that §§ 7-239, 7-255, and 7-258 impliedly authorize the plaintiff to sue the defendant to collect unpaid water and sewer service charges incurred by properties in the defendant municipality. We disagree.

As previously noted, the parties contracted for the provision of water and sewer services for more than sixty years. It also is undisputed that the defendant historically has acted as the collection agent for charges incurred by properties in the defendant municipality that use the plaintiff's waterworks and sewerage systems. In its memorandum of decision, the court specifically found that the defendant "directly charge[d] its residents for water and sewer services" provided by the plaintiff's waterworks and sewerage systems and then tendered payment to the plaintiff for those services.[21]

Despite that established practice—and despite the fact that the defendant continued to make partial payment to the plaintiff for water and sewer charges incurred by properties in the defendant municipality following the expiration of the parties' water and sewer service contracts in 2018—the defendant on appeal contends that the plaintiff lacks authority to sue the defendant to recover unpaid water and sewer charges. Rather, the defendant posits that the plaintiff's sole remedy to recover unpaid charges is to place liens on each individual property and then bring actions to foreclose

[21] Section 203 (B) of the parties' 2013 contract for water services obligated the defendant to "make payment of all charges described in this [a]greement to [the plaintiff] within thirty (30) calendar days of its receipt of an invoice." Article G of the parties' 2013 contract for sewer services provided that "Sewer User Charges and Sewer User Surcharges shall be billed to [the defendant] on a monthly basis" and that, "[i]f payment is not made within thirty (30) calendar days of such due date, the payment shall be deemed delinquent and subject to an interest penalty . . . ."

on those liens in the Superior Court pursuant to §§ 7-239 and 7-258.[22]

In its memorandum of decision, the court rejected that assertion and concluded that the statutory authorization to establish rates and charges necessarily includes the ability to collect unpaid service charges. We concur with that determination. Pursuant to the plain language of §§ 7-239 (a) and 7-255 (a), owners of property that use a municipal waterworks or sewerage system are liable for all charges incurred. At the same time, General Statutes § 7-148 (c) (2) expressly grants municipalities "the power" to "(B) regulate the mode of assessment and collection of taxes and assessments . . . including establishment of a procedure for the withholding of approval of building application when taxes or water or sewer rates, charges or assessments imposed by the municipality are delinquent for the property for which an application was made . . . ."[23] Accordingly, municipalities are authorized to regulate the manner in which assessments and charges incurred by their property owners for water and sewer services are collected.

[22] General Statutes § 7-239 (b) provides in relevant part: "The rates or charges established pursuant to this section [for the use of a waterworks system], if not paid when due, shall constitute a lien upon the premises served and a charge against the owner thereof . . . ."

General Statutes § 7-239 (j) provides in relevant part: "The amount of any such rate or charge [for the use of a waterworks system] which remains due and unpaid for thirty days may, with reasonable attorneys' fees, be recovered by the legislative body in a civil action in the name of the municipality against such owners. . . ."

General Statutes § 7-258 (a) provides in relevant part: "Any . . . unpaid . . . [sewer service] charge shall constitute a lien upon the real estate against which such charge was levied from the date it became delinquent. . . . The municipality may recover any such charges in a civil action against any person liable therefor. . . ."

[23] Notably, the court found that water and sewer charges levied by the defendant on properties in the defendant municipality contained two components: the rate for water and sewer services provided by the plaintiff and a separate charge for the defendant's "own customer service and infrastructure costs."

In our view, §§ 7-239, 7-255, and 7-258 cannot be read in isolation but, rather, must be read in light of the grant of statutory authority contained in § 7-148 (c) (2) (B) regarding municipal authority to proscribe the manner in which assessments and charges for water and sewer services are collected. "It is a basic tenet of statutory construction that statutes should be construed, where possible, so as to create a rational, coherent and consistent body of law." (Internal quotation marks omitted.) *Russo* v. *Waterbury*, 304 Conn. 710, 726, 41 A.3d 1033 (2012); see also *Doe* v. *Doe*, 244 Conn. 403, 428, 710 A.2d 1297 (1998) ("we read related statutes to form a consistent, rational whole, rather than to create irrational distinctions"); *In re Valerie D.*, 223 Conn. 492, 524, 613 A.2d 748 (1992) ("the legislature in enacting statutes is presumed to be aware of the existence of other legislation on the same or related issues . . . and [s]tatutes are to be interpreted with regard to other relevant statutes because the legislature is presumed to have created a consistent body of law" (citation omitted; internal quotation marks omitted)); *Robb* v. *Watertown*, Superior Court, judicial district of Waterbury, Docket No. 085166 (November 21, 1990) (2 Conn. L. Rptr. 830, 831) (construing §§ 7-148 (c) (2) (B), 7-148 (c) (4) (G) and 7-239 together and concluding that "[t]he statutory scheme [authorizes] the expenditure of [a municipality's] general fund revenues for a general purpose acquisition of water resources, while requiring users to pay user rates for the expenses related to their use of water").

Nothing in § 7-148 (c) (2) (B), § 7-239, § 7-255, or § 7-258 prohibits the defendant from permitting direct collection of water and sewer service charges by an outside entity, such as a water company or municipal provider. Indeed, § 7-258 (a) expressly authorizes that practice and provides in relevant part: "[F]or the purpose of collecting [service] charges any municipality

may enter into agreements with any water company or municipal water department furnishing water in such municipality for the purchase from such water company or municipal water department . . . and such agreement may designate such water company or municipal water department as a billing or collecting agent of the collector of sewerage system connection and use charges in the municipality. Any water company or municipal water department may enter into and fulfill any such agreements and may utilize for the collection of such charges any of the methods utilized by it for the collection of its water charges." The defendant, therefore, had the option, but was not obligated, to provide for the direct collection of water and sewer charges by a water company or municipal provider like the plaintiff.

When a municipality elects to collect water and sewer service charges incurred by properties within its geographical boundaries and then makes payment for those charges to the municipal provider—as the record unequivocally indicates the defendant did here following the expiration of the contract between the parties in 2018—the municipal provider necessarily may recover unpaid service charges from the collecting municipality. In this regard, we are mindful that "[a] municipality has only those powers that have been expressly granted to it by the state or that are necessary for it to discharge its duties and to carry out its objects and purposes." (Internal quotation marks omitted.) *Wright* v. *Woodridge Lake Sewer District*, supra, 218 Conn. 148.

The present case is not one in which individual property owners in the defendant municipality declined to pay water and sewer service charges. Rather, the defendant, on behalf of every user in the defendant municipality, made the decision not to pay in full the rates set by the plaintiff for water and sewer services provided after June 30, 2018. In such circumstances, it would be

absurd to interpret §§ 7-239, 7-255, and 7-258 to require the plaintiff to file liens on the thousands of individual properties in the defendant municipality that use its services and then commence foreclosure actions on each of those properties.[24] That construction is unworkable. We therefore conclude that, to carry out the purposes of §§ 7-239, 7-255, and 7-258, a municipality that provides water and sewer services to properties in another municipality necessarily is permitted to bring an action against that other municipality to recover unpaid charges when that other municipality has elected to collect payment for such charges incurred within its geographical boundaries.

III

The defendant alternatively argues that, even if the plaintiff was authorized to maintain the present action, the court erroneously found the plaintiff's water and sewer service rates to be reasonable and equitable. That claim is unavailing.

At the outset, we note that "a trial court's findings regarding the reasonableness of utility rates is governed by [the] clearly erroneous standard of appellate review." (Internal quotation marks omitted.) *Highgate Condominium Assn.* v. *Watertown Fire District*, 210 Conn. 6, 21 n.7, 553 A.2d 1126 (1989). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is

[24] Courts properly may take judicial notice of the population of municipalities in this state. See, e.g., *D'Amico* v. *Willis*, 13 Conn. App. 124, 127 n.2, 534 A.2d 1248 (1987) (taking "judicial notice of the [fact] that the city of New Britain has a population of more than twenty-five thousand"), cert. denied, 207 Conn. 803, 540 A.2d 73 (1988); *Nesko Corp.* v. *Fontaine*, 19 Conn. Supp. 160, 162, 110 A.2d 631 (1954) ("[i]t is established that judicial notice may be taken of the . . . population of [a state's] counties, cities and villages"). We take judicial notice of the fact that the defendant had an estimated population of 21,790 in 2018. See Connecticut State Register and Manual (2018) p. 596.

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. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, 346 Conn. 391, 413–14, 291 A.3d 64 (2023).

Pursuant to § 7-239 (a), any rates or charges established for the use of a municipal waterworks system must be "just and equitable . . . ." Section 7-255 (a) similarly requires that charges for the use of a municipal sewerage system must be "fair and reasonable . . . ." As the defendant correctly notes in its principal appellate brief, those various terms are not defined in either statute and precedent "treats them as different names for the same thing . . . ." The focus of our inquiry, then, is into the reasonableness of the rates set by the plaintiff. See *Barr* v. *First Taxing District*, 151 Conn. 53, 58, 192 A.2d 872 (1963) ("[w]hether a rate is reasonable or unreasonable is primarily a question of fact, depending largely on the circumstances of the particular case").

In its memorandum of decision, the court first noted that General Statutes §§ 7-239 and 7-256 provide a baseline for water and sewer rates set by the plaintiff, as such rates should be "sufficient" to pay the operation, repair, replacement, and maintenance expenses of the waterworks system and the principal and interest requirements of bonds and notes related to the sewerage system. The court then found that the rates set by

the plaintiff for water and sewer services were reasonable because they were "based upon a study by independent experts . . . who studied [the plaintiff's] water and sewer operations, and recommended rates that would be sufficient to fund the short and long-term needs of the systems. . . . [The plaintiff] arrived at water and sewer rates that were below those recommended by [its] independent experts and below the rates necessary to fund the short and long-term financial needs of the [plaintiff's] systems." (Footnotes omitted.)

Those findings are supported by evidence in the record before us, particularly the March 31 and April 4, 2014 reports prepared by the independent water and sewer consultants retained by the plaintiff in 2014 to conduct studies and make recommendations on appropriate rates for water and sewer services. In those reports, the consultants found that the plaintiff's existing rates for water and sewer services were substantially lower than other comparable providers in Connecticut and were insufficient to meet the short-term and long-term needs of the plaintiff's waterworks and sewerage systems. The consultants then provided rate recommendations intended to meet those needs.[25] In their report on the plaintiff's waterworks system, the consultants recommended a rate of $2.97 per hundred cubic feet of water. Records of the plaintiff's Board of Alderman, which were admitted into evidence, nevertheless indicate that it adopted a rate of $2.52 per hundred cubic feet for 2018 through 2021, and $2.65 per hundred cubic feet for 2022. Although the consultants recommended a rate of $3.52 per hundred cubic feet of sewage in their report on the plaintiff's sewerage

[25] In the April 4, 2014 report, the consultants explained that "[t]he rates presented . . . are calculated on a 'break-even' basis. This means that they represent our best estimate for the rates needed to generate revenues equivalent to the projected cost of running the [waterworks system] . . . ." The March 31, 2014 report contained nearly identical language regarding the plaintiff's sewerage system rates.

system, records of the plaintiff's Board of Public Works, which also were admitted into evidence, indicate that the plaintiff adopted a rate of $2.472 per hundred cubic feet for 2018 through 2022. That evidence demonstrates that the plaintiff adopted rates for both water and sewer services that were *less* than those recommended by the independent consultants to meet the needs of their waterworks and sewerage systems.

Records of the proceedings before the plaintiff's Board of Alderman and its Board of Public Works also confirm that proper notice of the rates in question was provided and public hearings were held in accordance with the requirements of §§ 7-239 and 7-255. Moreover, in his testimony at trial, Mayor O'Leary confirmed that the rates adopted by the plaintiff were among the lowest in the state and less than other providers such as the Connecticut Water Company and Aquarion Water Company. That evidence substantiates the court's determination that the rates set by the plaintiff for water and sewer services were reasonable and equitable.

The defendant nevertheless maintains that the rates set by the plaintiff failed to account "for the defendant's status as a wholesale user" of its water and sewer services. Because it previously purchased water and sewer services at a lesser rate than other users pursuant to the contractual agreements between the parties, the defendant claims that, following the expiration of those contracts, it was entitled to discounted rates "that reflect [its] status as a large, wholesale customer."

Contrary to that assertion, nothing in our General Statutes obligates a municipality that provides water or sewer services to classify particular users of its water and sewer services or to provide discounted rates to certain classes of users. As the court noted in its memorandum of decision, §§ 7-239 and 7-255 "permissively provide that the relevant authority 'may' set different

rates for different classes of users and 'may' consider various factors in establishing rates for classes of users. . . . However, the statutes are clear that classes of users are permissively allowed but not required and that the considerations provided are also permissive and not exclusive. Accordingly, the public authorities may, but need not, establish classes of users and may set the rates in their reasonable discretion, subject to public notice and hearing, as is required to fund the operations in the short and long-term." (Citations omitted; footnote omitted.) The use of a uniform rate structure for all users, therefore, remains an option for municipal providers like the plaintiff.

At trial, the plaintiff submitted excerpts from a treatise prepared by the American Water Works Association concerning the use of uniform rates by water providers.[26] That treatise explains that a uniform rate "is a constant unit price for all metered volumetric units of water" that "can be applied to all customer or service classifications, such as residential, commercial, industrial, wholesale, and so on." American Water Works Association, Principles of Water Rates, Fees, and Charges—Manual of Water Supply Practices (7th Ed. 2017) c. IV.2, p. 109. It further notes that "[t]he uniform rate structure has gained relatively wide acceptance." Id., p. 113. In its memorandum of decision, the court credited that evidence in concluding that "[i]t was reasonable for [the plaintiff] to adopt a uniform system of pricing" for its water and sewer services.

That evidence also undermines the defendant's argument that the plaintiff was obligated to classify it as a

[26] The defendant initially submitted a portion of that treatise into evidence as exhibit QQ. In response, the plaintiff offered into evidence additional pages of that treatise that pertained specifically to the use of uniform rates, which had been omitted from the defendant's exhibit. In its memorandum of decision, the court found that the defendant's selective omission of the pages concerning uniform rates from exhibit QQ "undercut the defendant's credibility."

wholesale user and charge properties in the defendant municipality lower rates than it does for ones in the plaintiff city because they use less services and infrastructure. Because classification of users is permitted, but not required, under §§ 7-239 and 7-255, the court aptly noted that "there is no legal basis upon which one can unilaterally demand lower rates merely because one does not utilize all of the services offered." On appeal, the defendant has not provided any legal authority indicating that municipal providers like the plaintiff are prohibited from adopting a uniform rate structure for water and sewer services.

In addition, we note a practical difficulty with the defendant's contention. As the court aptly observed: "[A]llowing [the defendant] to claim special status . . . [as a wholesale user entitled to] reduced rates would either promote similar requests from other potential classes of users or impair the fairness of the [plaintiff's] rate system. . . . [The defendant] is not the only user of [the plaintiff's] water and sewer services that can claim to use less infrastructure or services than other customers. . . . [O]ther towns, large industrial users, commercial users, and large residential complexes are all charged by [the plaintiff] the same rates as each other and the same rates charged to each individual residence. Large industrial, commercial, and residential complexes maintain their own water and sewer 'distribution system' within their [own] property and complexes. Should they be charged less because of the foregoing or because they use very large volumes? Other surrounding towns pay the standard rates even though they deploy their own infrastructure and customer service. Should they pay less than the standard rates? On the other end of the scale, should the residence located next door to the sewer treatment facility pay less than residences located further away from the facility based upon pipe usage? Instead of engaging in

this endless level of gradation,[27] [the plaintiff] has chosen to impose uniform rates and the defendant has pointed to no legal compulsion that prevents [that] choice." (Footnote altered.)

Also relevant to the question of whether the application of uniform rates to properties in the defendant municipality is reasonable and equitable is the fact that, at all relevant times, the rates charged by the plaintiff also applied to properties in other municipalities. The court found, and the record confirms, that the same rates applied to properties in Cheshire, Middlebury, Naugatuck, and Prospect.

Lastly, we emphasize that the record contains ample evidence to support the court's finding that the plaintiff provided advance notice to the defendant of both its intent to move to a uniform rate structure once the contractual agreements between the parties expired in 2018 and the defendant's option to secure an alternative provider if the plaintiff's rates were not agreeable to the defendant.[28]

[27] "The [trial] court notes that [the plaintiff's] current accounting would not support this level of gradation, and in fact does not support the level of gradation sought by [the defendant], and [the defendant] knew this."

[28] At trial, Mayor O'Leary testified that, during negotiations in 2013 that resulted in those contractual agreements, he advised the defendant that the plaintiff "wanted to move towards" a uniform rate schedule and have properties in the defendant municipality pay the same rates as those in the plaintiff city and other municipalities. He further testified that the parties entered into the 2013 agreements with "an understanding" that, after those agreements expired, the uniform rate structure that applied in the plaintiff city and other municipalities would also apply to the defendant. In addition, Mayor O'Leary testified that, after negotiations between the parties failed to produce an agreement in 2018, the plaintiff informed the defendant that it would have to find "alternative sources" for water and sewer services and that he "encouraged" the defendant to do so. The court expressly credited Mayor O'Leary's testimony.

The record also contains a letter dated June 8, 2018, from Linda T. Wihbey, the plaintiff's corporation counsel, to the defendant's town manager, in which she noted that, "[f]or approximately one year, the [plaintiff] has represented to [the defendant] and its designated negotiating representatives, that [the plaintiff] was seeking rate equalization with [the defendant]

The record before us contains evidence to support the court's finding that the rates set by the plaintiff for water and sewer services were reasonable and equitable. Moreover, on our review of that record, we are not left with a definite and firm conviction that a mistake has been committed. Indulging every reasonable presumption in favor of the correctness of the court's ruling, as we are obligated to do; see *Reserve Realty, LLC* v. *Windemere Reserve, LLC*, supra, 346 Conn. 414; we conclude that the court's finding is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

ARLEEN BEGER *v.* CITY OF BRISTOL ET AL.
(AC 47244)

Clark, Seeley and DiPentima, Js.

Syllabus

The plaintiff appealed from the trial court's judgment rendered after its granting of the defendants' motion for summary judgment on her complaint asserting a claim pursuant to the municipal highway defect statute (§ 13a-149), for personal injuries she sustained when she fell at the defendant city's transfer station. She claimed that the court improperly concluded that the walkway where she fell did not constitute a public highway for the purposes of § 13a-149. *Held*:

The trial court did not err in granting the defendants' motion for summary judgment, as, pursuant to *Read* v. *Plymouth* (110 Conn. App. 657), because the transfer station was accessible only to the defendant's residents who

similar to [other municipalities]." Wihbey then notified the town manager that, effective July 1, 2018, the plaintiff would be applying a uniform rate structure to users in all municipalities, including the defendant. Wihbey also noted that the defendant retained the option of not securing water and sewer services from the plaintiff, stating: "Should [the defendant] elect not to enter into a contract with [the plaintiff] at the reasonable rates set by [the plaintiff], please advise by June 15 so that we may facilitate any transitional service arrangements with your new supplier." In its memorandum of decision, the court credited that evidence.

had purchased a permit and, therefore, was confined to a group whose eligibility was gauged by predetermined criteria, it lacked the essential feature that would qualify it as open to public use and, thus, the plaintiff's claim did not fall within the purview of § 13a-149.

Argued April 16—officially released June 10, 2025

Procedural History

Action to recover damages for personal injuries sustained as a result of, inter alia, an allegedly defective municipal highway, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Young*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Mark A. Balaban, for the appellant (plaintiff).

Thomas R. Gerarde, with whom was *Tyler J. Carroll*, for the appellees (defendants).

Opinion

CLARK, J. In this personal injury action, the plaintiff, Arleen Beger, appeals from the summary judgment rendered by the trial court in favor of the defendants, the city of Bristol (city), Raymond Rogozinski, and Craig Kasparian. On appeal, the plaintiff claims that the trial court improperly granted the defendants' motion for summary judgment as to the first count of her complaint, which asserted a claim against the city under General Statutes § 13a-149,[1] also known as the municipal highway defect statute. We disagree and affirm the judgment of the court.

[1] General Statutes § 13a-149 provides: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. No action for any such injury sustained on or after October 1, 1982, shall be brought except within two years from the date of such injury. No action for any such injury shall be maintained against any town, city, corporation or borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation.

The following procedural history is pertinent to this appeal. The plaintiff commenced this action by way of a three count complaint on September 27, 2022. In her complaint, the plaintiff alleged that, on September 30, 2020, she traveled to the city's transfer station to dispose of certain waste materials and fell on the paved surface of a walkway located directly in front of the transfer station's receptacle bin for cardboard and corrugated waste. She claimed that she had fallen because of a dangerous and defective condition in the walkway that the defendants had failed to remedy. Count one of her complaint asserted a claim against the city under § 13a-149, count two asserted a negligence claim against the city, and count three asserted a negligence claim against Rogozinski and Kasparian, the city's director of public works and streets superintendent, respectively. The plaintiff attached to the complaint a copy of a written notice describing her injury, which had been served on the city on December 28, 2020, pursuant to the requirements of § 13a-149. The notice stated in relevant part: "[The plaintiff] was at the transfer station dropping off cardboard. She fell after she put the cardboard into the machine. There was a hole, and she lost her balance and landed on her right side, rolling over onto her right side. The area identified was located directly in front of a cardboard waste receptacle."

On February 1, 2023, the defendants filed an answer and special defenses in which they claimed, inter alia, that count one of the complaint failed to state a claim on which relief could be granted. Subsequently, on May 31, 2023, the defendants filed a motion for summary

If the injury has been caused by a structure legally placed on such road by a railroad company, it, and not the party bound to keep the road in repair, shall be liable therefor. No notice given under the provisions of this section shall be held invalid or insufficient by reason of an inaccuracy in describing the injury or in stating the time, place or cause of its occurrence, if it appears that there was no intention to mislead or that such town, city, corporation or borough was not in fact misled thereby."

judgment as to all counts of the complaint. In their motion, the defendants argued in relevant part that, in light of this court's decision in *Read* v. *Plymouth*, 110 Conn. App. 657, 955 A.2d 1255, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008), the plaintiff's claim did not fall within the purview of § 13a-149 because the area where the plaintiff allegedly had fallen did not constitute a public highway. In support of this claim, the defendants attached to their motion an affidavit from Rogozinski. Rogozinski's affidavit stated in relevant part that the area where the plaintiff claimed to have fallen was located within the perimeter of the transfer station; that the transfer station was only open Monday through Friday from 7:15 a.m. to 2:15 p.m., and Saturday from 7:30 a.m. to 1 p.m.; that outside of those hours, the gates to the transfer station were shut and locked; that only residents who purchased a transfer station permit were allowed to enter or use the transfer station, and that they must show their permit to be allowed access; that permits were available for residents to purchase for $40; and that residents with a permit were permitted to use the transfer station only during its hours of operation.

The plaintiff filed a memorandum in opposition to the defendants' motion for summary judgment on September 8, 2023. In her memorandum, the plaintiff argued generally that whether the area where she had fallen constituted a public highway presented a question of fact that "could not be determined on the basis of the record submitted . . . [and would] more appropriately [be] answered by a jury after the presentation of evidence"; she did not, however, dispute the specific factual assertions in Rogozinski's affidavit described herein. Instead, she contended that the various access restrictions on the use of the transfer station were de minimis and that "these minor restrictions . . . under the facts and circumstances herein ought not defeat

an otherwise viable personal injury claim . . . on the somewhat dubious notion that all roads or walkways at [the] transfer station are not public and within the ambit of the defective highway statute." The plaintiff attached several exhibits to her memorandum, including a map of the transfer station marked with various arrows delineating a route through the transfer station that was published on the city's website. This map, she argued, showed that the city "invited, encouraged, and/or should have reasonably anticipated" that members of the public would pass through the transfer station to dispose of their refuse.

The defendants filed a reply to the plaintiff's memorandum on September 19, 2023. On December 22, 2023, the court, *Young*, *J.*, issued a memorandum of decision granting the defendants' motion for summary judgment as to all counts of the complaint. With respect to count one,[2] the court concluded that, under this court's holding in *Read*—which, the court noted, presented "a remarkably similar fact pattern" to the present case—the access restrictions on the transfer station placed the plaintiff's claim outside the purview of § 13a-149. The court explained that the transfer station did not qualify as a "highway" under § 13a-149 because, according to the undisputed facts in the record, the transfer station "was not open to the indefinite public, nor open at all times," but, rather, was "restricted in accessibility both in limitation of users and limitation of hours." This appeal followed.

On appeal, the plaintiff claims that the court improperly concluded that the walkway in the transfer station where she fell did not constitute a public highway for the purposes of § 13a-149. We disagree.[3]

[2] On appeal, the plaintiff does not challenge the court's granting of the defendants' motion for summary judgment as to counts two or three of her complaint.

[3] The defendants argue, as an alternative ground for affirming the court's judgment, that the court also properly rendered summary judgment against

The following standard of review and legal principles are relevant to our review of the plaintiff's claim. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy [its] burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact." (Internal quotation marks omitted.) *Carty* v. *Merchant 99-111 Founders, LLC*, 227 Conn. App. 683, 690, 323 A.3d 414 (2024).

"The standard of review of a trial court's decision to [render] summary judgment is well established. [W]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . This court's review of the trial court's decision to [render] summary judgment in favor of the defendants is plenary. . . .

"Once the moving party has presented evidence in support of the motion for summary judgment, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue.

the plaintiff on her § 13a-149 claim because she was not using the area where she fell as a traveler. We do not reach the merits of this argument because, for the reasons we discuss herein, we agree with the court that the area where the plaintiff fell was not a public highway for purposes of § 13a-149.

Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the [trial] court under Practice Book § [17-45]. . . . The movant has the burden of showing the nonexistence of such issues but the evidence thus presented, if otherwise sufficient, is not rebutted by the bald statement that an issue of fact does exist. . . . To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . [that] contradict those stated in the movant's affidavits and documents." (Citation omitted; internal quotation marks omitted.) *Cazenovia Creek Funding I, LLC* v. *White Eagle Society of Brotherly Help, Inc., Group 315, Polish National Alliance*, 351 Conn. 722, 730–31, 333 A.3d 508 (2025).

"Historically . . . municipalities enjoyed immunity for injuries caused by defective highways under common law, due in good part to the miles of streets and highways under their control. . . . The [municipal] highway defect statute, § 13a-149 is a legislative exception to the immunity that municipalities enjoyed at common law and, as such, must be strictly construed. . . .

"[A] highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result. . . . Furthermore, a highway is defective within the meaning of § 13a-149 when it is not reasonably safe for public travel, and the term public travel refers to the normal or reasonably anticipated uses that the public makes of a highway in the ordinary course of travel. . . .

"According to General Statutes [§ 14-1 (46)], a highway includes any state or other public highway, road, street, avenue, alley, driveway, parkway . . . place [or dedicated roadway for bus rapid transit service], under

control of the state or any political subdivision of the state, dedicated, appropriated, or opened to public travel or other use. . . . Our Supreme Court has stated: The plain meaning of the word highway is [a] main road or thoroughfare; hence a road or way open to the use of the public. . . . It is thus that this court has customarily understood the word. We have stated, for example, that the essential feature of a highway is that every traveler has an equal right in it with every other traveler. . . . [T]he term highway is ordinarily used in contradistinction to a private way, over which only a limited number of persons have the right to pass. . . . For an area to be open to public use it does not have to be open to everybody all the time. . . . The essential feature of a public use is that it is not confined to privileged individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public. It is the indefiniteness or unrestricted quality of potential users that gives a use its public character. . . .

"Additionally [o]ur Supreme Court has recognized that, when the state [or municipal subdivision] either invites or reasonably should expect the public to use a particular area that is not directly in the roadway but that is a necessary incident to travel on the roadway, a defective condition therein may give rise to a cognizable action under the [applicable highway defect] statute. . . . [D]efective conditions located near the roadway, but in areas unintended for travel, are not highway defects within the ambit of the highway defect statute. . . .

"[W]hether there is a defect in such proximity to the highway so as to be considered in, upon, or near the traveled path of the highway must be determined on a case-by-case basis after a proper analysis of its own particular circumstances, and is generally a question of

fact . . . .” (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Pramuka* v. *Cromwell*, 160 Conn. App. 863, 869–73, 127 A.3d 320, cert. denied, 320 Conn. 908, 128 A.3d 952 (2015). It is also true, however, that, although “whether a highway is defective may involve issues of fact . . . whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . .” (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 147 Conn. App. 148, 159, 82 A.3d 647 (2013), aff’d, 315 Conn. 606, 109 A.3d 903 (2015).

In *Read*, this court affirmed the rendering of summary judgment in favor of the defendant town with respect to a § 13a-149 claim under circumstances, as the trial court in this case noted, that were nearly identical to those in the present case. The plaintiff in *Read* brought an action against the town of Plymouth and two employees of its department of public works, alleging that he had sustained injuries when he fell into a movable dumpster while attempting to dispose of waste at the town’s transfer station. *Read* v. *Plymouth*, supra, 110 Conn. App. 659. He further alleged that he had tripped and fallen as a result of a broken or separated concrete block that formed a platform or wall above the dumpster. Id. The second count of his complaint asserted a claim against the town under § 13a-149. Id. The trial court granted the town’s motion for summary judgment as to the second count, concluding that the area where the plaintiff fell did not constitute a public highway because it was within the town transfer station, access to which was limited to residents of the town who had permits. Id., 660–61. On appeal, this court affirmed that portion of the trial court’s judgment. This court explained that the undisputed facts, as set forth in an affidavit of the town’s former director of public works, established that the transfer station was a restricted

access facility, limited to town residents who held permits and had registered their vehicles with the town, and that the transfer station was open during limited hours and, when closed, was restricted by means of a locked gate. Id., 665–66. Accordingly, this court held that, "[b]ecause there was no factual dispute that access to the transfer station was restricted and was, therefore, not open to the public, the court properly determined that the plaintiff's claim did not fall within the purview of . . . § 13a-149."[4] Id., 666.

Read is dispositive of this appeal. In the present case, as in *Read*, the plaintiff alleged that she suffered injuries as a result of a defective walkway located within a municipal transfer station. As in *Read*, it is undisputed that this transfer station is accessible only to city residents who have permits; that it is open only during limited hours; and that, when closed, its gates are shut and locked. Therefore, under *Read*, the plaintiff's claim does not fall within the purview of § 13a-149, and the trial court did not err in granting the defendants' motion for summary judgment as to count one of the complaint.

We are not persuaded by the plaintiff's arguments to the contrary. The plaintiff argues that to deem the transfer station, and the walkways located therein, not open to public use, "especially where the access restrictions thereto are indisputably de minimis," is to read § 13a-149 in an unduly harsh and restrictive manner. To the extent that the plaintiff asks us to overrule *Read*, however, it is the well settled policy of this court that we must follow this court's precedent unless en banc review is granted. See, e.g., *State* v. *Gonzalez*, 214 Conn.

[4] Judge Lavery dissented. He contended that "[t]he fact that the [transfer] station has limited use and requires a local permit does not diminish its public use character" because residents of the town were required to use it as the disposal site for their solid waste, and "[e]very citizen of Connecticut has to have access to such a place." *Read* v. *Plymouth*, supra, 110 Conn. App. 667 (*Lavery*, *J.*, dissenting).

App. 511, 524, 281 A.3d 501 ("It is well established . . . that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we often have stated, this court's policy dictates that one panel should not, on its own, reverse the ruling of a previous panel. The reversal may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.)), cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). The plaintiff also emphasizes what she describes as the "trivial" nature of the restrictions on accessing the transfer station—namely, the allegedly low cost of the permits and the fact that the transfer station is open six days and more than forty hours per week—but there is nothing in this court's opinion in *Read* to suggest that the holding in that case turned on the transfer station's precise number of hours of operation or the precise cost of the permits required to access it.[5] Moreover, although the plaintiff correctly notes that, under this court's precedent, "[f]or an area to be open to public use it does not have to be open to everybody all the time"; (internal quotation marks omitted) *Cuozzo* v. *Orange*, supra, 147 Conn. App. 158; it is equally well established that "[t]he essential feature of a public use is that it is *not confined to privileged*

[5] In support of her argument that the transfer station should be considered a public place, the plaintiff further asserts in her brief that "she was required to use the transfer station to dispose of solid trash." The defendants dispute this assertion in their principal appellate brief, and we are unable to find any support for it in the affidavits or other documentary exhibits submitted by the parties in connection with the defendants' motion for summary judgment. Even if it were true, however, that the plaintiff was required to use the transfer station to dispose of her waste, to conclude on that basis that the transfer station was public would be to adopt as the law the reasoning of Judge Lavery's dissenting opinion in *Read*—which argued that the transfer station in that case should be deemed public for the same reason. See footnote 4 of this opinion. We decline to do so because "[i]t is axiomatic that a dissenting opinion, by its very nature, represents a minority of the court's *disagreement* with the law as established by the majority opinion and, therefore, is not an authoritative ruling . . . ." (Emphasis in original.) *Reville* v. *Reville*, 312 Conn. 428, 459 n.29, 93 A.3d 1076 (2014).

individuals or groups whose fitness or eligibility is gauged by some predetermined criteria, but is open to the indefinite public." (Emphasis added; internal quotation marks omitted.) Id. Because it is undisputed that the transfer station in the present case is, like the transfer station in *Read*, accessible only to city residents who have purchased a permit—that is, to a group whose eligibility is gauged by predetermined criteria—it lacks the " 'essential feature' " that would qualify it as open to public use for purposes of § 13a-149. Id.

The plaintiff also cites this court's decision in *Pramuka* v. *Cromwell*, supra, 160 Conn. App. 872–76, for the proposition that "a determination of whether a road is open to the public, or whether there are 'sufficient' restrictions that would limit its public availability, involves questions of fact that are more appropriately answered by a jury at trial, and ought not be decided by summary judgment." In *Pramuka*, this court determined that the trial court improperly rendered summary judgment in favor of the defendants, the town of Cromwell and the town's board of education, in a § 13a-149 action in which the plaintiff alleged that she had sustained injuries while walking on a walkway from a designated parking area to the entrance of a public elementary school. *Pramuka* v. *Cromwell*, supra, 865–66. "On the face of the record before [it]"; id., 865; this court concluded that there were material issues of fact because the record did not contain sufficient information as to whether the parking lot or the driveway(s) abutted by the walkway on which the plaintiff had fallen, which were on the property of the school, were open to the public or contained sufficient restrictions that would limit their public availability. Id., 878.

This court in *Pramuka* did not hold, however, that the question of whether a particular area is open to public use for purposes of § 13a-149 is *categorically* incapable of resolution on a motion for summary judg-

ment. To the contrary, this court and our Supreme Court repeatedly have concluded that a plaintiff's claims fall outside the purview of our highway defect statutes when, prior to trial, the undisputed facts clearly established that an alleged injury occurred in an area that was not open to public use under Connecticut case law interpreting and applying those statutes. See, e.g., *Kozlowski* v. *Commissioner of Transportation*, 274 Conn. 497, 505–506, 876 A.2d 1148 (2005) (remanding with direction to grant motion to dismiss in action predicated on state highway defect statute, General Statutes § 13-144, when undisputed facts established that "the public is neither invited nor expected to traverse" area where plaintiff's alleged injury occurred); *Read* v. *Plymouth*, supra, 110 Conn. App. 666 (trial court properly rendered summary judgment in favor of defendant with respect to § 13a-149 claim because undisputed facts showed that transfer station was not open to public).[6] The plaintiff's reliance on *Pramuka* is therefore misplaced.

The judgment is affirmed.

In this opinion the other judges concurred.

[6] The plaintiff also directs our attention to a trial court decision, *Covello* v. *Darien*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-5008909-S (October 22, 2010) (51 Conn. L. Rptr. 40, 44), in which the court denied the defendant town's motion for summary judgment with respect to a § 13a-149 claim arising from a fall on a municipal road in the town's transfer station, notwithstanding the existence of access restrictions on the transfer station analogous to those in *Read* and the present case. The court in *Covello* purported to distinguish *Read* on the basis that the plaintiff in *Read* had not fallen on a sidewalk or highway where vehicles traveled, but rather on a path near a dumpster, whereas the plaintiff in *Covello* had fallen on a road within the transfer station along which vehicles traveled. Id., 43–44. Our research does not reveal that *Covello* has been cited in any decisions of this court or our Supreme Court, and its reasoning does not bind us. We note, however, that it is undisputed that the plaintiff in the present case fell, not on a road, but on a walkway directly in front of a cardboard waste receptacle. Therefore, even if we were to endorse the court's attempt in *Covello* to distinguish *Read*, the present case clearly is more factually similar to *Read* than to *Covello*.

ALAN FISCHER *v.* M&T BANK, N.A., ET AL.
(AC 47029)

Alvord, Elgo and Seeley, Js.

Syllabus

The plaintiff appealed from the trial court's judgment dismissing his action for, inter alia, breach of contract, for lack of standing. The plaintiff claimed that the court erred in concluding that, as a member of a limited liability company, A Co., he did not have derivative authority to act on behalf of L Co., a limited partnership of which A Co. was the general partner. During the pendency of this appeal, A Co. was dissolved and ceased to act as general partner for L Co., and L Co. was dissolved, and a receiver was appointed to act on L Co.'s behalf. *Held*:

This court dismissed the plaintiff's appeal for lack of standing, as the plaintiff did not have a specific personal or legal interest in this appeal from the dismissal of his action concerning L Co.'s rights with respect to a certain mortgage refinance, A Co. and L Co. having been dissolved and a receiver having been appointed pursuant to statute (§ 52-509 (a)) for L Co., and the receiver, rather than the plaintiff, is the only person authorized pursuant to statute (§ 52-511) to act on L Co.'s behalf.

Argued February 18—officially released June 10, 2025

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield and transferred to the judicial district of Ansonia-Milford, where the court, *J. Welch*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Appeal dismissed.*

Laurence V. Parnoff, *Jr.*, for the appellant (plaintiff).

James T. Shearin, with whom was *Marcy Tench Stovall*, for the appellees (defendants).

Opinion

SEELEY, J. The plaintiff, Alan Fischer, appeals from the judgment of the trial court dismissing his action

for, inter alia, breach of contract against the defendants, M&T Bank, N.A. (M&T Bank),[1] formerly known as People's United Bank, N.A. (People's United),[2] and two former bank employees, Kenneth Nuzzolo and Virgilio Lopez, Jr. On appeal, the plaintiff raises a number of claims related to the court's dismissal of his action. We dismiss the appeal for lack of standing.

The following facts, which are either undisputed or taken from the operative amended complaint, or were set forth by this court in a prior appeal involving the parties; see *Fischer* v. *People's United Bank, N.A.*, 216 Conn. App. 426, 285 A.3d 421 (2022), cert. denied, 346 Conn. 904, 287 A.3d 136 (2023); and procedural history are relevant to our resolution of this appeal. The plaintiff is a licensed real estate broker and one of three members of AJC Management, LLC (AJC), a limited liability company that is the general partner of 1730 State Street Limited Partnership (1730 LP). The other two members of AJC were Jefferson Scinto and Christian Scinto. The original limited partners of 1730 LP were Karen Scinto, Marianne Scinto, and Gabrielle Fischer. Karen Scinto subsequently sold, assigned, or transferred her interest in 1730 LP to Christian Scinto. Under 1730 LP's partnership agreement, AJC, as general partner, had "full, exclusive and complete discretion" to manage and control 1730 LP, which included "the right to . . . [c]ompromise, submit to arbitration, sue or defend any and all claims for or against [1730 LP]."

"On behalf of AJC, [the plaintiff] has managed . . . property owned by 1730 LP since 1998 [which is located at 1730 Commerce Drive in Bridgeport (property)]. [The plaintiff's] duties on behalf of AJC . . . included acting

[1] M&T Bank is formally known as Manufacturers and Traders Trust Company.

[2] M&T Bank is the successor by merger to People's United, which merger occurred on or about April 2, 2022.

as the property's sole property manager and negotiating and securing mortgages for the property.

"On or about December, 2019, [the plaintiff] began negotiating with People's United, through Lopez, to refinance [a] 2010 mortgage loan on the property. As a result of the negotiations, People's United offered to refinance the 2010 mortgage under new terms, which would include lower interest rates, and to extend a new loan for environmental remedial costs. People's United confirmed these offers in a mortgage commitment letter dated July 28, 2020. Thereafter, People's United sent [the plaintiff] a checklist of the documents it required in order to formalize the new loan and refinance the 2010 mortgage.

"The initial checklist of required documents included the 1730 LP partnership agreement. After People's United received and reviewed the 1730 LP partnership agreement, it requested that [the plaintiff] provide a resolution from AJC, 1730 LP's general partner, that was signed by all of AJC's members and stated that AJC authorized the loan and execution of the closing documents. Due to a dispute between the members of AJC, People's United never received a resolution that was signed by all members of AJC. On August 24, 2020, People's United notified [the plaintiff] that the July 28, 2020 commitment letter was rescinded due to [the plaintiff's] failure to obtain an acceptable resolution from AJC. As a result of the unsuccessful refinancing of the property's loan, the 2010 mortgage was declared to be in default on August 26, 2020." (Footnote omitted.) *Fischer* v. *People's United Bank, N.A.*, supra, 216 Conn. App. 430–31.

As a result of the unsuccessful negotiations in 2020 to refinance the 2010 mortgage on the property owned by 1730 LP, the plaintiff commenced the action in *Fischer* against People's United, Nuzzolo and Lopez.

The action in *Fischer* was brought by the plaintiff; the plaintiff's real estate company, Fischer Real Estate, Inc.; and 1730 LP. See id., 428. In *Fischer*, the trial court dismissed the claims asserted on behalf of 1730 LP for lack of subject matter jurisdiction; id., 432; and this court affirmed the dismissal of those claims on appeal. See id., 448. This court also dismissed the appeal as to the plaintiff and Fischer Real Estate, Inc., for lack of a final judgment, as all causes of action brought by those plaintiffs had not been disposed of by the trial court. See id., 435–37.

Subsequently, the plaintiff commenced the present action on January 23, 2023, which also stems from the unsuccessful negotiations in 2020 to refinance 1730 LP's 2010 mortgage. In an amended complaint filed on March 27, 2023, the plaintiff alleged claims against the defendants for breach of contract, bad faith, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The plaintiff further alleged that he "is authorized as a member of AJC to bring an action for AJC to protect its interests as a 1 [percent] owner of 1730 [LP] and/or to recover a judgment in favor of AJC if an effort to cause the other general partners to bring an action is not likely to succeed."[3]

The defendants thereafter filed a motion to dismiss the action, which the trial court granted. The trial court noted that "the entity that could claim aggrievement is 1730 LP. As alleged in the complaint, it is 1730 LP that has privity with the bank as that is the entity to which the bank issued a mortgage commitment. To have standing, therefore, [the plaintiff] must plead and demonstrate the ability to bring suit on 1730 LP's behalf." The court concluded that the plaintiff did not have standing

[3] We note that, in his principal appellate brief, the plaintiff asserts that this action was brought "to recover a judgment for the limited partnership 1730 [LP]." The trial court also found that "the present action against the defendants is with respect to the rights of 1730 LP, not AJC . . . ."

to bring a direct or derivative action on behalf of 1730 LP based on his interest in AJC, the general partner of 1730 LP, and because, in light of this court's holding in *Fischer*, the plaintiff did not have a right to assert claims on behalf of 1730 LP without first obtaining the unanimous consent of the members of AJC. See *Fischer* v. *People's United Bank, N.A.*, supra, 216 Conn. App. 445. The court, thus, concluded that, "because [the plaintiff] cannot directly or derivatively effectuate an act on behalf of AJC in this instance, AJC cannot act directly or derivatively to institute a suit on behalf of 1730 LP." Following the dismissal of his action, the plaintiff appealed on October 25, 2023.[4]

During the pendency of this action, Caroline Scinto and Christian Scinto, Jr., the children and heirs of Christian Scinto and as successor limited partners in 1730 LP,[5] commenced an action in the Superior Court seeking injunctive relief and the appointment of a receiver for 1730 LP, as well as the dissolution of 1730 LP (receivership action).[6] In an order dated January 11, 2024, related

[4] The defendants subsequently filed a motion to dismiss the appeal, arguing that, even if the plaintiff could show that he had standing to bring this action, due to circumstances that have occurred since the filing of this appeal, the plaintiff no longer can claim a cognizable interest in, or relationship with, 1730 LP that would establish his standing to pursue this appeal. In an order dated October 15, 2024, this court denied the motion to dismiss "without prejudice to the defendants addressing the jurisdictional issue in their appellees' brief and the plaintiff addressing the issue in his reply brief, if any."

[5] Christian Scinto died on August 6, 2022. Pursuant to § 12.1 of 1730 LP's partnership agreement, upon the death of a partner, the partner's interest descends to and is vested in the partner's heirs, provided the heirs comply with § 11.3, which requires the heirs to sign a document adopting the terms and provisions of the partnership agreement. Christian Scinto, Jr., and Caroline Scinto complied with that provision of the partnership agreement and, thus, became limited partners in 1730 LP.

[6] "The Appellate Court, like the trial court, 'may take judicial notice of files of the Superior Court in the same or other cases.' " *Stanley* v. *Quiros*, 222 Conn. App. 390, 392 n.3, 305 A.3d 335 (2023), cert. denied, 348 Conn. 945, 308 A.3d 33 (2024), and cert. denied, 349 Conn. 903, 312 A.3d 1057 (2024).

to a motion for a temporary injunction, the court in the receivership action stated: "AJC . . . is the general partner of 1730 [LP]. The general partners of AJC . . . were Christian Scinto . . . Jefferson Scinto, and [the plaintiff]. Christian Scinto . . . died in August, 2022. The remaining partners of AJC . . . Jefferson Scinto and [the plaintiff], have not reached an agreement to continue the business activities of either AJC . . . or 1730 [LP]. As a result of Christian Scinto's death, AJC . . . has suffered dissolution. As a result of [AJC's] . . . dissolution, it has ceased to act and cannot act as general partner for 1730 [LP]. As a result of [AJC's] . . . dissolution and it ceasing to act as a general partner of 1730 [LP], 1730 [LP] itself has dissolved and/or has suffered an inability to effectively or properly conduct its business affairs or receive representation in [a] pending foreclosure action against it." On May 7, 2024, the court in the receivership action issued a final order, in accordance with an agreement of the parties, appointing a receiver for 1730 LP.

In light of those developments, the defendants assert that this court should dismiss the appeal for lack of subject matter jurisdiction on the ground that the plaintiff no longer has standing to pursue this appeal. Specifically, the defendants contend: "Given that it is the rights of 1730 LP that are alleged to be at issue in this appeal, given the finding that AJC 'has ceased to act and cannot act as general partner for 1730 [LP],' given the dissolution of 1730 LP (which has not been appealed), and given the consented-to appointment of the receiver for 1730 LP (which has not been appealed), [the plaintiff], neither individually nor as a member of AJC, has any authority to act on behalf of AJC, nor does he have any 'real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.' " The plaintiff responds only by asserting that he had the authority, pursuant to General Statutes

§§ 34-271a[7] and 34-271b,[8] to *bring the derivative action* on behalf of 1730 LP "to enforce AJC's right on behalf of 1730 [LP]"; he did not address the issue of *standing to maintain this appeal*, in light of the dissolution of AJC and 1730 LP and the appointment of a receiver for 1730 LP, in his appellate reply brief or when asked during oral argument before this court. We agree with the defendants.

"A threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . It is well established that the subject matter jurisdiction of the Appellate Court and of [our Supreme Court] is governed by [General Statutes] § 52-263, which provides that an aggrieved party may appeal to the court having jurisdiction from the final judgment of the court. . . . [O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case. . . . If it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed. . . . *Trumbull* v. *Palmer*, 123 Conn. App. 244, 249–50, 1 A.3d 1121, cert. denied, 299 Conn. 907, 10 A.3d 526 (2010), and cert. denied, 299 Conn. 907, 10 A.3d 526 (2010).

[7] General Statutes § 34-271a provides: "A member may maintain a derivative action to enforce a right of a limited liability company if: (1) The member first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and the managers or other members do not bring the action within ninety days; or (2) a demand under subdivision (1) of this section would be futile."

[8] General Statutes § 34-271b provides: "A derivative action to enforce a right of a limited liability company may be maintained only by a person that is a member at the time the action is commenced and: (1) Was a member when the conduct giving rise to the action occurred; or (2) whose status as a member devolved on the person by operation of law or pursuant to the terms of the operating agreement from a person that was a member at the time of the conduct."

"Standing is established by showing that the party . . . is authorized by statute to bring an action, in other words statutorily aggrieved, or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]." (Internal quotation marks omitted.) *Stratford* v. *500 North Avenue, LLC*, 210 Conn. App. 718, 722–23, 271 A.3d 137 (2022). "When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Our review of the question of the plaintiff's standing is plenary." (Internal quotation marks omitted.) *Black* v. *West Hartford*, 205 Conn. App. 749, 759, 261 A.3d 163 (2021).

Pursuant to General Statutes § 52-509 (a), "[w]hen any partnership is dissolved and the partners cannot agree upon the disposition of the partnership property and the settlement of the affairs of the partnership, any of them may apply to the superior court for the judicial district in which any of the partners resides . . . for the appointment of a receiver to hold the business and all of the property, both real and personal, belonging to the partnership, and dispose of, manage and apply the property as the court or the judge may direct." Under General Statutes § 52-511, "[u]pon the appointment of a receiver for a partnership, [the receiver] shall be entitled to the immediate possession and control of all its property . . . ."

As demonstrated by the filings in the receivership action, both AJC and 1730 LP have been dissolved, and a receiver has been appointed for 1730 LP. Pursuant to §§ 52-509 and 52-511, the receiver now has complete control of the property of 1730 LP and has the sole authority to dispose of or manage that property, as the court or a judge may direct. Because the receiver is the only person authorized by statute to act on behalf of 1730 LP, and, in light of the fact that AJC has been dissolved, the plaintiff does not have a specific personal or legal interest in this appeal from the dismissal of his action concerning 1730 LP's rights with respect to the 2010 mortgage refinance. Accordingly, because the plaintiff appeals from the judgment dismissing his derivative action brought on behalf of AJC, a now dissolved limited liability company, which sought to protect AJC's interest in, and primarily concerned the rights of, 1730 LP, a dissolved limited partnership for which a receiver has been appointed to act on its behalf, the plaintiff no longer has standing to maintain this appeal.[9] In fact, the plaintiff has conceded in a judicial admission,[10] made in two Superior Court cases,[11] that AJC and 1730 LP

[9] In light of our dismissal of this appeal for lack of standing, we do not reach the merits of whether the plaintiff had standing to commence this action in the first instance.

[10] "It has long been held that [f]actual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . An admission in [a] pleading dispenses with proof, and is equivalent to proof. . . . *Provencher* v. *Enfield*, 284 Conn. 772, 792, 936 A.2d 625 (2007). A judicial admission dispenses with the production of evidence by the opposing party as to the fact admitted, and is conclusive upon the party making it. . . . It is axiomatic that the parties are bound by their pleadings." (Internal quotation marks omitted.) *Tran* v. *Woodworth*, 225 Conn. App. 514, 520 n.3, 317 A.3d 117 (2024).

[11] On December 18, 2024, after this appeal was filed, the defendants filed a motion asking this court to take judicial notice of a filing by the plaintiff in two consolidated Superior Court actions. See *Fischer* v. *Southport Contracting, Inc.*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV-19-6088296-S (November 18, 2024); *Fischer* v. *Scinto*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV-20-6100675-S (November 18, 2024). In those actions, the plaintiff in the present

have been dissolved and that the receiver appointed for 1730 LP is the only person who can act on behalf of 1730 LP. This court, therefore, lacks subject matter jurisdiction over the appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EMMANUEL C.* (AC 47220)

Cradle, Clark and Prescott, Js.**

Syllabus

Convicted, following a jury trial, of risk of injury to a child, the defendant appealed. He claimed, inter alia, that there was insufficient evidence to support his conviction. *Held*:

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case sought to dismiss claims brought against him arising from an alleged breach of an agreement between AJC and 1730 LP. In a memorandum of law in support of his motion to dismiss, the plaintiff asserted: "AJC has been dissolved . . . and 1730 [LP] has had a receiver appointed to manage its business . . . . All acts [at issue] are acts done directly to, or by, 1730 [LP] and/or AJC . . . . It is undisputed that prior to AJC's dissolution, the only entity able to bring an action on behalf of 1730 [LP] was AJC, and only AJC can bring an action for itself through unanimous consent . . . . However, AJC is now dissolved . . . and has no ability to take any actions . . . . Consequently, only the appointed receiver for 1730 [LP] can bring legal action on behalf of 1730 [LP] . . . regarding any claims against it." (Citations omitted.) In an order dated January 28, 2025, this court granted in part the motion for judicial notice and took judicial notice of the memorandum in support of the motion to dismiss filed by the plaintiff on November 18, 2024, in the pending cases.

* 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.

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

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

The evidence was sufficient to support the defendant's conviction because the jury reasonably could have found, on the basis of the evidence presented and the inferences reasonably drawn therefrom, that the defendant engaged in an act of deliberate, blatant abuse that was likely to endanger the victim's physical well-being.

This court dismissed as moot the defendant's claim that the trial court erred in denying his motions for a bill of particulars, as the defendant's motions pertained solely to a count of the operative information on which the defendant had been acquitted.

This court affirmed the trial court's denial of the defendant's motion for a mistrial on the alternative ground that the defendant failed to establish that certain impeachment evidence was suppressed by the prosecutor in violation of *Brady* v. *Maryland* (373 U.S. 83), as the defendant failed to point to persuasive evidence that demonstrated that the prosecutor had prior knowledge of how the victim would testify and, even if this court assumed that the prosecutor knew prior to trial that the victim's testimony would differ from his previous statements to the police and to others, that information was elicited during the direct examination of the victim and, on the basis of the record, this court could not conclude that the defendant was prejudiced by his lack of knowledge of a portion of the victim's testimony prior to trial.

This court could not conclude from the record that the trial court clearly abused its broad discretion in determining that a proper foundation had been established to admit into evidence certain photographs depicting the victim's injuries that were affected by lighting distortions, as the portions affected by lighting distortions were identified and the jury was instructed to disregard them.

The trial judge did not abuse his discretion in denying the defendant's request to recuse himself from presiding over the case, the defendant having failed to meet his burden of establishing a factual basis that created a reasonable appearance of impropriety.

Argued February 5—officially released June 10, 2025

Procedural History

Substitute information charging the defendant with two counts of the crime of risk of injury to a child and one count of the crime of assault in the second degree, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, where the court, *Chaplin*, *J.*, denied the defendant's motions for a bill of particulars; thereafter, the case was tried to the jury before *Chaplin*, *J.*; subsequently, the court,

Chaplin, *J.*, denied the defendant's motions for a judgment of acquittal, judicial recusal and a mistrial; verdict and judgment of guilty of one count of risk of injury to a child, from which the defendant appealed to this court. *Appeal dismissed in part*; *affirmed.*

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

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Nichol Peco*, senior assistant state's attorney, for the appellee (state).

Opinion

CRADLE, J. The defendant, Emmanuel C., appeals from the judgment of conviction, rendered following a jury trial, of one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that (1) there was insufficient evidence to support his conviction, (2) the trial court improperly denied his renewed motions for a bill of particulars, (3) the trial court improperly denied his motion for a mistrial based on his allegation that the state failed to disclose certain impeachment evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), (4) the trial court abused its discretion in admitting certain photographs into evidence, and (5) the trial court improperly denied his request for judicial recusal. We dismiss as moot the defendant's claim as to the denial of his renewed motions for a bill of particulars. With respect to the defendant's remaining claims, we affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On November 13, 2019, the defendant's twelve year old son (victim) got into an argument with his nine year old half sister, resulting in the victim being sent

to his room by his stepmother. Shortly thereafter, the defendant arrived home and went to the victim's room. The defendant, who was angry and yelling at the victim for "being disrespectful," grabbed the victim by his shirt collar and "pinned" him against the wall. The defendant then "switched to the back" of the victim's shirt collar, lifted him off the ground, and "body slammed" the victim onto his bed, causing the victim to hit his head on the bed. At some point during the encounter, the defendant had the victim in a "chokehold." The force of the "body slam" caused one of the wooden planks underneath the mattress to break.

When the victim went to school the following day, his "head was hurting" and his eyes were bothered by the lights. The victim told a school social worker what had happened the night before. The disclosure was then relayed to the school nurse, the school resource officer, and a social worker from the Department of Children and Families (department). After being examined by the school nurse and speaking with the school resource officer and department social worker, the victim was transported to the pediatric emergency department of Yale New Haven Hospital. After being examined by two doctors at the hospital, the victim was diagnosed with a concussion. The doctors also noted the presence of petechiae[1] on the victim's neck and torso as well as bruising on his forehead, cheeks, torso, back, chest, and legs. The doctors determined that the victim's injuries were "consistent with being body slammed and held in a chokehold . . . ." Shortly thereafter, police officers, in the course of their investigation, went to the defendant's house, where they observed a "repaired broken slat beneath [the victim's] bed."

The defendant was arrested pursuant to a warrant and subsequently charged in an amended long form

[1] "Petechiae are . . . small little dots on the skin . . . caused by . . . blood vessels that pop underneath the skin."

information with one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (3) (count one) and two counts of risk of injury to a child in violation of § 53-21 (a) (1) (counts two and three). Following a jury trial over several days in August, 2023, the defendant was found guilty of risk of injury to a child under count two and not guilty as to the remaining counts.[2] On November 30, 2023, the court, *Chaplin*, *J.*, sentenced the defendant to five years of incarceration, execution suspended, followed by three years of probation. This appeal followed.

I

The defendant first claims that there was insufficient evidence to support his conviction.[3] We are not persuaded.

In count two of the amended long form information, the state charged the defendant with risk of injury to a child in violation of § 53-21 (a) (1), alleging that "the defendant did an act likely to impair the health of a child under the age of sixteen years . . . to wit: the defendant slammed [the victim] onto his bed, breaking the bed." At the close of the state's case-in-chief, the defendant filed a written motion for judgment of acquittal asserting, inter alia, that there was insufficient evidence to convict him of that offense. After hearing argument by both parties, the court denied the defendant's motion. On appeal, the defendant claims that there was insufficient evidence to support his conviction because, he argues, the act of slamming the victim onto the bed, and "[t]he breaking of one wooden slat under a mattress

[2] With respect to count one, the jury also found the defendant not guilty on the lesser included offense of assault in the third degree in violation of General Statutes § 53a-61 (a) (2).

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

. . . where the defendant restrained the [victim] does not rise to the level of blatant physical abuse."

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . In particular, before this court may overturn a jury verdict for insufficient evidence, it must conclude that no reasonable jury could arrive at the conclusion the jury did. . . . Although the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense . . . each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Charles L.*, 217 Conn. App. 380, 386, 288 A.3d 664, cert. denied, 346 Conn. 920, 291 A.3d 607 (2023).

Section 53-21 provides in relevant part: "(a) Any person who (1) wilfully or unlawfully . . . does any act likely to impair the health . . . of any [child under the age of sixteen years] . . . shall be guilty of . . . a class C felony . . . ." With respect to "acts likely to impair the health of children . . . our precedent provide[s] an authoritative judicial gloss that limits the type of physical harm prohibited by § 53-21 to instances of deliberate, blatant abuse. . . . [S]ee, e.g., *State* v. *McClary*, 207 Conn. 233, 234–39, 541 A.2d 96 (1988) (child suffered brain injury from violent shaking); *State* v. *Eason*, 192 Conn. 37, 38, 470 A.2d 688 (1984) (child beaten severely with belt), overruled in part on other grounds by *Paulsen* v. *Manson*, 203 Conn. 484, 525 A.2d 1315 (1987); *State* v. *Martin*, 189 Conn. 1, 6, 454 A.2d

256 (child pushed into wall and then to floor), cert. denied, 461 U.S. 933, 103 S. Ct. 2098, 77 L. Ed. 2d 306 (1983); *State* v. *Palozie*, 165 Conn. 288, 290–92, 334 A.2d 468 (1973) (child thrown against chair and head hit against floor)." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Ares*, 345 Conn. 290, 298, 284 A.3d 967 (2022). It is well established, however, that "the state need not prove actual injury . . . under . . . the act prong of § 53-21 (a) (1)." Id., 299. Rather, "[i]n order to secure a conviction under the act prong in the present case, the state was required to prove that the defendant had engaged in an act of deliberate, blatant abuse that was likely to [endanger the victim's] physical well-being."[4] (Internal quotation marks omitted.) Id., 302.

Here, the evidence indicated that the defendant lifted the victim off the ground by his shirt collar and, using both hands, "body slammed" the victim onto his bed with enough force to break a wooden slat underneath the mattress. Moreover, the investigating officer, Detective Angelo Delieto, testified that the defendant himself acknowledged during a voluntary interview shortly after the incident that "he may have slammed [the victim] hard enough to give him a concussion . . . ."

At the time of the offense, the defendant was an adult male who was approximately seven inches taller and 100 to 120 pounds heavier than the twelve year old victim. During trial, the jury heard the testimony of the victim, who described the incident and how the defendant slammed him on the bed. The jury also heard the testimony of medical professionals who had treated

[4] Our Supreme Court has defined "blatant" in this context to mean "obtrusive in an offensive manner . . . completely or crassly obvious"; (internal quotation marks omitted) *State* v. *Nathan J.*, 294 Conn. 243, 256, 982 A.2d 1067 (2009); while the term deliberate "merely requires that the abuse be intentional, conscious and wilful." Id., 257 n.10.

the victim the following day describe the victim's injuries and testify that those injuries were consistent with the version of events described previously. Thus, the jury reasonably could have concluded that the defendant "body slammed" the victim onto the bed with such significant force that it caused the victim to sustain a concussion.

On the basis of the foregoing evidence and the inferences reasonably drawn therefrom, the jury reasonably could have found that the defendant engaged in an act of deliberate, blatant abuse that was likely to endanger the victim's physical well-being. Accordingly, we conclude that there was sufficient evidence to support his conviction.

II

The defendant next claims that the court erred in denying his renewed motions for a bill of particulars. We dismiss this claim as moot.

The following facts and procedural history are relevant to the defendant's claim. On February 2, 2021, the defendant filed a motion for a bill of particulars. The motion was heard the following day, at which time defense counsel stated that a long form information from the state "should be acceptable" to satisfy the defendant's request for a bill of particulars. On February 9, 2021, the state filed a long form information (original information). In count two of the original information, the state charged the defendant with assault in the second degree in violation of § 53a-60 (a) (3), alleging that "the defendant recklessly caused serious physical injury to another person by means of a dangerous instrument . . . to wit: the defendant slammed [the victim] on his bed causing a concussion." In count four of the original information, the state charged the defendant with risk of injury to a child in violation of § 53-21 (a) (1), alleging that "the defendant did an act likely to

impair the health of a child under the age of sixteen . . . to wit: the defendant slammed [the victim] onto his bed, breaking the bed."[5]

On February 1, 2023, the defendant filed a renewed motion for a bill of particulars, wherein he objected to the original information insofar as the state alleged that "the defendant slammed [the victim] on his bed causing a concussion." Because, he asserted, "a bed consists of multiple separate parts—including the frame and mattress, composed of different materials," the defendant requested that "the court order the state to identify that part of the bed that the defendant is alleged to have committed assault in the second degree with" in order to identify "the specific part . . . allegedly used as the dangerous instrument." On June 19, 2023, after the state failed to respond and the court took no action on the defendant's renewed motion, the defendant filed a second renewed motion for a bill of particulars in order to call more attention to the first.[6]

Thereafter, on July 21, 2023, the state filed an amended long form information (operative information), removing counts one and three of the original information[7] so that count two, which charged the defendant with assault in the second degree, was now identified as count one, and count four, which charged the defendant with risk of injury to a child, was now identified as count two.[8] The state, however, made no changes to

[5] The original information charged the defendant with five counts. The defendant's claim only relates to count two and count four of the original information; thus, the remaining counts of the original information are not relevant to the defendant's claim on appeal.

[6] The second renewed motion for a bill of particulars stated in relevant part: "The defendant . . . respectfully renews again his renewed motion for a bill of particulars dated January 31, 2023. The state has neither filed a renewed bill of particulars nor objected to the defendant's [January 31, 2023] motion since it was filed . . . ."

[7] See footnote 5 of this opinion.

[8] Accordingly, in count one of the operative information, the state charged the defendant with assault in the second degree in violation of § 53a-60 (a) (3), alleging that "the defendant recklessly caused serious physical injury

the allegations as set forth in its original information, and, accordingly, the operative information did not address the issue raised by the defendant's renewed motions.

On August 7, 2023, the court held a hearing to address, inter alia, the defendant's two renewed motions.[9] After hearing arguments from both parties, the court denied the defendant's renewed motions on the ground that "the evidence will bear out which aspect of the bed" was used, and, therefore, it was not necessary for the state to identify in the operative information the specific part of the bed that the defendant allegedly used.[10]

On appeal, the defendant claims that the court erred in denying his renewed motions for a bill of particulars. Specifically, the defendant argues that because counts

to another person by means of a dangerous instrument . . . to wit: the defendant slammed [the victim] on his bed causing a concussion." In count two of the operative information, the state charged the defendant with risk of injury to a child in violation of § 53-21 (a) (1), alleging that "the defendant did an act likely to impair the health of a child under the age of sixteen years . . . to wit: the defendant slammed [the victim] onto his bed, breaking the bed."

Count five of the original information, charging the defendant with a second count of risk of injury to a child, became count three of the operative information. As stated herein, this charge is not relevant to the defendant's claims on appeal.

[9] The defendant indicated at the hearing that his original motion for a bill of particulars, dated February 2, 2021, was no longer pending because it had been resolved by the state's filing of the original information. The defendant further clarified that his second renewed motion was substantively identical to his first renewed motion, and, thus, a single ruling by the court would resolve both renewed motions.

[10] The court reasoned: "[T]he bed is, as counsel noted, an item made up of several components. The components need not be specifically stated for the jury to draw the appropriate assumption or the appropriate facts and apply those facts to the law to make their determination based on the longform allegations. . . . [I]t will not be inconsistent for the jury to find that there was a bed utilized and the defendant slammed . . . the victim onto the bed, depending on which part. If it was on the mattress, still can be slammed on the bed. If it was on the headboard, still can be slammed on the bed. The footboard, still can be slammed on the bed."

one and two of the operative information both alleged that he used a "bed" to commit the respective offense, but did not specify which part of the bed, the court's denial of his renewed motions "allowed the state to be purposefully vague" and prevented him "from being sufficiently apprised of the offenses he was alleged to have committed [in order] to prepare his defense." Conversely, the state argues that the defendant's renewed motions pertained solely to count one of the operative information, for which the defendant was acquitted, and, therefore, his claim on appeal is moot.[11] We agree with the state.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Citation omitted; internal quotation marks omitted.) *Wendy V.* v. *Santiago*, 319 Conn. 540, 544–45, 125 A.3d 983 (2015).

The defendant's contention that his renewed motions pertained to both counts one and two of the operative information is belied by the record. He specifically requested in his first renewed motion a court order requiring "the state to identify [the] part of the bed that the defendant is alleged to have *committed assault in the second degree with*" on the ground that "the state should be required to identify the specific part of the bed that was *allegedly used as the dangerous instrument*."[12]

[11] The defendant did not file a reply brief in this appeal, and his principal appellate brief did not address the issue of whether this claim is moot.

[12] At the August 7, 2023 hearing on the defendant's renewed motions, defense counsel clarified that the second renewed motion raised the "[s]ame claim" as the first and affirmed that "the court's ruling on one would address both."

(Emphasis added.) In arguing his renewed motions before the trial court, the defendant further reiterated that he sought specification solely with respect to which part of the bed he allegedly used as a dangerous instrument.[13] With respect to count two of the operative information, charging the defendant with risk of injury to a child, the state was not required to prove, nor did it allege, that the defendant used the bed as a dangerous instrument in his commission of that offense. See General Statutes § 53-21 (a) (1). Conversely, with respect to count one, the state alleged, and was required to prove, that the defendant "recklessly caused serious physical injury to [the victim] *by means of a dangerous instrument* . . . ." (Emphasis added.) See General Statutes § 53a-60 (a) (3). Accordingly, it is clear from the record before us that the defendant's renewed motions pertained solely to count one of the operative information. Because the defendant was acquitted on count one, we conclude that this claim is moot.

III

The defendant next claims that the court improperly denied his motion for a mistrial predicated on the state's alleged failure to disclose certain impeachment evidence in contravention of *Brady* v. *Maryland*, supra, 373 U.S. 87. We are not persuaded.

We begin with the standards of review governing the defendant's claim. "While the remedy of a mistrial is permitted under the rules of practice, it is not favored.

[13] Defense counsel argued: "The [victim] indicated that he was slammed on the bed, he hit his head on the mattress, and again, that is composed of multiple parts. So, the jury is going to be tasked with deciding whether or not the instrument used here is a dangerous instrument. . . . [I]t's not that the state hasn't provided any information in the long form, it's that it doesn't conform to what the evidence is going to be. . . . [I]t's a very specific incident here. The case law is clear, you know, anything can be a dangerous instrument. If the state is going to . . . identify the dangerous instrument in a long form, then it should be identified as to what it was."

. . . The general rule in Connecticut is that a mistrial is granted only where it is apparent to the court that as a result of some occurrence during trial a party has been denied the opportunity for a fair trial. . . . The trial court enjoys wide discretion in deciding whether a mistrial is warranted . . . . It is only when an abuse of discretion is manifest or where an injustice appears to have been done that a reversal will result from the trial court's exercise of discretion." (Internal quotation marks omitted.) *State* v. *Rivera*, 152 Conn. App. 248, 254–55, 96 A.3d 1285, cert. denied, 314 Conn. 934, 102 A.3d 85 (2014).

"The applicable standard of review with respect to an alleged *Brady* violation is as follows. In *Brady* v. *Maryland*, supra, 373 U.S. 87, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. . . . [T]he *Brady* rule applies not just to exculpatory evidence, but also to impeachment evidence . . . which, broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the suppressed evidence was favorable to the defense; and (3) that the evidence was material." (Citations omitted; internal quotation marks omitted.) *State* v. *Rivera*, supra, 152 Conn. App. 255–56. Thus, "[i]n order to obtain relief under *Brady*, a defendant bears the heavy burden of satisfying *all* three prongs of the aforementioned test . . . ." (Emphasis in original, internal quotation marks omitted.) *Stevenson* v. *Commissioner of Correction*, 165 Conn. App. 355, 368 n.3, 139 A.3d 718, cert. denied, 322 Conn. 903, 138 A.3d 933

(2016). "Whether the [defendant] was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Internal quotation marks omitted.) Id., 363.

The following facts and procedural history are necessary for our review of the defendant's claim. During the prosecutor's direct examination of the victim, the victim testified that when the defendant slammed him onto his bed, his head hit part of the bed frame.[14] The prosecutor then presented the victim with a pen and a photograph of his bed and asked him to circle where on the bed his head hit, upon which the victim circled the footboard of the bed.

At the close of the state's case-in-chief, defense counsel orally moved for a mistrial on the basis that all "the information provided to [the defendant] leading up to trial" indicated that the victim's head hit the mattress, and the state failed to disclose that the victim would testify differently at trial. Defense counsel argued that the state's failure to disclose that information violated *Brady* because the information is "exculpatory . . . it's impeachment material. It's relevant to [the victim's] credibility; it's relevant to the testimony provided by the medical providers as to the mechanism of injury." In response to the court's inquiry as to what information supported the defendant's belief that the prosecutor knew prior to trial that the victim would testify that his head hit the footboard, defense counsel argued that "the [prosecutor] had [the victim] circle where he hit his head" on the photograph of the bed, and "we're

[14] The victim was asked on cross-examination whether he had told the police that his head hit the mattress, and he indicated that he did not recall telling the police that. The victim was then asked what he had told the doctors at the hospital, and the victim indicated that he did not recall telling the doctors that his entire head hit the mattress but, rather, that he recalled telling them that part of his head hit the bed frame.

taught in law school not to ask questions that we don't know the answer to."[15]

After a brief recess, the court issued a ruling from the bench denying the defendant's motion for a mistrial on the ground that the state's case was not "entirely dependent" on the victim's testimony that his head hit the footboard. The court also found that defense counsel had effectively impeached the credibility of the victim through his "comprehensive" and "skillful" cross-examinations of the victim and the state's witnesses.[16] The court thus concluded that "the issue raised regarding the footboard versus the mattress . . . [was not] sufficient to rise to the level of [necessitating a mistrial]."

On appeal, the defendant argues that the fact "that the [victim] changed his story as to the mechanism of . . . injury" was material because, contrary to the trial

[15] In response, the prosecutor argued that the information about the victim's head hitting the footboard had been disclosed to the defendant because such information was necessarily included in the allegation that "his head . . . hit . . . the bed" because "the bed encompasses all parts of the bed."

[16] Specifically, the court stated: "[W]here impeachment evidence is at issue . . . typically, [a mistrial] arises [when] the [state's] case is entirely dependent upon the credibility of key witnesses. In this case we heard from the [victim]; however, we also heard from medical professionals. And the question of the elements of the crime of assault in the second degree do not rest entirely upon the testimony provided by the [victim] . . . . [H]is credibility is key to the case, but . . . the state's case is not entirely dependent upon [his] testimony [concerning the manner in which he was injured] in the sense that the testimony refers more so to the amount of force used in the act, rather than which specific portion of the bed was the basis for the injury itself. There was testimony here as well from medical professionals that [defense] counsel elicited . . . on the very issue at hand regarding the nature of [the victim's] injury; what would have been . . . the portion of . . . the bed that would have been likely or probable . . . to cause [the injury] . . . . So, in that respect, [defense] counsel . . . has effectively carried out . . . a comprehensive cross-examination on the issues including the specific manner in which the injury occurred; skillful cross-examination, if you will, to that very issue for impeaching . . . the credibility of the [victim] . . . ."

court's conclusion, "the state's case hinged almost entirely on the credibility" of the victim. Accordingly, he asserts that the state's failure to disclose that information constituted a *Brady* violation, and, therefore, the court erred in denying his motion for a mistrial. Conversely, the state argues that the defendant's *Brady* claim fails because he has not demonstrated the first prong of *Brady*, that the alleged impeachment evidence was suppressed by the prosecutor. Although the trial court did not address this particular prong of *Brady* in its ruling on the defendant's motion for a mistrial, the state urges us to affirm the court's denial on this ground. We agree with the state. See *State* v. *Kinch*, 168 Conn. App. 62, 68 n.4, 144 A.3d 509 ("[i]t is well established that we may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record" (internal quotation marks omitted)), cert. denied, 323 Conn. 930, 151 A.3d 383 (2016); see also *State* v. *John*, 210 Conn. 652, 679–80, 557 A.2d 93 (appellate court "is free to sustain a ruling on a different basis from that relied upon by the trial court"), cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989), and cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989).

"In order to establish a violation of *Brady* . . . the defendant must demonstrate the *prosecution had possession* of [*Brady* material] that was not disclosed upon request." (Emphasis added; footnote omitted.) *State* v. *Falcone*, 191 Conn. 12, 17, 463 A.2d 558 (1983). "Materials not possessed by the [prosecution] cannot be suppressed within the meaning of *Brady*." (Internal quotation marks omitted.) *State* v. *Conn*, 234 Conn. 97, 118, 662 A.2d 68 (1995). On appeal, the defendant fails to identify any evidence, and our thorough examination of the record has not disclosed any, demonstrating that the prosecutor knew prior to trial that the victim would testify that his head hit the footboard rather than the

mattress.[17] In arguing the defendant's motion for a mistrial before the trial court, defense counsel suggested that such knowledge was evidenced by the fact that the prosecutor had met with the victim prior to trial and, therefore, must have known how he would respond to her direct examination questions. Because the record does not support his assertion that the prosecution possessed prior knowledge of this testimony, his argument is speculative and, therefore, unavailing. This court has observed that, "[n]otwithstanding any pretrial indication or preview of testimony by a witness, there is no guarantee or certainty of the testimony under oath on the witness stand. . . . [T]he unpredictable testimony of a witness . . . is one of the inherent risks of trial." (Internal quotation marks omitted.) *Chairamonte* v. *Manson*, 6 Conn. App. 476, 480–81, 506 A.2d 154, cert. denied, 200 Conn. 806, 512 A.2d 230 (1986). This is especially true where, as here, the witness was only sixteen years old at the time of trial and testifying about events that happened to him when he was twelve years old. Because the defendant has failed to point to persuasive evidence that demonstrates that the prosecutor had prior knowledge of how the victim would testify, we conclude that he has failed to establish that such information was suppressed by the prosecutor.

Moreover, even if we assume that the prosecutor knew prior to trial that the victim's testimony would

[17] The defendant did not address this issue in his brief to this court. When asked during oral argument before this court whether there was any evidence in the record demonstrating that the alleged impeachment evidence was suppressed by the prosecutor, the defendant's counsel directed this court's attention to the prosecutor's statement before the trial court during argument on the defendant's motion for a mistrial that "[she] believe[d] that the evidence was disclosed" because "[the victim] indicated that his head . . . hit . . . the bed [which] encompasses all parts of the bed." See footnote 15 of this opinion. We disagree with the defendant that the prosecutor's statement demonstrates that she was aware prior to trial that the victim would testify specifically that his head hit the bed frame rather than the mattress.

differ from his previous statements, that information was elicited during the direct examination of the victim. "Evidence . . . that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*. . . . Under these circumstances, the defendant bears the burden of proving that he was prejudiced by the state's failure to make the information available to him at an earlier time. . . . The appropriate standard to be applied in a case such as this is whether the disclosure came so late as to prevent the defendant from receiving a fair trial." (Citations omitted; internal quotation marks omitted.) *State* v. *Reddick*, 197 Conn. 115, 121–22, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986).

On the basis of the record before us, we cannot conclude that the defendant was prejudiced by his lack of knowledge, prior to trial, that the victim would testify that his head hit the bed frame. To begin, the victim was the first witness to testify at trial, and the defendant was not prevented from utilizing the information elicited on direct examination in his cross-examination of any witnesses, including the victim, or in the presentation of his defense. Indeed, the record demonstrates that defense counsel availed himself of the opportunity to cross-examine witnesses and, as noted by the trial court, did so "effectively" and "skillful[ly]."[18] The defendant claims that he was prejudiced because, had the victim's testimony regarding the mechanism of injury

[18] See footnote 16 of this opinion. Specifically, during defense counsel's cross-examination of the victim, counsel elicited testimony from the victim affirming that the victim had recalled telling the police and hospital personnel that his head hit the bed frame and denying that he had ever reported that his head hit only the mattress. In defense counsel's subsequent cross-examination of Delieto, the two doctors who examined the victim, and a hospital social worker, counsel elicited testimony that, when the incident occurred in 2019, the victim had told each witness that his head hit the mattress, not the footboard or any part of the bed frame.

been disclosed earlier, it would have allowed his counsel "to utilize that information in more effectively cross-examining [the victim] and the [state's] other witnesses . . . [which] could have included retaining a medical expert to comment on the lack of [more severe injuries] . . . ." The defendant, however, fails to identify with any specificity how earlier disclosure of that information would have made his counsel's cross-examination of those witnesses more effective. The defendant likewise fails to explain why expert medical testimony was necessary to establish that the resulting injuries from being slammed into a wooden bed frame would have been more severe than an injury resulting from being slammed into a mattress. Defense counsel appeared to recognize in his closing argument, and we would agree, that the jurors were capable of making this inference themselves on the basis of their common sense and life experiences.[19] In addition, if the defendant, following the victim's disclosure on direct examination that his head hit the footboard, believed that additional time was necessary to prepare for cross-examination of the state's witnesses or to consult a medical expert, he could have requested a continuance or, at the very least, asked for a recess following the direct examination of the victim. See, e.g., *State* v. *Reddick*, supra, 197 Conn. 122; *State* v. *Small*, 180 Conn. App. 674, 696–97, 184 A.3d 816, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018). The defendant made no such request. Resultantly, the defendant's claims of prejudice are purely speculative and thus insufficient to satisfy his burden of proving that the timing of the disclosure prevented him from receiving a fair trial. See *State* v. *Walker*, 214 Conn. 122, 128, 571 A.2d 686 (1990).

[19] Specifically, defense counsel argued to the jury: "There's no cut to [the victim's] head; there's no fracture; there's no bruising on the brain . . . . [L]ook at [the picture of] the footboard, you tell me if that wooden footboard would not cause more damage . . . to a twelve year old's head."

Accordingly, we conclude that the defendant has failed to prove that the alleged impeachment evidence was suppressed by the prosecutor, as required to establish a *Brady* violation.[20] We therefore affirm the court's denial of his motion for a mistrial on this alternative ground.

IV

The defendant next claims that the court abused its discretion in admitting three photographs that made the victim look "more injured than he actually alleged" due to lighting issues. Specifically, he claims that "the court ignored [the] complete lack of foundation for [their] admissi[on]." We disagree.

The state introduced into evidence three photographs of the victim's injuries through Seth Woolf, one of the emergency department physicians who treated the victim on November 14, 2019. With respect to the first photograph, Woolf testified that it was "a fair and accurate representation of [the victim's] anterior neck on November 14, 2019." Before the photograph was admitted into evidence, defense counsel sought and was granted permission to voir dire the witness, and the following colloquy occurred between defense counsel and Woolf:

"[Defense Counsel]: Looking at the top half of that picture, is that how [the victim's] face looked at that time or is that the . . . lighting in the photo?

"[The Witness]: I'm not sure I understand the question.

[20] In light of this conclusion, we need not address the defendant's claim on appeal that he met his burden with respect to the materiality prong of *Brady*. See *State* v. *Orr*, 199 Conn. App. 427, 453, 237 A.3d 15 (2020) ("[i]f . . . the [defendant] has failed to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred" (internal quotation marks omitted)).

"[Defense Counsel]: Is there a claim based upon your examination that his whole face was bruised?

"[The Witness]: No, I think that is the lighting.

"[Defense Counsel]: Okay. So, then that is not a fair and accurate depiction of his face and neck?

"[The Witness]: The upper part."

Following that exchange, defense counsel objected on the basis that the state did not lay a proper foundation for the photograph's admission, arguing that the "entire picture . . . is not a fair and [accurate] depiction" of the victim's injuries. The court overruled defense counsel's objection, and the photograph was admitted as a full exhibit. In doing so, the court sua sponte "advise[d] the jury as to this photograph, that there is a portion of the photograph that has some lighting discrepancy but apart from that one portion, the rest of the photograph is a fair and accurate depiction [on] the date in question [of] the condition of the neck."[21]

Shortly thereafter, the state simultaneously introduced two additional photographs that depicted bruising on the victim's back, which Woolf testified to be "fair and accurate representation[s] of [the victim's]

[21] Although the defendant does not challenge on appeal the propriety of the court's sua sponte limiting instruction, we note that the court's instruction was incorrect insofar as it stated that "the rest of the photograph is a fair and accurate depiction [on] the date in question [of] the condition of the neck." Section 1-3 (a) of the Connecticut Code of Evidence provides that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court." However, "[i]f the court determines that a prima facie showing of authenticity has been made, the evidence, if otherwise admissible, goes to the [jury] [and] [*i*]*t is for the* [*jury*] *ultimately to decide whether evidence submitted for its consideration is what the proponent claims it to be.*" (Emphasis added.) Conn. Code Evid. § 1-3 (b), commentary. In other words, it was ultimately a question for the jury in this case as to whether the photograph accurately and fairly depicted the condition of the victim's neck.

injuries on November 14, 2019." During voir dire by defense counsel, Woolf identified the areas of bruising on each photograph but acknowledged that lighting issues on both photographs appeared to create shadows on other areas of the victim's back, which potentially could be misinterpreted as additional bruising. Defense counsel objected to the admission of these photographs on the same ground as his objection to the first photograph, and the court again overruled counsel's objections and admitted the photographs. In doing so, however, the court instructed the prosecutor "to further clarify in the testimony as to what . . . injuries are depicted." The prosecutor subsequently had Woolf hold up each photograph and identify specifically which areas depicted bruising and which areas depicted shadows due to lighting issues.

"Photographic evidence is admissible if it has a reasonable tendency to prove or disprove a material fact in issue or shed some light upon some material inquiry. . . . Verification of a photograph is a preliminary question of fact to be determined by the trial court. . . . Whether a photograph shows a situation with sufficient accuracy to render it admissible, is a preliminary question for the court . . . . Further, the trial court has wide discretion in admitting photographic evidence and its determination will stand unless there has been a clear abuse of that discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Walker*, 215 Conn. 1, 6, 574 A.2d 188 (1990).

At the outset of Woolf's direct examination, he testified that when he examined the victim in the emergency department on November 14, 2019, the victim's injuries included bruising on his back and petechiae on his anterior neck. When Woolf subsequently was shown the three photographs at issue, Woolf testified that each photograph was a fair and accurate depiction of how

the victim's injuries appeared on that date. Woolf's testimony thus provided a proper foundation for the admission of the photographs. See *State* v. *Swinton*, 268 Conn. 781, 802, 847 A.2d 921 (2004) ("[u]nder [the foundational] standard [for photographs], all that is required is that a photograph be introduced through a witness competent to verify it as a fair and accurate representation of what it depicts"). Although other portions of each photograph were affected by lighting distortions, those portions were identified and the jury was instructed to disregard them.[22] Although we recognize that the court could have directed the state to better sanitize the photographs so as to omit the areas affected by lighting distortions entirely, we cannot conclude from the record before us that the court clearly abused its broad discretion in determining that there was a proper foundation to admit the photographs into evidence.

V

Finally, the defendant claims that the court abused its discretion in denying his request for judicial recusal. Specifically, the defendant claims that recusal was warranted because, he argues, Judge Chaplin created an appearance of impropriety by allegedly engaging in an ex parte communication with the prosecutor. We disagree.

The following facts and procedural history are relevant to the defendant's claim. Prior to trial, the prosecutor had learned from a third party that the defendant previously worked as a judicial marshal but his employment had been terminated due to allegations of larceny. On August 10, 2023, the state presented the court with

[22] The court again advised the jury in its final instructions that it must disregard the distorted portions of each photograph: "Some . . . exhibits have been admitted for a limited purpose. When [the court] . . . ha[s] given a limiting instruction, you must follow it. For example, there are photographs admitted and [the court] told you to disregard the dark areas due to lighting issues."

a subpoena, which was signed by Judge Chaplin on the same day, directing the Judicial Marshal Service to appear in court on August 14, 2023, and to bring with it "[a]ll employment records of [the defendant]."[23]

Thereafter, the defendant's employment records were filed with the clerk of the court, and, on August 21, 2023, the prosecutor orally moved to unseal them. In response, defense counsel acknowledged that "the state [had sent defense counsel] an email indicating [that it was] going to subpoena the records" and that he had obtained a copy of the subpoena after the records were delivered. Defense counsel, however, "object[ed] to the issuance of [the] subpoena." Specifically, he argued that the court's signing of the state's subpoena was improper because the subpoena had not been "contemporaneously [sent] to [him] . . . ." Defense counsel thus claimed that, because "[the subpoena] went to the court without coming to [him]," the court's signing of the subpoena was "essentially an ex parte communication" between the court and the prosecutor.

After noting defense counsel's concerns with the manner in which the subpoena was issued, the court "grant[ed] the request to unseal the [records] so that both sides can . . . review [them]" but reserved ruling on the issue of whether the records were admissible.[24] Defense counsel took exception to the court's ruling and further stated: "I would request that the court consider disqualifying itself given the process that was used to obtain these records. I do think it could raise the

[23] The subpoena was served upon the Judicial Marshal Service on the same date that it was signed by the court.

[24] The following day, on August 22, 2023, the state filed a written motion to introduce the defendant's employment records as prior misconduct for impeachment purposes. The motion was heard before the court on the same date, and, after hearing arguments from counsel for both parties, the court denied the state's motion.

appearance of impropriety. There is . . . no way for me to say that the court acted inappropriately or could not ensure a fair trial for [the defendant], but I think the appearance is there." The court "appreciate[d] [him] raising that issue" but denied his request for recusal.

"A trial court's ruling on a motion for disqualification is reviewed for abuse of discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"Pursuant to our rules of practice; see Practice Book § 1-22; a judge should disqualify himself from acting in a matter if it is required by rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reasonably be questioned . . . . In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . the burden rests with the party urging disqualification to show that it is warranted." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 168 Conn. App. 354, 382, 147 A.3d 1083 (2016), aff'd, 328 Conn. 172, 177 A.3d 1128 (2018).

On appeal, the defendant argues that the court was "[w]orking ex parte with the state . . . to obtain potentially harmful evidence against the defendant," which, he asserts, "can only be viewed by a reasonable person as implicating the judge's impartiality." Although rule 2.9 of the Code of Judicial Conduct provides in relevant part that "[a] judge shall not initiate, permit, or consider ex parte communications or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter," the defendant's argument is unavailing because there is no evidence in the record that any improper ex parte communication occurred. Defense counsel acknowledged that the state notified him in advance that it "[was] going to subpoena" the defendant's employment records and that he subsequently received a copy of the subpoena. Defense counsel further acknowledged that he was aware that General Statutes § 31-128f required the state to obtain a court order in order to subpoena those records.[25] Because our statutes and rules of practice expressly authorized the court to issue such an order in the underlying case, the state's presentation to the court of a subpoena and the court's signing of the state's subpoena was proper. See General Statutes § 54-2a (a) (in all criminal cases, Superior Court may issue "subpoenas for witnesses" and "all other criminal process"); see also Practice Book § 40-2 ("the judicial authority may, upon written request or upon its own motion, issue a subpoena . . . directing that . . . documents or objects [that are the subject of discovery orders] be delivered to the clerk of the court

[25] General Statutes § 31-128f provides in relevant part: "No individually identifiable information contained in the personnel file . . . of any employee shall be disclosed by an employer to any person or entity not employed by or affiliated with the employer without the written authorization of such employee except . . . where the disclosure is made . . . (2) pursuant to a lawfully issued administrative summons or judicial order, including a . . . subpoena . . . ."

within a specified time"). Finally, the defendant concedes that the subpoena itself communicated no substantive information about the pending case,[26] and the record indicates that the court subsequently notified the defendant that the subpoena had been issued and did not unseal the subpoenaed records until both parties were afforded an opportunity to be heard on the matter.

Thus, from the record before us, the defendant clearly has not met his burden of establishing a factual basis that created a reasonable appearance of impropriety. Accordingly, we conclude the court did not abuse its discretion in denying the defendant's request for the trial judge to recuse himself from presiding over the case.

The portion of the appeal challenging the trial court's denial of the defendant's renewed motions for a bill of particulars is dismissed; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

BIRCH HILL RECOVERY CENTER, LLC *v.* HIGH WATCH RECOVERY CENTER, INC.
(AC 47452)

Alvord, Clark and Seeley, Js.

Syllabus

The plaintiff appealed from the trial court's judgment dismissing its action sounding in, inter alia, tortious interference with prospective business relations, following the court's grant of the defendant's special motion to dismiss

[26] In conceding this fact, defense counsel argued before the trial court and the defendant repeats in his brief to this court that the state's subpoena was merely "an unsupported request to obtain negative records for use at trial against the defendant," and, therefore, it was improper for the court to sign the subpoena where the state failed to provide "a proper foundation" for requesting the defendant's employment records. We are not persuaded. As stated herein, employment records are disclosable upon a lawfully issued judicial order, and the court, by signing the state's subpoena, properly issued such an order. Nothing in the controlling statutes or our rules of practice conditions the issuance of a subpoena for employment records upon any

filed pursuant to the anti-SLAPP statute (§ 52-196a). The plaintiff, which was seeking to open a substance abuse treatment facility in Kent, where the defendant operated its own such facility, claimed that the court erroneously dismissed the action because it had established that there was probable cause that it would prevail on its claims against the defendant for the defendant's conduct in opposing the plaintiff's opening of the facility. *Held*:

The trial court did not err in granting the defendant's special motion to dismiss, as the court properly concluded that the plaintiff failed to establish probable cause that it would prevail on its claims in light of the defendant's first amendment defense and, accordingly, the plaintiff's claims were barred by the first amendment to the United States constitution.

This court concluded that the plaintiff's claim that the trial court applied the wrong legal standard and should have analyzed the issue of whether the defendant's conduct was protected activity under the sham litigation exception, established by *California Motor Transport Co.* v. *Trucking Unlimited* (404 U.S. 508), to the doctrine of immunity for petitioning activity pursuant to *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.* (365 U.S. 127) and *United Mine Workers of America* v. *Pennington* (381 U.S. 657), was unavailing, as the record showed that the defendant had an objectively reasonable basis for challenging the plaintiff's application seeking to open a substance abuse treatment facility.

Argued March 11—officially released June 10, 2025

Procedural History

Action to recover damages for, inter alia, tortious interference with prospective business relations, and for other relief, brought to the Superior Court in the judicial district of Litchfield at Torrington, where the court, *Lynch, J.*, granted the defendant's special motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Christopher A. Klimmek, with whom was *Jeffrey P. Mueller*, for the appellant (plaintiff).

Peter J. Zarella, with whom was *Snigdha Mamillapalli*, for the appellee (defendant).

particular showing by the party requesting the records, and the defendant fails to provide any legal authority, nor could we locate any, that supports his contention otherwise.

Opinion

CLARK, J. The action underlying this appeal arises from the efforts by the plaintiff, Birch Hill Recovery Center, LLC, to open a substance abuse treatment facility (facility) in Kent and the alleged efforts of the defendant, High Watch Recovery Center, Inc., to prevent the plaintiff from doing so. The plaintiff brought this action sounding in tortious interference with prospective business relations and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., alleging that the defendant engaged in anticompetitive conduct designed to prevent the plaintiff from opening the facility by making false or misleading statements to the public and the press, by challenging the plaintiff's efforts to obtain necessary approvals from the Office of Health Care Access (OHCA) and the Kent Planning and Zoning Commission (commission), and by litigating appeals from the decisions of those administrative bodies in the Superior Court, this court, and our Supreme Court. The defendant filed a special motion to dismiss the action pursuant to the anti-SLAPP statute,[1] General Statutes § 52-196a.[2] The court granted that motion, concluding that

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Black Rock Gardens, LLC* v. *Berry*, 224 Conn. App. 379, 380 n.1, 312 A.3d 588 (2024).

[2] General Statutes § 52-196a provides in relevant part: "(b) 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. . . .

"(e) . . . (3) 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 com-

the defendant met its burden under § 52-196a (e) (3) to establish by a preponderance of the evidence that the plaintiff's claims were based on the defendant's exercise of its right to free speech, right to petition the government, or right of association under the United States constitution or the state constitution in connection with a matter of public concern and that the plaintiff failed to meet its burden to establish probable cause that it would prevail on the merits of its claims because (1) the plaintiff's claims were barred in their entirety by the first amendment to the United States constitution[3] and article first, §§ 4, 5 and 14,[4] of the Connecticut constitution, (2) the plaintiff's claims with respect to the defendant's litigation conduct in court and before the OHCA were barred by the absolute litigation privilege, and (3) the plaintiff failed to allege sufficient facts to support its claim for tortious interference with business relations.

On appeal, the plaintiff does not argue that the court erred in its determination that the defendant met its initial burden under the first prong of § 52-196a (e) (3). See footnote 2 of this opinion. Instead, the plaintiff claims that the court erred by dismissing the action

plaint, 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. . . ."

[3] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[4] Article first, § 4, of the Connecticut constitution provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Article first, § 5, of the Connecticut constitution provides in relevant part: "No law shall ever be passed to curtail or restrain the liberty of speech . . . ."

Article first, § 14, of the Connecticut constitution provides: "The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."

because it established that there is probable cause that it will prevail on its claims against the defendant. Specifically, the plaintiff contends that (1) the defendant's efforts to challenge the facility in court and administrative proceedings constituted "sham" litigation that is not protected by the first amendment to the federal constitution or the state constitution, (2) the absolute litigation privilege does not bar the plaintiff's claims, and (3) the complaint sufficiently alleged that the defendant's conduct amounted to tortious interference with business relations. We disagree with the plaintiff's claim that it established probable cause that it will prevail on its claim that the defendant's challenges to the facility constituted sham litigation. We, therefore, conclude that the court did not err in its determination that the defendant's conduct was protected by the first amendment. Because that conclusion is sufficient to uphold the dismissal of the complaint, we need not address the plaintiff's other challenges to the judgment of dismissal. Accordingly, we affirm the judgment of the trial court.[5]

The following facts and procedural history are relevant to this appeal.[6] The plaintiff was formed in 2017

[5] In its principal appellate brief, the plaintiff also claims that the court erred in denying its motion for leave to amend the complaint, which the plaintiff filed on the morning of oral argument on the special motion to dismiss. In response, the defendant argues that any such error was harmless because the court considered the allegations in the proposed amended complaint and accompanying affidavit in deciding the special motion to dismiss. In its reply brief, the plaintiff concedes that this court need address this claim only if we reverse the judgment of dismissal.

In addition, in its reply brief, the plaintiff challenges the court's decision to award attorney's fees to the defendant pursuant to § 52-196a (f) (1) and claims that, "[i]f this court reverses [the judgment of] dismissal . . . it should also reverse the award of attorney's fees." Because we affirm the judgment of dismissal, we need not address the plaintiff's claims challenging the court's denial of the motion for leave to amend and the court's award of attorney's fees.

[6] In reviewing the trial court's decision granting a special motion to dismiss pursuant to § 52-196a, we take the facts as they appear in the pleadings, affidavits, and other exhibits submitted by the parties and construe them in the light most favorable to the plaintiff. See *Murphy* v. *Rosen*, 351 Conn.

for the purpose of establishing the facility. The defendant has operated its own substance abuse treatment facility in Kent since the 1940s. On June 23, 2017, the plaintiff submitted a special permit and site plan application to the commission, seeking to convert a former convalescent home into a substance abuse treatment facility. On October 12, 2017, the commission voted to approve the plaintiff's application. On October 27, 2017, the defendant appealed the commission's decision to the Superior Court. In 2018, the parties reached a settlement allowing the plaintiff to retain its approvals; the settlement did not require the defendant to refrain from further opposing the facility.

Separately, in September, 2017, the plaintiff applied to the OHCA for a certificate of need.[7] The defendant requested and was granted permission to intervene in

120, 122, 329 A.3d 913 (2025); *Mulvihill* v. *Spinnato*, 228 Conn. App. 781, 794, 326 A.3d 251, cert. denied, 350 Conn. 926, 326 A.3d 248 (2024).

[7] Pursuant to General Statutes § 19a-638 (a) (1), any person or entity seeking to establish a new health care facility is required to obtain a certificate of need.

"Pursuant to General Statutes (Rev. to 2017) § 19a-612d, the deputy commissioner of public health was responsible for directing and overseeing the OHCA at the time that [the plaintiff] submitted its certificate of need application. Pursuant to No. 18-91, § 1, of the 2018 Public Acts, which became effective May 14, 2018, the [relevant] statutes . . . were amended to create a Health Systems Planning Unit [within the Office of Health Strategy and overseen by the Commissioner of Health Strategy], in lieu of the OHCA." *High Watch Recovery Center, Inc.* v. *Dept. of Public Health*, 207 Conn. App. 397, 400 n.3, 263 A.3d 935 (2021), rev'd on other grounds, 347 Conn. 317, 297 A.3d 531 (2023).

Pursuant to General Statutes § 19a-612d (b), the deputy commissioner of public health retained "independent decision-making authority over only the certificate of need applications that [were] pending before the [OHCA] and . . . deemed completed by said office on or before May 14, 2018. Following the issuance by the Deputy Commissioner of Public Health of a final decision on any such certificate of need application, the Commissioner of Health Strategy shall exercise independent authority on any further action required on such certificate of need application or the certificate of need issued pursuant to such application."

In their appellate briefs, both parties refer only to the OHCA and the Department of Public Health when discussing the certificate of need proceed-

the proceedings before the OHCA. On March 28 and May 10, 2018, the OHCA held hearings on the plaintiff's application. The defendant objected to the plaintiff's application on various grounds, including that there was no public need for the facility and that the facility would have a detrimental impact on the state's health care system generally. On November 6, 2018, the hearing officer issued a proposed final decision recommending the denial of the plaintiff's application. The plaintiff filed a brief and presented oral argument in opposition to the proposed final decision. Subsequently, on March 28, 2019, the plaintiff and the Department of Public Health (department) entered into an agreed settlement pursuant to which the plaintiff's application was approved, subject to certain conditions. As part of the agreed settlement, however, the department made findings of fact and conclusions of law in which it found that the plaintiff failed to satisfy ten of the twelve statutory factors it was required to consider in assessing the plaintiff's application.[8] Specifically, the department found

ings. In the interest of simplicity and clarity, we likewise refer solely to the OHCA in this opinion.

[8] At the time of the plaintiff's application, General Statutes (Rev. to 2017) § 19a-639 (a) required the OHCA to consider twelve "guidelines and principles" in assessing the application:

"(1) Whether the proposed project is consistent with any applicable policies and standards adopted in regulations by the Department of Public Health;

"(2) The relationship of the proposed project to the state-wide health care facilities and services plan;

"(3) Whether there is a clear public need for the health care facility or services proposed by the applicant;

"(4) Whether the applicant has satisfactorily demonstrated how the proposal will impact the financial strength of the health care system in the state or that the proposal is financially feasible for the applicant;

"(5) Whether the applicant has satisfactorily demonstrated how the proposal will improve quality, accessibility and cost effectiveness of health care delivery in the region, including, but not limited to, provision of or any change in the access to services for Medicaid recipients and indigent persons;

"(6) The applicant's past and proposed provision of health care services to relevant patient populations and payer mix, including, but not limited to, access to services by Medicaid recipients and indigent persons;

that: the "application is not consistent with the Statewide Health Care Facilities and Services Plan"; the plaintiff "has not sufficiently demonstrated that there is a clear public need for the proposal"; the plaintiff "has not satisfactorily demonstrated that the proposal will improve the accessibility, quality and cost effectiveness of health care delivery in the region"; the plaintiff "has not sufficiently demonstrated that there would be no adverse change to the provision of health care services to the relevant populations and payer mix, including access to services by Medicaid recipients and indigent persons"; the plaintiff "failed to submit evidence that there are persons that have sought [the type of treatment to be provided at the facility] but were unable to find it in Connecticut"; the plaintiff "has not provided any historical utilization of behavioral health treatment services in the service area that would support [the] proposal"; the plaintiff "has not satisfactorily demonstrated that [the] proposal would not result in an unnecessary duplication of existing services in the area"; the plaintiff "has not satisfactorily demonstrated that there will be no reduction in access to services by

"(7) Whether the applicant has satisfactorily identified the population to be served by the proposed project and satisfactorily demonstrated that the identified population has a need for the proposed services;

"(8) The utilization of existing health care facilities and health care services in the service area of the applicant;

"(9) Whether the applicant has satisfactorily demonstrated that the proposed project shall not result in an unnecessary duplication of existing or approved health care services or facilities;

"(10) Whether an applicant, who has failed to provide or reduced access to services by Medicaid recipients or indigent persons, has demonstrated good cause for doing so, which shall not be demonstrated solely on the basis of differences in reimbursement rates between Medicaid and other health care payers;

"(11) Whether the applicant has satisfactorily demonstrated that the proposal will not negatively impact the diversity of health care providers and patient choice in the geographic region; and

"(12) Whether the applicant has satisfactorily demonstrated that any consolidation resulting from the proposal will not adversely affect health care costs or accessibility to care."

Medicaid recipients or indigent persons"; the plaintiff "has not satisfactorily demonstrated that the proposal will not negatively impact the diversity of health care providers and client choice in the region"; and the plaintiff "failed to satisfactorily demonstrate that the proposal will not result in any consolidation that would affect health care costs or accessibility to care."[9]

On May 8, 2019, the defendant appealed from the agreed settlement to the Superior Court pursuant to the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq. The Superior Court dismissed the defendant's appeal on the basis that the defendant had not appealed from a final decision. See General Statutes § 4-183 (a).[10] On September 14, 2021, this court affirmed the judgment of dismissal, but, on July 25, 2023, our Supreme Court reversed. See *High Watch Recovery Center, Inc.* v. *Dept. of Public Health*, 207 Conn. App. 397, 263 A.3d 935 (2021), rev'd, 347 Conn. 317, 297 A.3d 531 (2023). On remand, the Superior Court again dismissed the defendant's appeal, concluding that the defendant was not aggrieved by the department's decision to grant the plaintiff a certificate of need. See *High Watch Recovery Center, Inc.* v. *Dept. of Public Health*, Superior Court, judicial district of New Britain, Docket No. CV-19-6052661-S (May 30, 2024). The defendant appealed from the judgment of dismissal, and that appeal remains pending before our Supreme Court at the time of the release of this opinion.[11]

[9] The department did not make a finding as to the first factor and found that the plaintiff satisfied the fourth factor. As to the seventh factor, the department found that the plaintiff had "satisfactorily identified the population to be [served]" but that the plaintiff did not demonstrate that that population had a need for the proposed services.

[10] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . ."

[11] This court heard oral argument on the defendant's appeal on March 11, 2025, and, following oral argument, recommended that the matter be

During the pendency of the defendant's appeal from the certificate of need proceedings before the OHCA, the plaintiff has been unable to proceed with the construction of the facility. On October 6, 2023, the plaintiff commenced the present action, alleging that the defendant pursued "a multiyear and multifaceted effort to thwart [the plaintiff's] ability to develop its facility at every step of the process for fear of the perceived competition it would create." The plaintiff alleged that the defendant "did not have a good faith belief to assert that [the plaintiff] did not meet the requirements for [a certificate of need], but instead [opposed the facility] simply because it did not want [the plaintiff] as a putative competitor." To support that claim, the plaintiff alleged that, although the defendant objected to the plaintiff's proposal to include detoxification beds on the basis that there was no public need, the defendant later received approval to expand its own facility to add detoxification beds and then objected to the plaintiff's request to extend the expiration date of the agreed settlement, relying on its expanded capacity to serve the needed population. The plaintiff further alleged that, although the defendant objected to the facility in part on the basis that it "would be a drain on the town's emergency services," when the defendant later sought permission from the commission to expand its own facility, the defendant represented that its expansion would not negatively affect the town's emergency services "because rehabilitation facilities do not have security issues like a prison, and they rarely need to call the police."

The plaintiff also alleged that the defendant "embarked on a smear campaign as another attempt to thwart [the plaintiff's] development plans." The plaintiff alleged

transferred to the Supreme Court. Thereafter, on April 9, 2025, the appeal was transferred to our Supreme Court pursuant to Practice Book § 65-1.

that Jerry Schwab, the defendant's chief executive officer, "sent a letter to all residents of Kent . . . ostensibly 'alerting' them to [the plaintiff's] proposed plans in advance of the [commission] hearing at which the public could voice its concerns." The plaintiff also alleged that "Schwab made false and misleading statements about [the plaintiff's] leadership" to the Republican-American (newspaper), which quoted him as saying that "the people who are applying and shopping this around town are investment fund people from Manhattan. They don't have one tiny speck of experience with a facility like this. These are venture capitalists that are looking at this. We need to make sure there are proper safety nets." The plaintiff alleged that the defendant's actions "deprived [the plaintiff] of the substantial income and profits that the facility would have generated" and sought damages based on claims of tortious interference with prospective business relations and a violation of CUTPA.

On November 22, 2023, the defendant filed a special motion to dismiss pursuant to § 52-196a, an accompanying memorandum of law, and several exhibits.[12] The defendant claimed that the complaint was based on the defendant's exercise of its rights under the state and federal constitutions to free speech, to petition the government, and to associate in connection with a matter of public concern within the meaning of § 52-196a (e) (3). The defendant further claimed that the plaintiff could not meet its burden under § 52-196a (e) (3) to

[12] The exhibits attached to the defendant's memorandum of law consisted of the newspaper article; the defendant's petition to intervene in the certificate of need proceedings; the OHCA ruling granting the petition to intervene; letters and emails submitted by members of the community in opposition to the plaintiff's application for a certificate of need; the agreed settlement granting the plaintiff's application for a certificate of need; the defendant's request for reconsideration of the agreed settlement; the order denying the defendant's request for reconsideration; and the order granting the plaintiff's request for an extension of the expiration date of the certificate of need.

establish probable cause that it would prevail on the merits of its complaint because, inter alia, the complaint was barred by the litigation privilege, the conduct at issue was protected by the first amendment to the United States constitution and article first, §§ 4, 5 and 14, of the Connecticut constitution, and the complaint failed to allege the existence of a business relationship that was harmed by the defendant's allegedly tortious conduct, as required to prevail on a claim of tortious interference with prospective business relations.

In support of its first amendment claim, the defendant argued that "speech that is objectively on a matter of public concern in light of its substance, form, and context is entitled to protection under the first amendment." In support of that argument, the defendant cited *Gleason* v. *Smolinski*, 319 Conn. 394, 125 A.3d 920 (2015), in which our Supreme Court held that the first amendment protected the family of a missing person from liability for intentional infliction of emotional distress for its targeted campaign hanging missing person posters near the home and workplace of the missing person's former girlfriend because that conduct related to a matter of public concern. See id., 425. The defendant argued that the conduct at issue in the present case—namely, communicating with the public and the press and opposing the plaintiff's facility in administrative and judicial proceedings—was protected by the first amendment because "[t]he addition of a substance abuse facility in the middle of Kent, and the governmental approvals that would be required, is plainly a matter of public concern" that is entitled to "the strongest of first amendment protections, notwithstanding [the plaintiff's] bald and conclusory allegations about [the defendant's] motives." The defendant further argued that the fact that this case involves a dispute between private businesses did not undermine its first amendment claim, citing the United States Supreme Court's

decision in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972), for the proposition that "the first amendment's protections apply even in the realm of commercial disputes between competitors . . . ."

The plaintiff filed an opposition to the special motion to dismiss on December 26, 2023.[13] The plaintiff first claimed that the defendant had not met its initial burden under § 52-196a (e) (3) to show that the complaint is based on the defendant's exercise of its rights to speak, petition, or assemble with respect to a matter of public concern. The plaintiff argued that the complaint is not "based on" the defendant's exercise of its first amendment rights but, rather, "is based on [the defendant's] multiyear campaign to take down a perceived competitor and thwart its business development," which, the plaintiff argued, "is simply not the type [of case that] the anti-SLAPP [statute] was designed to prevent . . . ." The plaintiff further argued that, even if the complaint was based on the defendant's exercise of its first amendment rights, the issues involved were not a matter of public concern because the defendant was motivated not by "a desire to protect the community or speak up against potentially harmful development" but, rather, to stifle competition and protect its own business interests.

The plaintiff then claimed that, even if the defendant had met its initial burden under § 52-196a (e) (3), there was probable cause that the plaintiff would prevail on the merits of the complaint. With respect to the first amendment defense, the plaintiff reiterated its argument that the alleged conduct was not protected by the first amendment because that conduct related to a private business dispute and was aimed at thwarting competition. The plaintiff argued that "where speech,

[13] The plaintiff did not include any exhibits with its opposition.

petition, or assembly is intended to harm another business, it is no longer protected under the first amendment," and that "[t]his is simply not the type of case involving an exercise of constitutional rights on an issue of public concern for which the first amendment can serve as a defense." The plaintiff further noted that the court in *Gleason* had distinguished between "matters of purely private significance" and "matters of public interest." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, supra, 319 Conn. 411. Finally, the plaintiff disputed the defendant's reliance on *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 404 U.S. 508, and cited that case for the proposition that the first amendment did not protect "[the defendant's] attempts to squash a potential competitor by using improper means."

On January 8, 2024, the court, *Lynch*, *J.*, held a hearing on the special motion to dismiss. On the morning of the hearing, the plaintiff filed a motion for continuance and a motion for leave to amend the complaint to add new factual allegations based on information it claimed to have received the day before. The court denied the motion for continuance on the record and indicated it would defer ruling on the motion for leave to amend until after it ruled on the special motion to dismiss. Prior to hearing oral argument, the court inquired whether either party had evidence to present in connection with the special motion to dismiss. The defendant noted that it intended to rely on the exhibits it had attached to its memorandum in support of the special motion to dismiss; see footnote 12 of this opinion; but neither party presented evidence during the hearing.[14]

[14] The defendant also indicated that, on the morning of the hearing, it had filed as an additional exhibit a copy of the release that was executed in connection with the settlement of the defendant's appeal from the decision of the commission. In its memorandum of decision, the court indicated that it did not consider that exhibit in its decision because the defendant had not explained how that exhibit was relevant to the special motion to dismiss.

On February 23, 2024, the court issued a memorandum of decision granting the special motion to dismiss. In its analysis, the court identified the following conduct and communications that formed the basis of the plaintiff's claims as alleged in the complaint: the defendant's statements to the newspaper and letter to the community about the facility; the defendant's written and oral statements to the commission; the defendant's statements in opposing the plaintiff's certificate of need application before the OHCA; and the defendant's statements in appealing the decisions of the commission and the department. Addressing the first prong of § 52-196a (e) (3), the court determined that all of the challenged conduct constituted an exercise of the defendant's right to free speech and to petition the government, that the defendant's statements to the public and to the newspaper were an exercise of the defendant's right of association, and that the plaintiff's development of the facility is a matter of public concern. The court therefore concluded that the defendant met its initial burden under § 52-196a (e) (3) to establish that the complaint was based on the defendant's rights to free speech, to petition the government, and to associate with respect to a matter of public concern.

The court then addressed whether the plaintiff established probable cause that it would prevail on the merits of its complaint. In assessing the defendant's first amendment defense, because the parties' briefs and arguments focused almost exclusively on whether the defendant's alleged speech and conduct related to a matter of public concern, the court began its analysis with a discussion of the United States Supreme Court's opinion in *Snyder* v. *Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011). It noted that, in *Snyder*,

Because neither party argues that the release is relevant to the plaintiff's claims on appeal, we do not consider that exhibit in our disposition of this appeal.

the court held that the first amendment shielded from tort liability church members who picketed near a soldier's funeral with "signs reflect[ing] the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment"; id., 447; because that speech related to a matter of public concern. The court quoted from *Snyder*, which explained that "[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community . . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public . . . . Deciding whether speech is of public or private concern requires [the court] to examine the content, form, and context of that speech, as revealed by the whole record." (Citations omitted; internal quotation marks omitted.) Id., 453.

Applying that standard, the court determined that "[t]he development of a new substance abuse treatment facility relates to the broad societal concerns of the community in which the facility plans to operate, and, thus, just as in *Snyder*, the defendant's alleged conduct relates to a matter of public concern." The court also rejected the plaintiff's contention that the defendant's alleged anticompetitive purpose precluded a determination that its speech and petitioning activity related to a matter of public concern. As the court explained, "the allegations that the defendant in the present case is motivated by a personal desire to harm its competitor does not transform its speech regarding the substance abuse treatment facility into a purely private matter. . . . Even if the defendant acted solely with a business motivation, it could still have intended to persuade others regarding the development of the substance abuse treatment facility, just as the speech in *Gleason* could have also been intended [not merely to] harass the plaintiff but persuade her regarding a matter of public

concern." (Citation omitted.) The court concluded that, because the defendant's conduct was protected by the first amendment, the plaintiff failed to meet its burden to establish probable cause that it would prevail on the merits of its complaint.[15] The court thereafter rendered judgment dismissing the plaintiff's complaint.[16]

On appeal, the plaintiff does not argue that the court erred in concluding that the defendant met its initial burden under the first prong of § 52-196a (e) (3). Rather, the plaintiff focuses its challenge on the court's conclusion that the plaintiff failed to establish probable cause that it would prevail on the merits of the complaint. The plaintiff claims that the court erred in concluding that the first amendment to the federal constitution, the state constitution, and the litigation privilege protected the defendant's conduct in opposing the proposed substance abuse treatment facility and in concluding that the plaintiff did not establish probable cause that it would prevail on its tortious interference claim because it failed to allege the existence of a business relationship.

With respect to the first amendment defense, the plaintiff claims that the court applied the wrong legal standard in analyzing whether the defendant's conduct was protected activity. Specifically, the plaintiff contends that the court should have analyzed the first

[15] As stated previously in this opinion, the court also concluded that all of the plaintiff's claims were barred by article first, §§ 4, 5 and 14, of the state constitution, that some, but not all, of the plaintiff's claims were barred by the litigation privilege, and that the plaintiff had not alleged sufficient facts to demonstrate probable cause that it would prevail on its tortious interference claim. Because our conclusion that the plaintiff cannot prevail on its sham litigation claim is sufficient to dispose of this appeal, we need not address whether the court properly concluded that the defendant's alleged conduct is protected by the Connecticut constitution.

[16] On the same day, the court entered an order denying the motion for leave to amend. In addition, on September 30, 2024, the court entered an order awarding the defendant attorney's fees in the amount of $26,880.

amendment defense under the *Noerr-Pennington* doctrine; see *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961) (*Noerr*); and the "sham litigation" exception thereto, established by the United States Supreme Court in *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 404 U.S. 508. The plaintiff claims that, analyzed under that standard, there was probable cause that the defendant's conduct falls within the sham litigation exception and, therefore, that the plaintiff's complaint was not barred by the first amendment. The defendant contends that the plaintiff cannot prevail on its sham litigation claim because the record does not support a finding of probable cause that the defendant's challenges to the facility were objectively baseless, as required to establish that the sham exception applies. We agree with the defendant.[17]

[17] The defendant also contends that the plaintiff's claim is not reviewable because the plaintiff "never once mentioned the *Noerr-Pennington* doctrine, the sham exception to it, any of the cases . . . setting forth the current test for the sham exception . . . or even that there was some established exception to first amendment protections for 'abuse of judicial and administrative proceedings for anticompetitive purposes' . . . ." Although the plaintiff did not expressly raise either the *Noerr-Pennington* doctrine or the sham exception, and we question whether the plaintiff's mere reference to *California Motor Transport Co.* was adequate to put the trial court on notice of its claim, we exercise our discretion to review the plaintiff's claim "because 'the minimal requirements for review [have been] met and . . . the party who raised the unpreserved claim cannot prevail.' " *Forgione* v. *Forgione*, 186 Conn. App. 525, 533, 200 A.3d 190 (2018), quoting *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014). Moreover, because the question of whether the plaintiff met its burden to establish probable cause that it would prevail, as required to defeat the defendant's anti-SLAPP motion, is a question of law subject to plenary review, we can address the plaintiff's claim even though the trial court did not expressly address it. See *Robinson* v. *V. D.*, 229 Conn. App. 316, 342, 328 A.3d 198 (2024) (in appeal from denial of anti-SLAPP special motion to dismiss, this court addressed question of whether plaintiffs established probable cause that they would prevail on their complaint without remanding to trial court because "determination of whether

The following legal principles and standard of review govern our review of the plaintiff's claim. Under § 52-196a, "a party may file a special motion to dismiss when the opposing party's complaint is based on the moving party's exercise of, among other things, the right of free speech or the right to petition the government in connection with a matter of public concern." *Priore* v. *Haig*, 344 Conn. 636, 659, 280 A.3d 402 (2022). Pursuant to § 52-196a (e) (3), the moving party bears the initial burden to show by a preponderance of the evidence that the complaint "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 . . . ." If the moving party satisfies that burden, the burden shifts to the nonmoving party to establish "that there is probable cause, considering all valid defenses, that the [nonmoving] party will prevail on the merits of the complaint . . . ." General Statutes § 52-196a (e) (3).

In the present case, the plaintiff challenges only the court's conclusion that it failed to establish probable cause that it would prevail under the second prong of § 52-196a (e) (3). "The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." (Internal quotation marks omitted.) *Elder* v. *Kauffman*, 204 Conn. App. 818, 825, 254 A.3d 1001 (2021). "Proof of probable cause is not as demanding as proof by preponderance of the evidence . . . and is substantially less than that required for conviction under the reasonable doubt standard." (Citation omitted; internal quotation marks omitted.) *Mulvihill* v. *Spinnato*, 228 Conn. App.

allegations of a complaint, assuming they are true, demonstrate the existence of probable cause raises a question of law").

781, 790, 326 A.3d 251, cert. denied, 350 Conn. 926, 326 A.3d 248 (2024). "Probable cause is a flexible common sense standard . . . [that] does not demand that a belief be correct or more likely true than false." (Internal quotation marks omitted.) *36 DeForest Avenue, LLC* v. *Creadore*, 99 Conn. App. 690, 695, 915 A.2d 916, cert. denied, 282 Conn. 905, 920 A.2d 311 (2007).

In assessing whether the plaintiff established probable cause that it would prevail under the second prong of § 52-196a (e) (3), the court must "construe the pleadings, affidavits, and other proof submitted in the light most favorable to the [plaintiff]"; *Mulvihill* v. *Spinnato*, supra, 228 Conn. App. 794; and determine "whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment." Id., 795. Whether the plaintiff established probable cause that it would prevail is a question of law subject to plenary review. Id., 790.

The plaintiff argues that the court erred in concluding that the first amendment barred its claims because the court should have analyzed the first amendment defense under the *Noerr-Pennington* doctrine and determined that there was probable cause that the sham litigation exception to that doctrine applies. As this court previously has explained, the *Noerr-Pennington* doctrine stems from a trio of federal antitrust cases: *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 404 U.S. 508, *United Mine Workers of America* v. *Pennington*, supra, 381 U.S. 657, and *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, supra, 365 U.S. 127; see *Zeller* v. *Consolini*, 59 Conn. App. 545, 550, 758 A.2d 376 (2000); in which the United States Supreme Court held that the first amendment "shields from the Sherman [Antitrust] Act [15 U.S.C § 1 et seq.] a concerted effort to influence public officials regardless of intent or purpose." (Internal quotation marks omitted.) Id. In those cases, the Supreme Court

"reasoned that 'it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors. *California Motor Transport Co.* v. *Trucking Unlimited*, supra, 510–11.' " *Zeller* v. *Consolini*, supra, 550. The doctrine has since "evolved from its antitrust origins to apply to . . . myriad . . . situations in which it shields individuals from liability for petitioning a governmental entity for redress." Id., 551. In *Zeller* v. *Consolini*, supra, 545, this court "adopt[ed] the *Noerr-Pennington* doctrine and its accompanying sham [litigation] exception as the applicable analysis" for CUTPA and tortious interference with business relations claims premised on a defendant's use of agency and court proceedings for an anticompetitive purpose. Id., 554; see also *Procurement, LLC* v. *Ahuja*, 197 Conn. App. 696, 707, 234 A.3d 135 (2020).

The protection afforded by the *Noerr-Pennington* doctrine, however, "is not limitless," as it does not apply to "petitioning activity . . . [that] is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling." *Zeller* v. *Consolini*, supra, 59 Conn. App. 551–52. "In *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60–62, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993), the court outlined a two part test to define sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Id., 60. Second, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor . . . through the use [of] the governmental process—as

opposed to the outcome of that process—as an anticompetitive weapon . . . . Id., 60–61." (Internal quotation marks omitted.) *Zeller* v. *Consolini*, supra, 552. "This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability." (Emphasis in original.) *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Industries, Inc.*, supra, 61. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." Id., 60.

The objective prong of the sham litigation exception is a high bar. As the court explained in *Professional Real Estate Investors, Inc.*, a plaintiff invoking the sham exception must show that the challenged litigation was "so baseless that no reasonable litigant could realistically expect to secure favorable relief"; id., 62; and "[t]he existence of probable cause to institute legal proceedings precludes a finding that [a] . . . defendant has engaged in sham litigation." Id. In other words, a plaintiff "[cannot] pierce [a defendant's] [*Noerr-Pennington*] immunity without proof that [the challenged] action was . . . frivolous." Id., 65. Moreover, because "a party's action cannot be objectively baseless when at least one claim in the action has merit"; *Procurement, LLC* v. *Ahuja*, supra, 197 Conn. App. 720; the plaintiff must show that *all* claims in the challenged litigation were frivolous. Thus, under the objectively baseless standard, "[a] defendant will be entitled to *Noerr-Pennington* immunity if it enjoyed virtually *any* success in the underlying litigation, unless [that success is] tainted by fraud."[18] (Emphasis added.) 8 P. Halle & J. Everett,

[18] Some federal courts have held that the sham exception may be satisfied if the plaintiff shows that the defendant made fraudulent misrepresentations in the challenged proceeding that affected the outcome of that proceeding. See, e.g., *Mercatus Group, LLC* v. *Lake Forest Hospital*, 641 F.3d 834, 843 (7th Cir. 2011) ("a misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered

Business & Commercial Litigation in Federal Courts (R. Haig ed., 5th Ed. 2024) § 87:68. This demanding standard is warranted because "even unsuccessful but reasonably based suits . . . allow the public airing of disputed facts . . . and raise matters of public concern." (Citation omitted; internal quotation marks omitted.) *BE&K Construction Co.* v. *National Labor Relations Board*, 536 U.S. 516, 532, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); see also *Zeller* v. *Consolini*, supra, 59 Conn. App. 553–54 ("[t]he *Noerr-Pennington* doctrine subordinates . . . commercial expediency to the constitutional rights of individuals and groups to petition their government . . . [and] failure to apply [it] aggressively may create a chilling effect on the first amendment right to petition in zoning and other matters" (internal quotation marks omitted)).

In the present case, the complaint alleged that the defendant participated in the following proceedings for the purpose of preventing the construction of the facility: the plaintiff's application for a special permit and site plan application before the commission; the defendant's subsequent appeal from the commission's decision to the Superior Court; the plaintiff's application

the outcome of the proceeding"); *Baltimore Scrap Corp.* v. *David J. Joseph Co.*, 237 F.3d 394, 401–402 (4th Cir. 2001) ("If a fraud exception to *Noerr Pennington* does exist, it extends only to the type of fraud that deprives litigation of its legitimacy. . . . If a judgment is not procured by fraud or deceit, it cannot fall within any fraud exception to *Noerr-Pennington*." (Citations omitted.)), cert. denied, 533 U.S. 916, 121 S. Ct. 2521, 150 L. Ed. 2d 693 (2001); but see *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154, 162 (3rd Cir. 1999) (plaintiff's claim that defendant committed antitrust violation by inducing state regulators to deny certificate of need application on basis of allegedly false and misleading statements did not satisfy sham exception because "[l]iability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision making process"), cert. denied, 530 U.S. 1261, 120 S. Ct. 2716, 147 L. Ed. 2d 982 (2000). Connecticut courts have yet to address this issue and we need not address it here because the plaintiff has not raised it in the present appeal.

for a certificate of need before the OHCA; and the defendant's subsequent appeals from the OHCA proceedings to the Superior Court, this court, and our Supreme Court.[19] Because § 52-196a (e) (3) provides that the plaintiff was required to establish probable cause that it would prevail on its claims, in assessing the plaintiff's claim that the sham exception applies to the defendant's conduct in these proceedings, we review the record to determine whether the plaintiff met its burden to establish probable cause that the defendant's challenge in each proceeding was objectively baseless. See *Robinson* v. *V. D.*, 229 Conn. App. 316, 342, 328 A.3d 198 (2024) (reviewing trial court record to determine whether plaintiffs established probable cause that they would prevail on claim).

As an initial matter, we note that, in arguing on appeal that the sham litigation exception applies, the plaintiff primarily directs its arguments toward the defendant's intervention in the proceedings before the OHCA. Although the plaintiff makes one passing reference to the proceedings before the commission in connection with its argument regarding the subjective prong of the sham exception, the plaintiff otherwise focuses exclusively on the proceedings before the OHCA. Similarly,

[19] As noted previously in this opinion, the complaint also alleged that the defendant made statements to the public and to the press intended to drum up opposition to the facility. On appeal, neither party addresses whether these statements—which were made outside of the proceedings at issue—are protected by the *Noerr-Pennington* doctrine and, if so, whether they are subject to the sham exception. In addition, the plaintiff does not claim that the court erred in concluding that these statements were a matter of public concern. In fact, in the section of the plaintiff's brief addressing the court's first amendment analysis, the plaintiff does not mention the defendant's statements to the public and to the press at all. Accordingly, we decline to address whether the court erred in concluding that the first amendment barred the plaintiff's claims with respect to these statements. See, e.g., *Procurement, LLC* v. *Ahuja*, supra, 197 Conn. App. 703 n.3 (declining to address application of *Noerr-Pennington* doctrine and sham exception to alleged nonpetitioning activity where plaintiff failed adequately to brief that issue).

before the trial court, the plaintiff did not make any allegations or present any evidence concerning the factual or legal bases of the defendant's claims before the commission or in its ensuing administrative appeal from the commission's decision.[20] Nor did the plaintiff present any information about the legal basis for the defendant's claims in its administrative appeal from the OHCA proceedings, or any argument to support a claim that the defendant's subsequent appeals to this court and our Supreme Court were objectively without merit. The plaintiff, which bore the burden of establishing probable cause that it would prevail on these claims, is unable to satisfy its burden without providing a sufficient record to establish that the defendant's claims were objectively baseless. Accordingly, we conclude that the plaintiff failed to establish probable cause that the sham litigation exception applies to the defendant's challenge before the commission, its appeal from the decisions of the commission, and its appeals from the OHCA proceedings.

With respect to the OHCA proceedings themselves, although the record does include information about at

[20] The only information in the record that even arguably relates to the defendant's claims before the commission and the ensuing administrative appeal appears in two paragraphs in the complaint, in which the plaintiff alleged that the defendant made "false and damaging statements about [the plaintiff] and its leadership before the [commission] and the OHCA, falsely characterizing them as nothing more than money-grabbing investors with no legitimate interest in serving the addiction treatment population in Connecticut," and that, during the appeal from the commission's decision, Schwab stated that the plaintiff would " 'skim the cream off the top' . . . in terms of attracting patients with 'good insurance policies.' " There is no information in the record, however, that provides any context to explain whether these statements were relevant to the merits of the defendant's legal claims, and the plaintiff does not argue on appeal that these statements show that the defendant's legal claims in the relevant proceedings were objectively baseless. Accordingly, these allegations do not support the conclusion that the defendant's claims before the commission and in its subsequent administrative appeal were objectively baseless.

least some of the arguments that the defendant presented to the OCHA, it does not support the plaintiff's claim that the defendant's challenge was objectively baseless. To the contrary, the information that was presented to the court about the OHCA proceedings supports the conclusion that the defendant had an objectively reasonable basis for challenging the plaintiff's application for a certificate of need.[21]

In its request to intervene in the certificate of need proceeding, the defendant stated that it intended to present evidence that "(1) the [plaintiff] has failed to establish a clear public need for the facility; (2) the proposed facility will have a significant and detrimental impact on existing residential substance use disorder treatment facilities located in Connecticut, including the [defendant's] facility; and (3) the proposed application will not be in the best interests of the statewide health care delivery system." As the plaintiff acknowledges, the hearing officer agreed with the defendant and issued a proposed final decision recommending that the department deny the plaintiff's application. Although the department did not adopt the proposed final decision and instead granted the plaintiff's application by way of the agreed settlement, the department's findings that accompanied the agreed settlement were consistent with many of the arguments the defendant made in its motion to intervene. Specifically, the department found that "[t]he [plaintiff] has not sufficiently demonstrated that there is a clear public need for the [facility]"; that "[t]he [plaintiff] did not provide any evidence that its proposal would not have a negative economic impact on facilities like [the defendant's] or the

[21] As mentioned previously; see footnote 13 of this opinion; the plaintiff did not present any evidence in support of its opposition to the special motion to dismiss. Thus, aside from the allegations in the complaint, all of the information in the record about the defendant's challenge to the plaintiff's certificate of need application is from the exhibits submitted by the defendant in support of its special motion to dismiss.

behavioral health care system in Connecticut"; that "[t]he [plaintiff's] proposal . . . will have a negative impact on the financial strength of the behavioral health care system in the state"; and that the plaintiff "failed to provide credible evidence that its program would be a high quality, cost-effective model that would avoid negatively impacting the financial well-being of nonprofit substance abuse treatment facilities in Connecticut." Moreover, as discussed previously; see footnotes 8 and 9 of this opinion and accompanying text; the department found against the plaintiff on ten of the twelve statutory factors that it was required to consider in assessing the plaintiff's application. Even though the defendant ultimately was not successful in convincing the department to deny the plaintiff's application, the defendant's initial success before the hearing officer, together with the department's favorable findings, weigh heavily against the plaintiff's claim that the defendant lacked an objectively reasonable basis for its claims in that proceeding. The plaintiff's failure to provide evidence or argument to the contrary is fatal to its claim that the defendant's challenge before the OHCA constituted sham litigation.

The plaintiff nevertheless points to two arguments that the defendant made in the OHCA proceedings that, the plaintiff contends, show that the defendant's challenge to the plaintiff's certificate of need application was baseless. First, the plaintiff notes that the defendant "told the OHCA that there was no public need for [the plaintiff's] substance abuse treatment services, but then sought to expand its own facility to provide the same services and serve the need it claimed did not exist."[22]

[22] As the defendant notes in its appellate brief, it appears from the record that the defendant's subsequent decision to expand its own facility to serve the target population was not inconsistent with its claim that there was no clear public need for the plaintiff's facility. Specifically, in the agreed settlement, the department found that "[t]he [plaintiff] has not sufficiently demonstrated that there is a clear public need for the [facility]" and, citing Schwab's testimony, further found that "[e]xisting providers in the service

Second, the plaintiff relies on the fact that the defendant "told the OHCA that [the] facility would increase emergency services costs, but then dismissed these same concerns when raised about its proposed expansion." The plaintiff argues that this "incongruity" between the defendant's arguments to the OHCA and its subsequent conduct "at least provides good reason to believe . . . that those objections were disingenuous and baseless." We disagree.

First, the mere fact that the defendant took a position in later proceedings that arguably was inconsistent with certain arguments it previously had made to the OHCA does not mean that those arguments were objectively meritless at the time that they were made. To satisfy the sham litigation exception, the plaintiff was required to show that the defendant's challenge to the plaintiff's application was "frivolous"; *Professional Real Estate Investors*, *Inc.* v. *Columbia Pictures Industries*, *Inc.*, supra, 508 U.S. 65; in that "no reasonable litigant could realistically [have] expect[ed]" to prevail. Id., 62. The plaintiff did not present any evidence to indicate that the defendant did not have a good faith basis for its arguments at the time it presented them to the OHCA. That the defendant later took a position in a different proceeding that differed with respect to some of the arguments it made to the OHCA does not mean that those arguments were objectively baseless. Cf. *Diamond 67*, *LLC* v. *Oatis*, 167 Conn. App. 659, 688–89, 144 A.3d 1055 (evidence supported claim that defendants lacked good faith basis for claim that proposed construction project would pollute groundwater, so as to satisfy sham exception, based on emails indicating defendants were aware their claims were false when they made them), cert. denied, 323 Conn. 926, 150 A.3d 230 (2016), and cert. denied, 323 Conn. 927, 150 A.3d

area can incrementally add beds to existing operations in a cost effective manner."

228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 228 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 229 (2016), and cert. denied, 323 Conn. 927, 150 A.3d 230 (2016).[23]

Second, and perhaps more importantly, even if the alleged inconsistency in the defendant's arguments does establish that those specific arguments were baseless, that still would not be sufficient to satisfy the plaintiff's burden. As this court previously recognized, because "a party's action cannot be objectively baseless when at least one claim in the action has merit"; *Procurement, LLC* v. *Ahuja*, supra, 197 Conn. App. 720; a party "[does] not need to show a realistic expectation of success on *all* of [the] arguments in each petition . . . ." (Emphasis in original; internal quotation marks omitted.) Id. Thus, the plaintiff could not meet its burden by pointing only to certain arguments made by the defendant before the OHCA that were allegedly inconsistent with its later conduct. Instead, the plaintiff was required to establish that no reasonable litigant could have expected to prevail in challenging the plaintiff's application for a certificate of need. As discussed

[23] The plaintiff incorrectly relies on *Diamond 67, LLC*, in arguing that there was probable cause that the sham exception applies because the defendant made "knowingly false" claims to the OHCA. First, the plaintiff did not present evidence of any "knowingly false submissions" on the part of the defendant, but merely alleged that the defendant took a different position on certain issues in subsequent proceedings. In contrast, in *Diamond 67, LLC*, the plaintiff submitted evidence that the defendants, who had intervened in prior proceedings to object to a construction project on the basis that it would pollute a reservoir they claimed was a source of drinking water, knew that claim was false at the time they submitted their verified petitions to intervene. See *Diamond 67, LLC* v. *Oatis*, supra, 167 Conn. App. 688–89. Second, as discussed herein, the plaintiff here did not allege or present any evidence that *all* of the defendant's claims before the OHCA were objectively baseless, but only that some of their arguments were inconsistent with positions they took in later proceedings. In contrast, because the sole basis of the defendants' opposition to the construction project in *Diamond 67, LLC*, was that it would pollute the reservoir; see id., 667–68; evidence that the defendants knew their claim was false necessarily sufficed to establish that their entire claim was baseless.

previously, the record before the court showed the opposite: that the defendant had an objectively reasonable basis for challenging the plaintiff's application.

On the basis of the foregoing, we conclude that the plaintiff failed to establish probable cause that it would prevail on its claims in light of the defendant's first amendment defense and, accordingly, that the court did not err in concluding that the complaint was barred by the first amendment. Because the court's conclusion in that regard, standing alone, was sufficient to justify its dismissal of the complaint, we further conclude that the court did not err in dismissing the plaintiff's complaint.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HUGO ROSA
(AC 46610)

Alvord, Elgo and Westbrook, Js.

Syllabus

Convicted of the crimes of risk of injury to a child and sexual assault in the fourth degree as a result of his abuse of the minor victim, T, the defendant appealed, claiming, inter alia, that the trial court improperly limited its disclosure of certain of T's confidential medical and mental health records and refused to conduct a second in camera review of those records in light of the Supreme Court's decision in *State* v. *Juan A. G.-P.* (346 Conn. 132). *Held*:

The evidence was sufficient to support the defendant's conviction with respect to one count each of risk of injury to a child and fourth degree sexual assault, predicated on the defendant's conduct in touching T in her buttock area, as T's testimony at trial was consistent with her statements during her forensic interview by a clinical social worker describing how the defendant had contact with her buttock while she was asleep.

The trial court did not abuse its discretion in admitting into evidence portions of a video recording of T's forensic interview with a clinical social worker under the medical diagnosis and treatment exception to the hearsay rule

in a provision (§ 8-3 (5)) of the Connecticut Code of Evidence, as an objective observer reasonably could conclude that T's disclosures during the interview, in particular her statement regarding DNA, were made, at least in part, for the purpose of receiving medical treatment and were pertinent to that end.

The trial court did not abuse its discretion by declining to release portions of T's confidential medical and mental health records or by redacting portions of those records it did disclose, and, in rejecting the defendant's request that it conduct a second review of those records in light of *Juan A. G.-P.*, the court correctly concluded that *Juan A. G.-P.* did not alter the standard applicable to in camera review of confidential records and indicated that, in conducting its review, it had searched the records for both relevant exculpatory and inculpatory material.

Argued February 11—officially released June 10, 2025

Procedural History

Substitute information charging the defendant with five counts of the crime of risk of injury to a child and two counts of the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of New Haven, geographical area number seven at Meriden, and tried to the jury before *Chaplin*, *J.*; thereafter, the court granted in part the defendant's motion for a judgment of acquittal and denied the defendant's motion for in camera review of certain confidential records; verdict and judgment of guilty of three counts of risk of injury to a child and two counts of sexual assault in the fourth degree, from which the defendant appealed to this court. *Affirmed.*

Trent A. LaLima, assigned counsel, with whom was *Virginia Gillette*, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Nichol Peco*, senior assistant state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The defendant, Hugo Rosa, appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of risk of injury to a child in violation of § 53-21 (a) (1). On appeal, the defendant claims that (1) there was insufficient evidence for the jury to reasonably find that he had contact with the "buttock area" of the victim, T,[1] as alleged in the information with respect to one count of sexual assault in the fourth degree and one count of risk of injury to a child under § 53-21 (a) (2); (2) the trial court improperly admitted portions of T's video-recorded forensic interview under the medical diagnosis and treatment exception to the rule against hearsay; and (3) the trial court improperly limited the disclosure of certain of T's confidential medical and mental health records following an in camera review of those records.[2] We disagree and, accordingly, affirm the judgment of the court.

The following facts, which the jury reasonably could have found on the basis of the evidence presented, and

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

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

[2] Although the defendant addresses his claim of evidentiary insufficiency last in his brief to this court, we will address that claim first because, if he were to prevail on that claim, he would be entitled to a directed judgment of acquittal, rather than to a new trial, and it would not be necessary to address his other claims. See, e.g., *State* v. *White*, 215 Conn. App. 273, 276 n.1, 283 A.3d 542 (2022), cert. denied, 346 Conn. 918, 291 A.3d 108 (2023).

procedural history are relevant to our resolution of this appeal. In April, 2015, the defendant began sharing a residence with his girlfriend, L, and her two children, T and E, when T was ten years old and E was five years old. During this time, T and E visited their biological father every other weekend, and L worked night shifts from 6 p.m. until 12 a.m. In March, 2016, T and E's brother, J, was born, and he also lived with the defendant and L.

One night in June, 2017, while L was working, T, who was then eleven years old, woke up while lying on her stomach with her underwear pulled down to her midthigh and the defendant rubbing directly underneath her left buttock. Before T had gone to sleep, her underwear had been fully on. T told L about the incident, but L did nothing about it. On another occasion, when T was twelve years old, she awoke to the defendant rubbing her vaginal area. T told L about this incident as well, but L, again, took no action. In October, 2018, at approximately 5 a.m., T was asleep on a couch with E when she awoke to the sound of a picture frame falling and saw the defendant walking away from her. T looked down and noticed that her shirt was "rolled up just above [her] chest." E told T that he had seen the defendant take a blanket off T, roll up her shirt, and touch her breasts. T immediately told L what had happened, and, on this occasion, L confronted the defendant. The defendant, however, denied what had happened.

On April 24, 2019, E was in the home, standing on a counter that had lights hanging overhead. E was swinging a toy around the lights when, according to T, the defendant said to E, "if you break that I'm going to break your face." T then took E to a bedroom, locked the door, and called their father. During this phone call, T told her father that the defendant had been touching her inappropriately. On April 26, 2019, T's father picked up T and E for his scheduled visitation and went to

the Meriden Police Department, where T provided a statement regarding the defendant's abuse.

On May 30, 2019, on the basis of a referral from the Department of Children and Families (department), T met with Maria Silva, a clinical social worker at the Yale Child Abuse Clinic, for a forensic interview to assess T's safety, mental health, and medical well-being. The interview was observed by Silva's colleagues from the clinic, as well as the police and a department employee. After the interview, Silva informed the clinic's nurse practitioner that T was ready to be seen for an assessment of any medical needs, and, through T's father, referred T to a trauma therapy program to connect her with both short-term and long-term mental health services.[3]

Following the forensic interview, both the department and the police conducted concurrent investigations into T's allegations.[4] On October 11, 2019, the police arrested the defendant, and, on December 9, 2019, he was charged in a long form information with two counts of sexual assault in the fourth degree in violation of § 53a-73a[5] and five counts of risk of injury to a child in violation of § 53-21.[6] Counts one and three

[3] T later received treatment from Julia Savio, a licensed marriage and family therapist, and Mariyah Charlton, a clinical mental health counselor, to whom T was referred due to depression, suicidal ideations, self-injurious behavior, and trauma as a result of sexual abuse.

[4] According to the police officer's affidavit submitted with the arrest warrant application for the defendant, which was not presented to the jury, the department substantiated allegations of physical neglect by L of T and E, and also substantiated allegations of sexual abuse by the defendant regarding T.

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

[6] General Statutes § 53-21 (a) provides in relevant part: "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

charged the defendant with sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) for, respectively, touching T in her buttock area and rubbing her vaginal area. Counts two and four charged him with risk of injury to a child in violation of § 53-21 (a) (2) for, respectively, touching T in her buttock area and rubbing her vaginal area. Counts five, six, and seven, charged him with risk of injury to a child in violation of § 53-21 (a) (1) for, respectively, rolling up T's shirt and exposing her breasts, physically assaulting E, and physically assaulting J. The defendant entered not guilty pleas on all counts.

The case was tried to a jury beginning on February 8, 2023. On February 9, 2023, after the close of the state's case-in-chief, defense counsel made an oral motion for a judgment of acquittal as to counts one, two, six, and seven, arguing that the evidence presented did not support the factual allegations in the information. After hearing counsel's arguments, the state conceded that the court should dismiss count seven but otherwise opposed the motion. Thereafter, the court, *Chaplin*, *J.*, dismissed count seven but denied the motion as to counts one, two, and six. On February 10, 2023, the state filed a substitute long form information reflecting this change.

On February 14, 2023, the jury found the defendant guilty of both counts of sexual assault, both counts of

impair the health or morals of any such child, or (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of (A) a class C felony for a violation of subdivision (1) . . . of this subsection, and (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

risk of injury to a child in violation of § 53-21 (a) (2), and the count of risk of injury to a child in violation of § 53-21 (a) (1) predicated on the defendant's having exposed T's breasts. The jury found the defendant not guilty on the remaining count of risk of injury predicated on his alleged physical assault of E. The court sentenced the defendant to a total effective term of twenty years of incarceration, suspended after seven years, with ten years of probation and lifetime sex offender registration. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's claim that the evidence was insufficient to support his conviction with respect to counts one and two, which allege, respectively, sexual assault in the fourth degree in violation of § 53a-73a (a) (1) and risk of injury to a child in violation of § 53-21 (a) (2). Specifically, he asserts that no evidence was admitted from which the jury reasonably could have found that he had contact with T's "buttock area" as alleged in the information as the factual predicate for those counts. We disagree.

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

"[T]he jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and

inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"[P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [finder of fact], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Nichols*, 226 Conn. App. 359, 374–75, 317 A.3d 861 (2024).

Counts one and two of the operative long form information charged the defendant with sexual assault and risk of injury on factual allegations that "the defendant touched [T] . . . in her buttock area." Section 53a-73a (a) (1) provides in relevant part that a person is guilty of sexual assault in the fourth degree if that person "subjects another person to sexual contact . . . ." Sexual contact, as that term is used throughout part VI of the Penal Code governing sex offenses, is defined in General Statutes (Rev. 2017) § 53a-65 (3), which provides in relevant part that sexual contact means "any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the

actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person." Section 53a-65 further defines "intimate parts" to mean "the genital area or any substance emitted therefrom, groin, anus or any substance emitted therefrom, inner thighs, buttocks or breasts." General Statutes § 53a-65 (8). Moreover, § 53-21 (a) (2) provides in relevant part that a person is guilty of risk of injury to a child if that person "has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . ." Accordingly, proof of contact with an intimate part of T's body, specifically, her buttock, was an essential element of both counts one and two.

Contrary to the defendant's assertion on appeal, however, there was sufficient evidence presented to the jury from which it reasonably could have found, beyond a reasonable doubt, that the defendant had contact with T's buttock. T testified at trial that, when she was approximately eleven years old, "there was a night where I'd wake up and my underwear was, like, down. And he was—I was [lying] on my stomach and he was rubbing this, like, the underneath my butt, like, where my thigh, the back of my thigh. Just, like, rubbing on my body. . . . Just below—just below my butt." This testimony was consistent with her statements at the forensic interview, admitted at trial,[7] during which she

[7] Although the defendant challenges on appeal the admission of the forensic interview video, a claim we reject in part II of this opinion, "in evaluating a claim of evidentiary insufficiency, we consider the totality of the evidence that was before the trier of fact, including any evidence claimed to have been improperly admitted by the court." *In re Alizabeth L.-T.*, 213 Conn. App. 541, 604 n.26, 278 A.3d 547 (2022), citing *State* v. *Chemlen*, 165 Conn. App. 791, 818, 140 A.3d 347 ("[A]ppellate review of the sufficiency of the evidence . . . properly includes hearsay evidence even if such evidence

told Silva that she "woke up with my underwear down and [the defendant] was rubbing my leg back here." Contemporaneously with that statement, T placed a mark on a line of an anatomically correct drawing that represented the crease between the bottom of the buttock and the top of the thigh, reiterating that the defendant had touched her on the "line between my butt and my leg. My thigh." Silvia clarified with T where the defendant had touched her, asking: "Butt and thigh?" T responded: "Yes." The defendant argues that the only reasonable inference to be drawn from this evidence is that he had touched T in the buttocks area but not on the actual buttocks. We reject such a narrow view of the evidence.

"[J]urors, in deciding cases, are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion." (Internal quotation marks omitted.) *State* v. *Elmer G.*, 176 Conn. App. 343, 376, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019). T's description of the area where the defendant had touched her encompassed the area of the buttocks where it meets the upper thigh. She indicated that same area on the anatomical drawing. When asked by Silva to clarify whether the defendant had touched her on the "butt *and* thigh"; (emphasis added); T answered, "yes," from which the jury was free to conclude that he had touched both areas of her body. Construing the evidence in the light most favorable to sustaining the verdict, as we must, we view the aforementioned evidence alone as supporting a reasonable inference that the defendant had touched T on the buttocks. See *State*

was admitted despite a purportedly valid objection. Claims of evidentiary insufficiency in criminal cases are always addressed independently of claims of evidentiary error." (Internal quotation marks omitted.)), cert. denied, 322 Conn. 908, 140 A.3d 977 (2016).

v. *Alberto M.*, 120 Conn. App. 104, 111, 991 A.2d 578 (2010) (victim's testimony that defendant touched her " 'breast area' " was sufficient to support jury's finding that defendant made contact with victim's breasts).

Moreover, T also testified that her underwear was on when she fell asleep, and it is both logical and common sense that, to pull down her underwear to expose her buttocks and upper thigh, the defendant would have made contact with T's buttocks. See id., (irrelevant whether contact was made through victim's clothing rather than against bare skin). We agree with the state that "a person who is engaged in surreptitiously pulling down a sleeping child's underpants in the dead of night, exposing her buttocks, is acting crudely in haste, unconcerned with doing so delicately enough to ensure that his hand or hands touch only the garment, but not the child's flesh." Because, on the basis of the totality of the evidence presented, it was reasonable for the jury to infer that the defendant had touched T's buttock, an intimate part of her body, we reject the defendant's sufficiency of the evidence claim.

II

The defendant next claims that the trial court abused its discretion by admitting into evidence portions of T's forensic interview. Specifically, the defendant argues that the court should have excluded the videotape of the interview as hearsay because it did not meet the medical diagnosis and treatment exception to the rule against hearsay set forth in § 8-3 of the Connecticut Code of Evidence.[8] We disagree.

[8] The defendant also argues, as an aspect of his claim, that the court abused its discretion because it admitted the videotape without first viewing and considering its content. We agree with the state that this aspect of the defendant's evidentiary claim was not preserved because the defendant never asked the court to view the videotape prior to ruling on its admission and did not raise any objection to its admission on the ground that the court had not viewed it prior to ruling. "In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise

The following additional facts and procedural history are relevant to our discussion of this claim. During its direct examination of Silva regarding her forensic examination of T, the state sought to introduce into evidence the videotape of the forensic interview. Defense counsel objected to the admission of the videotape on hearsay grounds. The state countered that the videotape was admissible under the medical diagnosis and treatment exception to the hearsay rule.

The court heard argument on the objection outside the presence of the jury. Defense counsel argued that the medical exception did not apply in this case because T's forensic interview was conducted only for investigative purposes. Counsel pointed to the fact that the interview was conducted more than one month after T had disclosed the alleged incidents of abuse and eight months after the last alleged incident of abuse. Moreover, defense counsel argued that T, who had testified just prior to Silva, had not established through her own testimony that she understood the interview to have any medical purpose, having indicated that she did not undergo any medical examination or procedure as part of the interview.[9] Defense counsel also pointed out to

the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013). Because the defendant failed to properly preserve this aspect of his claim, we decline to review it.

[9] The relevant portion of T's direct testimony regarding the forensic interview was as follows:

"Q. . . . [D]id you meet with Maria Silva from Yale?

"A. Yes.

"Q. And do you remember why you met with Maria Silva from Yale?

"A. She was explaining to me that she wanted to make sure I knew the body parts. She was showing me a poster of, like, a drawing of a body, telling me to point out what areas were which. And she would tell me that this was a place where people have similar—children have similar cases like mine, and they check for DNA and stuff like that.

"Q. So, did you get a medical examination while you were there?

"A. No. . . .

"Q. Did you meet with an [advanced practice registered nurse] after you met with Maria Silva, a nurse?

the court that, during the forensic interview, Silva had asked T why her father had brought her to the clinic that day and that T had responded, "[b]ecause the [department] said to come here today so they can ask questions . . . ."

The prosecutor argued to the court that it was reasonable to infer from T's testimony that the interview had a medical purpose, stating that "[t]he medical issue that she was there for was the sexual assault and the trauma that she was experiencing because of it." The prosecutor further noted that T had indicated in her testimony that she was there to discuss her body and had "mentioned DNA." The prosecutor further argued that, because the contents of the videotape had not yet been entered into evidence, the court, in deciding whether to admit the videotape, should not consider T's statement regarding the department.

The court, after hearing from the parties, stated on the record that the primary question before it was "whether there is sufficient information before the court and before the jury that the child in question, the alleged victim, understood that this was for a medical or psychiatric purpose." Thereafter, focusing on T's testimony regarding her understanding of why she was being interviewed by Silva; see footnote 9 of this opinion; the court stated: "So, as to the portion regarding other children, that has no relevance as to her understanding of what her purpose was for that day. As to the evidence that she began therapy after the fact, has no bearing on what her belief of was—belief for the purpose of that event going into it. That doesn't connect that dot. However,

"A. No.
"Q. Did you start therapy soon after meeting with Maria Silva?
"A. Yes.
"Q. Were you going to therapy before meeting with Maria Silva?
"A. No."
The defense did not cross-examine T regarding the forensic interview.

the piece regarding her being examined for DNA, the court will find that is sufficient basis for the medical exception provision to be satisfied, barely." The videotape of the forensic interview was subsequently played, in part, for the jury.[10]

We begin our analysis by setting forth relevant legal principles and our applicable standard of review. "The standard under which we review evidentiary claims depends on the specific nature of the claim presented. . . . To the extent a trial court's admission of evidence is based on an interpretation of [law], our standard of review is plenary. For example, whether a challenged statement properly may be classified as hearsay and whether a hearsay exception properly is identified are legal questions demanding plenary review. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Gordon*, 206 Conn. App. 70, 81–82, 259 A.3d 676, cert. granted, 339 Conn. 913, 262 A.3d 135 (2021) (appeal withdrawn April 8, 2022).

"Hearsay is an out-of-court statement offered for the truth of the matter asserted and generally is inadmissible. . . . The rules of evidence, however, recognize that certain out-of-court statements warrant an exception to the general rule that hearsay constitutes inadmissible evidence. . . . [S]tatements made by a sexual assault victim to a social worker who is acting within the chain of medical care may be admissible under the medical treatment exception to the hearsay rule." (Citations omitted; internal quotation marks omitted.) *State* v. *Freddy T.*, 200 Conn. App. 577, 590–91, 241 A.3d

[10] Three short segments of the videotaped interview were not played for the jury on the basis of other objections raised by defense counsel and sustained by the court, none of which is relevant to our discussion of the present claim. A redacted copy of the forensic interview containing only those portions played for the jury was admitted into evidence as a full exhibit.

173 (2020); see also *State* v. *Roy D. L.*, 339 Conn. 820, 834, 262 A.3d 712 (2021) (medical treatment hearsay exception is applicable to forensic interviews if "the surrounding circumstances could lead an objective observer to reasonably infer that the victim's statements were given in order to obtain medical treatment and diagnosis" (internal quotation marks omitted)).

The medical diagnosis and treatment exception to the hearsay rule, codified in § 8-3 of the Connecticut Code of Evidence, provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) . . . A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment." As our Supreme Court has explained, "the rationale behind the medical treatment exception is that a person's desire to recover his [or her] health incentivizes them to tell the truth to individuals involved in their medical care." (Internal quotation marks omitted.) *State* v. *Roy D. L.*, supra, 339 Conn. 833–34.

Thus, "§ 8-3 (5) [of the Connecticut Code of Evidence] sets forth . . . a two-pronged test. The first [prong] addresses the declarant's purpose or motivation in the making of the statement, and the second addresses the pertinence of the statement to that end.[11] . . . The application of the medical treatment exception, therefore, turns in the first instance on the declarant's state

[11] Although the record before us is silent regarding the pertinence prong of § 8-3 (5) of the Connecticut Code of Evidence, the defendant has not raised on appeal any claim that the court failed to consider pertinence in admitting the videotaped interview or that any admitted statements by T failed to meet the test for admissibility under § 8-3 (5). Accordingly, we do not address the issue further.

of mind and the purpose for which each individual statement was made. . . . The purpose prong is satisfied so long as the declarant's statement was motivated, *at least in part*, by a desire to obtain medical treatment or a diagnosis." (Citations omitted; emphasis added; footnote added; internal quotation marks omitted.) Id., 831.

"[T]he proper application of the existing medical treatment hearsay exception . . . [can] ensure the reliability of . . . statements made at a forensic interview. . . . In cases in which the substance of a juvenile declarant's statement and the circumstances surrounding the statement support an inference that the statement was made in furtherance of obtaining medical treatment, a trial court can reasonably conclude that the purpose prong of the medical treatment exception is satisfied." (Citation omitted; internal quotation marks omitted.) Id., 833.

In the present case, the circumstances surrounding the interview tend to support a reasonable inference that T would have understood that at least one purpose of her participation in the forensic interview was related to her obtaining medical treatment, which would include treatment for any potential mental health issues. See, e.g., *State* v. *Cecil J.*, 99 Conn. App. 274, 289, 913 A.2d 505 (2007) (statements made for purpose of psychological therapy were admissible pursuant to medical treatment exception to hearsay rule), aff'd, 291 Conn. 813, 970 A.2d 710 (2009). Silva's interview with T took place at a medical clinic. Upon arrival, Silva escorted T to the second floor to be registered as a medical patient within the Yale New Haven health care system. T was then given a medical bracelet. Prior to the interview, T met with a child life specialist whose job it was to assess T for any developmental delays and her ability to move forward with the interview process. During the forensic interview, Silva explained to T that

she wanted to make sure that T knew different body parts and asked her to point out the affected areas of her body on an anatomically correct poster. Additionally, as recognized by the trial court, T believed that one of the purposes of the interview was to "check for DNA . . . ."

T also stated during the interview that the department had sent her to the clinic. The defendant argues that, because the department is primarily an investigative agency, not a health care agency, the fact that the department sent T to the clinic for the forensic interview undermines any conclusion that she understood the interview to be for medical treatment purposes. The referral by the department, however, established only *who* sent her to the clinic, not *why* she was sent or, more importantly, whether she reasonably believed the interview would also address medical concerns. Stated differently, the referral by the department did not make it less likely that T's statements during her interview were in some part motivated by her desire to obtain medical treatment, including an evaluation of her current mental health.

At the end of the interview, T was in fact told that she would have the opportunity to ask a nurse about any concerns that she had. The defendant argues that, because T was not told that she could speak with a nurse until the end of the interview, she was not aware that her statements during the interview had any medical purpose, and thus the interview was not for medical treatment purposes. It is true that, in *Freddy T.*, we noted that, "allowing the hearsay exception to be invoked as a result of medical referrals made at the end of a forensic interview poses a risk that the state can 'sanitize' the interview and subvert the hearsay exception." *State* v. *Freddy T.*, supra, 200 Conn. App. 594 n.16. Ultimately, however, "the focus of the hearsay

exception is the declarant's understanding of the interview's purpose, i.e., was it relevant for medical purposes." Id. Accordingly, Silva was not required to expressly inform T that the interview was for medical treatment purposes or to make medical referrals prior to the interview in order for T to have been motivated to participate to obtain medical treatment or a diagnosis. See id., 593 ("the state need only show that the forensic interview had a medical purpose that the declarant reasonably understood").

On the basis of T's statements during the interview, in particular her statement regarding DNA, and, more importantly, the circumstances in which she made those statements, including the location and nature of the interview, an objective observer reasonably could conclude that T's disclosures during the interview were made, at least in part, for the purpose of receiving medical treatment and were pertinent to that end. We, therefore, conclude that the trial court did not abuse its discretion in admitting the videotaped recording of the forensic interview under the medical treatment exception to the hearsay rule.

III

Finally, the defendant claims that the trial court improperly limited the disclosure to him of certain of T's confidential medical and mental health records. According to the defendant, the court's partial disclosure and significant redactions of such records prevented him from fully cross-examining and impeaching T about her allegations against him, which he speculates could have been the result of animus against him and a desire not to be separated from her father. The defendant also argues that the jury had heard harmful testimony from T's therapists, Julia Savio, a licensed marriage and family therapist, and Mariyah Charlton, a clinical mental health counselor, about the impact of

the alleged sexual abuse on T's mental health, and he posits that some of the redacted or undisclosed records may have shed light on alternative causes of T's mental health issues. Finally, the defendant suggests that the disclosed portions of the records indicate that T had participated in family therapy sessions but that the information about those sessions was redacted by the court. The defendant argues that, assuming T's father and brother had participated in those sessions, anything they said that was inconsistent with their testimony, was exculpatory in any way, or gave insight into T's relationship with her father would have been useful in the defendant's cross-examination of them as witnesses. The defendant asks us to review the undisclosed portions of the record as well as the unredacted versions of the disclosed records "to determine whether the undisclosed pages or redactions contained important impeachment or exculpatory information."

The state responds that, without access to the undisclosed portion of the records at issue, it is "unable to offer a meaningful response to the defendant's speculative assertion that the trial court improperly restricted his ability to cross-examine T, Savio, and Charlton." Nonetheless, the state agrees that this court must review the undisclosed portions of T's medical records to determine whether the trial court abused its discretion and, if so, whether that error was harmful.

The following additional facts and procedural history are relevant to this claim. Prior to trial, the state subpoenaed certain confidential medical and mental health records pertaining to T. The records were submitted to the court under seal, and, by agreement of the parties, the court conducted an in-camera review of the records to determine what records, if any, should be disclosed to the parties. At a proceeding on December 5, 2022, the court informed the parties that it had begun its review of the records and had determined that several

documents would need to be disclosed, albeit with substantial redactions. The court indicated that, once its review of the records was complete, it would have the courthouse clerk's office make copies available to the parties of any disclosable records. The court thereafter provided the parties with copies of a significant portion of the reviewed records, with redactions. The court also marked a set as a court exhibit.

On February 8, 2023, prior to the start of the first day of evidence, the defendant filed a motion asking the court to conduct an additional in camera review of the sealed records in light of our Supreme Court's then newly released decision in *State* v. *Juan A. G.-P.*, 346 Conn. 132, 287 A.3d 1060 (2023). Although the defendant acknowledged in his motion that the court already had conducted an in camera review at the request of the parties, he argued that the court had conducted that review "without the guidance for the court provided by *Juan A.* [*G.-P.*]. "The defendant noted that the records the court had disclosed were heavily redacted and that the "entire record must be reviewed to determine if there is exculpatory information, inculpatory information, or information probative of [T's] ability to know and relate to the truth with respect to the event in question, and her ability to observe, understand and accurately narrate the events in question." Defense counsel stressed that it was particularly important to the defense "to know fully every reason as to why [T] is seeking mental health treatment" and that the records the court had provided appeared to redact many of those reasons. The state opposed the motion.

In response to the defendant's motion, the court indicated on the record that it believed it already had conducted an appropriate and thorough review of the records and had disclosed any and all records that the court determined would "show some tendency to disprove or prove relevance as to truthfulness, any regard

to the allegations themselves and things of that nature. So, exculpatory, inculpatory, and just relevance to truthfulness or untruthfulness. So, that was my view of those records. So, it was in line with the Supreme Court case [*Juan A. G.-P.*]." The court also agreed with the state's position that *Juan A. G.-P.* "did not create new law, did not expand the scope [of in camera review]; it just restated the law based on improper exercise of that review . . . ." On that basis, the court denied the defendant's motion requesting an additional in camera review of T's medical records.

We next set forth the law relevant to this claim as well as the applicable standard of review. "A criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. . . . Thus, in some instances, otherwise privileged records . . . must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility. . . . [T]he linchpin of the determination of the defendant's access to [confidential] records is whether they sufficiently disclose material especially probative of the ability to comprehend, know and correctly relate the truth . . . so as to justify breach of their confidentiality and disclos[ure] . . . in order to protect [the defendant's] right of confrontation." (Citations omitted; internal quotation marks omitted.) *State* v. *Francis*, 267 Conn. 162, 177, 836 A.2d 1191 (2003). "[E]ven inculpatory material contained in psychiatric records is relevant information and should be turned over to the defense. This is so because the inculpatory information may differ from the evidence presented at trial, or be inconsistent with

the victims' other statements, thereby calling into question the reliability of the state's version of events." *State* v. *Juan A. G.-P.*, supra, 346 Conn. 155–56.

Upon conducting an in camera review of confidential records, "[i]f the court discovers no probative and impeaching material, the [records] must be sealed and preserved for possible appellate review. . . . Once the trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. . . . Access to confidential records should be left to the discretion of the trial court which is better able to assess the probative value of such evidence as it relates to the particular case before it . . . and to weigh that value against the interest in confidentiality of the records." (Internal quotation marks omitted.) Id., 154.

In the present case, T's confidential medical records were subpoenaed by the state, delivered to the court, sealed and properly marked as a court exhibit to preserve them for appellate review. The court conducted an in camera review of T's records and, on the basis of that review, disclosed portions of the records to the defense. When asked by the defendant to conduct a second review following our Supreme Court's decision in *Juan A. G.-P.*, the court declined to do so, explaining that its prior review of the records was conducted utilizing the correct legal standard. We agree with the trial court that *Juan A. G.-P.* did not alter the standard applicable to an in camera review of confidential records and that, to the extent the Supreme Court clarified that courts have a duty to search for both relevant exculpatory and inculpatory material in conducting their review, the trial court indicated that it had done so in this case. Accordingly, to the extent that the defendant is claiming that there was error in the manner in

which the court conducted its review, he has failed to demonstrate such error.

Moreover, having engaged in our own examination of the records in question, as required; see, e.g., *State* v. *Delgado*, 64 Conn. App. 312, 319, 780 A.2d 180 (2001), aff'd, 261 Conn. 708, 805 A.2d 705 (2002); we cannot conclude that the trial court abused its discretion by declining to release other portions of the records to the defendant or by redacting some portions of the records it did disclose. Because the trial court applied the appropriate legal standard in conducting its review and appropriately balanced the parties' competing interests, including the significant interest in the confidentiality of mental health records,[12] and because, on the basis of our own review of the records, we are not persuaded that the trial court's limited disclosure of T's confidential records likely impaired the defendant's rights to impeach or cross-examine witnesses, the defendant's claim fails.

The judgment is affirmed.

In this opinion the other judges concurred.

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[12] See General Statutes § 52-146e; *State* v. *Kemah*, 289 Conn. 411, 424, 957 A.2d 852 (2008) ("[Section] 52-146e spreads a veil of secrecy over communications and records relating to the diagnosis or treatment of a patient's mental condition. . . . The broad sweep of the statute covers not only disclosure to a defendant or his counsel, but also disclosure to a court even for the limited purpose of an in camera examination." (Citation omitted; internal quotation marks omitted.)).