UNITED CLEANING & RESTORATION, LLC *v.* ANTONIOS KOSKERIDES ET AL.
(AC 47522)

Alvord, Suarez and Clark, Js.

Syllabus

The defendants, commercial property owners, appealed from the trial court's judgment for the plaintiff, a cleaning and restoration construction company, on its breach of contract claim and on the defendants' counterclaim, and from the court's award of attorney's fees to the plaintiff. The defendants claim, inter alia, that the court made clearly erroneous factual findings in connection with its conclusions that the plaintiff had proved its claim that the defendants failed to pay the plaintiff for work performed to repair and remediate the defendants' property after it was damaged in a fire. *Held*:

The trial court's finding that the plaintiff had substantially performed its contractual obligations, despite the defendants' allegation that the plaintiff

failed to obtain a warranty for the property's roof, was not clearly erroneous, as this finding was supported by evidence in the record that the plaintiff was unable to obtain the roof warranty due to the defendants' failure to provide instructions to the plaintiff that would have allowed the plaintiff to obtain a final inspection from the roof manufacturer, and this court was not left with a definite and firm conviction that a mistake had been committed.

The trial court's finding that the plaintiff's completion of phase two of the contract constituted substantial performance was not clearly erroneous, as, although the plaintiff's work took longer than the four months specified in the contract, the timeliness of the plaintiff's work was never an issue, from which the court could have concluded that the parties did not intend for time to be of the essence.

The trial court's finding that the plaintiff substantially performed under the contract, despite having failed to obtain a certificate of occupancy, was not clearly erroneous, as the court reasonably could have concluded that the plaintiff's failure did not deprive the defendants of a benefit reasonably expected in light of the terms and scope of the contract, and that the plaintiff, nonetheless, attempted in good faith to procure certificates of occupancy, but was thwarted by the defendants' failure to provide necessary information.

The trial court's finding that the plaintiff substantially performed under the contract, despite having failed to complete work on the restaurant portion of the property, was not clearly erroneous, as the court was entitled to reasonably conclude that the plaintiff's failure to complete the work only minimally deprived the defendants of a benefit that they reasonably expected under the contract, the defendants had been adequately compensated for the unfinished work by virtue of a credit that the plaintiff provided and honored in pursuing its breach of contract claim, and the plaintiff acted in good faith in attempting to complete all of its required work under the contract.

This court concluded that it did not need to reach the merits of the defendants' claim that the trial court disregarded evidence supporting their valuation of damages in connection with its analysis of the defendants' breach of contract counterclaim, as the defendants failed to challenge the trial court's finding that they bore responsibility for any damages to the property, a finding that was fatal to the defendants' breach of contract claim.

The trial court improperly calculated the award of attorney's fees to the plaintiff, as the plaintiff was not authorized under the language of the parties' contract to recover fees in connection with a third-party complaint it had filed against its insurer because that litigation was not an attempt to recover sums due under the contract and the third-party defendant was not a party to the contract and did not owe the plaintiff any money thereunder.

The trial court properly awarded the plaintiff a full recovery of reasonable attorney's fees in connection with both its prosecution of its own breach of contract claim and its defense of the counterclaim, as the plaintiff's breach of contract claim and the defendants' breach of contract counterclaim arose out of the same factual nucleus, which was the parties' performance of their respective obligations under the contract, and the defendants' counterclaim threatened the plaintiff's ability to enforce the contract and to recover the sums it was owed.

Argued April 14—officially released August 19, 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 New Haven, where the defendants filed a counterclaim; thereafter, Penelope Koskerides, executrix of the estate of Antonios Koskerides, was substituted for the named defendant and counterclaim plaintiff; subsequently, the court, *Young*, *J.*, granted the plaintiff's motion to cite in Starr Surplus Insurance Company as a third-party defendant; thereafter, the plaintiff filed a third-party complaint; subsequently, the court, *Shah*, *J.*, granted in part the third-party defendant's motion to bifurcate the third-party action; thereafter, the case was transferred to the judicial district of Middlesex; subsequently, the case was tried to the court, *Swienton*, *J.*; judgment in part for the plaintiff on the complaint and for the plaintiff on the counterclaim, from which the defendants appealed to this court; thereafter, the court, *Swienton*, *J.*, granted the plaintiff's motion for attorney's fees, and the plaintiff filed an amended appeal. *Vacated*; *affirmed in part*; *further proceedings*.

Frank W. Murphy, for the appellants (defendants).

Stephen J. Curley, for the appellee (plaintiff).

Opinion

CLARK, J. The defendants, Penelope Koskerides (Penelope), in her individual capacity and as executrix

of the estate of Antonios Koskerides (Antonios),[1] appeal from the judgment rendered by the trial court in favor of the plaintiff, United Cleaning & Restoration, LLC, on both its claim of breach of contract and on the defendants' counterclaim for breach of contract, and from the court's subsequent award of attorney's fees. On appeal, the defendants claim that the court (1) made clearly erroneous factual findings in connection with its conclusions that the plaintiff had proved its breach of contract claim and that the defendants had failed to prove their breach of contract claim, and (2) improperly calculated the plaintiff's award of attorney's fees.[2] We disagree with the defendants' first claim and, therefore, affirm the judgment in the plaintiff's favor on its breach of contract claim and on the defendants' breach of contract counterclaim. Because the court may have improperly awarded the plaintiff attorney's fees that the plaintiff was not authorized to receive under the parties'

[1] The plaintiff initially filed this action against Penelope and Antonios. On July 26, 2022, however, Antonios died, leaving a will in which he named Penelope as executrix of his estate. Penelope subsequently filed a motion requesting that she be substituted, in her capacity as executrix of Antonios' estate, as a party defendant and counterclaim plaintiff in lieu of Antonios. The court, *Young*, *J.*, granted that motion on November 28, 2022.

[2] The defendants have also claimed on appeal that the trial court improperly excluded from evidence certain construction cost estimates prepared by one of the defendants' witnesses. The defendants contend that these estimates were relevant to the amount of damages that they sought to prove in connection with their breach of contract counterclaim. Because we affirm the trial court's denial of the defendants' counterclaim on the basis that the plaintiff did not proximately cause any damages to the property; see footnote 8 of this opinion; see also part I D of this opinion; we need not address this claim.

We further note that, in the statement of issues in their principal appellate brief, the defendants identify eleven issues for this court's review. Our discussion of these issues is largely subsumed in our analysis of the defendants' overarching claims on appeal. To the extent, however, that any of these issues are mentioned in the statement of issues but not subsequently discussed or developed in the defendants' brief, they have been abandoned. See, e.g., *Ramos* v. *State*, 230 Conn. App. 524, 530, 330 A.3d 278 (2025) ("[when] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation

contract, we conclude that we must vacate the award of attorney's fees and remand the case for a new hearing on the plaintiff's motion for attorney's fees consistent with this opinion.

The following facts, as found by the court or as are otherwise undisputed in the record, and procedural history are relevant to this appeal. The defendants own an eight unit strip mall located at 1-10 Rogers Square in Norwalk (property). In November, 2015, a fire broke out at the property, and the businesses located therein were evacuated. Following the fire, the defendants received a payment of $1.3 million from their insurer to repair and restore the property. An adjuster referred David Koskerides (David), Penelope and Antonios' son, to the plaintiff, which is a cleaning and restoration construction company. The plaintiff, Penelope, and Antonios thereafter entered into a contract for the restoration of the property, which was broken down into two phases. Each phase was accompanied by a scope of work specifying the various tasks to be performed by the plaintiff and the price for each.

The first phase of the contract (phase one) was executed on January 20, 2017. Under phase one, the plaintiff was required, inter alia, to clean and treat all exposed framing in the property for soot and smoke; to remove and replace damaged masonry at the rear of the property; to remove and replace the roofing system; and to cut, cap, and make safe all utilities within damaged areas of the property. Phase one further required that the plaintiff install a polyvinyl chloride (PVC) membrane roofing system, manufactured by the company GAF, and provide a twenty year manufacturer's warranty for the roof. Phase one was fully paid in the amount of $467,851.29, and the plaintiff has not claimed

of authorities, it is deemed to be abandoned" (internal quotation marks omitted)).

that the defendants owe it any additional money for services rendered under phase one.

The second phase of the contract (phase two) was executed on May 9, 2017. Under phase two, the plaintiff was required, inter alia, to supply labor and materials necessary to bring all eight units in the property to " 'vanilla' finish level,"[3] and to construct a new front facade for the property. Phase two further specified that the "anticipated start date" for the work under phase two would be "[two] weeks from signing," and that the "anticipated completion date" would be "[four] months from start" but did not state that time was of the essence. Phase two also stated: "[The plaintiff] will turn over finished spaces to be available for rent as they are completed while remaining areas are being completed. This solely depends on the approval of Norwalk city officials." The original written contract price for phase two was $866,495.44, but that price was modified via certain change orders and discounts.

In 2019, the plaintiff stopped working at the property. The trial court found that, at that point in time, all of the work had been completed under phase two, with the exception of work to be performed on Penny's, a restaurant located on the property that the defendants owned. At some point in 2018, the plaintiff prepared a change order crediting $25,260 toward the contract price to reflect work that had not been performed at Penny's; the plaintiff subsequently sent that change order to David, but David did not respond or otherwise acknowledge the change order. The defendants ultimately paid $809,948.50 toward phase two, leaving an unpaid balance of $61,350.52.

The plaintiff commenced this action by way of a two count complaint on October 21, 2020. In count one, which sounded in breach of contract, the plaintiff

[3] See footnote 10 of this opinion.

alleged that, with the exception of those items for which it had issued credits, it had fully performed its obligations under the contract and that Penelope and Antonios[4] had failed to pay the full balance owed. In count two, which sounded in unjust enrichment and was pleaded in the alternative to the contractual claim in count one, the plaintiff alleged that it had performed work on the property at Penelope and Antonios' request; that Penelope and Antonios knew that the plaintiff expected to be paid for its work; that the value of the work was greater than the amount Penelope and Antonios had paid for it; and that Penelope and Antonios had unjustly retained the benefit of the plaintiff's work without paying for it.

On March 19, 2021, Penelope and Antonios filed an answer, special defenses, and counterclaim. In their answer, Penelope and Antonios denied that the plaintiff had fully performed its obligations under the contract and denied that any sum was presently due beyond the $890,948.50 that they had already paid. They further denied that the change order reflecting work not performed on Penny's had been accepted. They also asserted three special defenses: (1) that the plaintiff had "forfeited its claim to any balance due on the contract because of its failure to perform the contract in a timely and workmanlike manner"; (2) that the plaintiff "is in breach of its contract in that after almost four years of work on the project, it has failed to complete any of the units or obtain a temporary or permanent certificate of occupancy . . . which would permit [Penelope and Antonios] to use and/or rent the units"; and (3) that "[a]ll payments have been made by [Penelope and Antonios] under the terms of the contract." In their counterclaim, Penelope and Antonios claimed that the plaintiff had breached its contract in several ways. Relevant to this appeal, they asserted that the plaintiff had failed to

[4] See footnote 1 of this opinion.

timely complete its work on the contract; failed to obtain a temporary or final certificate of occupancy for any of the units on the property; failed to provide a warranty for the roof; failed to remove obsolete heating, ventilation, and air conditioning (HVAC) units; and performed incomplete and inadequate work on Penny's. They sought, inter alia, compensatory and punitive damages, the cancellation and termination of the contract, and a forfeiture of any amount claimed to be due to the plaintiff.

On April 16, 2021, the plaintiff filed a reply to the special defenses and answer to the counterclaim. The plaintiff claimed in relevant part that its failure to timely complete the project was due to Penelope and Antonios' "delay and inaction in making decisions . . . to resolve issues raised by the [Norwalk] building department with respect to building code requirements"; that it had been unable to obtain temporary or permanent certificates of occupancy "due to [Penelope and Antonios'] failure to comply with [the] requirements for obtaining said certificates"; and that it had failed to provide a warranty for the roof or to remove old HVAC units due to Penelope and Antonios' default in paying moneys due and owing to it. The plaintiff denied certain other allegations regarding its purportedly inadequate work on Penny's.

On November 16, 2022, the plaintiff filed a motion to cite in its insurer, Starr Surplus Insurance Company (Starr), as a third-party defendant, accompanied by a memorandum of law. In this motion, the plaintiff asserted that Starr was "obliged to provide the plaintiff with indemnity and defense for the counterclaim under an applicable liability policy," but that Starr had yet to do so. The plaintiff further argued that "Starr should be cited in as a third party to this action so that the plaintiff may obtain a declaratory judgment from the court as to whether [Starr] must provide the plaintiff with indemnity and defense as to the counterclaim." The court,

Young, *J.*, granted that motion on November 28, 2022. Starr was subsequently served with a third-party writ, summons and complaint on December 9, 2022, in which the plaintiff sought a declaratory judgment directing Starr to provide the plaintiff a defense and indemnity for the defendants' counterclaim. On February 23, 2023, Starr filed a motion and accompanying memorandum of law in which it sought to strike the third-party complaint or, in the alternative, to bifurcate the declaratory judgment action from the present action. On June 12, 2023, the court, *Shah*, *J.*, granted Starr's motion in part and bifurcated the declaratory judgment action from the breach of contract action.[5]

The plaintiff's breach of contract claim and the defendants' counterclaim were subsequently tried before the court, *Swienton*, *J.*, on October 3, 4 and 11, and November 9, 2023. The plaintiff presented testimony from Nicholas Sarro, its vice president; Steven Martin, an estimator and project manager with a roofing business; Louis Proto, a real estate broker; Carl Cianci, a structural engineer; and John Carlson, the owner of a company that provided, inter alia, air quality and mold remediation services. The defendants presented testimony from David ; Kalonji Diyoka, an environmental consultant ; William Andriopoulos, an architect ; George Shawah, a real estate appraiser ; and James Balazs, a construction manager. The parties submitted voluminous exhibits.

On March 19, 2024, the court issued a memorandum of decision and, thereafter, issued a corrected memorandum of decision on March 27, 2024. The court found in favor of the plaintiff on both count one of its complaint (breach of contract)[6] and on the defendants'

[5] Starr filed an answer and special defenses to the third-party complaint on August 1, 2023, to which the plaintiff replied on September 15, 2023. The record reflects that the merits of the third-party complaint have not yet been adjudicated.

[6] In light of its conclusion that the defendants had breached the parties' contract, the court found against the plaintiff on count two of its complaint (unjust enrichment). See, e.g., *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766

counterclaim. With respect to the plaintiff's breach of contract claim, the court concluded that, "[t]o fulfill its obligations under the contract, [the plaintiff] rendered the services set forth in the contract, performing all of its obligations and requirements. The exception to fulfilling all the work would be the completion of the Penny's space. . . . [T]he plaintiff needed to know the intent of the usage of the Penny's space before the work could be completed. Even after numerous attempts to contact David . . . to find out this information, Sarro was unable to learn this needed information. The plaintiff then gave a credit for the work that needed to be done for completion of Penny's . . . ." The court further concluded that "[t]here is no credible evidence to indicate that [the plaintiff] failed to substantially perform its contractual obligations." The court also concluded that the defendants had failed to meet their burden of proof with respect to any of their special defenses.

With respect to the defendants' counterclaim, the court concluded that the defendants had "spent an inordinate amount of time listing item by item work they believed was not completed or completed incorrectly as well as expenses associated with ownership of the property. However, the defendants failed to submit credible evidence to support these claims, or costs of the repairs or completion, or submit any proof of payment." The court further found "that substantially all of the damage claimed by the defendants was attributable to the negligence or the affirmative conduct of the defendants in that they failed to give to the plaintiff any indication of what needed to be done to complete

A.2d 416 (2001) ("Unjust enrichment applies whenever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract . . . . Indeed, lack of a remedy under the contract is a precondition for recovery based upon unjust enrichment." (Citation omitted; internal quotation marks omitted.)). Neither party has challenged that portion of the court's judgment on appeal.

the job. The defendants allowed the building to stand idle without sufficient HVAC for two to three years, which caused the deterioration now being claimed, including the development of mold. The court credits the testimony of the plaintiff's expert, Carl Cianci . . . . In his submitted report, he . . . found that the claims made by the defendants that certain work was not performed was additional work not included in the contract between the plaintiff and the defendants." Ultimately, the court concluded that the defendants had failed to meet their burden of proving that the plaintiff had proximately caused any damages to the property.

On April 12, 2024, the plaintiff filed a motion for attorney's fees. The defendants filed an objection to the motion on April 26, 2024. On May 29, 2024, the court issued a memorandum of decision and accompanying order in which it awarded attorney's fees in the aggregate amount of $202,372.13, divided among the plaintiff's various counsel. This appeal followed.[7] Additional facts and procedural history will be set forth as necessary.

[7] At the time that this appeal was filed, in April, 2024, the trial court had not yet specified the rate at which prejudgment interest should be calculated. On August 30, 2024, the defendants filed a motion for articulation in which they sought clarification of (1) the date on which prejudgment interest would start to accrue, (2) the prejudgment interest rate to be awarded pursuant to General Statutes § 37-3a (a), and (3) the postjudgment interest rate to be awarded pursuant to § 37-3a (a). The trial court granted that motion and issued a memorandum of decision on October 3, 2024, in which it clarified that prejudgment interest started to accrue on October 15, 2020, and that the prejudgment and postjudgment interest rates would each be 10 percent.

On December 2, 2024, this court, sua sponte, ordered the parties to submit supplemental memoranda addressing whether this appeal should be dismissed for lack of a final judgment "because, when this appeal was filed, there had been no final determination regarding the amount of damages where the trial court had not yet specified the rate at which prejudgment interest should be calculated, and the defendants did not amend their appeal after the court subsequently specified the rate." On January 8, 2025, this court ordered that the appeal would be dismissed unless an amended appeal was filed on or before January 21, 2025. On January 14, 2025, the defendants filed an amended appeal in accordance with this court's order.

I

The defendants claim that the trial court erred in concluding that the plaintiff substantially performed its obligations under the contract, and in failing to find in the defendants' favor on their breach of contract counterclaim.[8] In connection with this claim, the defendants direct our attention to various alleged deficiencies in the work performed by the plaintiff and certain evidence pertaining to the value of their damages that, they contend, the trial court overlooked in reaching its conclusion. We are not persuaded.

Because the trial court concluded that the plaintiff had substantially performed its obligations under the contract and that the defendants had failed to establish a causal link between the plaintiff's alleged breaches and their claimed damages, we begin with a brief discussion of the legal principles relevant to those conclusions. "The elements of a breach of contract action are

[8] In claiming that the trial court disregarded the plaintiff's allegedly defective work, the defendants appear to challenge *both* the court's conclusion that the plaintiff substantially performed under the contract, as a condition of the plaintiff's recovery on its breach of contract claim, and the court's failure to conclude that the plaintiff breached the contract, as an element of the defendants' breach of contract counterclaim. These challenges, although closely related, are logically distinct, because this court has recognized that even a breach that does not amount to a failure to substantially perform may nonetheless provide a basis for liability on a breach of contract claim. See, e.g., *669 Atlantic Street Associates* v. *Atlantic-Rockland Stamford Associates*, 43 Conn. App. 113, 132 n.9, 682 A.2d 572 ("[w]e note that the defendant is entitled to a jury trial on two counts of his counterclaim [alleging fraudulent inducement, breach of contract, and breach of lease], even though the trial court properly determined that the defendant would not be excused from performance if the defendant proved its allegations"), cert. denied, 239 Conn. 949, 686 A.2d 126 (1996), and cert. denied, 239 Conn. 950, 686 A.2d 126 (1996). For the reasons we set forth in part I of this opinion, we conclude that the court's conclusion that the plaintiff substantially performed its contractual obligations was not clearly erroneous. We need not reach, however, the merits of any separate and distinct claim by the defendants that the court, in analyzing their counterclaim, improperly failed to find a breach by the plaintiff, because, as we discuss in part I D of this opinion, we affirm the court's conclusion that any breach of contract by the plaintiff did not proximately cause damages to the defendants.

the formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *Bross* v. *Hillside Acres, Inc.*, 92 Conn. App. 773, 780–81, 887 A.2d 420 (2006). "Although this court has intimated that causation is an additional element thereof . . . proof of causation more properly is classified as part and parcel of a party's claim for breach of contract damages. . . . The causation requirement focuses on whether a loss may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself. . . . [U]nder Connecticut law, the causation standard applicable to breach of contract actions asks not whether a defendant's conduct was a proximate cause of the plaintiff's injuries, but rather whether those injuries were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 149 Conn. App. 177, 186–89, 90 A.3d 219 (2014). "The requirement of proximate cause is a less severe limitation of liability than the requirement of anticipation or foreseeability in breach of contract cases. A proximate cause is [simply] [a]n actual cause that is a substantial factor in the resulting harm . . . ." (Internal quotation marks omitted.) Id., 188. "Causation [is] a question of fact for the [fact finder] to determine . . . and, thus, is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) *Winakor* v. *Savalle*, 198 Conn. App. 792, 813, 234 A.3d 1122 (2020), aff'd, 343 Conn. 773, 276 A.3d 407 (2022).

"The doctrine of substantial performance," meanwhile, "shields contracting parties from the harsh effects of being held to the letter of their agreements. Pursuant to the doctrine of substantial performance, a technical breach of the terms of a contract is excused,

not because compliance with the terms is objectively impossible, but because actual performance is so similar to the required performance that any breach that may have been committed is immaterial." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 367 n.12, 166 A.3d 800 (2017). "[T]he general rule is that a contractor who substantially performs under a building or construction contract is entitled to recover the contract price minus the cost of repairing the defects or completing the unfinished part of the work so as to bring the construction up to the level required by the contract . . . ." (Internal quotation marks omitted.) *Coppola Construction Co.* v. *Hoffman Enterprises Ltd. Partnership*, 157 Conn. App. 139, 160–61, 117 A.3d 876, cert. denied, 318 Conn. 902, 122 A.3d 631 (2015), and cert. denied, 318 Conn. 902, 123 A.3d 882 (2015).

"Although the issuance of a certificate of occupancy may be evidence of substantial performance, it is not dispositive of the question. . . . Other factors to be considered include the extent to which the injured party will be deprived of the benefit reasonably expected, the extent to which that party can be adequately compensated for the deficiency of performance, the extent to which the performing party will suffer forfeiture, the likelihood that the performing party will cure his failure in light of the circumstances and his reasonable assurances, and the extent of good faith and fair dealing on the part of the performing party." (Internal quotation marks omitted.) *Pettit* v. *Hampton & Beech, Inc.*, 101 Conn. App. 502, 508, 922 A.2d 300 (2007). "The determination of [w]hether a building contract has been substantially performed is ordinarily a question of fact for the trier to determine. . . . We have long held that a finding of fact is reversed only when it is clearly erroneous. A factual finding is clearly erroneous when it is not supported by any evidence in the record or when

there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses. . . . Moreover, [t]he analysis necessarily involves an inquiry into the totality of facts and circumstances surrounding the performance of the contract." (Citation omitted; internal quotation marks omitted.) *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, 119 Conn. App. 423, 429–30, 988 A.2d 351 (2010).

A

The defendants first claim that the trial court's finding that the plaintiff had substantially performed its contractual obligations was clearly erroneous because the evidence before the court allegedly established both that the plaintiff had failed to provide a twenty year manufacturer's warranty for the roof, as required by phase one, and had failed to properly install the roof such that it would be eligible for that warranty. We disagree.

The following additional facts are relevant to the defendants' claim. The plaintiff did not provide the defendants with a warranty for the roof. Sarro testified that this warranty was to be issued by the manufacturer of the roofing system, GAF, and that GAF would have issued the warranty upon a final inspection of the roof. Sarro further testified, however, that he had been unable to call for a final inspection of the roof because he had never received instructions from the defendants regarding the disposition of certain rooftop HVAC units. Sarro explained that "there was no direction on all the units as far as how we were going to be replacing them. So, just to give context to what I'm saying, is that, in a larger—for instance, above the Penny's space, if the

Penny's space were to be used as a restaurant as it was, as it sat, the curb[9] would most likely stay the same size. If it was going to be reduced to a vanilla box[10] or if it was going to be a different type of restaurant, then the curbs would likely shrink and/or become larger, whatever they depended on doing, so you couldn't do an exact slash of anything until you knew what was going on." (Footnotes added.) The plaintiff's counsel subsequently asked Sarro if there was "anything that [the plaintiff] needed to do in order to obtain that warranty . . . [a]side from actually asking," to which Sarro replied that there was not.

Andriopoulos testified that he had been contacted by David in September, 2021, and had inspected the roof at least three times. During one of his inspections in October, 2021, Andriopoulos took twenty-two photographs, which were entered into evidence as full exhibits. He testified, inter alia, that certain of these photographs captured standing water on the roof that was attributable to folding of the roof membrane; that he had observed an opening in the roof that could allow water to get through; that certain pipes on the roof had not been capped; and that he had observed that certain objects on the roof appeared to be coming apart from the roof membrane, "which is a source for a water leak or a possible water leak." Andriopoulos also testified, however, that he had never worked as a roofing contractor; that he had never worked on a roof; that he had "probably never" appeared in court previously to give

[9] Sarro later clarified that a "curb" is "what [the] rooftop units sit on top of."

[10] "Vanilla box" has been defined as "a trade term which means space enclosed by sheetrock walls, taped and ready for a final finish." *Ginsburg* v. *Savin Rock Seafood, Inc.*, Docket No. CV-94-096537, 1995 WL 476809, *1 (Conn. Super. July 14, 1995); see also, e.g., *Bernblum* v. *Grove Collaborative, LLC*, 211 Conn. App. 742, 747–48, 274 A.3d 165 (witness testified that "vanilla box" meant that "everything is painted white, you have carpeting, and a ceiling, heat, utilities, electric" (internal quotation marks omitted)), cert. denied, 343 Conn. 925, 275 A.3d 626 (2022).

his opinion regarding a roof; and that he had not seen a roof of the type on the property in recent memory. He also did not testify as to the requirements for obtaining a GAF warranty or provide any testimony as to what work, if any, would be required to obtain such a warranty for the roof. He did, however, prepare a report regarding the additional work that, in his opinion, was required for the building to obtain a certificate of occupancy; see part I B of this opinion; in that report, he stated that "[c]lient wants complete new roof—for a completed project and warranty."

Balazs testified that he personally had inspected the roof, that he previously had installed the type of roofing on the roof "hundreds of times," and that the roof was "incomplete and poorly installed" in various respects. He testified that "you can't get a warranty from a roof that is improperly installed because whoever—whether it be Firestone, GAF, any of the big roofing . . . manufacturers, the minute you buy the product from them, it has to be installed as per their specifications and when the roof is done they do a personal inspection in order to get the warranty. And this wasn't in—it wasn't done so they never would've gotten a warranty."

Martin testified that he had worked in the roofing business for thirty-seven years and had inspected the roof in July, 2023. He stated that, when he had inspected the roof, he had "seen a lot of unfinished details because the project to me didn't seem like it was completed," but that he had not observed any defective work, holes in the roof, or evidence of water intrusion. He conceded, under cross-examination by the defendants' counsel, that certain of the areas where he had observed incomplete work were areas of potential water leakage, but repeatedly denied that the roofing work he had observed had been defective, as opposed to merely unfinished. He did not testify as to the requirements for obtaining

a warranty or express any opinion as to whether the roof satisfied those requirements.

The defendants contend that Andriopoulos', Balazs', and Martin's testimony each established that there were "defects in the roof construction which would have prevented the provision of the twenty year warranty by GAF," and that "there is no adequate explanation by [the plaintiff] for its failure to properly install the roof or [its] failure to provide the twenty year roof warranty." As a preliminary matter, the defendants mischaracterize Martin's testimony, because he did not testify that the roof as installed would have been ineligible for a GAF warranty and he repeatedly testified that he had *not* observed any defective work on the roof. More to the point, however, the court had before it testimony from Sarro—who also testified to his substantial construction experience[11]—that the plaintiff did not need to do any additional work to obtain a warranty from GAF, and that the only obstacle to securing that warranty was the defendants' failure to provide the plaintiff with instructions as to the disposition of the rooftop HVAC units, which prevented the plaintiff from calling for a final manufacturer's inspection. To the extent that this testimony conflicted with other witnesses' testimony or other evidence in the record, it was "the exclusive province of the [trial court] to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none" of Sarro's testimony; (internal quotation marks omitted) *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022); and we will not disturb its determination on appeal. The court therefore reasonably could

[11] Sarro testified that he had worked as the plaintiff's vice president for eleven years; that prior to working for the plaintiff, he had worked as vice president of operations for a national roofing and masonry restoration company for seven years; that prior to that, he had worked as an estimator and project manager for a large general contractor; and that, in total, he had worked in the construction business for more than twenty-one years.

have concluded that the plaintiff had substantially performed its contractual obligations with respect to the roof warranty. See, e.g., *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 367 n.12 (defendant substantially performed contract obligation requiring it to obtain loan commitment despite failure to secure loan commitment letter when, even assuming such letter was required under terms of contract, defendant "had found a willing lender and all that remained to secure a formal commitment was the signing of the [loan] application," which plaintiff refused to do); *DuBaldo Electric, LLC* v. *Montagno Construction, Inc.*, supra, 119 Conn. App. 430–31 and n.7 (affirming conclusion that plaintiff substantially performed under construction contract when plaintiff's failure to complete required electrical work on schedule was due to delay in issuance of permit that was attributable to defendants and not fault of plaintiff). Because this finding is supported by evidence in the record, and we are not left with a definite and firm conviction that a mistake has been committed, it is not clearly erroneous.

B

Next, the defendants claim that the trial court's finding that the plaintiff substantially performed was clearly erroneous because the evidence established that the plaintiff failed to complete the work under phase two within four months and that the plaintiff failed to provide certificates of occupancy for any of the units. We disagree.

1

The following additional facts are relevant to the defendants' claim with respect to the timeliness of the plaintiff's work under phase two. As we previously have explained, phase two was executed on May 9, 2017, and provided that the "anticipated completion date" for the work under phase two would be "four months from

start." Sarro testified that the plaintiff started work on phase two in September, 2017. He further testified that the plaintiff completed its work under phase two, with the exception of work on Penny's, but he provided inconsistent testimony as to the precise point in time at which the work was completed. At one point, for instance, Sarro testified that the work had been completed under phase two (Penny's excepted) as of March, 2018; at another point, he stated that the work under phase two was ongoing through early 2019. Sarro further testified that, while the plaintiff was working at the property, it never received any complaints from the defendants about the quality or timeliness of its work. In its memorandum of decision, the trial court found that the plaintiff had "ceased working at the property some time in 2019," at which point in time "[a]ll the work was completed under . . . phase two . . . with the exception of work to be performed in the Penny's space." The court further found that, "[d]uring the period of the restoration and reconstruction, the plaintiff never received any complaints about the work, quality, or timeliness."

The defendants argue that "[r]egardless of whether the start date and completion date [for phase two] are measured from the date of the contract in May, [2017] or the date of the initial payment in August, [2017] or in mid-September, [2017] it is clear that the work was not completed on phase two for all units except Penny's . . . within four months." The defendants, however, overlook the fact that phase two did not provide that time was of the essence. It is well established that "[w]here a time for performance is stated in an agreement, a party's tender of performance within a reasonable time thereafter will be considered substantial performance unless the parties intended that time for performance be of the essence. . . . Where the agreement does not specifically state that time is of the

essence, it is presumed not to be unless the parties have expressed a contrary intent. . . . The fact that a contract states a date for performance does not necessarily make time of the essence." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *JPMorgan Chase Bank, N.A.* v. *Cam*, 172 Conn. App. 659, 666, 161 A.3d 650 (2017); see also *Miller* v. *Bourgoin*, 28 Conn. App. 491, 498, 613 A.2d 292 (observing that, "[b]ecause delays are typical in transactions involving real property or building contracts, time is ordinarily not of the essence in these contracts"), cert. denied, 223 Conn. 927, 614 A.2d 825 (1992). In the present case, the court made no findings that the parties ever intended for time to be of the essence; to the contrary, it found that the plaintiff never received any complaints about the timeliness of its work while it was working at the property, from which the court reasonably could have concluded that the parties did *not* intend for time to be of the essence.[12] See, e.g., *Mihalyak* v. *Mihalyak*, 11 Conn. App. 610, 616–17, 529 A.2d 213 (1987) (in absence of contractual language stating that time was of essence, court considered testimony as to parties' intent). The court therefore was entitled to conclude that, notwithstanding any failure by the plaintiff to complete the work under phase two within four months, its substantial completion of this work[13] by 2019 constituted substantial performance.

[12] The defendants claim that this finding was clearly erroneous because "there was constant discussion about the slow progress of the work." Because this claim consists of two sentences, unsupported by any citations to record evidence, it is inadequately briefed. See, e.g., *State* v. *Jose A. B.*, 342 Conn. 489, 528 n.29, 270 A.3d 656 (2022) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). Even if we were to overlook the defendants' failure to adequately brief this claim, however, it fails because the court's finding is supported by evidence in the record, and we are not left with a definite and firm conviction that a mistake has been committed.

[13] At one point in their principal appellate brief, the defendants argue that "the evidence clearly demonstrates that the work was not completed within

With respect to the defendants' claim that the court overlooked the plaintiff's failure to provide certificates of occupancy for any of the units on the property, the following additional facts are relevant. As we have explained, phase two provided that "[the plaintiff] will turn over finished spaces to be available for rent as they are completed while remaining areas are being completed. This solely depends on the approval of Norwalk city officials." It is undisputed that no temporary or permanent certificate of occupancy was ever provided for any unit on the property; indeed, the plaintiff stipulated to that fact. Sarro testified, however, that the Norwalk building department had refused to issue any such certificate "until the Penny's space was either going to be owner-occupied and they had that in writing as far as what that was going to be, or if it was going to be leased by another tenant. The reason why they would not do that is because there's life safety issues that can be pertained between a restaurant space and a different space. So, they would not give us any spaces at all. And our contract actually references at the beginning that we would try to turn over each space as they were completed if the building official would allow it." Sarro further testified that he had made various attempts to contact David regarding the disposition of Penny's but had never received direction from him in this regard. The defendants, for their part, do not dispute that David never reached a decision regarding whether Penny's would be owner-occupied or leased to a tenant, but claim that he never did so "due to the [COVID-19 pandemic] and related economic factors involving restaurants in general."

four months, *and remains incomplete to this day*." (Emphasis added.) To the extent that the defendants' claim about the timeliness of the work is, in effect, simply a general claim that the plaintiff failed to substantially perform its contractual obligations, we resolve this claim via our analysis of the defendants' various claims of material breach in part I of this opinion.

Andriopoulos testified that he had prepared a report concerning the additional work that would be required in order to obtain a certificate of occupancy, and his report was entered into evidence as a full exhibit. In his report, Andriopoulos listed various tasks that, in his view, the plaintiff had not completed but were required to be completed before a certificate of occupancy could be issued, including the remediation of certain mold issues in the property,[14] and the inspection of the property's electrical systems. The plaintiff submitted into evidence a report from Cianci in which Cianci—upon review of, inter alia, Andriopoulos' report—concluded in relevant part that "[w]ork that is alleged to be required to obtain a certificate of occupancy . . . is additional work that was not included in the contract between [the plaintiff] and [the defendants]." In its memorandum of decision, the trial court credited Cianci's testimony. The trial court further found that "the plaintiff needed to know the intent of the usage of the Penny's space before the work could be completed," and that, "[e]ven after numerous attempts to contact David . . . to find out this information, Sarro was unable to learn this needed information."

We discern no error in the trial court's finding that the plaintiff substantially performed under the contract, notwithstanding that the plaintiff failed to obtain certificates of occupancy. As we previously have explained, in the context of construction contracts, "[a]lthough

[14] In their principal appellate brief, the defendants—while acknowledging that there was "conflicting testimony" on the subject—appear to argue that the evidence before the court established that there was water seepage and mold in the basement, and that the trial court inappropriately disregarded this evidence when it ruled in the plaintiff's favor. However, in their reply brief, the defendants assert that they have "not appealed with regard to the basement mold," and that "[t]here is no assignment of error" on the subject. We therefore do not consider any claim of error by the defendants pertaining to the trial court's alleged failure to account for the presence of mold on the property.

the issuance of a certificate of occupancy *may* be evidence of substantial performance, *it is not dispositive of the question*. . . . Other [nondispositive] factors to be considered include [inter alia] the extent to which the injured party will be deprived of the benefit reasonably expected . . . and the extent of good faith and fair dealing on the part of the performing party." (Emphasis added; internal quotation marks omitted.) *Clem Martone Construction, LLC* v. *DePino*, 145 Conn. App. 316, 336–37, 77 A.3d 760, cert. denied, 310 Conn. 947, 80 A.3d 906 (2013). The court thus was not required to conclude that the failure to procure certificates of occupancy constituted a failure to substantially perform under the contract. This is especially true in light of the facts that (1) the contract language providing that the plaintiff would turn over completed units to the defendants for rental, contingent "solely . . . upon the approval of Norwalk city officials," provided no guarantee that the plaintiff would be able to secure a certificate of occupancy;[15] and (2) the plaintiff nonetheless repeatedly sought clarification from the defendants regarding the anticipated use of Penny's, which Sarro testified was necessary before a certificate of occupancy could be issued for any of the units on the property. The court reasonably could have concluded, on the basis of these facts and the evidence before it, both that the plaintiff's failure to obtain a certificate of occupancy did not deprive the defendants of a " 'benefit reasonably expected' " in

[15] We further note that phases one and two both provided in relevant part that, although the plaintiff was responsible for "secur[ing] and pay[ing] for the building permit, fees, licenses, and inspections," "[i]mprovements required by the local or state building code are not the responsibility of the [plaintiff]," and that, "[e]xcept for permits and fees, the [o]wner [i.e., Penelope and Antonios] shall secure and pay for other necessary charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities. Such approvals, assessments and changes may be required by the local building officials for structural improvements based on local code requirements. Payments for any such requirements or improvements will be the responsibility of the [o]wner."

light of the terms and scope of the contract; *Clem Martone Construction, LLC* v. *DePino*, supra, 337; and that the plaintiff nonetheless attempted in good faith to procure certificates of occupancy, but was thwarted by the defendants' failure to provide necessary information. On the basis of our thorough review of the record, we cannot conclude that the court's determination that the plaintiff substantially performed under the contract notwithstanding its failure to obtain a certificate of occupancy is clearly erroneous.

C

The defendants next claim that the trial court erred in finding that the plaintiff substantially performed under the contract despite the fact that it failed to complete the work on Penny's,[16] and that the court improperly overlooked the fact that the work done on Penny's was contrary to the contract in certain respects. We disagree.

The following additional facts are relevant to our consideration of this argument. The scope of work for phase two originally provided that the cost of work on Penny's would total $46,313.12, although the price was later increased by $1120 (excluding overhead, profit, and tax). The plaintiff, as discussed previously, did not complete the work on Penny's under phase two and sent the defendants a change order crediting $25,260 toward the contract price to account for work that had

[16] The defendants also claim, in a separate section of their principal appellate brief, that the plaintiff materially breached the contract by failing to remove certain rooftop HVAC units. Sarro testified that the only rooftop units that the plaintiff did not remove were those above Penny's, and the defendants do not dispute this representation on appeal. Sarro further testified that the plaintiff's failure to remove these rooftop units was accounted for in the 2018 change order providing the defendants a credit for work that had not been performed at Penny's. We therefore consider the defendants' argument pertaining to the rooftop units as part and parcel of their contention that the failure to complete work on Penny's constituted a material breach of the contract.

not been performed on Penny's. The plaintiff did not include that $25,260 as a component of the damages that it sought on its breach of contract claim. Sarro testified that the work on Penny's had not been completed because the defendants had never provided the plaintiff clear information as to whether they intended to rent the space to a tenant—in which case "a lot more work needed to happen as far as code was concerned"—or whether they intended to "remain the owner and operate [Penny's] as an owner operator." He stated that the plaintiff also had not removed any of the rooftop HVAC units above Penny's for the same reason, and, at a later point in his testimony, explained that, "if [Penny's] was going to [be] reuse[d] . . . as a restaurant to either another tenant [or be owner-occupied], it would change how [the equipment in Penny's] was vented through the roof." He further testified that the plaintiff had left Penny's "insulated and [with] rough mechanicals done," but that the plaintiff had not put drywall or a ceiling in place.

The scope of work for phase two originally contained a provision stating: "Penny's pizza space existing floors to remain due to restaurant booths and fixtures to remain." This provision, however, was manually crossed out by a strikethrough next to which David wrote his initials.[17] Sarro testified that, prior to stopping work, the plaintiff had taken out the tile flooring in Penny's, but that "[w]e weren't touching any restaurant equipment, coolers, hoods, booths, anything that was affixed . . . ." He testified that none of the fixtures in Penny's had been removed. David, to the contrary, testified that, "[a]t one point, the booths were actually going to stay, and so were the tables . . . [but] [the plaintiff] pulled out all the booths . . . . And the cantilevers I asked them to keep, and they threw them out,

[17] The scope of work for phase one, which was executed several months prior to phase two, contained an identical provision, which was not crossed out.

which hold up the tables." David further claimed that "[t]he tile flooring wasn't supposed to be removed, [only] the carpet was," and that "[t]here was a server stand that was taken out which wasn't supposed to be taken." On cross-examination, however, David acknowledged that he had written his initials next to the strikethrough in the scope of work for phase two, and further admitted that, when he had stated that the tile flooring and server stand were not supposed to be removed, he had been referring to an oral agreement to that effect that, he alleged, he had reached with the plaintiff. He admitted that no such agreement was reflected in the scope of work for phase two, and he was unable to recall which representative of the plaintiff he had struck the alleged agreement with, or whether the alleged agreement had been reached before or after he wrote his initials next to the strikethrough.

The defendants argue that "there was incomplete work [done on Penny's] regardless of whether Penny's would be owner-occupied or not," and further claim that the evidence shows that "contrary to the contract . . . [the plaintiff] removed the booth cantilevers, the server stand, and the tile floor from Penny's." As the record reflects and David conceded, however, the scope of work for phase two (unlike the scope of work for phase one; see footnote 17 of this opinion) did *not* require that floors, booths, and/or fixtures in Penny's remain in place—indeed, a provision to that effect was stricken from the contract. Moreover, the trial court was required neither to credit nor to afford dispositive weight to David's self-serving claim that he and the plaintiff had reached an oral agreement with respect to the tile flooring and fixtures that contradicted the written modification to phase two, especially in light of David's hazy memory as to when and with whom he struck this alleged agreement.

With respect to the plaintiff's failure to complete the required work on Penny's, we note at the outset that, apart from a single undeveloped assertion in their principal appellate brief,[18] the defendants do not meaningfully contend on appeal that the $25,260 credit that they were issued inaccurately represents the value of the work that the plaintiff left unfinished in Penny's. That credit, $25,260, is roughly 2 percent of the total price for the work on the property prior to the credit's deduction.[19] See, e.g., *Clem Martone Construction, LLC* v. *DePino*, supra, 145 Conn. App. 332–33 (affirming conclusion that plaintiff substantially performed under construction contract when trial court found, inter alia, that "[t]he damages as a consequence of [the plaintiff's] substandard performance total barely 2 percent of the contract price" (internal quotation marks omitted)). Moreover, given that $25,260 represented roughly one half of the total cost for the work on Penny's, the court was not required to conclude that a credit of that amount would be insufficient to compensate the defendants for the unfinished work, especially in light of Sarro's testimony that rough mechanicals and insulation had been completed. Finally, there was evidence to support the trial court's finding that the plaintiff

[18] The defendants state that $25,260 is "inadequate" to complete the unfinished work on Penny's but provide no support for this conclusory proposition other than by directing our attention to certain photos of the unfinished interior of Penny's, which were entered into evidence as full exhibits.

We note that elsewhere in their brief, the defendants claim damages in at least the hundreds of thousands of dollars due to the plaintiff's alleged breach of contract, resulting from, inter alia, lost rental income, out of pocket expenses, and the cost of repair and restoration. However, the testimony and exhibits to which they point to support these figures consist of cost estimates and payment records that appear to apply to the property as a whole, rather than to Penny's in particular.

[19] In particular, the trial court found that the defendants had paid $467,851.29 for phase one. The trial court further found that "change orders were issued which brought the total cost of [phase two] to $946,559.02" and that "[t]he plaintiff orally agreed to provide the defendants with a discount of $50,000 at the end of the project . . . ." Prior to the subtraction of the $25,260 credit, this yields a total price of $1,364,410.31.

repeatedly and unsuccessfully sought clarification from the defendants as to the anticipated use of Penny's and, lacking such information, was unable to complete the work on Penny's. The trial court was thus entitled reasonably to conclude that the plaintiff's failure to complete the work on Penny's would only minimally deprive the defendants of a benefit that they reasonably expected under the contract; that the defendants could be (and had been) adequately compensated for the unfinished work by virtue of the $25,260 credit that the plaintiff provided and honored in pursuing its breach of contract claim; and that the plaintiff acted in good faith in attempting to complete all its required work under the contract. The defendants' claim therefore fails.

D

Finally, the defendants claim that the court—in connection with its analysis of the defendants' breach of contract counterclaim—erred in concluding that they had failed to submit credible evidence to support their estimates of the value of damages allegedly caused by the plaintiff. We conclude that we need not reach the merits of this claim.

In addition to concluding that the defendants had failed to submit credible evidence on which to base a monetary valuation of damages, the trial court also concluded that the defendants had failed to establish that any breach of contract by the plaintiff proximately caused damages to the property. In particular, the court found that "substantially all of the damage claimed by the defendants was attributable to the negligence or the affirmative conduct of the defendants in that they failed to give to the plaintiff any indication of what needed to be done to complete the job" and that "the defendants have failed in their burden of proof that

the [plaintiff] proximately caused[20] any damages at the property." (Footnote added.) As we have previously explained, the court's finding that the defendants never provided the plaintiff with the information that it needed in order to fully comply with its contractual obligations is not clearly erroneous. The defendants have not challenged the court's finding that they thereby bore responsibility for any damages to the property. Because this finding is fatal to their breach of contract claim; see, e.g., *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 186; we need not reach the merits of their claim that the court improperly disregarded evidence supporting their valuation of the damages.

II

The defendants next claim that the trial court erred in determining the plaintiff's entitlement to attorney's fees. Specifically, the defendants argue that the court

[20] In *Meadowbrook Center, Inc.* v. *Buchman*, supra, 149 Conn. App. 188–89, this court explained that, under Connecticut law, proximate cause is not the proper causation standard for breach of contract actions; rather, a court must ask whether the plaintiff's injuries "were foreseeable to the defendant and naturally and directly resulted from the defendant's conduct." In the present case, however, any error resulting from the court's application of the proximate cause standard to the defendants' breach of contract counterclaim does not change our conclusion, because proximate cause—a standard that requires the court to assess only whether the defendant's conduct is an "actual cause that is a substantial factor in the resulting harm"—is a more lenient standard than the causation standard applicable to breach of contract actions. (Internal quotation marks omitted.) Id., 188. In other words, because the court found that the defendants had not established proximate cause, it necessarily could not find that the defendants had satisfied the more stringent causation standard applicable to breach of contract actions.

We further note that some cases have articulated the causation standard applicable to breach of contract actions as requiring the plaintiff to establish that he or she "sustained damages as a direct *and* proximate result of the defendant's breach." (Emphasis added; internal quotation marks omitted.) *O'Donnell* v. *AXA Equitable Life Ins. Co.*, 210 Conn. App. 662, 681, 270 A.3d 751, cert. granted, 343 Conn. 910, 273 A.3d 695 (2022) (appeal withdrawn September 8, 2022). Under this formulation of the standard, it is likewise clear that the court's conclusion that the defendants failed to prove that the plaintiff proximately caused damages at the property was sufficient to dispose of their breach of contract counterclaim.

improperly permitted the plaintiff to recover fees incurred in connection with the plaintiff's motion to cite in Starr and its prosecution of its third-party complaint against Starr (Starr litigation), and in connection with the plaintiff's defense against the defendants' counterclaim. We agree in part with the defendants. In particular, we agree that the plaintiff is not entitled to recover attorney's fees from the defendants in connection with the Starr litigation. We further conclude that, because it is unclear the extent to which the court's attorney's fees award incorporates fees incurred in connection with the Starr litigation, the award of attorney's fees must be vacated and the case remanded for a new hearing on the plaintiff's motion for attorney's fees. We reject, however, the defendants' argument that the plaintiff is not entitled to recover attorney's fees incurred in connection with its defense of the counterclaim.[21]

The following additional facts and procedural history are relevant to this claim. Article II, paragraph 3, of both phase one and phase two of the contract provides that "[o]wner agrees to pay all costs of collection by the [plaintiff] in recovering sums due hereunder, including, but not limited to, [attorney's] fees, pre-judgment costs, post-judgment costs and all other expenses." In connection with this case, the plaintiff retained the services of Attorney Stephen Curley, of the Law Offices of Stephen J. Curley, LLC; Attorneys Jon D. Biller, Scott C. DeLaura, and Brianna K. Robert, of The Biller Law Firm, LLC; and Attorney Robert R. Lewis, of The Law Offices of Robert R. Lewis, Esq. Curley and The Biller Law Firm, LLC, entered appearances for the plaintiff in the Superior Court, but Lewis did not, although Lewis did

[21] The defendants also claim that the amount of attorney's fees was excessive and unreasonable. In light of our conclusion that the case must be remanded for a new hearing on attorney's fees, we do not reach the merits of this claim.

sign the complaint. The record reflects that Robert was present in court on at least the first day of the trial, but that she only spoke twice, and that Curley examined all the witnesses and conducted all arguments throughout the trial. The record does not reflect that any of the plaintiff's other attorneys, apart from Curley and Robert, were present during the trial.

Following the rendering of judgment for the plaintiff on its breach of contract claim and on the defendants' counterclaim, the plaintiff filed a motion for attorney's fees on April 12, 2024, accompanied by affidavits from Curley and Biller. On May 10, 2024, the plaintiff filed an additional affidavit from Lewis. In its motion and accompanying affidavits, the plaintiff claimed that it had incurred $168,400 in attorney's fees to Curley; $48,822.50 in attorney's fees to The Biller Law Firm, LLC; and $5225 in attorney's fees to Lewis, for a total of $222,447.50. The plaintiff also submitted invoices listing the various tasks its attorneys had performed in connection with the case, the amount of time expended on each task, and the fee for each task. Some of the tasks listed on these invoices clearly pertained to the Starr litigation, such as, for instance, an entry that read "draft and edit third-party complaint." Other task entries, however—such as some that were identified simply as "attention to file" or that referred to telephone conferences without specifying the subject—did not clearly indicate whether they involved work on the Starr litigation or on some other component of the case. The defendants filed an objection to the motion on April 26, 2024, in which they argued, inter alia, that, by their calculations, approximately $25,000 of the plaintiff's attorney's fees were attributable to the Starr litigation and should be disallowed. In their objection, however, the defendants tacitly acknowledged that simply from examining the plaintiff's invoices they could not state

definitively how much of the plaintiff's claimed attorney's fees were attributable to the Starr litigation; at one point, for instance, they contended that "[a]n examination of the hourly entries shows *at least* $15,430.37 was billed for the third-party complaint by . . . Curley alone, *and because of the nature of the entries*, *it may have been as much as $20,000*, *or more*." (Emphasis added.)

On May 29, 2024, following a remote hearing, the court issued a memorandum of decision in which it awarded the plaintiff $202,372.13 in attorney's fees—$20,075.37 less than the plaintiff had requested—divided as follows: $152,969.63 for Curley's services; $44,177.50 for The Biller Law Firm, LLC's services; and $5225 for Lewis' services. In its memorandum of decision, the court stated that it had based its award on "the evidence presented, the arguments of counsel, and the criteria set forth in the Rules of Professional Conduct as well as the court's general knowledge of the file and the proceedings." It did not explain why it had reduced the amount of the award by $20,075.37 from the amount sought by the plaintiff. Nor did it state how much, if any, of the $202,372.13 it awarded was attributable to the plaintiff's counsel's efforts in connection with the Starr litigation. The court acknowledged the defendants' argument that the "insurance coverage issues are separate and apart from the contract claims by [the plaintiff] and the defenses and counterclaim [of] the defendants," but did not expressly accept, reject, or otherwise analyze this argument. The defendant did not file a motion for articulation, or otherwise seek clarification, of the court's attorney's fees award.

The following legal principles are relevant to our review of this claim. "Connecticut adheres to a basic principle regarding awards of attorney's fees and expenses related to litigation known as the American

rule. Under the American rule, attorney's fees and ordinary expenses and burdens of litigation are not allowed to the successful party absent a [specific] contractual or statutory exception." (Internal quotation marks omitted.) *Ames* v. *Commissioner of Motor Vehicles*, 70 Conn. App. 790, 800, 802 A.2d 126 (2002), aff'd, 267 Conn. 524, 839 A.2d 1250 (2004). In determining whether the recovery of attorney's fees is authorized by a contract, "we apply the well established principle that [a] contract must be construed to effectuate the intent of the parties, which is determined from [its] language . . . interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 327, 63 A.3d 896 (2013) (*Total Recycling*). "[The] intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]." (Internal quotation marks omitted.) *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, 153 Conn. App. 387, 415, 102 A.3d 87, cert. denied, 315 Conn. 901, 104 A.3d 106 (2014).

"It is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award. . . . Under the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Internal

quotation marks omitted.) *Roach* v. *Transwaste, Inc.*, 210 Conn. App. 686, 692, 270 A.3d 786 (2022), aff'd, 347 Conn. 405, 297 A.3d 1004 (2023). In the present case, however, the defendants' claim requires us to examine the clear and unambiguous language of the parties' contract to determine whether it authorized a recovery of attorney's fees in connection with certain aspects of the litigation—a question over which our review is plenary. See, e.g., *Heyman Associates No. 5, L.P.* v. *FelCor TRS Guarantor, L.P.*, supra, 153 Conn. App. 411; *Trugreen Landcare, LLC* v. *Elm City Development & Construction Services, LLC*, 101 Conn. App. 11, 13–15, 919 A.2d 1077 (2007).

On the basis of the language of the parties' contract, we conclude that the plaintiff was not authorized to recover fees incurred in connection with the Starr litigation. The contractual language of phase one and phase two provided that the defendants would pay "all [of the plaintiff's] costs of *collection . . . in recovering sums due hereunder*," including attorney's fees. (Emphasis added.) The prosecution of the Starr litigation, however, was not an attempt to recover sums due under the contract. Starr was not a party to the contract and did not owe the plaintiff any money thereunder. The outcome of the Starr litigation had no bearing on the amount of the plaintiff's recovery on its breach of contract claim; the Starr litigation was intended to resolve the collateral question of whether Starr was responsible for defending the plaintiff against the defendants' counterclaim. Cf., e.g., *Connecticut Community Bank, N.A.* v. *Kiernan*, 187 Conn. App. 868, 872, 877, 204 A.3d 97 (provision of note that stated "[i]f we enforce our rights in court, you agree to pay our court costs and attorney's fees" did not impose liability on mortgagor for bank's attorney's fees incurred in protecting priority of its mortgage, where, inter alia, bank "provided no legal or factual basis for extending the explicit language relating

to foreclosing its mortgage to a separate claim against another party asserting priority over that other party's lien, nor are we aware of any"), cert. denied, 331 Conn. 911, 203 A.3d 570 (2019). The contract thus did not authorize the plaintiff to recover attorney's fees incurred in its prosecution of the Starr litigation.

We disagree, however, with the defendants' contention that the trial court should have barred the plaintiff from recovering attorney's fees that it incurred in defense of the counterclaim. In support of this contention, the defendants argue that Starr refused to defend against the counterclaim because the plaintiff negligently failed to timely report the counterclaim to Starr. The defendants therefore argue—without citing to any authority—that the plaintiff "should not be awarded attorney's fees for defense of the counterclaim, when its obligation to pay for the defense arose only because of its own misconduct." Even if we were to agree, however, with the general proposition advanced by the defendants—that an insured party's negligence in failing to timely report a litigation adversary's claim to its liability insurer may be a basis for denying it recovery of attorney's fees in connection with that claim—and even if we were to further agree that the plaintiff acted negligently in the present case, we would still not conclude that the trial court should have disallowed the plaintiff's recovery of attorney's fees in connection with its defense of the counterclaim.

Our conclusion is grounded on our Supreme Court's decision in *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, supra, 308 Conn. 312. In that case, our Supreme Court held that, "when certain claims provide for a party's recovery of contractual attorney's fees but others do not, a party is nevertheless entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual

nucleus and are intertwined." Id., 333; see also, e.g., *Noyes* v. *Antiques at Pompey Hollow, LLC*, 144 Conn. App. 582, 599, 73 A.3d 794 (2013) (trial court properly determined that apportionment of fees between counts on which plaintiff prevailed and counts on which plaintiff lost was unnecessary where "the same facts were relevant to all counts of the plaintiff's complaint"). In the present case, the plaintiff's breach of contract claim and the defendants' breach of contract counterclaim arose out of the same factual nucleus: the parties' performance of their respective obligations under the contract. Moreover, because the defendants' counterclaim sought the cancellation and termination of the contract, as well as the forfeiture of any amounts due to the plaintiff under the contract, the counterclaim threatened the plaintiff's ability to enforce the contract and to recover the sums it was owed. See, e.g., *Diamond D Enterprises USA, Inc.* v. *Steinsvaag*, 979 F.2d 14, 18 (2d Cir. 1992) ("where a fee applicant recovers on a claim subject to a contractual attorney's fee provision and in the process litigates a counterclaim on which he must prevail in order to recover on his claim, then the fee applicant is entitled to his attorney's fees for both the claim and the counterclaim" (internal quotation marks omitted)), cert. denied, 508 U.S. 951, 113 S. Ct. 2442, 124 L. Ed. 2d 660 (1993). The plaintiff was thus entitled to a full recovery of reasonable attorney's fees in connection with both its prosecution of its own breach of contract claim and its defense of the counterclaim.[22]

[22] The plaintiff does not argue, however, that the claims it has asserted in the Starr litigation arise out of a common nucleus of fact with its breach of contract claim and the defendants' counterclaim. To the contrary, the plaintiff's motion to cite in Starr and its third-party complaint against Starr assert allegations not pertaining to the plaintiff's or the defendants' performance under the contract for restoration of the property but, rather, pertaining to the terms of the plaintiff's insurance policy and Starr's alleged refusal to defend the plaintiff against the counterclaim. The rule announced by our Supreme Court in *Total Recycling* thus does not allow the plaintiff to recover from the defendants attorney's fees incurred in connection with

We now turn to the scope of our remand. It is unclear—for the reasons we have discussed—whether, and to what extent, the trial court's attorney's fees award incorporates fees incurred by the plaintiff in connection with the Starr litigation. The plaintiff did not apportion its attorney's fees between those that were incurred in connection with the Starr litigation and those that were not, leaving the trial court without a basis from which to definitively determine how much of the plaintiff's fees were connected to the Starr litigation, and excise them from the award accordingly. Accordingly, a new hearing on attorney's fees is necessary. On remand, the plaintiff should be prepared to apportion its attorney's fees between those that are attributable to the Starr litigation and those that are not, and the trial court should ensure that the former are not included in the attorney's fees award.[23]

The award of attorney's fees is vacated and the case is remanded for a new hearing on the plaintiff's motion

the Starr litigation, notwithstanding the lack of contractual authorization for such fees.

[23] It is true, as the plaintiff points out, that the defendants did not file a motion for articulation of the court's award of attorney's fees. Under the circumstances of this case, however, we cannot hold the defendants primarily responsible for the lack of clarity in the award. Cf., e.g., *Jacques* v. *Jacques*, 223 Conn. App. 501, 516, 309 A.3d 372 (2024) (remanding case for new hearing on attorney's fees where court improperly awarded defendant attorney's fees without making sufficient factual findings as to plaintiff's bad faith, but where defendant had submitted evidence that court disregarded, meaning that "the defendant, through no fault of her own, was deprived of a full and fair opportunity" to make her case). Because the plaintiff did not apportion its requested attorney's fees between those that were incurred in connection with the Starr litigation and those that were not, the trial court lacked a sufficient evidentiary basis from which it could reliably have determined how much of the plaintiff's attorney's fees were in fact attributable to the Starr litigation. We cannot see how the defendants, for their part—who presumably were not privy to their adversary's confidential communications, discussions, and work product—were in a position to reliably supplement the plaintiff's evidentiary submission by conducting such an apportionment themselves. We therefore do not view the failure to file a motion for articulation as fatal to the defendants' claim.

for attorney's fees consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KATY DUCLOS *v.* SYLVIA HAYES
(AC 46823)

Moll, Suarez and Seeley, Js.

Syllabus

The plaintiff appealed from the trial court's rendering of summary judgment for the defendant landlord with respect to the plaintiff's claims of negligence based on premises liability in connection with her alleged slip and fall on a front porch stairway leading to a tenant's apartment. The plaintiff claimed, inter alia, that the court improperly rendered summary judgment despite the existence of genuine issues of material fact as to whether the defendant owed a duty of care to her. *Held*:

Although the trial court committed error in failing to provide an oral or written statement of decision containing its conclusion as to each claim of law raised by the parties and the factual basis therefor, as required by our rule of practice (§ 64-1 (a)), this court was not precluded from considering the plaintiff's claims on the merits because its review was plenary, there was an adequate record, and it was in the interests of judicial economy and fairness to the parties to proceed.

The trial court properly rendered summary judgment for the defendant, as there was no genuine issue of material fact that the defendant did not exercise possession and control of the illumination of an operational light fixture in the front exterior entryway of the premises, the defendant's tenant having exclusive possession and control of the light switch, located inside his demised apartment, that operated the light fixture, and, therefore, she did not owe a duty of care to the plaintiff.

Argued April 15—officially released August 19, 2025

Procedural History

Action to recover damages for, inter alia, personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards*, *J.*, granted the plaintiff's motion to cite in Eugene Bell as a defendant; thereafter, the court, *S. Richards*, *J.*,

granted the named defendant's motion for summary judgment and rendered judgment thereon; subsequently, the plaintiff withdrew her claims against the defendant Eugene Bell and appealed to this court. *Affirmed.*

Andrew T. Boivin, with whom, on the brief, was *Alphonse J. Balzano, Jr.*, for the appellant (plaintiff).

Ellen M. Costello, for the appellee (named defendant).

Opinion

MOLL, J. The plaintiff, Katy Duclos, appeals from the summary judgment rendered by the trial court in favor of the defendant Sylvia Hayes on count one of the plaintiff's second amended complaint sounding in premises liability arising out of her alleged slip and fall.[1] On appeal, the plaintiff claims that the court improperly granted summary judgment in favor of the defendant (1) without providing an oral or written statement of decision and (2) because there were genuine issues of material fact.[2] We conclude that (1) the trial court erred in failing to issue an oral or written statement of its decision granting summary judgment, but that this deficiency does not prevent our review of the plaintiff's

[1] On June 25, 2020, the trial court, *S. Richards, J.*, granted the plaintiff's motion to cite in Eugene Bell as a defendant. On August 2, 2023, the plaintiff withdrew her claims against Bell, and Bell is not participating in this appeal. Accordingly, in this opinion we refer to Hayes as the defendant and to Bell by name.

The plaintiff's motion to cite in Bell stated that Bell, as the tenant of the premises, "constitutes a necessary party to the present action because he may have been the party in possession and control of the subject premises and the subject defect, and responsible for the injuries and damages sustained by the plaintiff." After the court granted the plaintiff's motion, the plaintiff filed (1) an amended complaint, dated June 25, 2020, and (2) a second amended complaint, dated September 3, 2021, both of which directed one count to the defendant and one count to Bell. Because the plaintiff thereafter withdrew the present action against Bell, we refer solely to the allegations set forth in count one of the second amended complaint throughout this opinion.

[2] We address the plaintiff's claims in a different order than they are set forth in her principal appellate brief.

claims on the merits, and (2) there existed no genuine issues of material fact as to whether the defendant owed a duty of care to the plaintiff, such that the defendant was entitled to summary judgment as a matter of law. Accordingly, we affirm the summary judgment of the trial court.

The following facts, which are undisputed, and procedural history are relevant to our resolution of this appeal. At all relevant times, the defendant owned a two-story residential building located at 103 Judson Avenue in New Haven (premises). In September, 2017, pursuant to a residential lease agreement (lease agreement), the defendant was leasing the first floor apartment of the premises to Eugene Bell.[3] Outside of the first floor apartment, there is a single stair that leads from the sidewalk to the front porch entryway.[4] There is a lighting fixture installed on the ceiling of the front porch, and the light switch that operates the lighting fixture is located inside of the first floor apartment, which was leased to Bell.

On September 14, 2019, the plaintiff commenced the present action against the defendant. In her second amended complaint, dated September 3, 2021 (i.e., the operative complaint), the plaintiff alleged that, on September 17, 2017, at approximately 8:30 p.m., Bell permitted her to enter onto the premises and she tripped and fell on the front porch stairway of the premises, sustaining injuries as a result. The plaintiff further alleged that (1) she fell because "there existed a defective, unsafe, dangerous, and/or hazardous condition in

[3] The lease agreement in effect at the time of the alleged slip and fall, which both parties submitted as an exhibit in their respective summary judgment filings, reflects that the lease term began on September 1, 2017, and ended on August 31, 2018.

[4] In the defendant's affidavit submitted in support of her motion for summary judgment, filed on September 8, 2021, she averred that the second floor apartment was accessed through the rear of the building. This averment went unrebutted.

that there were improper, damaged, and/or neglected lighting fixtures installed on or about the exterior of [the] premises, which failed to sufficiently illuminate the external stairway of the premises" and (2) the defective lighting constituted a breach by the defendant of her duty to use reasonable care to keep and to maintain the premises in a reasonably safe and good condition. On December 13, 2019, the defendant filed an answer denying the plaintiff's material allegations and asserted a special defense alleging that the plaintiff's injuries, losses, and damages were caused by her own carelessness and negligence.[5] On January 21, 2020, the plaintiff filed a reply denying the defendant's special defense.

On September 8, 2021, the defendant filed a motion for summary judgment, arguing that there were no genuine issues of material fact that (1) she did not maintain control of the allegedly defective lighting fixture, such that she owed no duty of care to the plaintiff to ensure that the front porch light was adequately lit, (2) the lighting on the front porch did not constitute a defective condition, and (3) she was not on notice of the allegedly defective condition. Attached to the defendant's supporting memorandum were various exhibits, including (1) the lease agreement, (2) the defendant's supporting affidavit, (3) a photograph of the front exterior entryway of the premises, and (4) a transcript excerpt from the deposition of the plaintiff.

On November 24, 2021, the plaintiff filed a memorandum in opposition to the defendant's motion for summary judgment, attached to which was the lease agreement only. The plaintiff argued that the defendant was

[5] The defendant's answer and special defense were directed to the plaintiff's original complaint dated September 9, 2019. The defendant did not plead further. See Practice Book § 10-61 ("When any pleading is amended the adverse party may plead thereto within the time provided by Section 10-8 or, if the adverse party has already pleaded, alter the pleading, if desired, within ten days after such amendment or such other time as the rules of practice, or the judicial authority, may prescribe, and thereafter pleadings shall advance in the time provided by that section. If the adverse party fails

not entitled to summary judgment because genuine issues of material fact existed as to "(1) whether the defendant retained control of the subject property, including the exterior entryway/light fixtures, (2) whether the lease agreement between [the defendant] and . . . Bell expressly stated the terms of control over the subject property, including the exterior entryway/light fixtures, (3) whether the [lease agreement] unambiguously conveyed [to Bell] control over the part of the property at issue in this case, and (4) whether . . . the defendant . . . was charged with notice, actual or constructive, of the defect causing injury to the plaintiff, as alleged."

On January 20, 2022, the court, *S. Richards*, *J.*, heard argument on the defendant's motion for summary judgment. On March 10, 2022, the court granted the defendant's motion for summary judgment and, on April 21, 2022, denied the plaintiff's subsequent motion to reargue/reconsider and for articulation. This appeal followed. Additional procedural history will be set forth as necessary.

I

We preliminarily address the plaintiff's claim that the trial court, in granting the defendant's motion for summary judgment, committed error in failing to provide an oral or written statement of decision containing its conclusion as to each claim of law raised by the parties and the factual basis therefor. We agree that the court committed error in this regard.[6]

to plead further, pleadings already filed by the adverse party shall be regarded as applicable so far as possible to the amended pleading.").

[6] The plaintiff raises a separate claim challenging the denial of her motion to reargue/reconsider and for articulation, contending that, in denying that motion, the court compounded its initial failure to articulate the basis of its summary judgment rendered in the defendant's favor. Insofar as the plaintiff moved for articulation prior to filing her appeal and now seeks our review of the trial court's denial thereof, we cannot afford such review. See *Brycki* v. *Brycki*, 91 Conn. App. 579, 593–94, 881 A.2d 1056 (2005) (Practice Book § 66-7 affords review of decision on motion for articulation filed pursu-

The following additional procedural background is relevant to our resolution of this claim. On March 10, 2022, the court, *S. Richards*, *J.*, granted the defendant's motion for summary judgment by way of a one word order that simply stated: "GRANTED." On March 28, 2022, the plaintiff filed a motion to reargue/reconsider and for articulation of the court's ruling, to which the defendant filed an objection on April 8, 2022. On April 21, 2022, the court denied the plaintiff's motion on the ground that "the court's [March 10, 2022] ruling speaks for itself."

The plaintiff filed a notice of intent to appeal on March 28, 2022, and her case proceeded against Bell until it was withdrawn on August 2, 2023. Thereafter, the plaintiff filed this appeal on August 21, 2023. On September 6, 2023, pursuant to Practice Book § 64-1 (b), the plaintiff filed a notice with this court seeking a statement of decision by the trial court on the ground that the trial court had failed to comply with § 64-1 (a). In response, on September 21, 2023, the court, *Abrams*, *J.*, issued an order wherein it stated: "Judge Sybil Richards has retired and is unavailable to provide a decision."

Practice Book § 64-1 (a) mandates, inter alia, that the judicial authority "state its decision either orally or in writing" when "making any . . . rulings that constitute a final judgment for purposes of appeal under Section 61-1,[7] including those that do not terminate the proceedings. The court's decision shall encompass its conclusion as to each claim of law raised by the parties and

ant to Practice Book § 66-5 only, which motion may be filed only *after* appeal has been filed); see also *Swanson* v. *Groton*, 116 Conn. App. 849, 865–66, 977 A.2d 738 (2009) (declining to review appellant's claim challenging trial court's denial of motion for articulation filed prior to appeal). Even if we were to consider the plaintiff's claim, however, the claim would be without merit because, as we conclude herein, the court's failure to issue an oral or written statement of decision does not preclude our review of the plaintiff's claims on the merits.

[7] Practice Book § 61-1 provides: "An aggrieved party may appeal from a final judgment, except as otherwise provided by law."

the factual basis therefor. If oral, the decision shall be recorded by an official court reporter or court recording monitor, and, if there is an appeal, the trial court shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court. . . .''[8] (Footnote added.)

Practice Book § 64-1 (b) provides: "If the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter

[8] Practice Book § 6-1 (a), the Superior Court counterpart to Practice Book § 64-1 (a), similarly mandates that "[t]he judicial authority shall state its decision either orally or in writing" when "making any . . . rulings that constitute a final judgment for purposes of appeal under General Statutes § 52-263, including those that do not terminate the proceedings. The judicial authority's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by an official court reporter or court recording monitor and, if there is an appeal, the trial judge shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed in the trial court clerk's office."

General Statutes § 52-263 provides in relevant part: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict . . . ."

comply with subsection (a)." This court has explained that the purpose of Practice Book § 64-1 is "to help create an adequate record for appellate review." *Russo* v. *Thornton*, 217 Conn. App. 553, 570 n.22, 290 A.3d 387, cert. denied, 346 Conn. 921, 291 A.3d 608 (2023); see also *LaBossiere* v. *Jones*, 117 Conn. App. 211, 215–16, 979 A.2d 522 (2009). Practice Book § 64-1 also may serve to reveal whether (1) some controlling decision or principle of law has been overlooked, (2) there has been a misapprehension of facts, or (3) the court did not address a claim of law raised by the movant. See Practice Book § 11-11.[9] The decision contemplated by Practice Book § 64-1 also may aid the parties in their decision-making as to how to proceed with the litigation (or any resolution thereof). Simply put, a trial judge who fails to comply with this obligation when required, and certainly when granting a motion for summary judgment, does a disservice to the parties and any reviewing court.

In the present action, the trial court erred in failing to provide an oral or written statement of decision containing "its conclusion as to each claim of law raised by the parties and the factual basis therefor," as required by Practice Book § 64-1 (a).[10] Nevertheless, the

[9] Practice Book § 11-11 provides: "Any motions which would, pursuant to Section 63-1, delay the commencement of the appeal period, and any motions which, pursuant to Section 63-1, would toll the appeal period and cause it to begin again, shall be filed simultaneously insofar as such filing is possible, and shall be considered by the judge who rendered the underlying judgment or decision. The party filing any such motion shall set forth the judgment or decision which is the subject of the motion, the name of the judge who rendered it, the specific grounds upon which the party relies, and shall indicate on the bottom of the first page of the motion that such motion is a Section 11-11 motion. The foregoing applies to motions to reargue decisions that are final judgments for purposes of appeal, but shall not apply to motions under Sections 16-35, 17-2A and 11-12."

[10] In her appellate brief, the defendant appears to argue that the plaintiff has failed to present this court with an adequate record for review because the plaintiff delayed the filing of her Practice Book § 64-1 (b) notice. We note that § 64-1 (b) does not set forth a deadline for the filing of such notice. See Practice Book § 64-1 (b). In any event, the plaintiff filed this appeal on

trial court's noncompliance with this rule of practice does not preclude our consideration of the plaintiff's claims on the merits because our review is plenary; see part II of this opinion; and the precise legal analysis undertaken by the trial court is not essential to this court's review of the issues on appeal.[11] See *DAB Three, LLC* v. *Fitzpatrick*, 215 Conn. App. 835, 844 n.10, 283 A.3d 1048 (2022) (absence of memorandum of decision or transcript signed by trial court did not preclude reviewing court's consideration of appeal because, inter alia, "our standard of review is plenary, and the precise legal analysis undertaken by the trial court is not essential to [this court's] consideration of the issue on appeal" (internal quotation marks omitted)), cert. denied, 345 Conn. 971, 286 A.3d 907 (2023); cf. *Claude* v. *Claude*, 143 Conn. App. 307, 309–12, 68 A.3d 1204 (2013) (under "unique circumstances" of case, reversing denial of plaintiff's motion to open judgment of nonsuit, which was subject to abuse of discretion standard of review, and remanding case for new hearing on motion when trial judge (1) summarily denied motion, (2) did not file memorandum of decision following plaintiff's § 64-1 (b) notice, and (3) retired before complying with order issued by this court requiring compliance with § 64-1). In short, the trial judge's unavailability as a result of her retirement, the plenary standard of review applicable to this appeal, the fact that there is an adequate record for our plenary review, and the interests of judicial economy and fairness to the parties prompt us to proceed with our consideration of the plaintiff's claims on the merits.

August 21, 2023, and filed her § 64-1 (b) notice sixteen days later, on September 6, 2023. Thus, insofar as the defendant asserts dilatory conduct on the part of the plaintiff, we reject that assertion.

[11] We note that, during oral argument before this court, both parties agreed that we could proceed to resolve the merits of the appeal in lieu of a remand for reconsideration of the defendant's motion by a different trial judge.

II

The plaintiff next claims that the trial court improperly granted the defendant's motion for summary judgment because genuine issues of material fact existed as to whether the defendant owed a duty of care to the plaintiff. We reject this claim.[12]

We begin by setting forth the standard of review and legal principles relevant to an appeal from summary judgment. "The standard of review of a trial court's decision granting summary judgment is well established. 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary."

[12] The plaintiff also contends that the summary judgment was improper because genuine issues of material fact existed as to whether (1) the alleged defective condition existed on the portion of the premises at issue and (2) the defendant had actual or constructive notice of the alleged defective condition. Because we conclude that no genuine issues of material fact existed as to whether the defendant owed a duty of care to the plaintiff, we need not resolve these claims.

(Internal quotation marks omitted.) *Doe* v. *Flanigan*, 201 Conn. App. 411, 422–23, 243 A.3d 333, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020). "A material fact is a fact that will make a difference in the result of the case." (Internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, 120 Conn. App. 298, 305, 991 A.2d 1105, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010).

The plaintiff brought this negligence action sounding in premises liability. "In a negligence action, the plaintiff must meet all of the essential elements of the tort in order to prevail. These elements are: duty; breach of that duty; causation; and actual injury." *LaFlamme* v. *Dallessio*, 261 Conn. 247, 251, 802 A.2d 63 (2002). Moreover, "to succeed in a traditional negligence action that is based on premises liability, the plaintiff must prove (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Hill* v. *OSJ of Bloomfield, LLC*, 200 Conn. App. 149, 154–55, 239 A.3d 345 (2020).

With respect to the element of duty, it is well established that "[t]he existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . . Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." (Citation omitted; internal quotation marks

omitted.) *Demond* v. *Project Service, LLC*, 331 Conn. 816, 834, 208 A.3d 626 (2019).

Generally, "[t]he test for the existence of a legal duty of care entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Internal quotation marks omitted.) *Cannizzaro* v. *Marinyak*, 312 Conn. 361, 366, 93 A.3d 584 (2014). "The general rule regarding premises liability in the landlord-tenant context is that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control . . . . [L]andlords [however] generally [do] not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the tenant." (Internal quotation marks omitted.) *Baldwin* v. *Curtis*, 105 Conn. App. 844, 848–49, 939 A.2d 1249 (2008). "Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property. . . . Retention of control is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . The word control has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or oversee." (Internal quotation marks omitted.) *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 50, 58 A.3d 293 (2013). "[P]ossession cannot be fairly construed as anything short of the exercise of dominion and control similar to and in substitution for that which ordinarily would be exerted by the owner in possession." (Internal quotation marks omitted.) *Silano* v.

Cumberland Farms, Inc., 85 Conn. App. 450, 454, 857 A.2d 439 (2004).

As stated previously, the plaintiff's complaint alleged that "there existed a defective, unsafe, dangerous, and/or hazardous condition in that there were improper, damaged, and/or neglected *lighting fixtures* installed on or about the exterior of said premises, which failed to sufficiently illuminate the external stairway of the premises . . . ." (Emphasis added.) Although the plaintiff frames on appeal the issue of duty in general terms of possession and control of the front porch area containing the lighting fixture at issue, we distill the plaintiff's allegations regarding duty into the following two parts: (1) whether the defendant had a duty to maintain a functioning lighting fixture in the ceiling above the external entryway; and (2) whether the defendant had a duty of assuring actual illumination of that fixture. See *Pergament* v. *Green*, 32 Conn. App. 644, 650, 630 A.2d 615 ("A fundamental tenet in our law is that the plaintiff's complaint defines the dimensions of the issues to be litigated. [T]he right of a plaintiff to recover is limited to the allegations of [her] complaint." (Internal quotation marks omitted.)), cert. denied, 228 Conn. 903, 634 A.2d 296 (1993). We address these in turn.

First, to the extent that the complaint alleged that the lighting fixture was damaged or neglected, it is undisputed that a lighting fixture was installed and that it was operational at all relevant times, and, therefore, we need not reach the issue of whether the defendant had a duty to install and maintain a functioning lighting fixture in the ceiling above the front external entryway. In her affidavit in support of her motion for summary judgment, the defendant averred that the lighting fixture "at all times was operational, in good repair, and capable of providing adequate illumination of the [external] entryway to . . . Bell's first floor apartment" and "was at no time during [her] ownership of [the premises]

inoperable, damaged or neglected." In support of her motion, the defendant also attached a transcript excerpt from the deposition of the plaintiff, which included, inter alia, the following colloquy between the defendant's attorney and the plaintiff:

"Q. Do you have any knowledge of whether or not that light was functional?

"A. No, I do not.

* * *

"Q. Did you ever ask [Bell] whether the light on the porch worked?

"A. No.

"Q. So you don't have any knowledge of whether or not it was a working light bulb in that light?

"A. I had no idea.

"Q. And he never said anything to you about whether the light worked?

"A. No."

Second, concerning whether the defendant had a duty of actual illumination of that fixture, the defendant averred in her affidavit that "Bell had exclusive control over whether the light . . . was activated to provide light to the entry area" and "[t]hat at all times during the tenancy of . . . Bell he paid utilities, including electricity for the first floor apartment . . . and had the ability to light the [external] entryway area at any time he chose to do so."

Having properly framed the issue in two parts, we conclude that the defendant satisfied her burden, as the moving party, of demonstrating that the lighting fixture above the external entryway was, at all relevant times, not damaged or neglected and that Bell retained

exclusive possession and control of the light switch that operated the lighting fixture, as it was located inside of his demised apartment. These evidentiary submissions by the defendant were sufficient to meet her burden of establishing that no genuine issue of material fact exists as to possession and control of the light switch and, therefore, she did not owe a duty to the plaintiff.

We further conclude that, once the burden had shifted to her, the plaintiff did not "present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Doe* v. *Flanigan*, supra, 201 Conn. App. 423. As previously stated in this opinion, the sole evidence provided by the plaintiff in opposing the defendant's motion for summary judgment was the lease agreement, which the defendant also had submitted. The plaintiff argues that, because the lease agreement "only identifies the demised premises as the '[1st] floor' and does not more particularly or specifically define, delineate, describe, or identify the demised premises," there is a genuine issue of material fact as to who retained possession and control of the external entryway. The plaintiff also contends that "the lease [agreement] does not provide or indicate that the front porch area outside the apartment was part of the first floor nor does it provide that the lighting on the front porch area was under [Bell's] control and his responsibility." Instead, in the plaintiff's view, the fact that paragraph 21 of the lease agreement provides that "[Bell] will not block any of the sidewalks, hallways, doorways, or decks (front or back) with anything and [Bell] will not use them except to come and go from [his] residence," demonstrates that the front porch area was not part of the demised premises but rather a common area within the defendant's possession and control because the lease agreement directed what could be done with such area by Bell.

Insofar as the plaintiff focuses her attention on possession and control of the front exterior entryway containing the allegedly defective lighting fixture, the plaintiff misses the mark. As we have explained, the issue here, properly framed, is whether a genuine issue of material fact existed as to possession and control of the illumination of the lighting fixture itself. The plaintiff adduced no evidence to rebut the defendant's evidence demonstrating that whether the lighting fixture was activated was in the exclusive control of Bell, rather than the defendant.[13]

We acknowledge that, "if the terms of control are not express between the parties, the question of who retains control over a specific part of the property is an issue of fact and a matter of intent that can be determined only in light of all the relevant circumstances." *LaFlamme* v. *Dallessio*, supra, 261 Conn. 257. The issue with the plaintiff's reliance on this principle, in conjunction with the fact that the lease agreement does not definitively express that Bell was in possession and control of the external entryway, is that there is no factual dispute that the light switch was located inside Bell's apartment.

In sum, we conclude that there is no genuine issue of material fact that the defendant did not exercise possession and control of the illumination of the otherwise operational lighting fixture in the front exterior entryway and, therefore, did not owe a duty of care to

[13] To the extent that the plaintiff suggests that the defendant had a duty to install a lighting fixture that turned on automatically when it became dark or with motion, rather than one that was operated by a light switch inside of Bell's apartment, we reject this notion. The plaintiff has cited no legal authority or evidentiary submission (e.g., a contractual obligation, a building or housing code provision, or other legislative fiat) to support a contention that the defendant had a duty to install sensored or timed exterior lighting, and we decline to impose such a duty, as a matter of law, on the defendant.

the plaintiff. Accordingly, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT LEE NICHOLS
(AC 46989)

Alvord, Suarez and Westbrook, Js.

Syllabus

Convicted of the crimes of assault in the first degree and risk of injury to a child, the defendant appealed to this court. He claimed, inter alia, that the trial court applied an incorrect legal standard in denying his postverdict motion for a new trial, in which he claimed that the verdict was against the weight of the evidence. *Held*:

Contrary to the defendant's contention, the evidence was sufficient to support the jury's verdict finding him guilty of the crimes with which he was charged and that his abuse of the minor victim, an infant, occurred within the applicable statute of limitations (§ 54-193 (c)), as the jury reasonably could have credited the testimony of a witness who had watched the defendant cause the victim to hit his head on a granite countertop, drag the victim on a rug and slam him several times on a floor.

The trial court applied an incorrect legal standard in denying the defendant's motion for a new trial to the extent that the court's statement that it could not reject the jury's findings and substitute its own view of the evidence applied the legal standard used to adjudicate sufficiency of the evidence claims, as the proper inquiry in adjudicating a motion for a new trial required the court to determine if there was a substantial question regarding the reliability of the verdict and to make its own credibility determinations, and the court's summary statement that it agreed with the jury's findings based on the evidence did not alter this court's conclusion that the trial court applied an incorrect legal standard; accordingly, the trial court's denial of the motion for a new trial was reversed and the case was remanded to the trial judge who presided over the trial to make his own assessment of the jury's credibility determinations.

Argued May 19—officially released August 19, 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 first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *K. Doyle, J.*; verdict of guilty; thereafter, the court denied the defendant's motions for a judgment of acquittal, in arrest of the judgment and for a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Corinne A. Burlingham, with whom were *Michael S. Taylor* and *Brendon P. Levesque*, for the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Michael W. Riley*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Robert Lee Nichols, appeals from the judgment of conviction, rendered following a jury trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (3) and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that the trial court improperly (1) denied his motion for a judgment of acquittal because there was insufficient evidence for the jury to find him guilty on all counts, and (2) denied his motion for a new trial because the jury's verdict was against the manifest weight of the evidence. We disagree with the defendant's first claim. However, we are persuaded that the court applied an incorrect legal standard in adjudicating the defendant's motion for a new trial. Accordingly, we

reverse the court's denial of the motion for a new trial and remand the case to the trial court, *K. Doyle*, *J.*, for a new determination on that motion. The judgment is affirmed with respect to the defendant's claim that the evidence was insufficient to support his conviction.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of the defendant's claims. The defendant and his wife (collectively, Nichols) were pastors of a small congregation and operated a day care out of their house. The minor victim[1] was born in October, 2012. The victim's parents, R and D, attended services at the defendant's congregation and enrolled the victim in the defendant's day care. The Nichols and H,[2] another person who attended services at the defendant's congregation and who lived with the Nichols, were the only people who worked at the day care. The Nichols also watched the victim outside of the regular day care hours.

During August, 2013, R and D fell ill, which led to the victim, who was approximately nine or ten months old at the time, having an extended stay of about ten days (extended stay) at the Nichols' house.[3] At the

[1] 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 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] R, D and H were raised in a religion that viewed women as subservient to men. R and H believed they had to submit to the authority of their husbands and pastors.

[3] D and R provided inconsistent testimony about why the Nichols watched the victim during the extended stay. D testified that the Nichols wanted to keep the victim in order to teach him how to be more obedient, whereas R testified that the Nichols were concerned that the victim would catch the illness if they took him home.

beginning of the victim's extended stay, the defendant placed the victim, several times, in a sink filled with cold water and ice cubes. The defendant used the sink faucet sprayer to spray water over the victim's head, causing the victim to flail and gasp for air.[4] On one of these occasions, the victim flailed, fell backward, and hit his head on a granite countertop.

Other incidents occurred during the victim's extended stay. The defendant slapped and hit the victim, causing the victim to have bruises on his legs. Also, the defendant very roughly put the victim into a playpen, making a "thud" sound, and placed pillows on either side of the victim in order to force him to sit upright. In addition, the defendant tightly swaddled the victim. One time, the defendant tightly wrapped the victim, took him by the legs, flipped him over, and dragged him along a carpeted floor. While the victim was still wrapped, the defendant hit the victim on the floor about three to four times.[5] After those incidents, the victim had marks on his head and bruises.

After R and D recovered from their illnesses, they attended a service at the defendant's church. The defendant did not allow R and D to see the victim at that

Initially, R testified that the Nichols watched the victim in August, 2013. Although R and D testified that the stay could have been in July, 2013, and H initially testified that she did not remember the exact dates of the extended stay and that it might have been in the fall of 2013, H later testified that the stay began on August 10, 2013, because she had a photo with that date and recalled that the photo was taken the first day of the extended stay.

[4] During trial, H testified that the victim had not been standing up when the defendant commanded him to do so, and the defendant "was trying to prove to me, like, he . . . said to me . . . see, look . . . if [the victim] can't breathe, if [the victim is] fighting for his life, [the victim] can do it. So, that means [the victim] knows how to do it and he's being rebellious. And so, [the defendant] was trying to prove that [the victim] knew how to do it, but [the victim] wasn't because, if he was fearing for his life, he would do it."

[5] H testified: "I heard the thud of [the victim's] head on the floor. . . . [I]t was a carpeted floor, but not like a plush, thick carpet. It's like that thin . . . kind of carpet that's knit very tightly. . . . And it was in the living room where we had a lot of the day care time."

time because, according to the defendant, the victim was rebellious.[6] The victim was returned to R and D after being with the Nichols for about ten days.[7] When the victim was returned to his parents, R and D noticed that the victim seemed off and did not seem to be himself.[8] R saw bruises on the victim's legs. R wanted to take the victim to a doctor, but D did not allow her to do that. Following the extended stay, the victim would cry whenever R dropped him off at day care or passed him to the defendant.

In September, 2013, R, D and the victim left the apartment in which they had been living and moved into the defendant's basement. D's sister helped R and D move out of the apartment. At the time, D's sister did not see any bruises or cuts on the victim, but the victim appeared cross-eyed[9] and would put his head down and keep it down when he was on the floor.

[6] The defendant told R that the victim's "rebellious behavior was because of [her], because [she] was rebellious, and [she] had passed that on to [her] son."

[7] H testified that the defendant "seemed very concerned that [R] would see [the bruises]. And he said that [they] had to keep [the victim] until the bruises went away so she wouldn't see it because he was concerned . . . she wouldn't understand how necessary this was and she would say something to the doctor. . . . He thought it was necessary because he was convinced that [the victim] had a rebellious spirit and that it was Satan's attack, and that he had to get it out of [the victim]." In addition, H "was very strictly told not to take any photos of [the victim] once [the victim] had the bruises and his eyes were crossed." During the victim's extended stay, H did not report the incidents to R or to the police "[b]ecause I was afraid if I went against [the defendant], who was my pastor and the one who was my authority, that I would be going against God, and then I would be vulnerable to Satan attacking me. . . . I was also afraid of my life and what [the defendant] would do to me. If he was capable of doing that to a small infant, I was very scared to stand up to him because, if I had ever tried in the past, it resulted in verbal yelling and screaming at me. And so, I was very afraid to attempt speaking up about it."

[8] R testified that the victim "was not as happy as he normally was" and "look[ed] more pale whenever he would vomit, which would happen periodically after he came home." D testified that the victim looked "somber" and "malnourished. . . . [The victim's] face color was different."

[9] D's sister testified that the victim did not appear cross-eyed on prior visits.

On October 9, 2013, a pediatrician examined the victim during a routine wellness visit. During this twelve month wellness visit, the pediatrician observed that the victim had experienced abnormal head growth. At the victim's nine month wellness visit, his head had normal measurements; there had been an abrupt and abnormal acceleration in the victim's head growth in the three month interval between the two wellness visits. As a result, the pediatrician ordered an ultrasound for the victim. The ultrasound was done on October 14, 2013, and the victim was sent home following the procedure. Upon receiving the radiology results, which showed fluid in the victim's head, the pediatrician notified authorities of suspected child abuse and called R and D to schedule an MRI scan for the victim. R and D decided against scheduling an MRI.[10] However, the victim was transported to a hospital by ambulance that night, where he later underwent an MRI scan.

R gave two statements to Detective Kerri Rosa of the Manchester Police Department during the victim's hospitalization.[11] D was present each time R was interviewed by Rosa, and R was not allowed to meet with Rosa outside the presence of D. In addition, the defendant coached R before her meeting with Rosa. R provided one written statement on October 15, 2013, in which she stated that she "[did] not know of anything that could have caused a serious injury to [the victim]."

[10] The defendant advised R and D to ensure that their insurance would cover the MRI. R and D contacted the insurance company, which told them a referral was required. The pediatrician would not provide a referral, so R and D did not schedule the MRI. R testified that "[t]he way it was communicated at [the victim's] well visit was . . . it was all precautionary anyways." R further testified that she did not believe that the victim's condition was serious at the time. She then left for work that night. D testified that, at that time, the defendant told R and D that they should pray over the victim, that the fluid would dissipate, and that their insurance might not cover the procedure.

[11] D also gave a statement to the police.

On October 16, 2013, R gave a second statement to Rosa. In that statement, she provided examples of how the victim may have been injured, such as by a wave hitting the victim while they were in Florida, and an incident in which the victim hit his head after R fell backward when taking the victim out of a car. Although the defendant was not present when R gave her statements to Rosa, the defendant had prompted R to respond to the detective's questions with those examples.[12]

H also gave a statement to Rosa on October 15, 2013. H had spoken to and was instructed by the defendant before she gave the statement.[13] In that statement, she recounted that she did not notice any abnormal behavior by or injuries to the victim and that she did not see the victim act in a way to make her believe that he had been abused.

The victim's MRI results showed that he had subdural hematomas around his brain and blood in another layer of tissues near his brain. On October 17, 2013, the victim underwent surgery to relieve pressure on his brain.

[12] The defendant gave statements to Rosa on October 15 and 16, 2013. In his October 16 statement, the defendant recalled that he "was bathing [the victim] in [his] kitchen sink, and [he] went to rinse [the victim] off with the water and [the victim] jerked backward, striking the back of his head on the granite kitchen countertop that surrounds the sink." The defendant also noted that "[R] recalled two different situations. One . . . was when we were all vacationing together in Florida. [R] said her and [D] had brought [the victim] to the beach, and a wave hit him. And the other incident happened when she was getting him out of the car. [R] explained that . . . within the last couple weeks, she was getting him out of the car, and she lost her balance and stumbled backward. [R] said [the victim] struck his forehead on the car's doorframe and grab bar area."

[13] H testified that the defendant had told her that "[Rosa] was, essentially, like, I believe he called [Rosa] Satan multiple times. Or she was of Satan. Or working on Satan's behalf. She was, like, evil." H also testified that, after she provided her statement to Rosa, the defendant told her that "people are never going to understand the ways of God or understand disciplining children. They're not going to understand that this is a spiritual attack of Satan. They're not going to understand the ways of God or how you discipline children."

The treatment providers conducted a six month long assessment of the victim. Subdural hematomas are commonly caused by trauma but can result from rare medical causes. The treatment providers believed it was more likely than not that the injuries were the result of abusive head trauma because the injuries were unexplained.[14]

Because of the victim's injuries, R and D lost custody of the victim. The victim was placed in foster care by the Department of Children and Families while R and D continued living in the Nichols' house. R, however, eventually left the defendant's church, moved out of the Nichols' house, and separated from her husband. The victim was returned "full-time [to her] care" in June, 2014. H left the Nichols' house in December, 2016.

In June, 2018, H told R about what had happened to the victim. H then gave a statement to the police, in which she described the defendant's assault on the victim.[15] On June 4, 2018, R provided her third statement to the police.[16] In the 2018 statement, R described how she and D had fallen ill in August, 2013, the Nichols took the victim, and she and D were not allowed to see the victim for about ten days. D also gave a statement to the police in 2018.

[14] Nina Livingston, a pediatrician specializing in child abuse, testified that the treatment providers "originally, during [their] evaluation, said that [the injuries] were suspicious for physical abuse. . . . [They] could not find a medical reason for these collections [of blood in the victim's brain]. And there were many things, including this head growth chart, that pointed to some event occurring between nine and twelve months of age." In addition, she opined that the injury had taken place more than one week before the victim was treated at the hospital.

[15] H testified that her 2018 statement was different from her 2013 statement "[b]ecause, in 2013, I was so afraid of disobeying [the defendant]. And he told me what to say, and I felt that I had to obey him because he was the man of God. He was my authority. And I was too scared to tell the truth. And I just said exactly what he told me to say."

[16] R testified that she gave that statement because "[t]he case was being revisited. [H] had come forward and [R] felt at that time [that she] was free to speak for [herself]."

Thereafter, the defendant was arrested and charged by way of a substitute long form information with one count of assault in the first degree in violation of § 53a-59 (a) (3) and two counts of risk of injury to a child in violation of § 53-21 (a) (1). A jury trial was held in June, 2023.

When the state rested its case, defense counsel orally moved for a judgment of acquittal on the ground that there was "not enough evidence that would reasonably permit a finding of guilty on all the charges." Specifically, although defense counsel did not dispute that someone had injured the victim, he argued that there was insufficient evidence identifying the defendant as the perpetrator. In addition, defense counsel moved for a judgment of acquittal on the ground that the state had not commenced this case within the five year statute of limitations; see part I of this opinion; arguing that there was conflicting evidence from H regarding the start date of the victim's extended stay.[17] The trial court denied the motion, concluding that there was sufficient evidence "to find the defendant guilty and to avoid the statute of limitations claim."

The jury found the defendant guilty on all counts. On June 30, 2023, the defendant filed three motions. The defendant filed a motion for a judgment of acquittal on all counts on the ground that the evidence was insufficient to permit a finding of guilt beyond a reasonable doubt. The defendant filed a motion in arrest of judgment on the ground that the court lacked jurisdiction because the prosecution did not commence within the statute of limitations. The defendant filed a motion for a new trial on all counts on the ground that the verdict was against the weight of the evidence. Following argument, the trial court denied all three motions in an oral decision. On August 16, 2023, the court sentenced the

[17] See footnote 3 of this opinion.

defendant to a total effective term of twenty years of incarceration, execution suspended after ten years, followed by five years of probation. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to support his conviction. Specifically, he argues that the evidence was insufficient to establish that he committed the alleged conduct or, in the alternative, that the evidence was insufficient to establish that the conduct occurred within the statute of limitations because "the only evidence of the defendant's involvement in the injuries sustained by [the victim] came from a single, highly incredulous witness—[H]." We are not persuaded.

We begin with the well settled standard governing our review of the defendant's claim that his conviction was predicated on insufficient evidence. "In reviewing a sufficiency of the evidence claim, 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 . . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . .

"While 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. . . . 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. . . .

"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 jury's verdict of guilty. . . .

"Furthermore, we are mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record." (Citation omitted; internal quotation marks omitted.) *State* v. *Douglas C.*, 195 Conn. App. 728, 735–36, 227 A.3d 532 (2020), aff'd, 345 Conn. 421, 285 A.3d 1067 (2022).

Next, we set forth the relevant statutory language. Section 53a-59 (a) provides in relevant part that "[a] person is guilty of assault in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ." Section 53-21 (a) provides in relevant part that "[a]ny person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of . . . a class C felony for a violation of subdivision (1) . . . ." In addition, with the exception of certain crimes identified in General Statutes § 54-193 (a), "[n]o person may be prosecuted for any offense . . . for

which the punishment is or may be imprisonment in excess of one year, except within five years next after the offense has been committed."[18] General Statutes § 54-193 (c).

The defendant's insufficiency of the evidence claim is premised on his contention that the jury could not reasonably have relied on the testimony of the sole eyewitness, H. Specifically, the defendant argues that "[n]o reasonable fact finder could have relied on [H's] claims" because H "is an admitted liar who has proven [that she would] lie to law enforcement and when under penalty of perjury"; "[H's] testimony that she was sexually assaulted by the defendant was contrary to objective contemporaneous records from [H]";[19] and "H has several demonstrated motives for lying, which are to exact revenge against the defendant and personally profit in the process."[20] The defendant also argues, on the ground that H's testimony was unreliable, that the evidence was insufficient because it failed to establish that the crimes occurred within the statute of limitations.

Construing the evidence in the light most favorable to sustaining the verdict, we conclude that the jury reasonably could have found that the victim had been injured by the defendant during his extended stay with the defendant in his home in the days following August 10, 2013. From H's testimony, in conjunction with evidence that the victim had acted differently after his

[18] Detective Claire Hearn testified that a judge had signed the arrest warrant for the defendant on August 10, 2018. The state was required to prove that the defendant's crimes occurred on or after August 10, 2013.

[19] The defendant points to evidence that H had a sexual relationship with the defendant and his wife. He argues that H, despite claiming that she had been sexually abused by the defendant, told another pastor that she liked having sex with the defendant "in the moment" and grew to have feelings for the defendant.

[20] The defendant argues that H was retaliating against the defendant for a $22,000 debt she had incurred, which she blamed the defendant for, and capitalizing on her story by appearing in podcasts and writing a book.

extended stay and sustained life-threatening head injuries requiring surgery in October, 2013, the jury was permitted to infer that the defendant had wilfully caused serious physical injuries to the victim. See, e.g., *State* v. *Franklin*, 162 Conn. App. 78, 89, 129 A.3d 770 (2015) ("[t]he credited testimony of even a single witness may be sufficient to sustain a defendant's conviction" (internal quotation marks omitted)), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016).

The jury could have reasonably found the following facts on the basis of H's testimony. In the days after August 10, 2013, the victim had an extended stay at the Nichols' house. During the extended stay, H saw the defendant place the victim in an ice bath in the kitchen sink and spray the victim with cold water, causing the victim to flail and hit his head on a granite countertop. At that time, the defendant stated that he believed the victim was being "rebellious" because the victim was not following his commands. Also during the extended stay, as H testified, the defendant, "wrapped [the victim] very tightly and took [the victim] by his legs and flipped him over and dragged him. So, he had a rug burn on his head, and [the defendant] slammed him on the floor like three or four times with, like, a loud thud sound." Following these incidents, the victim had marks on his head and bruises on his legs, which the defendant concealed from R by keeping the victim for about ten days.

Although the defendant presented evidence to impeach H's credibility,[21] "it is the function of the jury to consider the evidence and [to] judge the credibility of witnesses." (Internal quotation marks omitted.) *State* v. *Williams*, 350 Conn. 363, 374, 324 A.3d 760 (2024); see *State* v. *A. M.*, 156 Conn. App. 138, 145, 111 A.3d 974 (2015) ("[Q]uestions of whether to believe or to disbelieve a

[21] See footnotes 19 and 20 of this opinion.

competent witness are beyond our review. . . . Our review of factual determinations is limited to whether those findings are clearly erroneous. . . . We must defer to the [finder] of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.)), aff'd, 324 Conn. 190, 152 A.3d 49 (2016). Accordingly, we conclude that there was sufficient evidence to support the jury's verdict.

II

The defendant also claims that the trial court applied an incorrect legal standard in denying his motion to set aside the verdict as against the weight of the evidence. We agree with the defendant.

We begin by setting forth the standard of review applicable to the defendant's claim. Because the defendant's claim challenges the legal standard applied by the trial court, it is subject to plenary review. See, e.g., *State* v. *Hughes*, 341 Conn. 387, 414, 267 A.3d 81 (2021) ("[i]nsofar as the defendant's claims [challenging the court's ruling on the motion for new trial] bear on the proper legal standard, they are subject to plenary review").

Our analysis is guided by the following principles. "[A] challenge to the weight of the evidence is not the same as a challenge to the sufficiency of the evidence. A sufficiency claim dispute[s] that the state presented sufficient evidence, if found credible by the jury, to sustain [the defendant's] conviction. . . . In contrast, a weight claim does not contend that the state's evidence . . . was insufficient, as a matter of law, to establish the defendant's guilt beyond a reasonable doubt. . . . Rather, [it] asserts that the state's case . . . was so flimsy as to raise a substantial question regarding the reliability of the verdict [and that there

was a] serious danger that [the defendant] was wrongly convicted. . . .

"Given that these two types of claims raise fundamentally different issues, the inquiry appropriately undertaken by a court ruling on a sufficiency of the evidence claim differs substantially from that of a court ruling on a weight of the evidence claim. In reviewing the sufficiency of the evidence, a court considers whether there is a reasonable view of the evidence that would support a guilty verdict. . . . In doing so, the court does not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record. . . . [It] cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Thus, a court will not reweigh the evidence or resolve questions of credibility in determining whether the evidence was sufficient. . . .

"In contrast, a court determining if the verdict is against the weight of the evidence does precisely what a court ruling on a sufficiency claim ought not to do. That is, the court must do just what every juror ought to do in arriving at a verdict. The juror must use all his experience, his knowledge of human nature, his knowledge of human events, past and present, his knowledge of the motives which influence and control human action, and test the evidence in the case according to such knowledge and render his verdict accordingly. . . . The trial judge in considering the verdict must do the same . . . and if, in the exercise of all his knowledge from this source, he finds the verdict to be so clearly against the weight of the evidence in the case as to indicate that the jury did not correctly apply the law to the facts in evidence in the case, or were governed by ignorance, prejudice, corruption or partiality, then it is his duty to set aside that verdict and to grant a new trial. . . . In other words, the court

specifically is required to act as a [seventh] juror because it must independently assess [the] credibility [of witnesses] and determine the weight that should be given to . . . evidence. . . .

"Thus, because a court is required to independently assess credibility and assign weight to evidence, a weight of the evidence claim necessarily raises the issue of which courts are competent to perform those tasks. It is well settled that only the judge who presided over the trial where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence . . . . Consequently, a judge in a later proceeding, such as a direct appeal or a habeas corpus proceeding, is not legally competent to decide such a claim on the basis of the cold printed record before it. . . . The rationale behind this rule is sound: [T]he trial court is uniquely situated to entertain a motion to set aside a verdict as against the weight of the evidence because, unlike an appellate court, the trial [court] has had the same opportunity as the jury to view the witnesses, to assess their credibility and to determine the weight that should be given to their evidence. . . . [T]he trial judge can gauge the tenor of the trial, as [an appellate court], on the written record, cannot, and can detect those factors, if any, that could improperly have influenced the jury." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Capasso*, 203 Conn. App. 333, 345–47, 248 A.3d 58, cert. denied, 336 Conn. 939, 249 A.3d 352 (2021); see also *State* v. *Soto*, 175 Conn. App. 739, 745–48, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017).

The following procedural history is relevant to our review of the defendant's claim. As set forth previously, the defendant filed three postverdict motions: a motion for a judgment of acquittal on all counts, a motion in arrest of judgment, and a motion for a new trial on all counts. In an oral decision, the trial court denied the

motions, concluding that, "[i]n all three of the motions, defense essentially are arguing that this court should sit as a ninth juror and reject the jury's factual findings. This court cannot reject the jury's findings and substitute its own view of the evidence. The jury's verdicts are supported by the evidence, and the jury found [H] credible and that she lacked any motive to falsely accuse the defendant, who, at one point, acted as her father and spiritual leader. The jury rejected the inference raised by the defense that [H] would come forward and lie and expose herself to being charged almost five years after the incident. This court agrees with the jury's findings that were based on the evidence presented in this matter and, therefore, denies all of the defendant's motions."

We conclude that the trial court applied the incorrect legal standard relative to the motion for a new trial. First, we note that nowhere in the court's oral decision did it expressly state the legal standard applicable to the defendant's motion for a new trial. Cf. *In re Xavier H.*, 201 Conn. App. 81, 100, 240 A.3d 1087 (when court correctly set forth legal standard elsewhere in its memorandum of decision, imprecision in conclusory statement did not reflect application of incorrect legal standard), cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020). To the contrary, the legal standard set forth by the court at the beginning of its analysis to apply to all three motions stated that "[t]his court cannot reject the jury's findings and substitute its own view of the evidence." To the extent the court applied the standard used for sufficiency of the evidence claims to the defendant's claim that the verdict was against the weight of the evidence, such an application was improper. See *State* v. *Capasso*, supra, 203 Conn. App. 345 ("[T]he inquiry appropriately undertaken by a court ruling on a sufficiency of the evidence claim differs substantially from

that of a court ruling on a weight of the evidence claim. In reviewing the sufficiency of the evidence . . . the court does not sit as a [seventh] juror who may cast a vote against the verdict." (Internal quotation marks omitted.)). In contrast, "[a] weight claim predicated on a challenge to the jury's credibility determinations . . . requires the trial court to make its own assessment of the jury's credibility determinations." *State* v. *Soto*, supra, 175 Conn. App. 755.

Although the trial court concluded its oral decision by noting its "agree[ment] with the jury's findings that were based on the evidence presented in this matter," that summary statement alone does not alter our conclusion that the court applied an incorrect legal standard. Accordingly, we must reverse the court's determination on this issue and remand the case to the judge who presided over the trial[22] to "make [his] own assessment of the jury's credibility determinations." *State* v. *Soto*, supra, 175 Conn. App. 755.

The denial of the motion for a new trial is reversed and the case is remanded to the trial court, *K. Doyle*, *J.*, for a determination, on the existing record, of the motion for a new trial; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

[22] We recognize that Practice Book § 1-22 (a) provides in relevant part: "A judicial authority shall, upon motion of either party or upon its own motion, be disqualified from acting in a matter . . . because the judgment was reversed on appeal. . . ." However, considering the procedural posture of this case and the factual determination to be made, the determination required on remand must be made by the same trial judge. See, e.g., *State* v. *Phillips*, 102 Conn. App. 716, 739 n.19, 927 A.2d 931 (reversing denial of motion for new trial and remanding case to same trial judge for determination as to whether there was racial bias on part of juror against defendant), cert. denied, 284 Conn. 923, 933 A.2d 727 (2007); *State* v. *Soto*, supra, 175 Conn. App. 748 ("[i]t is well settled that *only the judge who presided over the trial* where a challenged verdict was returned is legally competent to decide if that verdict was against the weight of the evidence" (emphasis in original; internal quotation marks omitted)).

RAYMOND J. MILOT *v.* CHRISTINE M. MILOT
(AC 47073)

Alvord, Moll and Wilson, Js.

Syllabus

The defendant appealed from the trial court's judgment resolving several postdissolution motions concerning custody and visitation. The defendant claimed, inter alia, that the court improperly delegated its judicial authority over visitation to the plaintiff. *Held*:

The trial court's order authorizing the plaintiff to exercise his discretion over the defendant's visitation with the parties' minor children was an improper delegation of judicial authority, as, pursuant to the Supreme Court's decision in *R. H.* v. *M. H.* (350 Conn. 446), it placed the trial court's decision-making authority in the hands of a party to the litigation.

The trial court abused its discretion in precluding the defendant from communicating with her youngest child's health-care providers or therapists, as the court failed to make a finding, pursuant to statute (§ 46b-56 (g)), that the defendant should be denied access for good cause shown.

Argued May 28—officially released August 19, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Danbury and tried to the court, *Eschuk*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Heidi G. Winslow*, judge trial referee, granted the plaintiff's motion to modify custody and visitation and denied the defendant's motions to modify custody, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Mark A. Shiffrin, for the appellant (defendant).

Rebecca Mayo Goodrich, for the appellee (plaintiff).

Opinion

PER CURIAM. In this postjudgment dissolution matter, the defendant, Christine M. Milot, appeals from the judgment of the trial court resolving several motions, including the motion filed by the plaintiff, Raymond J. Milot, to modify custody and visitation. On appeal, the defendant claims that the trial court (1) improperly delegated its judicial authority over visitation to the plaintiff and (2) abused its discretion in ordering that the defendant was not permitted to contact the healthcare providers or therapists of the parties' youngest child without finding good cause in support of the order. We reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the defendant's claims on appeal. The parties' marriage was dissolved in June, 2019. At the time of the dissolution, the parties had three minor children. The judgment of dissolution incorporated by reference the parties' separation agreement, which incorporated by reference a final parenting plan executed on June 20, 2019 (parenting plan). Pursuant to the parenting plan, the parties had joint legal and shared physical custody of the children, with the older two children primarily residing with the plaintiff and the youngest child primarily residing with the defendant. Only the parties' youngest child currently remains a minor.

Shortly after the dissolution, in the fall of 2019, the parties agreed that the youngest child would live with the plaintiff. In September, 2020, within the context of a matter pending in juvenile court, the parties agreed that an order vesting in the plaintiff temporary custody of the youngest child would be sustained until further order of the court. In June, 2022, the juvenile court issued an order providing that sole physical custody and guardianship of the youngest child shall be vested

in the plaintiff under an order of protective supervision, which was to expire on September 3, 2022. The juvenile court orders provided a comprehensive plan to extend beyond the expiration of the period of protective supervision. The orders addressed, inter alia, the responsibilities of the custodial parent and the defendant's relationship with the youngest child, including that any in-person contact by the defendant with the youngest child must be supervised clinically or by a third-party professional. The juvenile court did not retain jurisdiction following the expiration of the protective supervision and expressly provided that the orders would be subject to modification by the family court.

In February, 2023, the plaintiff filed a motion to modify custody and visitation in the dissolution action. Therein, he requested that the orders contained within the June, 2022 decision of the juvenile court be adopted in the present file. A hearing was held on the motion for modification, among other motions,[1] before the court, *Hon. Heidi G. Winslow*, judge trial referee, on October 18 and 19, 2023. Both parties testified.

On October 19, 2023, the court issued a ruling on the motions, in which it found that "[t]here have been substantial changes affecting the parenting of the minor children in this case since the last parenting orders entered by this court, as well as the orders of the juvenile court. Among those changes are the juvenile court's removal of the defendant as the custodial parent and guardian of [the youngest child]; the defendant's relocation of primary residence to North Canaan; the children's adamant refusal to spend time with the defendant or attend therapy with the defendant; and the substantial improvement of the children's behaviors and demeanors since living full-time with the plaintiff and seeing little of the defendant."

[1] The defendant had filed two postjudgment motions seeking, inter alia, modification of custody.

The court found that the parties' relationship is contentious and they are unable to make joint decisions regarding the needs of the children. The court found that the original agreement providing for split custody of the children "did not work when it was first agreed upon and has not worked at any time since." The court found that the children were "under tremendous stress" following the dissolution of the parties' marriage and that the youngest child demonstrated that stress by acting out dangerously, prompting the parties to agree in the fall of 2019, for the youngest child to live with the plaintiff. The court found: "To alleviate their stress, the children chose to align themselves with the plaintiff and see as little as possible of the defendant. By doing so, they minimize their exposure to parental conflict. Both children are doing well emotionally and physically with the status quo and little or no contact with the defendant. . . . Both children have made it known emphatically that they do not wish to spend time with the defendant or attend therapy with the defendant."

The court awarded the plaintiff sole legal and physical custody of the parties' youngest child. The court further ordered that "[v]isits between the children and the defendant shall be at the sole [discretion] of the plaintiff with all arrangements approved by the plaintiff," and that the plaintiff "shall not impose any limitations upon the children restricting or discouraging them from initiating communications with [the defendant]." The court ordered that "[t]he defendant is barred from communicating with the children's health-care providers or therapist."[2] This appeal followed.

[2] The court also ordered: "The plaintiff shall write a paragraph to the defendant twice per week for each minor child (a minimum of four paragraphs per week) informing the defendant of the children's health, education, activities, interests, aspirations, achievements, disappointments and general welfare. Any electronic method of communication that the defendant is likely to actually receive may be used. . . . The defendant and her extended family are entitled to attend all practices, performances and graduations of the children. If there are a restricted number of tickets, the tickets shall be

I

The defendant's first claim on appeal is that the court improperly delegated its judicial authority when it ordered that "[v]isits between the children and the defendant shall be at the sole [discretion] of the plaintiff with all arrangements approved by the plaintiff." We agree that the trial court improperly delegated its judicial authority to the plaintiff.

We begin with our standard of review and relevant legal principles. Whether the trial court improperly delegated its judicial authority is a legal question over which we exercise plenary review. *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018). "It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to [issue] any order or [to render a] judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority. . . .

"The trial court's authority to issue orders pertaining to the custody and visitation of minor children is prescribed by statute. [General Statutes §] 46b-56 (a) provides in relevant part that the court may make or modify

apportioned equally between the parties. The defendant and her family shall not approach the children at any of those events unless the children initiate the contact. . . . There shall be no contact of the children allowed by either parent with John Goodwin. The children shall continue to reside in the town of New Milford unless the parties agree in writing to a relocation of their primary residence, or a court order allows relocation of their primary residence outside New Milford. . . . The provisions of Practice Book § 25-26 (g) are imposed in this case."

any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction . . . . Section 46b-56 (a) thus authorizes the trial court alone to make or modify any proper order regarding custody and visitation of a minor child. Subsection (b) of § 46b-56 provides in relevant part that a trial court, in crafting such orders, shall consider the rights and responsibilities of both parents . . . and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . . Section 46b-56 (c) requires the trial court, when making or modifying an order as provided in subsections (a) and (b), to consider the best interests of the child and enumerates seventeen factors the court may consider. None of the provisions in § 46b-56 permits the delegation by a trial court of its statutory duty to one of the litigants before it." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *R. H.* v. *M. H.*, 350 Conn. 432, 440–41, 324 A.3d 720 (2024).

The trial court did not have the benefit of the guidance found in our Supreme Court's decision in *R. H.*, which was issued after the trial court's decision in the present case. In *R. H.* v. *M. H.*, supra, 350 Conn. 437, the court considered a mother's challenge to an order that authorized the father to suspend visitation between the child and the mother in the event that the father, after consultation with the child's therapist, reasonably determined that visitation was causing negative behavioral or emotional consequences for the child. Our Supreme Court concluded that the order constituted an impermissible delegation of judicial authority on the basis that "the trial court's visitation order effectively removes the court entirely from the decision-making process and delegates its authority to the plaintiff to suspend visitation." Id., 445.

We conclude that the court in the present case impermissibly delegated its authority to the custodial parent in ordering that "[v]isits between the children and the defendant shall be at the sole [discretion] of the plaintiff with all arrangements approved by the plaintiff." This order is akin to the order determined to be improper in *R. H.* v. *M. H.*, supra, 350 Conn. 446, because it "places the decision-making authority in the hands of a party to the litigation."[3] Accordingly, the court erred in rendering this order.

II

The defendant's second claim is that the court abused its discretion in precluding her from communicating with the youngest child's health-care providers or therapists without making the statutorily required finding of good cause. We agree in part with the defendant.

We first set forth our standard of review. "An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either

[3] The plaintiff argues that the challenged order does not constitute a delegation of judicial authority because it was accompanied by an order prohibiting the plaintiff from "impos[ing] any limitations upon the children restricting or discouraging them from initiating communications with" the defendant. We are not persuaded that the additional provision protecting the child's ability to communicate with the defendant renders the order giving the plaintiff sole discretion over visitation permissible.

Moreover, the present case is distinguishable from *Zilkha* v. *Zilkha*, supra, 180 Conn. App. 172, a case on which the plaintiff relies. In *Zilkha*, the trial court exercised its authority in deciding that the defendant "should not have any right to custody or visitation," but left open the possibility of voluntary visits at the discretion of the children. (Emphasis omitted.) Id.

incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Clark* v. *Clark*, 150 Conn. App. 551, 568, 91 A.3d 944 (2014).

Section 46b-56 (g) provides: "A parent not granted custody of a minor child shall not be denied the right of access to the academic, medical, hospital or other health records of such minor child, unless otherwise ordered by the court for good cause shown."

On the basis of the language of § 46b-56 (g), the defendant, as the noncustodial parent, is statutorily entitled to have access to the youngest child's health records, including therapy records, "subject only to the court's denying [her] the right of access to the records for good cause shown." *C. D.* v. *C. D.*, 218 Conn. App. 818, 847, 293 A.3d 86 (2023). The court did not make a finding that the defendant should be denied access for good cause shown. To the extent that the court's decision can be construed to prohibit the defendant from accessing the health records of the youngest child, in the absence of a good cause finding required by § 46b-56 (g), the court's order constitutes an abuse of its discretion.

The defendant's claim on appeal is limited to the argument that the court abused its discretion in rendering its order in the absence of a finding of good cause. The defendant has not argued nor demonstrated that the court abused its discretion in precluding her from communicating with the youngest child's health-care

providers in a manner that extends beyond her exercise of the right of access to the records.

The judgment is reversed only with respect to the order delegating the trial court's authority over the defendant's visitation rights to the plaintiff and the order precluding the defendant from accessing the youngest child's health records and the case is remanded for further proceedings solely on those issues consistent with this opinion; the judgment is affirmed in all other respects.

LONNIE OWEN *v.* COMMISSIONER OF CORRECTION
(AC 46954)

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

Syllabus

The petitioner, who previously had been convicted of murder, appealed after the habeas court denied his petition for certification to appeal from the court's judgment denying his third petition for a writ of habeas corpus. He claimed, inter alia, that the court abused its discretion in requiring that his withdrawal prior to trial of certain counts and claims in his habeas petition be with prejudice. *Held*:

The habeas court did not abuse its discretion in denying the petitioner certification to appeal, as he failed to show that his claims involved issues that were debatable among jurists of reason, that a court could resolve them in a different manner or that they were adequate to deserve encouragement to proceed further.

The habeas court's requirement that any withdrawal of counts or claims in the petitioner's habeas petition would be with prejudice did not constitute an abuse of the court's discretion, as the petitioner's conviction was nearly twenty years old, he had withdrawn, on the eve of trial, two previous habeas petitions he had filed, and his third habeas petition was seven years old.

The habeas court properly determined that the petitioner failed to demonstrate that his counsel at his criminal trial rendered ineffective assistance

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

by failing to properly investigate and prepare an alibi defense, as the petitioner failed to call alibi witnesses to testify at the habeas trial and the court found that the petitioner had "zero credibility" regarding his claims that he never discussed an alibi defense with counsel and had told counsel that he did not want to testify at the trial.

Argued December 10, 2024—officially released August 19, 2025

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Newson, J.*; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Chad L. Edgar, assigned counsel, for the appellant (petitioner).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Jonathan Formichella*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Lonnie Owen, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal, (2) abused its discretion when it required that the withdrawal of certain counts of his petition be with prejudice, and (3) improperly concluded that he had failed to prove ineffective assistance of counsel. We dismiss the appeal.

The following undisputed facts and procedural history are relevant to the resolution of the present appeal.

"On January 1, 2003, at approximately 7:40 a.m., the body of Jikki Bruce was found on Center Street in Bridgeport. The cause of Bruce's death was a single gunshot wound to his abdomen. After an investigation, the police determined that the [petitioner] had shot Bruce on the fifth floor of a building in a housing project approximately eight hours before Bruce's body was found. Bruce fled from that building and then collapsed and died one block away on Center Street. The state charged the [petitioner] with murder [in violation of General Statutes § 53a-54a (a)], but he claimed that he had been at a New Haven nightclub at the time that Bruce had been shot." *State* v. *Owen*, 101 Conn. App. 40, 41, 919 A.2d 1049, cert. denied, 283 Conn. 902, 926 A.2d 671 (2007).

The petitioner was initially represented by Attorney Joseph Mirsky. On February 9, 2004, the court, *Hauser*, *J.*, declared a mistrial after a jury was unable to reach a unanimous verdict during the petitioner's first criminal trial (first trial). Shortly thereafter, Mirsky began to experience health issues, and, on March 10, 2004, Attorney Wayne R. Keeney began representing the petitioner. On October 5, 2004, following a second jury trial (second trial), the petitioner was found guilty of murder in violation of § 53a-54a. On November 19, 2004, the court, *Harper*, *J.*, sentenced the petitioner to sixty years of incarceration. This court affirmed the judgment of conviction. See id., 44.

The petitioner commenced the present action in 2016, his third habeas action. The operative third amended habeas corpus petition (operative petition) alleged claims of actual innocence in count one, ineffective assistance by the petitioner's second trial counsel in count two, a due process violation for the state's alleged failure to disclose exculpatory evidence in count three, and a due process violation for the prosecutor's knowing presentation of false testimony in count four.

Prior to the commencement of trial on May 25, 2023, the petitioner's habeas counsel informed the court, *Newson*, *J.*, that he was withdrawing "certain claims . . . ." In response, the court indicated to counsel that, "[t]o the extent [the petitioner] withdraws anything today, I am going to consider that withdrawal, whether it is before or after evidence, to be with prejudice because this [conviction] is [nearly twenty] years old. He's come here. He's filed two prior [habeas petitions]. He's had DNA testing done or requested DNA on certain items. . . .

"But, at this point, in fairness to everybody, because habeas cases have to be resolved at some point, and this [conviction] is [nearly twenty] years old, and it hasn't been his first trial yet, to the extent that there would be any claim that matters that are withdrawn should be able to slide out from under ineffective assistance and be brought under some other guise, I would just make a finding that it will be with prejudice. He has a right to object. He has the right to challenge it. He just needs to understand my order is, the withdrawals are going to enter with prejudice."

After the petitioner's counsel objected, arguing that the petitioner's prior withdrawals had been made in good faith based on agreements with counsel for the respondent, the Commissioner of Correction, the court responded: "Listen, counsel, I will say this. I don't know why, I don't know what the reasons were . . . and there are many reasons why people withdraw [habeas petitions]. . . . [T]here is the strategic withdrawal; I don't like what my lawyer is doing, I want the lawyer to bring other claims that the other lawyer doesn't agree with, so I'm just going to withdraw. And then there's the, I realize I really don't have a case, so I'm going to go back to the drawing board, and I'm going to try to put something else together. There's . . . legitimate reasons that you make every effort to find a critical

witness, and he or she goes ghost on you and you can't find them. I don't know. I just know this [conviction] is [nearly twenty] years old. This amended petition is a year old, and this file dates back to 2016.

"So, at this point, [nearly twenty] years after his conviction, for whatever the reasons are, he has a right to go forward. That is why we are here. We are finally going to try his habeas matters. But, other than things that clearly would support an actual innocence claim, in fairness to everybody that . . . needs finality, [the petitioner], police officers, the victims and the state—that this habeas case moves along in the process, I am not going to allow for the third time, potentially, him to withdraw claims only to say I get a freebie, I get to relitigate those claims over again if I don't like the results of this habeas. So, your objection is noted. . . . If . . . you withdraw things here, I'm going to enter [the withdrawals] with prejudice." Thereafter, the court canvassed the petitioner as to his understanding of the implications of withdrawing claims and accepted the withdrawal of all counts except portions of count two of the operative petition.[1] The withdrawals of the petitioner's due process claims and certain allegations that were part of his ineffective assistance of counsel claim were deemed by the court to be with prejudice.[2]

The habeas trial then proceeded solely on the remaining allegations of the petitioner's ineffective assistance of counsel claim that had not been withdrawn. The court heard the testimony of Keeney; the petitioner; James DePietro and Joseph Adiletta, detectives associated with the police investigation; Brent E.

[1] In count two, the petitioner alleged that Keeney had rendered ineffective assistance by, inter alia, failing "to adequately investigate, prepare, and present the testimony of the petitioner" and by failing "to adequately present an alibi defense . . . ."

[2] The habeas court made clear that the withdrawal of the petitioner's actual innocence claim was without prejudice.

Turvey, PhD, a crime scene reconstruction expert; and Brian Cutler, PhD, an expert in coerced compliance. The petitioner also introduced into evidence transcripts of the second trial.

Keeney testified that he only vaguely remembered having represented the petitioner. Nevertheless, Keeney testified that he would have reviewed all materials provided through discovery, all materials in the petitioner's file and all of the transcripts from the petitioner's first trial. According to Keeney, the police investigation had indicated a "pretty strong identification" of the petitioner as the perpetrator. Keeney further testified that the petitioner had claimed to have been at a New Haven nightclub at the time of the shooting and, although Keeney did not recall whether he had visited the nightclub, he testified that this seemed to be something he would do. Keeney stated that it was his general practice to prepare his alibi witnesses for cross-examination; however, he could not recall if he had done so in the present case and could not recall the names of the alibi witnesses or if they had testified at trial. Keeney did recall, however, that, when the petitioner testified at trial, his description of the nightclub was different from the actual configuration of the nightclub. Last, Keeney testified that it was his general practice to advise clients against testifying, but he could not recall what advice he had given the petitioner or whether the petitioner had wanted to testify.

The petitioner testified that he and Keeney had met only twice prior to the commencement of the second criminal trial. He testified that he had met Keeney when Keeney was first appointed to represent him and then again at the commencement of jury selection. The petitioner further testified that he had never informed Keeney of an alibi and had told Keeney that he did not want to testify. According to the petitioner, Keeney had told him that it was not the petitioner's decision as

to whether he would testify. Moreover, the petitioner testified that Keeney had never discussed with him the risks of testifying at the second trial or prepared him prior to calling him as a witness. Last, the petitioner testified that he had not discussed with Keeney the configuration of the New Haven nightclub.

On August 4, 2023, the court issued a memorandum of decision in which it found that "[t]he petitioner [had] filed two prior habeas corpus petitions challenging his conviction. The first on August 8, 2007 . . . was withdrawn prior to trial on June 26, 2013. The second . . . was filed on March 27, 2014, and was also withdrawn prior to trial on April 10, 2015. Just over eighteen months later, the petitioner commenced the present action on November 16, 2016."

With respect to the withdrawn counts, the court noted that "the petitioner withdrew multiple counts and claims immediately prior to the opening of trial. Given the age of the petitioner's convictions, the age of this case, and the fact that the petitioner has filed two prior habeas petitions and withdrawn those entirely on the proverbial eve of trial . . . he was notified that . . . any withdrawals in the present case would be entered 'with prejudice,' with the exception of the petitioner's claim for actual innocence."

Moreover, the habeas court noted that, "[a]fter a thorough canvass, the petitioner withdrew subparagraphs 52.3 (failing to properly cross-examine Jimmie Epps and Annette Adorno), paragraph 52.9 (failure to investigate, prepare, and present the testimony of sixteen named witnesses), paragraph 52.11 (failure to get the statement of a Juan Gomez into evidence), and [paragraph] 52.12 (failure to adequately investigate the evidence found outside of building 3) of claim two alleging ineffective assistance against trial counsel. He also withdrew claim three (failure to disclose exculpatory evidence) and

claim four (presentation of false testimony). All were entered with prejudice." (Internal quotation marks omitted.)

With respect to the remaining allegations of ineffective assistance of counsel that were tried, the court noted that the petitioner "alleges that . . . Keeney failed to adequately present the petitioner's alibi defense supported by testimony from the petitioner, Jonathan Tucker, and Clarissa Austin." The court found that, "while the petitioner testified about how he did not wish to testify [in the second criminal trial], he failed to add any new or substantially different evidence from the transcript of the second trial. . . . Tucker and . . . Austin did not testify, so the claim fails with respect to them as a matter of law."

The court denied the habeas petition. Thereafter, the petitioner filed a timely petition for certification to appeal, which the habeas court denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal. We conclude that the court's ruling did not constitute an abuse of its discretion.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be

reviewed by the court having jurisdiction and the judge so certifies."

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 811, 975 A.2d 42 (2009); see also *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994) (adopting factors identified by United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as appropriate standard for determining whether habeas court abused its discretion in denying certification to appeal).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification. . . . *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 573, 211 A.3d 72, cert. denied, 333 Conn. 902, 215

A.3d 160 (2019)." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 78–79, 256 A.3d 684, cert. denied, 339 Conn. 909, 261 A.3d 744 (2021).

For the reasons subsequently set forth in this opinion, we conclude that the petitioner has not demonstrated that the habeas court abused its discretion in denying his petition for certification to appeal because he has not shown that the issues he raises are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. Accordingly, we conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, therefore, dismiss the appeal.

II

The petitioner next claims that the habeas court abused its discretion when it required that his withdrawal of certain counts and claims in his operative petition be with prejudice. The petitioner argues that, in the absence of " 'procedural chicanery,' " the court's requirement was an abuse of its discretion. The respondent argues that the petitioner has not shown that the court abused its discretion. We agree with the respondent.

We begin by setting forth our standard of review and relevant legal principles. "The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Internal quotation marks omitted.) *Marra* v. *Commissioner of Correction*, 174 Conn. App. 440, 455, 166 A.3d 678, cert. denied, 327 Conn. 955, 171 A.3d 456 (2017). "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner

to subserve and not impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial discretion is the idea of choice and a determination between competing considerations. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did. . . .

"General Statutes § 52-80 provides in relevant part: The plaintiff may withdraw any action . . . before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action . . . only by leave of court for cause shown. The term with prejudice means [w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim. . . . The disposition of withdrawal with prejudice exists within Connecticut jurisprudence. . . . Indeed, the disposition of withdrawal with prejudice is a logically compelling disposition in some circumstances. A plaintiff is generally empowered, though not without limitation, to withdraw a complaint before commencement of a hearing on the merits. . . . A plaintiff is not entitled to withdraw a complaint without consequence at such hearing." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 187 Conn. App. 857, 863–64, 204 A.3d 55, cert. denied, 331 Conn. 912, 203 A.3d 1247 (2019).

"Moreover, [h]abeas courts are given wide latitude in fashioning remedies. . . . [H]abeas corpus has traditionally been regarded as governed by equitable principles. . . . Among them is the principle that a [petitioner's] conduct in relation to the matter at hand may

disentitle him to the relief he seeks. . . . A [petitioner] should never be permitted to abuse [his] right to voluntarily withdraw an action. Such abuse may be found if, in executing [his] right of withdrawal, the [petitioner] unduly prejudices the right of an opposing party or the withdrawal interferes with the court's ability to control its docket or enforce its rulings. . . . Significantly . . . [this] court . . . [has] recognized that in certain circumstances, a withdrawal of a petition prior to the commencement of a hearing on the merits could be deemed to be with prejudice . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 865.

When a petitioner has engaged in the type of gamesmanship that "constitutes procedural chicanery, that is, it offends the orderly and due administration of justice and is intended to avoid the consequences of [a previous] waiver," a court may condition a withdrawal to be with prejudice without abusing its discretion. (Internal quotation marks omitted.) *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 457. Procedural chicanery, however, is not an absolute requirement for conditioning that a withdrawal be with prejudice; other abuses of the right to voluntarily withdraw may justify such a decision. Indeed, this court has recognized a variety of considerations that may support a habeas court's decision to require that a withdrawal be with prejudice, including the temporal proximity of the withdrawal to trial, the length of time that the case had been pending, the number of past continuances, the time and effort spent by the respondent and court staff, any special expenses incurred in preparation for trial, the initiation of any evidentiary proceedings, and the petitioner's voluntary participation in the decision to withdraw. See, e.g., id., 447–49, 454, 458 (habeas court acted within its discretion when it conditioned withdrawal as being with prejudice when petition was

withdrawn day before start of trial, petition had been pending for approximately two and one-half years and trial had been continued three times, court staff already took time to meet with attorneys and mark exhibits, court staff and respondent were ready for trial, and petitioner personally participated in decision to withdraw); *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 759–60, 83 A.3d 1174 (habeas court acted within its discretion in requiring withdrawal of count in habeas petition to be with prejudice when petition at issue was petitioner's third, action had been pending approximately two and one-half years, subpoenaed witnesses were in court and ready to proceed, expenses had been incurred for setting up videoconferencing for out-of-state witness, and several exhibits had already been admitted in full into evidence), cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014); see also, e.g., *Smith* v. *Commissioner of Correction*, supra, 187 Conn. App. 865–68 (affirming that factors considered in *Marra* and *Mozell* were properly considered and that court acted within its discretion when it required withdrawal of petition to be with prejudice).

In the present case, the petitioner was convicted of the underlying offense in 2004. In August, 2007, the petitioner filed his first habeas petition, which he withdrew on June 26, 2013, prior to trial. Less than one year later, he filed a second petition on March 27, 2014, which he also withdrew prior to trial on April 10, 2015. The petitioner then filed the operative petition on November 16, 2016. On May 25, 2023, prior to the commencement of trial in the present matter, the petitioner withdrew three of the four counts in the petition and a portion of another count. The court made the petitioner fully aware that, if he withdrew any count of the operative petition, the court was going to grant his motion

with prejudice. The court thereafter canvassed[3] the petitioner with respect to his intention to withdraw certain counts and claims in the operative petition, and, with the exception of his actual innocence claim, accepted the withdrawal with prejudice. In doing so, the court noted the age of the petitioner's conviction, the age of the pending petition, and the fact that the petitioner had filed two prior petitions and withdrew them entirely on the eve of trial.

Accordingly, we conclude that the habeas court acted within its discretion in requiring the petitioner's withdrawal of certain claims to be with prejudice.

III

The petitioner's final claim on appeal is that the habeas court improperly concluded that he had failed to prove that Keeney rendered ineffective assistance at the second criminal trial. Specifically, the petitioner asserts that Keeney performed deficiently by failing to properly investigate and prepare the petitioner's alibi defense. The respondent counters that the record does not support that either Keeney's investigation or preparation of the alibi defense fell below an objective standard of reasonableness. We agree with the respondent.

We first set forth our well settled standard of review and the following legal principles. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct.

[3] On appeal, the petitioner does not challenge the propriety of the habeas court's canvass of him.

2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"Because our resolution of the present case turns on our review of the performance prong, some additional explication of that prong is necessary. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . Nevertheless, [j]udicial scrutiny of counsel's performance *must be highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to

conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court *must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action *might* be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"Inasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . .

"Nevertheless, strategic choices made after thorough investigation of law and facts relevant to plausible options *are virtually unchallengeable*; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. . . .

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. . . .

"Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation *and without adequate explanation*, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it. . . . Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. . . .

"[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense

counsel's decision not to investigate or call certain witnesses or to investigate potential defenses [including] when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case. . . .

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . The United States Supreme Court has cautioned that a reviewing court, in considering whether an attorney's performance fell below a constitutionally acceptable level of competence pursuant to the standards set forth herein, must properly apply the strong presumption of competence that *Strickland* mandates and is *required* not simply to give [trial counsel] the benefit of the doubt . . . but *to affirmatively entertain the range of possible reasons* [*that*] *counsel may have had for proceeding as* [*he*] *did*. . . . This strong presumption of professional competence extends to counsel's investigative efforts . . . as well as to choices made by counsel regarding what defense strategy to pursue." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 829–34, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

"It is [also] well established that the burden of establishing grounds for relief in a habeas corpus proceeding rest[s] with the petitioner. . . . The petitioner, as the plaintiff in a habeas corpus proceeding, bears a heavy burden of proof." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 229 Conn. App. 393, 420, 327 A.3d 1028 (2024), cert. denied, 351 Conn. 919, 333 A.3d 105 (2025). "[I]t is well established that a petitioner in a habeas proceeding cannot rely on mere conjecture or speculation . . . but must instead offer

demonstrable evidence in support of his claim." (Internal quotation marks omitted.) *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 358, 261 A.3d 184, cert. denied, 339 Conn. 919, 262 A.3d 139 (2021).

It is equally well established that "the [habeas] court, as the trier of fact, [is] the sole arbiter of facts and credibility and [is] free to believe in whole or in part the [witness'] testimony. . . . The court also [is] free to draw reasonable inferences from that testimony when rendering judgment." (Internal quotation marks omitted.) *Person* v. *Commissioner of Correction*, 146 Conn. App. 477, 484, 78 A.3d 213, cert. denied, 310 Conn. 960, 82 A.3d 627 (2013).

The following additional facts are necessary for the resolution of this claim. Mirsky did not pursue an alibi defense at the petitioner's first trial. At the second trial, however, Keeney presented an alibi defense. Specifically, Keeney presented evidence that, on the evening of December 31, 2002, into the early hours of January 1, 2003, the petitioner was at a New Haven nightclub. In support thereof, the petitioner testified that his friend, Tucker, had worked at the nightclub, providing security. The petitioner further testified that he arrived at the nightclub at approximately 9 p.m. and left with Tucker when the nightclub closed at approximately 2:30 to 3 a.m. on the morning of January 1, 2003. The petitioner described the nightclub as "one big room where you dance at." He further described the nightclub as "packed" and estimated that there were more than 100 people there that night.

Keeney also called Tucker to testify in support of the petitioner's alibi defense. Tucker testified that he had known the petitioner since they were children. He further testified that he worked at the nightclub as a bouncer on the evening of December 31, 2002, into the morning of January 1, 2003. According to Tucker, the

petitioner arrived at the nightclub that night at approximately 10:30 p.m. and left with Tucker at about 3:30 a.m. Tucker described the nightclub as a two-story building, the first floor consisting of a lobby with rooms to the right and left with a bar in each room, and the second floor consisting of one big dance room with a bar. Tucker further testified that the nightclub could hold approximately 350 people, but he had previously seen as many as 600 people in the club.

Keeney next presented the testimony of Austin, who was also providing security at the nightclub on the night of December 31, 2002, into the morning of January 1, 2003. She testified that she had seen the petitioner at the nightclub but could not remember if she saw him that night. She described the nightclub as a two-story building with the first floor having a "VIP room" and a dance floor, and a second floor. Austin estimated that there were approximately 400 people in the club that night.

On appeal, the petitioner asserts that Keeney's investigation and preparation of the alibi defense fell below an objective standard of reasonableness. Specifically, the petitioner argues that, assuming Keeney had visited the nightclub and had interviewed Tucker and Austin, he should have identified any divergence between the petitioner's anticipated testimony and that of Tucker and Austin and better prepared the petitioner to address any such discrepancies at trial or advised him not to testify. Alternatively, he argues that, if Keeney had neglected to visit the nightclub or interview and prepare Tucker and Austin to testify, those failures alone would constitute deficient performance. In support thereof, the petitioner relies on Keeney's inability to recall certain actions he had taken in connection with the investigation and preparation of the defense and the divergence of accounts regarding the nightclub, as well as the petitioner's own testimony that he never discussed

his alibi with Keeney and was not prepared to testify with respect to the alibi. We are not persuaded.

At the habeas trial, the petitioner testified that he had never discussed an alibi defense with Keeney and told Keeney that he did not want to testify at the second trial. The habeas court, however, found that the petitioner had "zero credibility on this issue." With respect to the petitioner's allegation that Keeney failed to adequately present his alibi defense, the court found that the claim failed as a matter of law because the petitioner did not call Tucker and/or Austin to testify at the habeas trial.

Keeney testified that he recalled that the petitioner had claimed he was at a New Haven nightclub on the night of the shooting. Although Keeney did not recall if he had visited the nightclub, he testified that doing so "seem[ed] to [him] what [he] would do." Keeney further testified that he did not remember the names of the alibi witnesses or if they had testified at the second trial, but that it was his general practice to prepare alibi witnesses. Because it was Keeney's general practice to prepare and investigate alibi defenses, and there was no credible testimony to the contrary, it was reasonable for the court to infer that Keeney had adequately prepared the alibi defense.[4]

[4] Although the habeas court did not make a finding that Keeney had interviewed the alibi witnesses, the record supported Keeney's testimony that it was his practice to do so. During Keeney's direct examination of Austin at the second criminal trial, Austin testified that she did not remember if she had seen the petitioner at the club on the night in question. Keeney then asked Austin, "[*t*]*hree times you've been interviewed in this matter*, and each time you've said it was that night, you remember it was that night because it was New Year's Eve . . . . Is there something that's caused you to change you[r] opinion; did some activity occur to you in the last day or two relating to your position with your security company that's causing you now to have a lapse of memory?" (Emphasis added.) Austin responded: "When *originally I was sent to you to speak with you*, I was told you just wanted me to identify him to [see] if I knew him, if I seen his face before at the club, then over the [past] few days I've been subpoenaed to come here, and I was told I would have a warrant for my arrest if I didn't show up." (Emphasis added.)

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to demonstrate that Keeney performed deficiently.[5]

The appeal is dismissed.

In this opinion the other judges concurred.

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[5] Although the habeas court did not address the prejudice prong of the *Strickland* test, we have "repeatedly explained that a court may resolve ineffective assistance of counsel claims on either the performance prong or the prejudice prong" of *Strickland*. *Williams* v. *Commissioner of Correction*, 223 Conn. App. 745, 762, 310 A.3d 381, cert. denied, 349 Conn. 901, 312 A.3d 586 (2024). Accordingly, "[i]n light of our determination that the petitioner failed to establish that [counsel's] performance was deficient, we need not address the prejudice prong." *Quint* v. *Commissioner of Correction*, 211 Conn. App. 27, 36 n.7, 271 A.3d 681, cert. denied, 343 Conn. 922, 275 A.3d 211 (2022).