ROBERT SURGENT *v.* GERALDINE SURGENT
(AC 46632)

Elgo, Suarez and Westbrook, Js.

Syllabus

The plaintiff, whose marriage to the defendant had previously been dissolved, appealed from the trial court's judgment granting his motion for modification of unallocated child support and alimony payable to the defendant. The plaintiff claimed, inter alia, that the court improperly considered the defendant's allegation that he had failed to share with her certain proceeds of a postdissolution sale of stock when it was undisputed that no motion raising that issue had been filed with the court. *Held*:

The trial court abused its discretion in considering evidence regarding the plaintiff's allegedly contemptuous conduct in failing to split the proceeds of a postdissolution stock sale with the defendant and the court's award to the defendant of a commensurate reduction in an arrearage she owed to the plaintiff was harmful and violated the plaintiff's due process rights, as the court admitted testimony regarding that conduct for the limited purposes of assessing credibility and establishing the plaintiff's total financial picture, and this issue had not been properly raised in a motion by the defendant with due notice to the plaintiff.

The trial court did not improperly modify the terms of the alimony provision in the parties' separation agreement in construing the agreement to require the plaintiff to issue the final alimony payment in 2028, beyond the term of the alimony as agreed to by the parties based on the plaintiff's 2027 income, as such agreement anticipated that the final payment to the defendant would be calculated on the basis of the plaintiff's year-end bonuses for employment in 2027, which would not be calculated and awarded until 2028.

Argued January 9—officially released September 2, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Stanley Novack*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Moukawsher*, *J.*, granted the plaintiff's motion for modification of unallocated child support and alimony, and the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

Leslie I. Jennings-Lax, for the appellant (plaintiff).

Opinion

ELGO, J. In this postdissolution matter, the plaintiff, Robert Surgent, appeals from the judgment of the trial court granting his motion for modification of unallocated child support and alimony payable to the defendant, Geraldine Surgent. The plaintiff contends that the court, in modifying his alimony obligation, improperly (1) considered the defendant's claim that he had failed to share with her the proceeds of a postdissolution sale of stock when it is undisputed that no motion raising that issue had been filed with the court, and (2) modified a nonmodifiable term of the alimony award. We agree with the plaintiff as to the first claim and, accordingly, reverse the judgment of the trial court only with respect to the order pertaining to the postdissolution sale of the stock.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The parties married in 1999, and two children were born of the marriage. Following the subsequent breakdown of their marriage, the parties voluntarily entered into a comprehensive separation agreement (agreement). On September 10, 2015, the court dissolved the marriage,

finding that it had broken down irretrievably, and incorporated the agreement into its judgment of dissolution.

The following provisions of the agreement are relevant to the plaintiff's appeal. Article III addressed the plaintiff's obligation to pay the defendant unallocated alimony and child support. The plaintiff was obligated to pay to the defendant, as of the first of each month and for "an otherwise non-modifiable" term of twelve years, a payment calculated in relation to his "gross annual earned income from employment."[1] Section 3.1 of the agreement provided that these payments "shall be made as and when [g]ross [e]arned [i]ncome from [e]mployment is received" by the plaintiff. Section 3.2 of the agreement defined gross annual earned income from employment to mean "all compensation paid and transferred by the [plaintiff's] employer to him on account of personal services rendered by the [plaintiff] and any and all earnings of any nature received by the [plaintiff] in the form of cash or cash equivalents or which the [plaintiff] is entitled to receive from any and all sources rendered by the [plaintiff] by way of his current or future employment, before deductions . . . including but not limited to: (a) salary and/or base salary . . . (d) bonus, guaranteed bonus and/or performance awards . . . ." Potential deductions were laid out in some detail, including "carried interest distributions which shall include payments, transfers, and accruals made on account of the [plaintiff's] ownership or carried interest in any entity including a general partnership, limited partnership, limited liability company or corporation; provided the [plaintiff's] ownership or carried interest is the result, in whole or in part, or is in some way related to the [plaintiff] having rendered personal services. [The plaintiff's] carried interest shall

[1] The agreement also contained a provision capping the amount of the plaintiff's income subject to any alimony order at the nonmodifiable amount of $2.5 million.

include all payments and distributions of any kind which the [plaintiff] receives in whole or in part, or is in some way related to the [plaintiff] having rendered personal services, is entitled to, or otherwise accruing to the [plaintiff] . . . .'' Section 3.1 of the agreement further states: ''Payments to the [defendant] shall be made as and when [g]ross [e]arned [i]ncome from [e]mployment is received by the [plaintiff]. For the purposes of calendar year 2015 the calculations of the amounts due to the [defendant] shall be based on [g]ross [e]arned [i]ncome from [e]mployment received by the [plaintiff] between the date of dissolution and December 31, 2015, with a new annual calculation commencing on January 1, 2016.'' Because of the structure of the plaintiff's compensation, including the disbursement of bonuses in the year(s) subsequent to the year(s) in which he had earned them, the agreement provides that the plaintiff would engage in a ''true up'' with the defendant when those bonuses were disbursed to him.[2] In particular, section 3.4 of the agreement states: ''Within thirty (30) days after December 31 of each calendar year in which alimony and/or child support is payable to the [defendant], the [plaintiff] shall provide the [defendant] with all documents necessary to confirm his gross earned income from employment from all sources, including bonuses. Not later than March 15 of each year, commencing March 15, 2016, the parties shall determine whether the [plaintiff] has paid to the [defendant] the correct amount of unallocated alimony and child support, as the case may be for the immediately preceding calendar year.'' This arrangement proceeded without court involvement until 2019.

In 2019, the plaintiff filed a postjudgment motion to modify his unallocated alimony and child support

[2] As will be explained in further detail subsequently in our opinion, the parties ultimately disagreed as to how to interpret the agreement, though this disagreement did not emerge until the closing arguments at the hearing on the plaintiff's motion to modify.

obligations because the parties' children had turned eighteen and no longer were entitled to child support under the terms of the agreement.[3] The parties filed proposed postjudgment orders pursuant to Practice Book § 25-30. In her proposed postjudgment orders, the defendant asked for, inter alia, one half of the "value of the Straight Path Communications, Inc. shares as of the value on the date of the dissolution of the marriage" and the division of a "[p]reviously undisclosed Goldman Sachs UK retirement plan . . . ." In a memorandum of law submitted at the request of the court, the defendant urged the court to take into consideration her allegation that the plaintiff "has failed to comply fully with the orders of the court with respect to equitable distribution. Specifically, the defendant has claimed that the plaintiff failed to distribute to her the proceeds from the sale of stock he owned at the time of judgment, but failed to share with her according to the judgment. In addition, the defendant was able to confirm that at the time of judgment the plaintiff had a pension in the United Kingdom that had not been properly disclosed by the time of judgment, thereby depriving her of a substantial equitable distribution benefit." The defendant asked the court to exercise its discretion in any retroactive reward, "limiting the retroactivity order to amounts that are consistent with the total circumstances of the parties, including their respective incomes."

The court held a hearing on the plaintiff's motion to modify on April 17, 2023.[4] The plaintiff and the defendant testified, and their respective financial affidavits were admitted into evidence. The plaintiff testified that,

[3] The plaintiff also sought modification of life insurance requirements as well as a court order for the defendant to refinance the mortgage on the former marital residence. Neither of those issues are germane to this appeal.

[4] As the court noted in its memorandum of decision, "a substantial portion of the delay in deciding the motion to modify [was] the court's fault" due to the COVID-19 pandemic.

at the time he entered into the agreement, he was employed by Tudor Investments, but was employed by Goldman Sachs when he filed the motion to modify in November, 2019. The plaintiff further testified that, when he left Goldman Sachs in December, 2019, he forfeited various restricted stock components that had been part of his income. The plaintiff then accepted a position with the firm of Neuberger Berman in March, 2020, where his compensation had both a "salary component" and a "performance component." He testified that the performance component "can be cash, or it can be a contingent compensation plan, which is known as deferred compensation that you do not receive unless you remain for another three years with the firm." The plaintiff further clarified that any contingent compensation granted in January of a given year would be disbursed in one-third increments, every January for three subsequent years.

On cross-examination, the defendant's counsel questioned the plaintiff on his predissolution employment and whether the plaintiff had accrued a pension at Goldman Sachs that he did not disclose on his 2015 financial affidavit. The plaintiff's counsel objected on the grounds that such questioning was irrelevant. The following colloquy then transpired:

"[The Defendant's Counsel]: Your Honor, I expect to inquire of the witness to show the court that the witness had taken steps to conceal income and assets, and that goes to his credibility.

"The Court: But that's the only purpose you're attempting to use it? Because are you going to pursue the proposed order you submitted that you want some sort of division of this piece of property?

"[The Defendant's Counsel]: Yes, Your Honor, because I think that's relevant to—also to the claim for retroactivity.

"The Court: Well, it's a different thing to say that, you know, that there were certain things that he hasn't disclosed that you think damage his credibility. Then there's a second consideration where you might say that I should take it into account when considering his total financial picture. Then there's a third thing where you might say I would like you to give a postjudgment property order dividing this money between them. Are you—which of these things, or all of them are you—you seeking to use it for?

"[The Defendant's Counsel]: One and two, Your Honor. . . .

"The Court: I didn't think you were going to (indiscernible) three, that's what I wanted to clear up. In effect, [the plaintiff's counsel] will be able to argue that that's what you're trying to do through the back door. But, [Plaintiff's Counsel], isn't it true that I am able to consider his total financial picture when considering what to do about this unbundling and future alimony? I can look at his total financial picture, including any pension he has from Goldman Sachs, right?

"[The Plaintiff's Counsel]: I don't have an objection to that, Your Honor. Does the answer that [the defendant's counsel] just gave, does that mean he's withdrawing his claims in his proposed orders with respect to asking the court to do something for which there's no motion.

"The Court: I am assuming that he is withdrawing any proposal, which he did write into his proposed orders, of a division of this pension asset because he knows that . . . I don't have the power to do that. So, what he wants to do is have me consider it as a question of [the plaintiff's] credibility and, second of all, about taking into account his total financial picture when looking at what he has and doesn't have for purposes of a future alimony award. . . . [Y]ou don't object to, at

least, the total financial picture part, do you, [Plaintiff's Counsel]?

"[The Plaintiff's Counsel]: I do not, Your Honor."

Shortly thereafter, the defendant's counsel inquired about the plaintiff's ownership of stock in a company called Straight Path (stock), which the plaintiff purchased in September, 2014, and sold after the dissolution of his marriage to the defendant. The plaintiff's counsel objected to this line of questioning on relevancy grounds, and the court inquired as to whether the defendant was pursuing this line of questioning for the same reasons as the inquiry regarding the Goldman Sachs pension, namely, for credibility purposes as well as for the court to consider as a part of the plaintiff's total financial picture. The defendant's counsel then represented that the plaintiff had sold the stock, postjudgment, without dividing it with the defendant. The court then noted that, "[w]ell, for the purposes of understanding shifts in his financial picture postjudgment, it's appropriate for me to hear it. As to whether it goes to his credibility . . . I'm not sure how his credibility, frankly, has been put . . . into dispute here, yet. But, in any case, it comes in for the limited purpose anyway."[5]

[5] During subsequent questioning, the plaintiff denied that he had not divided the asset with the defendant and testified that he had discussed the sale of the stock with the defendant "in her office" and that they had "split the loss" on the stock, which was sold at $10 per share. In her testimony, the defendant denied receiving any portion of the proceeds of the sale of the stock. The plaintiff's counsel did concede that 1000 shares of this stock had come out of the plaintiff's Fidelity account in September, 2015, in the amount of $42,000. During questioning of the plaintiff, the plaintiff's counsel indicated that the stock was sold for $42,000 in 2015, though the plaintiff denied receiving cash for the sale of the stock and stated that he "did not take 100 percent of the proceeds." The plaintiff's counsel also asked the plaintiff to confirm that it was sold for $19,000. The plaintiff then testified that he had purchased additional stock from the same company after the dissolution of his marriage to the defendant. The plaintiff's counsel then noted to the court that there were several transfers of stock during the relevant time period, one of which "we are presuming because we don't have all the documents because we didn't think we were doing this" went into the plaintiff's account and was subsequently sold. The defendant's

The defendant testified that she had not received a "true up" in 2017, related to the 2016 alimony that she had received from the plaintiff. When the defendant was asked why she was claiming an arrearage for alimony in 2016, the plaintiff's counsel objected, noting that there was no pending motion before the court "with respect to a claim for an alimony arrearage for 2016 or 2017." The court then responded that, "a motion for contempt would be appropriate for that" but that, "if it's established that [the plaintiff] underpaid certain court required payments, and I have to exercise a judgment call about retroactivity and how much retroactivity, why can't I take that into account?" The plaintiff's counsel responded, arguing that "[w]e're seeking retroactivity back to January 1 of 2020, not back to 2016, not back to 2017. So, the orders that we're seeking ha[ve] nothing to do with that. This is also, Your Honor, a backhanded way to try to get this court to find an arrearage when no motion's been filed, and, therefore, there is no due process to my client whatsoever to deal with these claims."[6] Later in the hearing, the plaintiff's counsel again argued that the plaintiff's due process rights were being violated because the defendant should have brought a "proper motion" and should not use the plaintiff's motion as "an attempt to add onto this motion, it's not fair to my client."

counsel then remarked, "I don't know how we can—we have no possible way of identifying which shares got transferred, and which shares were sold. . . . [T]he judgment required the division of the stock . . . . The [plaintiff] never did that. He just continued to trade it." The plaintiff's counsel stipulated to the fact that the plaintiff owned 1000 shares prior to the dissolution of his marriage, but stated that "there's a difference of opinion as to what happened there." In its memorandum of decision, the court found that the plaintiff "did not properly share" the proceeds of the sale of the stock with the defendant, which he "sold for around $40,000 despite a court order" to share the proceeds with the defendant.

[6] As the plaintiff's counsel put it during closing argument, the plaintiff was seeking "a modification of the percentages of what is in the court order now as an unallocated alimony and support order. He wants it retroactive to the date of service, and he wants a decrease in the life insurance."

During closing arguments, the defendant's counsel broached the topic of how to interpret the agreement, noting that section 3.2 provides that "gross annual earned income from employment means—shall be all compensation paid and transferred by the husband's employer to him on account of personal services rendered by the husband. Transferred to him is when did he get it in his hands? It doesn't say accrued, it's transferred." The court interjected, "[w]ell, wait a minute, you're just going too fast for me, because nobody has talked about this before, and I want to know—I want to have the language in front of me."

The defendant's counsel then argued, repeatedly, that the court should interpret the language of the agreement to mean that the plaintiff should pay the defendant alimony that is calculated for money received by the plaintiff during a calendar year.[7] Pointing to the year 2016, the defendant's counsel argued that "the alimony paid [in 2016] was only 30.8 percent of all of the money that he received in that year, and there's no suggestion that she got any portion of [the] 2015 bonus." When asked by the court if the plaintiff had stopped paying

[7] In arguing that the plaintiff had incorrectly reported his income during the annual true ups in 2016 and 2019, the defendant's counsel argued: "How better could you have . . . proof of his earned income than his W-2 income on his tax return?" "[T]he intent of the parties clearly, it's not ambiguous, would be . . . you take the money that he actually received by getting a transfer from the employer in a given year . . . ." "What other possible instruction could you place on the phrase money earned and transferred to him. Nothing is transferred to him until it shows up in his paycheck." The defendant's counsel further argued: "[L]et's say that alimony ends on December 31st, 2027. . . . And, on 2028, he gets a bonus check from his employer, [the defendant] doesn't share in that because it wasn't transferred to him in the year." The defendant's counsel also pointed to federal tax law, noting that federal income tax is due on funds actually received during a calendar year. As he stated: "For the [plaintiff's] tax return has to show all of the W-2 income actually received in a certain tax and calendar year. If you—if [the defendant] were not entitled to alimony on the actual earned cash transferred to him and received in a particular calendar year, this would make no sense. It just—it just wouldn't."

his alimony obligation under the agreement, the defendant's counsel referred again to 2016, stating that "the claim is that he did not pay her all she was entitled to in 2016."

The plaintiff's counsel argued, inter alia, that the agreement, section 3.2, provided for noncash compensation to be calculated into the alimony payments owed to the defendant, which would not be reflected in the plaintiff's W-2 as income. Accordingly, counsel argued that merely looking at the plaintiff's W-2 for a specific year would not accurately reflect what he would be responsible for paying, with respect to alimony, to the defendant. The plaintiff's counsel then argued that "the years 2020 through 2023, with respect to all of this, was not disputed. What is in dispute, apparently, according to [the defendant's counsel], are the years that predate this motion for which there has been no motion filed. I don't believe that that is something that's relevant . . . in terms of dealing with the modification. If [the defendant] truly believes that she hasn't been paid the money to which she was entitled, then let's go back and figure that out and, perhaps, she should put that square before the court . . . in a motion." In sum, the plaintiff argued that his due process rights would be violated if the court took up these claims of arrearage, and that the defendant should bring a motion of her own.

In its memorandum of decision, the court found that there had been a substantial change in circumstances since the dissolution of the marriage because the children of the marriage were no longer eligible for child support. The court noted that General Statutes § 46b-82 provides a number of "flexible" factors that the court should consider when hearing a motion to modify based on a substantial change of circumstances.[8] The court

[8] General Statutes § 46b-82 (a) provides: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-

further found that the plaintiff "makes what most people would see as a lot of money in the investment field—recently around $1.2 million a year." With respect to the defendant, the court found that, "for reasons unexplained, [she] earns virtually no money," although she did have a "$1 million investment portfolio." As a result, the defendant was "dependent on the depletion of her assets and on alimony" from the plaintiff which has been "roughly" around $400,000 to $450,000 per year. Noting that "[n]either proposal gets near providing [the defendant] with enough to pay her expenses," the court ordered that the plaintiff pay alimony, retroactive to the approximate time of the filing of the motion to modify, at a rate of one third of his first $500,000 of income, followed by one quarter on any subsequent $1,000,000 of income, and one tenth of everything the plaintiff earns between $1,501,000 and $2,500,000.

The court also noted that the defendant had "not convinced the court" that the plaintiff's actions were "unreasonable" or otherwise "wilfully in defiance of the court's orders." The court then explained that it would not rely on the defendant's interpretation of the

81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order pursuant to subsection (b) of this section or an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. The court may order that a party obtain life insurance as such security unless such party proves, by a preponderance of the evidence, that such insurance is not available to such party, such party is unable to pay the cost of such insurance or such party is uninsurable. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

agreement because, in order to calculate what the plaintiff earned in a given year, "we must look at what they paid him in exchange for his work that year even if he gets that pay a few weeks into the new year."

The court also found that the plaintiff had not divided the proceeds of the sale of the stock with the defendant and ordered that any retroactive order would be reduced by $20,000—or one half of the proceeds therefrom. With respect to the Goldman Sachs pension, which the court noted the defendant claimed had been concealed by the plaintiff at the time of the dissolution agreement, the court found that it had no jurisdiction "to modify its property awards directly . . . or indirectly by means of some adjustment of retroactivity."[9]

After the court issued its ruling, the defendant filed a postjudgment motion for clarification. Noting that the court had adopted the plaintiff's proposed methodology for the determination of alimony, the defendant requested clarification as to whether "[w]hen alimony terminates, if not sooner, at the end of 2027, [the defendant was] entitled to the bonus received by the plaintiff in the year 2028, for work that he performed" in 2027. The plaintiff objected to the defendant's motion for clarification, arguing that the underlying motion that was the subject of the April 17, 2023 hearing was to "modify the alimony based upon the child support component no longer being applicable" and that, because there was no effort on the part of the plaintiff "to alter the language of the alimony as set forth in the agreement," the defendant's request for clarification was "beyond the scope of the [plaintiff's] motion." By order dated June 6, 2023, the court granted the defendant's motion for clarification, stating simply: "The court agrees that she is so entitled."[10]

[9] The court also ordered the parties to file with the court a calculation of the sum due under the terms of the order and also granted the plaintiff's request to modify his life insurance plans.

[10] In February, 2024, the plaintiff filed a request with the trial court to file a late motion for articulation of the court's June 6, 2023 order pursuant to

Subsequently, the plaintiff filed a motion to reargue, asserting that the court had improperly addressed the issue of the stock transfer. The plaintiff emphasized that "there was no motion pending [that gave] the plaintiff notice that the defendant intended to pursue any claim that she had not received a portion of the property division from some eight years prior to the hearing," citing *Swain* v. *Swain*, 213 Conn. App. 411, 419, 277 A.3d 895 (2022), for the proposition that a trial court is not permitted to decide issues outside of those raised in the pleadings.[11] The plaintiff further noted that, when the property division issue was raised by the plaintiff at the April 17, 2023 hearing, "the issue was specifically noted as being raised for credibility purposes." The plaintiff thus asked the court to strike the language addressing the issue of the stock transfer from the memorandum of decision and vacate the portion of its order that provided the defendant with a $20,000 credit for the stock transfer. By order dated June 5, 2023, the court denied that request, stating: "Functionally, the court allowed the defendant to orally modify the motions pending before the court to accommodate the relief she sought in the proposed orders [she] submitted at trial. The plaintiff did not deny that he failed to comply with

Practice Book § 66-5. In May, 2024, the administrative judge for the judicial district of Stamford-Norwalk, Judge Blawie, denied the motion. In so doing, Judge Blawie explained that the judge who had issued the June 6, 2023 order, Judge Moukawsher, had resigned in October, 2023. For that reason, Judge Blawie concluded that it was "simply impossible for another judge to attempt to further articulate the reasoning behind [Judge Moukawsher's] orders . . . ." See *Ocwen Loan Servicing, LLC* v. *Mordecai*, 209 Conn. App. 483, 497 n.14, 268 A.3d 704 (2021) ("[i]f a judge other than the one who rendered a decision is permitted to attempt to divine from its review of the record the factual and legal basis for a decision, the result, effectively, is a wholly new decision").

[11] In *Swain*, this court held that the "court is not permitted to decide issues outside of those raised in the pleadings. . . . It is equally clear, however, that the court must decide those issues raised in the pleadings. . . . This rationale extends equally to motions." (Internal quotation marks omitted.) *Swain* v. *Swain*, supra, 213 Conn. App. 419.

the court's order on this subject nor did he suggest that, if given more time, he could come up with some sort of defense to the claim. The court does not believe that the plaintiff was prejudiced by the court taking the issue up. Indeed, the opposite is true. He and the defendant would both be prejudiced by requiring new motion practice, further years of delay, and thousands of dollars in attorney's fees to litigate the issue. A court sitting in equity can do better than that." This appeal followed.[12]

I

The plaintiff first claims that the court improperly considered the defendant's claim that he failed to share with the defendant certain proceeds of a postdissolution sale of stock. Specifically, the plaintiff contends that the court's order reducing the retroactive payments owed to the plaintiff by the defendant—in the amount of $20,000—should be vacated as the plaintiff did not raise such a claim in any motion before the court. Because he had no notice that this issue was going to be addressed at the hearing on his motion to modify, the plaintiff submits that his due process rights were violated by the court's consideration of that issue. The plaintiff also argues that the court admitted the testimony regarding the sale of the stock for the limited purpose of assessing credibility and giving the court information as to the plaintiff's total financial picture, and that the court's order exceeded those limitations. We agree.

First, we note the general principles that guide our analysis of this claim. "It is axiomatic that the appellant bears the burden of providing this court with a record

[12] The defendant appeared, but has not participated, in this appeal. Because she did not file an appellate brief, we ordered that the appeal shall be considered on the basis of the plaintiff's brief, oral argument, and the record. See, e.g., *Ammar I.* v. *Evelyn W.*, 227 Conn. App. 827, 830 n.2, 323 A.3d 1111 (2024).

adequate to review his claim of error. . . . [I]n the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, 210 A.3d 620 (2019). As discussed previously in this opinion, the plaintiff did file a motion for articulation. We note that, in denying the request to file a late motion for articulation, the court did not take up the timeliness of the request. Moreover, because Judge Moukawsher had resigned, the court concluded that it was impossible for any other judge to articulate the reasoning behind Judge Moukawsher's orders and denied the plaintiff's motion. The plaintiff then filed a motion for review with this court. We granted review but denied the relief requested.

The plaintiff contends that he has done all that can reasonably be expected to provide us with an adequate record on this issue, and we agree. We have made an exception to the general rule presuming the correctness of a trial court's decision for those circumstances in which "a party has done all that can reasonably be expected to obtain an articulation but has been thwarted through no fault of [his] own." Id., 397; see also id. (declining to apply presumption of correctness to trial court decision that was devoid of any factual findings in support of its conclusions).

With respect to the scope of the court's decision, we note that, "[i]n general, a court's decision is restricted to those issues raised by the parties in their pleadings and in argument." *Swain* v. *Swain*, supra, 213 Conn. App. 418. "Our rules of practice require that every motion directed toward pleading or procedure, unless relating to procedure during the course of a trial, be in writing. . . . The purpose of requiring written motions

is not only the orderly administration of justice . . . but the fundamental requirement of due process of law." (Citations omitted.) *Connolly* v. *Connolly*, 191 Conn. 468, 475, 464 A.2d 837 (1983). Further, "in the context of motions to modify support orders, we have held that a court's reliance on a ground not raised in a motion to modify is an abuse of discretion in the absence of an amendment to the motion." *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 514, 146 A.3d 26 (2016).

Additionally, although we acknowledge the court's broad equitable power in acting on postdissolution motions for modification; see *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 397; our appellate courts "repeatedly have emphasized that [e]vidence [that] is offered and admitted for a limited purpose only . . . cannot be used for another and totally different purpose." (Internal quotation marks omitted.) *State* v. *Robles*, 348 Conn. 1, 21, 301 A.3d 498 (2023). Therefore, "[i]n the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded [issue] actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity. . . . In making this determination, our courts look not only to what occurred during the hearing itself . . . but also to whether actions occurring prior to the hearing placed the party on notice as to the unpleaded issues or facts." (Internal quotation marks omitted.) *Swain* v. *Swain*, supra, 213 Conn. App. 419–20.

Moreover, "[a] fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution

and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Whe[n] a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, 210 Conn. App. 364, 376–77, 270 A.3d 108, cert. denied, 343 Conn. 909, 273 A.3d 696 (2022); see also *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 288, 928 A.2d 566 (2007) ("[b]ecause the court acted in violation of the state's due process rights to be given adequate notice of the issues the court intended to address, and, accordingly, to be given a reasonable opportunity to be heard in sufficient time to prepare a position on the issues involved, the action taken by the court cannot stand").

In the present case, the plaintiff did object—in a timely and consistent manner—to the introduction of the testimony regarding his allegedly contemptuous conduct in failing to split the proceeds of the postdissolution stock sale with the defendant. Although the plaintiff did have some notice of the defendant's claim when the defendant filed her proposed orders one week before the hearing on the plaintiff's motion, the court specifically tailored the admission of the testimony in question toward its assessment of the plaintiff's overall financial picture as well as for credibility purposes, rather than to support a claim that the plaintiff failed to comply with the terms of the agreement.

Moreover, the court acknowledged that the issue would "arguably [be] best addressed through a motion for contempt" but that "the efficiency of addressing it here outweighs the possible propriety of addressing it there." As the plaintiff repeatedly argued before the court, the failure of the defendant to file her own motion

to raise these issues implicates due process and is inherently unfair. This is especially true with issues effectively charging a party with contempt of court. "[T]here are constitutional safeguards that must be satisfied in indirect contempt cases. It is beyond question that due process of law . . . requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation. . . . [U]nder Connecticut law, such proceedings should be proven by clear and convincing evidence." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 315 Conn. 300, 317–19, 105 A.3d 887 (2015).

In light of the plaintiff's objections and the court's assurance at the April 17, 2023 hearing that this testimony would be admitted for the "limited purpose" of assessing credibility and establishing the plaintiff's total financial picture, we conclude that the court abused its discretion in considering this evidence beyond those stated purposes. We further conclude that, having determined that the plaintiff failed to share the proceeds of the stock sale with the defendant—an issue not properly raised in a motion with due notice to the plaintiff—the court's award to the defendant of a commensurate reduction in the arrearage owed to the plaintiff was harmful and violated the plaintiff's due process rights.

II

The plaintiff next claims that the court, in responding to the defendant's request for clarification, improperly modified the nonmodifiable term of the alimony. The plaintiff argues that the court misconstrued the unambiguous language of the agreement, which terminates alimony in September, 2027. In essence, the plaintiff

contends that, in construing the agreement to require the plaintiff to issue payment in 2028, beyond the term of the alimony as agreed to by the parties, such payment based on his 2027 income—including year-end bonuses—the court improperly modified the terms of the agreement. We do not agree.

We begin by setting forth the applicable standard of review. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law. . . .

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity when ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not

necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Brown*, 199 Conn. App. 134, 144–45, 235 A.3d 555 (2020). A "contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so." (Internal quotation marks omitted.) Id., 147.

As the court expressly found in its memorandum of decision, and as the language of the agreement clearly supports, the defendant is dependent on the plaintiff "until 2027 when both parties have agreed that alimony will certainly end." In our view, the plain and unambiguous language of the agreement indicates that the parties intended to craft an agreement that would provide the defendant with alimony for twelve years after the date of dissolution, such alimony being based on the plaintiff's earnings for that year. Section 3.1 of the agreement explicitly states that alimony would persist, with payments made on the first of each month, until the death of either party, the defendant's cohabitation, or "for an otherwise nonmodifiable term of twelve (12) years from the date of dissolution . . . ." The plaintiff was obligated to pay to the defendant a monthly alimony payment calculated in relation to his "gross annual earned income from employment." Section 3.1 of the agreement further provided that these payments "shall be made as and when [g]ross [e]arned [i]ncome from [e]mployment is received" by the plaintiff. Section 3.2 of the agreement defined gross annual earned income

from employment to mean "all compensation paid and transferred by the [plaintiff's] employer to him on account of personal services rendered by the [plaintiff] and any and all earnings of any nature received by the [plaintiff] in the form of cash or cash equivalents or which the [plaintiff] is entitled to receive from any and all sources rendered by the [plaintiff] by way of his current or future employment, before deductions . . . including but not limited to: (a) salary and/or base salary . . . (d) bonus, guaranteed bonus and/or performance awards . . . ." We reiterate that section 3.4 of the agreement specifically states: "Within thirty (30) days after December 31 of *each calendar year in which alimony and/or child support is payable to the* [*defendant*], the [plaintiff] shall provide the [defendant] with all documents necessary to confirm his gross earned income from employment from all sources, including bonuses. Not later than March 15 of each year, commencing March 15, 2016, the parties shall determine whether the [plaintiff] has paid to the [defendant] the correct amount of unallocated alimony and child support, as the case may be, for the immediately preceding calendar year." (Emphasis added.)

In our view, the final calculation of alimony due to the defendant contemplates any bonuses awarded in 2028 for work performed through September, 2027, without improperly modifying the terms of the alimony agreement. Put differently, the agreement anticipates that the plaintiff will be entitled to receive year-end bonuses based on his employment over the previous calendar year, and that these bonuses will be calculated no later than March 15, 2028. Accordingly, we conclude that the court did not modify the terms of the alimony provision of the agreement.

The judgment is reversed in part and the case is remanded with direction to vacate the order entitling

the defendant to a $20,000 reduction of the arrearage owed to the plaintiff.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM A.* (AC 47138)

Alvord, Clark and Seeley, Js.

Syllabus

Convicted, following a jury trial, of the crimes of sexual assault in the fourth degree and risk of injury to a child, the defendant appealed. He claimed, inter alia, that the state deprived him of his fifth amendment right to remain silent when the prosecutor impermissibly asked a question and elicited testimony about the defendant's silence occurring after he had been informed of his rights under *Miranda* v. *Arizona* (384 U.S. 436), in violation of *Doyle* v. *Ohio* (426 U.S. 610), during the state's case-in-chief and commented about the defendant's post-*Miranda* silence during closing argument. *Held*:

This court reviewed the merits of the defendant's unpreserved claim of a *Doyle* violation pursuant to *State* v. *Golding* (213 Conn. 233), as it was of constitutional magnitude and the record was adequate to review the alleged claim of error.

This court, having concluded that the defendant had established the existence of a constitutional violation that violated his due process right to a fair trial for purposes of the third prong of *Golding*, further concluded that the state failed to meet its burden of proof that the *Doyle* violation was not harmless beyond a reasonable doubt, as the state's case against the defendant was not particularly strong and the prosecutor made multiple remarks concerning the defendant's post-*Miranda* silence, which struck at the jugular of the defendant's theory of defense or suggested a connection between

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

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

the defendant's silence and his guilt; accordingly, this court reversed the judgment of the trial court and remanded the case for a new trial.

Argued March 11—officially released September 2, 2025

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, and tried to the jury before *Papastavros*, *J.*; verdict and judgment of guilty; thereafter, the court, denied the defendant's motion for a new trial, and the defendant appealed to this court. *Reversed*; *new trial.*

Conrad O. Seifert, assigned counsel, for the appellant (defendant).

Olivia M. Hally, deputy assistant state's attorney, with whom, on the brief, were *Paul Narducci*, state's attorney, and *Adam B. Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. The defendant, William A., appeals from the judgment of conviction, rendered after a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). On appeal, the defendant claims that (1) pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976),[1] the state violated his fifth amendment right to remain silent when the prosecutor impermissibly asked a question and elicited testimony during the state's case-in-chief and commented during closing

[1] "In *Doyle* v. *Ohio*, supra, 426 U.S. [619], the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process." *State* v. *Washington*, 345 Conn. 258, 267, 284 A.3d 280 (2022).

argument about the defendant's post-*Miranda*[2] silence, (2) the prosecutor's improper question about the defendant's post-*Miranda* silence implicated the defendant's constitutional right to have the state prove his guilt beyond a reasonable doubt and thereby implied that the defendant had to prove his innocence, in violation of *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970),[3] (3) the prosecutor engaged in improprieties during the trial and closing argument that deprived the defendant of his due process right to a fair trial, and (4) the trial court committed plain error by instructing the jury on consciousness of guilt when there was no evidence to support such an instruction and the instruction did not comply with the model Connecticut Criminal Jury Instructions. We agree that the prosecutor impermissibly asked a question and elicited testimony about the defendant's post-*Miranda* silence in violation of *Doyle* and conclude that the state has failed to meet its burden of demonstrating that the constitutional violation was harmless beyond a reasonable doubt. Accordingly, we reverse the judgment of conviction and remand the case for a new trial.[4]

The jury reasonably could have found the following facts. On October 29, 2020, the complainant, K, who

[2] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (person who has been taken into custody or otherwise deprived of his freedom in any significant way "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

[3] In *In re Winship*, supra, 397 U.S. 364, the United States Supreme Court held "that the [d]ue [p]rocess [c]lause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

[4] Because we agree with the defendant's claim that the prosecutor violated *Doyle* by impermissibly asking a question and eliciting testimony about the defendant's post-*Miranda* silence and remand the case for a new trial, we do not reach the merits of his other claims on appeal.

was sixteen years old at the time, told her mother that she did not want to take the bus home from school. Although her mother told her that she had to, K did not take the bus home, and she subsequently lied to her mother about having done so. When K's mother confronted K, K acknowledged that she did not take the bus. K's mother punished K by taking her cell phone away from her for one month. That same day, K told her mother information about her sexual orientation. K's mother was supportive but thought that K might have made that statement in an effort to get her cell phone back. The next day, K revealed to her mother that the defendant, her stepfather, had touched her inappropriately when she was younger. K's mother also thought that, in making these allegations, "[K] could be attempting to have her phone returned to her." K testified at trial that she came forward out of concern for her sister, who is autistic, in case the defendant had done the same thing to her.

In her trial testimony, K described an incident that occurred in April, 2013, when she was eight years old and had stayed home from school due to a lung infection. According to K, she used to get sick a lot because she has asthma, and, on that particular day when she stayed home, she and the defendant were the only two people in the house. K was lying underneath a blanket in a chair in the living room watching television while the defendant, who had worked the night shift, was sleeping. When the defendant woke up, he came into the living room and sat down on a couch that was across from K. After a few minutes passed, the defendant got up, lay down next to K, and then slid his hands underneath the waistband of K's leggings and underwear. The defendant left his hand there for a time and then began to "try and feel" K's vagina, but her legs were closed, and, when she noticed what he was trying to do, she sat up and took a drink of water to try and indicate

to the defendant that she was uncomfortable with his conduct. K then moved to the couch on the opposite side of the room, and the defendant followed her, lay on top of her, stuck his hands down her leggings and underwear again, and started touching her vagina. K responded by getting up and sitting on the other couch, but the defendant followed her again, repeated the same behavior, and began moving his hand back and forth while touching her vagina. Thereafter, K got up and went to the bathroom to "be safe . . . ." In the bathroom, K decided to take a shower. While in the shower, she realized that she did not have a washcloth and asked the defendant to bring her one. When the defendant entered the bathroom to give K a washcloth, K covered her body with the shower curtain and extended her arm over the curtain to take the washcloth from the defendant. After having done so, however, K noticed that the defendant had not left the bathroom and was still standing there, which prompted her to say something to the effect of: "[A]re you just going to stand there?" Thereafter, the defendant left the bathroom. K testified that, after this incident, she did not want to have contact with the defendant but acknowledged that she would ask to go along with him when he would pick up his daughter in Maryland. During those long road trips, she would be alone with the defendant in the car, but nothing happened between her and the defendant on those trips.

K also described an incident in which the defendant allegedly touched her on her leg. When K was between thirteen and fourteen years old, she was sleeping in her mother's bed with her mother while the defendant was at work because she was afraid of the dark. When the defendant arrived home from work, he got into the bed and lay in between K and her mother, with the front of his body positioned against the back of K's body. K, who was awake, felt the defendant start to slide his

hand down her leg, but she got out of the bed and went to her bedroom before he could touch her further. K's mother recalled a time when K was a teenager and the defendant lay in bed with the both of them. K's mother testified that, the next morning, she told the defendant that she felt it was inappropriate for him to be in bed with K because she was a teenager, and he agreed. K testified that, apart from these two instances, there were no other times when the defendant touched her inappropriately.

After K's disclosure, K's mother informed the defendant of K's allegations, and he denied them. The next day, K's mother made a report to the Department of Children and Families, which informed the Norwich Police Department. On November 6, 2020, K's mother was interviewed by John Tangney, a patrol officer with the Norwich Police Department, and she conveyed to him K's account of what had occurred. See footnote 7 of this opinion. A forensic interview of K subsequently was conducted.

On February 10, 2021, the defendant voluntarily went to the Norwich Police Department for the purpose of being interviewed about K's allegations. The interview was conducted by Peter Karasik, the detective assigned to the case, and another detective. At the outset of the interview, Karasik informed the defendant that he was not under arrest, that he was free to go at any time, and that the door to the interview room had been closed for privacy purposes. During the interview, which lasted approximately one hour and fifteen minutes, the defendant was asked repeatedly about the allegations, and each time he responded by denying that anything inappropriate had happened. At least twenty-six times during the course of the interview the defendant denied K's allegations.[5] The defendant also was asked multiple

[5] Specifically, the defendant stated that nothing happened, K's allegations were not true, there was nothing that could be construed as inappropriate, he never put his hand on K's thigh, never got into bed with K, never saw

times why K would make up the allegations or lie. He consistently responded that he did not know why and mentioned how K often asked to join him on long road trips when he would drive out of state to pick up his daughter, and it would be just the two of them in the car, and that such road trips occurred after the alleged sexual abuse took place. At several points in the interview, the defendant also speculated that maybe K did not like that he was her stepfather, especially when she did not get her way; was covering for someone else, including a boyfriend; was trying to make her allegations appear credible; was trying to get the defendant "away from her mother . . . to get her parents back together"; was describing a bad dream; or was looking for attention. Nevertheless, one of the detectives stated that they needed to be able to give their boss a "reasonable explanation" as to why they should believe the defendant over K, and that, if they could not explain why K was making up the allegations, they could "only assume [the allegations were] accurate."

Twice during the interview, the defendant stated that he was willing to take a lie detector test, but no such test ever was conducted. Toward the end of the interview, after telling the defendant that he felt that there was something that the defendant wanted to get off of his chest, Karasik stated that the defendant could call Karasik at any time and leave a message if he recalled anything. Thereafter, the other detective stated that K had given them "a completely credible account of what occurred," and that "[t]he next time we'll be in touch . . . will be to arrest you. Is that what you want? Be honest with us now. Cause you got two choices." The defendant responded: "Good luck . . . you guys are beyond [the] statute of limitations." The detectives then informed the defendant that the applicable statute of

K come out of the shower or hand her a washcloth while she was in the shower, and the couch and bathroom incidents did not happen.

limitations was thirty years. The defendant thereafter ended the interview.

The defendant was arrested on March 26, 2023, at which time he was advised of his *Miranda* rights, and subsequently he was charged in an amended substitute long form information with sexual assault in the fourth degree in violation of § 53a-73a (a) (1) (A) and risk of injury to a child in violation of § 53-21 (a) (2). Both charges stemmed from the April, 2013 incident. A two day jury trial followed,[6] at which the state presented testimony from K, Karasik, and K's mother, and submitted three exhibits into evidence: the videotape of the defendant's police interview, a photograph of how K looked when she was eight years old, and a physician's note showing that K had asthma.

K and her mother provided their accounts of the events, and Karasik testified about the defendant's videotaped interview, which was played in its entirety for the jury. Immediately thereafter, the prosecutor asked Karasik: "[D]id the defendant ever give you a reason why he thought the victim gave—or the complainant . . . strike that. Your Honor, I apologize—[the] complainant gave you any other reason why this could have happened, why she made these allegations?" Defense counsel objected to this question on the ground that the question called for speculation. The prosecutor offered to clarify the question, and the court responded by telling the prosecutor to ask the question again. The prosecutor subsequently asked Karasik: "[D]id the defendant *ever* offer up a reason why the complainant made these allegations?" (Emphasis added.) Defense counsel objected again, this time on the grounds that the question was "[a]sked and answered of the complainant," and that it was being asked "to augment [K's]

[6] The evidence portion of the trial commenced and ended on June 13, 2023, and, on June 15, 2023, counsel made their closing arguments and the court instructed the jury, which returned its verdict that day.

testimony." The court overruled defense counsel's objection, and Karasik answered: "No." The state then concluded its direct examination of Karasik.

The defendant did not present any testimony and submitted one exhibit into evidence, which consisted of a police report concerning K's allegations.[7] At the conclusion of trial, the jury found the defendant guilty of both charges. On August 25, 2023, the court, *Papastavros*, *J.*, sentenced the defendant to a total effective term of ten years of incarceration, execution suspended after three years, followed by ten years of probation. It also ordered the defendant to register as a sexual offender for life. Four days prior to sentencing, on August 21, 2023, the defendant filed a motion for a new trial. In that motion, he asserted that a new trial was warranted for a number of reasons, including because the "state presented inadmissible evidence about [his] . . . post-*Miranda* silence." The court denied the motion, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant claims, inter alia, that the state violated the proscriptions set forth in *Doyle* when the prosecutor asked Karasik whether the defendant "ever" had given a reason as to why K made the allegations of sexual assault. Although defense counsel objected to the prosecutor's question, he did so on

[7] In the report, Officer Tangney recounts the details of his interview with K's mother, who told him about her conversation with K and K's allegations of inappropriate touching by the defendant. After setting forth the details of the incidents of alleged abuse described to him, Tangney noted the incident that occurred on October 29, 2020, when K lied to her mother about taking the bus home from school and her mother punished her by taking K's cell phone away from her. The report references K's statement to her mother about her sexual orientation, and that K's mother "was very accepting but felt her daughter may be telling her this just to get her phone back. Upon hearing the [allegations of inappropriate touching by the defendant] from her daughter, [K's mother] also thought [K] could be attempting to have her phone returned to her."

evidentiary grounds and did not assert a *Doyle* violation before the trial court. The defendant, therefore, seeks review of his unpreserved *Doyle* claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Washington*, 345 Conn. 258, 267, 284 A.3d 280 (2022). We conclude that the defendant's *Doyle* claim is of constitutional magnitude; see *State* v. *Smith*, 180 Conn. App. 181, 195, 182 A.3d 1194 (2018) (claim that state violated defendant's right to remain silent is of constitutional magnitude); and that the record is adequate to review the alleged claim of error, as the record demonstrates that the defendant received a *Miranda* warning at the time of his arrest, and the *Doyle* claim relates, at least in part, to the defendant's silence during a time period after the *Miranda* warning was given. See *State* v. *Griffin*, 232 Conn. App. 866, 882, 337 A.3d 1211 (2025) ("[a]s a factual predicate to an alleged *Doyle* violation, the record must demonstrate that the defendant received a *Miranda* warning prior to the period of silence that was disclosed to the jury" (internal quotation marks omitted)), petition for cert. filed (Conn. June 20, 2025) (No. 240408); see also *State* v. *Patrick M.*, 344 Conn. 565, 583 n.6, 280 A.3d 461 (2022) (because "it [was] undisputed that the defendant received *Miranda* warnings at the time of his arrest . . . any reference to the

defendant's postarrest silence also was a reference to his post-*Miranda* silence''). We therefore will review the merits of the defendant's claim.

Next, we must ascertain whether a constitutional violation exists that deprived the defendant of a fair trial. To answer that question, we must determine whether the prosecutor's question constituted an impermissible reference to the defendant's post-*Miranda* silence. The following legal principles guide our analysis.

"In *Doyle* v. *Ohio*, supra, 426 U.S. 610, the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process. See id., 611, 619. In reaching its conclusion, the court in *Doyle* v. *Ohio*, supra, 617–19, reasoned, first, that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value, and, [s]econd . . . [although] it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. . . . *State* v. *Bell*, 283 Conn. 748, 765, 931 A.2d 198 (2007); accord *State* v. *Patrick M.*, [supra, 344 Conn. 582]. In a subsequent case, the United States Supreme Court went on to explain that [t]he point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. *Wainwright* v. *Greenfield*, 474 U.S. 284, 292, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

"Although *Doyle* explicitly prohibits *impeachment* of a defendant with evidence of his post-*Miranda* silence, [our Supreme] [C]ourt has extended the *Doyle* rationale to conclude that due process is also violated when the state uses evidence of a defendant's post-*Miranda*

silence as *affirmative proof* at trial . . . . *State* v. *Plourde*, 208 Conn. 455, 468, 545 A.2d 1071 (1988), cert. denied, 488 U.S. 1034, 109 S. Ct. 847, 102 L. Ed. 2d 979 (1989); accord *State* v. *Montgomery*, 254 Conn. 694, 714, 759 A.2d 995 (2000)." (Emphasis in original; internal quotation marks omitted.) *State* v. *Washington*, supra, 345 Conn. 267–68. "Use of a defendant's pre-*Miranda* silence, by contrast, does not raise the same constitutional concerns: evidence of prearrest, and specifically pre-*Miranda*, silence is admissible to impeach the testimony of a defendant who testifies at trial, since the rule of *Doyle* . . . is predicated on the defendant's reliance on the implicit promise of *Miranda* warnings. *State* v. *Angel T.*, 292 Conn. 262, 286 n.19, 973 A.2d 1207 (2009); see *Jenkins* v. *Anderson*, 447 U.S. 231, 240, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (if [t]he failure to speak occurred before the [defendant] was taken into custody and given *Miranda* warnings . . . [then] the fundamental unfairness present in *Doyle* is not [implicated], and impeachment by use of prearrest silence does not violate the [f]ourteenth [a]mendment)." (Citation omitted; internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 583. "The defendant bears the burden of proving that a *Doyle* violation occurred. . . . If the defendant fulfills his burden, then the state assumes the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) Id., 588.

In support of his claim that the prosecutor improperly asked a question and elicited testimony about his post-*Miranda* silence, in violation of *Doyle*, the defendant contends that, although he was interviewed by the police months prior to his arrest, "[the] improper question was not limited to [the] one hour and [fifteen] minute interview. The reason is because the prosecutor

used the word '*ever*.' . . . 'The jury would have naturally and necessarily interpreted the answer to include the entire period after the defendant became aware of the allegations, including the twenty-seven months between the defendant's arrest and trial. Certainly, the jury would have inferred that the use of the word "ever" included more than just the video recorded interview. The jury had already seen the interview—it did not need to be informed that the defendant did not provide an explanation for the allegations during the interview. The natural interpretation of the prosecution's question is that it went beyond what the jury had seen and was asking whether the defendant "ever" provided such an explanation.' " (Emphasis altered.) The state, citing *State* v. *Jeffrey*, 220 Conn. 698, 721, 601 A.2d 993 (1991), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992),[8] counters these assertions by arguing that, "[i]n determining whether a prosecutor's ambiguous remarks refer to pre-*Miranda* silence or post-*Miranda* silence, this court draws the 'more probable' interpretation, given the context of the remarks." According to the state, the prosecutor's question "pertained to the defendant's silence during his police interview, at which he was not in custody and, therefore, had *not* received *Miranda* warnings," and that "it was

[8] In *Jeffrey*, our Supreme Court, in concluding that the defendant in that case had failed to establish a *Doyle* violation, stated: "On appeal, the defendant maintains that [a] . . . question [posed to him on cross-examination] should . . . have been excluded as an impermissible use of [his] postarrest silence. Although he acknowledges that it is not clear from the question whether the [prosecutor] was referring to the defendant's silence before or after he was arrested, he contends that the question reasonably could have been understood by the jury to encompass the defendant's postarrest silence. We agree that the question was ambiguous but believe that, given the context in which it was asked, it is more probable that it would have been understood to refer to the defendant's pre-arrest silence. The state's line of inquiry leading up to this question concerned the defendant's conduct when the police arrived at his home before they placed him under arrest." (Emphasis omitted.) *State* v. *Jeffrey*, supra, 220 Conn. 721.

more probable, given the context in which the prosecutor asked the question, that it would have been understood to refer to the defendant's prearrest silence, specifically, his silence in the police interview." (Emphasis in original.)

These differing positions of the parties demonstrate the ambiguity[9] in the prosecutor's use of the word "ever." In *State* v. *Patrick M.*, supra, 344 Conn. 584, our Supreme Court recently addressed how to construe ambiguous remarks that reasonably can be interpreted to refer either to a defendant's pre-*Miranda* or post-*Miranda* silence. In *Patrick M.*, our Supreme Court concluded that the prosecutor's references to the defendant's silence in that case "were ambiguous because they were not confined to a defined point in time within the pre-*Miranda* period but, instead, referred generally to the defendant's delay in disclosing his version of events without limitation. That delay, when referenced by the prosecutor in an unspecified and, therefore, unrestricted manner, could reasonably have been understood to include both the four days of pre-*Miranda* silence and the much lengthier period between the defendant's arrest and his trial." Id. In light of those circumstances, the court adopted a "contextualized approach" for addressing such situations. Id., 586. "Under this approach, [b]oth the intent of the prosecutor and the character of the remarks are determined by reviewing the context in which they occur, and the burden of proving such intent is on the defendant. . . . The standard is strict; virtually any description of a defendant's silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." (Citation omitted; internal quotation marks omitted.) Id. The court further concluded: "[T]o determine whether a

[9] See *State* v. *Patrick M.*, supra, 344 Conn. 584 (citing *State* v. *Courtney G.*, 339 Conn. 328, 345–46, 260 A.3d 1152 (2021), for proposition that "prosecutorial statements are ambiguous if their meaning is unclear and susceptible to more than one reasonable interpretation").

Doyle violation occurred . . . we must analyze whether the language used [by the prosecutor was] manifestly intended to be, or was . . . of such a character that the jury would *naturally and necessarily* take it to be a comment on the [defendant's post-*Miranda* silence]. . . . [I]n applying this test, we must look to the context in which the statement was made in order to determine the manifest intention [that] prompted it and its natural and necessary impact [on] the jury." (Emphasis in original; internal quotation marks omitted.) Id., 588.

Similarly, in the present case, the prosecutor failed to use language restricting the time period covered by his question to the police interview only and, thus, did not confine his question to a defined point in time within the pre-*Miranda* period. Because the word "ever" used in the question posed could be construed as referring to a time period that included both pre-*Miranda* and post-*Miranda* silence; see *State* v. *Patrick M.*, supra, 344 Conn. 584; we apply the contextualized approach set forth in *Patrick M.* in our determination of whether a *Doyle* violation occurred. We conclude that the question, when viewed in the context in which it was made, was of such a character that the jury naturally and necessarily[10] would have understood it to be a comment on the defendant's post-*Miranda* silence.[11]

[10] We note that the defendant utilizes the "naturally and necessarily" language from *State* v. *Patrick M.*, supra, 344 Conn. 588, in his appellate briefs. The state, on the other hand, does not refer to or rely on the language set forth in *Patrick M.* but, rather, refers in its appellate brief to the "more probable than not" language employed in *State* v. *Jeffrey*, supra, 220 Conn. 721, even though it does cite to *Patrick M.* generally regarding *Doyle* violations. The state has not raised any argument as to why *Patrick M.* should not apply to the present case. Even though we apply the test set forth in *Patrick M.*, we note that, under either test, our conclusion would be the same, as they both focus primarily on the context in which the challenged statement was made.

[11] In light of this conclusion, we need not determine whether the prosecutor's question was "manifestly intended to refer to the defendant's post-*Miranda* silence . . . ." *State* v. *Patrick M.*, supra, 344 Conn. 588.

Our determination is guided, in part, by our Supreme Court's decision in *State* v. *Silano*, 204 Conn. 769, 529 A.2d 1283 (1987). In *Silano*, the defendant argued on appeal to our Supreme Court that the trial court improperly "allow[ed] the state to ask a question on cross-examination concerning [the defendant's] postarrest silence after *Miranda* warnings had been given . . . ." Id., 770–71. Specifically, the defendant claimed that he was denied due process "because the court allowed the state to cross-examine him about his failure to contact the police after the interrogation had ceased in order to correct [a] statement he had given to them. [Also] . . . the prosecutor commented about that failure during the state's final argument. The defendant characterize[d] th[e] issue as one involving postarrest silence, and the state characterize[d] it as one involving the permissible use of prior inconsistent statements to impeach credibility during cross-examination." Id., 778–79. Our Supreme Court concluded that "one of the prosecutor's questions on cross-examination was constitutionally improper . . . ." Id., 779. In particular, the state asked the defendant if he "ever again" contacted "the police to correct allegedly false statements he had made during the interrogation." (Internal quotation marks omitted.) Id.

On appeal, our Supreme Court concluded: "The state may impeach a defendant by cross-examination concerning a prior inconsistent statement made after arrest and the giving of *Miranda* warnings, even though such impeachment may call into question a defendant's silence about the truth when he made that prior inconsistent statement. *Anderson* v. *Charles*, 447 U.S. 404, 100 S. Ct. 2180, 65 L. Ed. 2d 222, reh. denied, 448 U.S. 912, 101 S. Ct. 27, 65 L. Ed. 2d 1173 (1980). Such an examination is allowed because it is impossible to 'bifurcate' a prosecutor's questions concerning inconsistency into those relating to facts contained in a prior

statement and those concerning facts omitted therefrom. Id., 408–409. A prosecutor may not, however, question a defendant about his silence after the interrogation has ceased, since a 'defendant may reassert his right to remain silent at any time, and if he ceases to answer questions, or to come forward with additional or correcting information after questions are no longer being asked of him, there is a reasonable possibility that he is relying upon that right.' . . . We conclude, therefore, that the question concerning the defendant's failure 'ever again' to contact the police, after he had been arrested and given a *Miranda* warning, was improper under the strictures of *Doyle*." (Citation omitted.) *State* v. *Silano*, supra, 204 Conn. 780–81.

Likewise, in the present case, the prosecutor asked Karasik whether the defendant "ever" provided an explanation for why K made the allegations of sexual assault. The adverb "ever," used in this context, means "at any time . . . ." Merriam Webster's Collegiate Dictionary (11th Ed. 2003) p. 433. The question asked by the prosecutor contained no language limiting it to "any time" during the defendant's police interview.[12] Also,

[12] The present case is distinguishable from *State* v. *Devito*, 159 Conn. App. 560, 124 A.3d 14, cert. denied, 319 Conn. 947, 125 A.3d 1012 (2015), on which the state relies in support of its argument that the defendant cannot establish a *Doyle* violation resulting from the prosecutor's use of the word "ever" in his question to Karasik. In *Devito*, the defendant claimed "that his due process right to a fair trial was violated when the court improperly admitted testimony regarding his post-*Miranda* silence at the police station" following his arrest for operating a motor vehicle while under the influence of intoxicating liquor or drugs. Id., 567. The prosecutor in *Devito* questioned state police troopers on the witness stand by asking if the defendant "*ever* denied driving [his] vehicle during the course of the evening" when he was arrested. (Emphasis added.) Id., 570. The defendant argued that the question could have been understood by the jury as implicating his post-*Miranda* silence. This court disagreed, concluding, inter alia, that, given the context in which the question was asked, "it [was] more probable that it would have been understood to refer to the defendant's prearrest silence," as the trooper's "testimony was primarily focused on the defendant's conduct during the traffic stop," and "the state's line of inquiry leading up to the question related only to the defendant's conduct at the scene rather than at the [police]

the question was asked after the jury had just finished viewing the videotape of the interview, during which the defendant, numerous times, emphatically denied the allegations of sexual assault and, aside from speculating—at the detectives' invitation—about a few reasons why K may have done so, stated repeatedly that he did not know why K made the allegations. Because the jury had just viewed the videotape of the interview, it was aware of the position taken by the defendant during his pre-*Miranda* interview. Moreover, the fact that the defendant did offer some explanations during the interview as to why K may have made the allegations further supports a determination that the question posed by the prosecutor necessarily would have covered a time period after the interview, which included the defendant's post-*Miranda* silence. Significantly, toward the end of the interview, after Karasik told the defendant that he felt that there was something that the defendant wanted to get off of his chest, Karasik stated that the defendant could call Karasik at any time and leave a message if he recalled anything. With that in mind, the jury naturally and necessarily would have viewed the question posed by the prosecutor, immediately following its viewing of the interview, as referring to a time period following the interview and up to trial, which, at least in part, pertained to the defendant's post-*Miranda* silence.

As our Supreme Court has made clear, "[t]he standard is strict; virtually any description of a defendant's

barracks." (Emphasis omitted.) Id., 572. With respect to testimony from two other troopers, this court concluded that their testimony did not implicate the defendant's post-*Miranda* silence, as one trooper testified "only as to events that transpired during the traffic stop," and the other trooper's testimony was limited to the defendant's silence during the traffic stop, as the prosecutor had used the phrase "during that time" in reference to when the trooper had approached the defendant's vehicle. (Emphasis omitted; internal quotation marks omitted.) Id., 571. These circumstances differ from those of the present case, as we explain in this opinion.

silence following arrest and a *Miranda* warning will constitute a *Doyle* violation." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 586. Consequently, we conclude that the prosecutor's question to Karasik of whether the defendant "ever" offered an explanation for K's allegations, when viewed in the context in which it was made, violated the proscriptions of *Doyle* in that, by posing that question and eliciting the response, the prosecutor improperly used the defendant's post-*Miranda* silence against him. See *State* v. *Patrick M.*, supra, 591; see also *Griffin* v. *California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (fifth amendment to federal constitution "forbids . . . comment by the prosecution on the accused's silence"); *State* v. *A. M.*, 324 Conn. 190, 200, 152 A.3d 49 (2016) ("[t]he fifth amendment prohibits the state from forcing the defendant to be a witness against himself, and the United States Supreme Court has concluded that this protection also prohibits prosecutors from commenting at trial on the defendant's decision not to testify"); *State* v. *Carlson*, 226 Conn. App. 514, 537, 318 A.3d 283 ("fifth amendment to the United States constitution protects a defendant's right not to testify and prohibits comments on a defendant's silence"), cert. denied, 350 Conn. 911, 324 A.3d 143 (2024). When a prosecutor's remarks violate *Doyle*, they are regarded as "fundamentally unfair, in violation of [a] defendant's fourteenth amendment right to due process." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 592. Accordingly, we conclude that the defendant has established the existence of a constitutional violation that violated his due process right to a fair trial for purposes of the third prong of *Golding*.

This conclusion, however, does not end our inquiry. Next, we must address the fourth prong of *Golding* concerning the harmfulness of the *Doyle* violation. See

id. ("*Doyle* violations are subject to harmless error analysis"). Under the fourth prong of *Golding* and when, as here, the error involves a constitutional violation, "[t]he state bears the burden of demonstrating that the constitutional error was harmless beyond a reasonable doubt. . . . That determination must be made in light of the entire record [including the strength of the state's case without the *Doyle* violation]." (Internal quotation marks omitted.) Id. "Whether an error is harmful, as always, depends on its impact on the trier of fact and the result of the case." Id.; see also *State* v. *A. M.*, supra, 324 Conn. 204 ("[t]he focus of our harmless error inquiry is on whether the state has demonstrated that the [error] did not influence the outcome of the trial").

"A *Doyle* violation may, in a particular case, be so insignificant that it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible question or comment [on] a defendant's silence following a *Miranda* warning. Under such circumstances, the state's use of a defendant's [post-*Miranda*] silence does not constitute reversible error. . . . The [error] has similarly been [found to be harmless when] a prosecutor does not focus [on] or highlight the defendant's silence in his cross-examination and closing remarks and [when] the prosecutor's comments do not strike at the jugular of the defendant's story. . . . The cases [in which] the error has been found to be prejudicial disclose repetitive references to the defendant's silence, reemphasis of the fact [during] closing argument, and extensive, [strongly worded] argument suggesting a connection between the defendant's silence and his guilt." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 592.

In *State* v. *Patrick M.*, supra, 344 Conn. 592, our Supreme Court, after finding a *Doyle* violation, engaged in a harmless error analysis and concluded: "The state's

harmless error argument erroneously focuses exclusively on the rebuttal argument and fails to consider the impact of the similar remarks the prosecutor made during his initial argument. It argues that the 'single *Doyle* violation during rebuttal argument was harmless' but does not explain how the prosecutor's repeated emphasis on the defendant's post-*Miranda* silence during initial closing argument, which struck at the jugular of the defendant's exculpatory story that [his wife] was killed during the course of a robbery, was harmless beyond a reasonable doubt. We therefore conclude that the state has failed to fulfill its burden of demonstrating harmlessness." Id., 592–93. After viewing the entire record in the present case, we reach a similar conclusion.

Here, the state contends that, "even if this court were to determine that the state had violated *Doyle*, any such violation was harmless beyond a reasonable doubt." In support of this contention, the state argues that the prosecutor's question was "infrequent," and that "the state never returned to the subject of the defendant's post-*Miranda* silence during closing or rebuttal argument. . . . At no point during closing or rebuttal argument did the prosecutor reference or comment on the defendant's decision not to testify during the trial." The state also asserts that the prosecutor's question "did not affect the defendant's defense that K fabricated the allegations . . . [or] that K had motivation to lie about the sexual assault because she had her phone taken away by her mother that same month." Finally, the state argues that the prosecutor's "singular question . . . did not 'strike at [the] jugular' of the defendant's silence after his arrest" and that the state presented strong evidence of the defendant's guilt. (Emphasis omitted.) We do not agree with the state's contentions that it "never returned to the subject of the defendant's post-*Miranda* silence during closing or rebuttal argument,"

that the *Doyle* violation did not relate to or have an impact on the defendant's theory of defense, and that the state presented a strong case against the defendant. Accordingly, we conclude that the state has not met its burden of demonstrating that the *Doyle* violation was harmless beyond a reasonable doubt.

First, following our review of the entire record, which necessarily includes comments made by the prosecutor during closing and rebuttal arguments;[13] see *State* v.

[13] Although we do not review the merits of the defendant's second *Doyle* violation claim concerning a comment made by the prosecutor during closing argument, we take that comment into consideration in our analysis of harm. Specifically, during closing argument the prosecutor discussed K's testimony about the alleged sexual assault and stated in part: "You may look at the fact that . . . K was isolated and alone in the home, and . . . point that toward intent. You may use the fact that the defendant pursued . . . K from one couch to another couch as an intentional act, and you may definitely use the fact that he manipulated his fingers to determine sexual gratification and intent. For a man to place his hands down an eight year old child's pants, inside her underwear, who isn't a doctor, who doesn't verbalize what his meaning in doing it is, you may find that that was an intentional act for sexual gratification. *That testimony is unrefuted.*" (Emphasis added.) The defendant argues that the italicized comment "planted in the jury's mind that the defendant's decision to not testify at his trial meant that he was guilty or [that he] should have taken the witness stand to prove his innocence." Our Supreme Court addressed a similar type of comment in *State* v. *Ruffin*, 316 Conn. 20, 26, 110 A.3d 1225 (2015). In *Ruffin*, the defendant claimed that "the prosecutor's no conflicting witness argument constituted an impermissible comment on the defendant's silence because the defendant alone [had] information to contradict [the victim] as to [her allegations of] sexual abuse." (Internal quotation marks omitted.) Id. Although our Supreme Court ultimately disagreed with that claim, in part because "there were witnesses other than the defendant who could have, and did, contradict other aspects of the victim's allegations"; (emphasis omitted) id., 33; it "note[d] that, although the prosecutor did not comment on the defendant's failure to testify, '[a] prosecutor does take a risk whenever the "not contradicted" argument is made' . . . and that prosecutors generally should avoid taking this unnecessary risk . . . and avoid language that could be misinterpreted as a veiled comment on the defendant's failure to testify." (Citations omitted.) Id., 33–34. In the present case, the prosecutor made the comment after discussing K's testimony about the defendant's alleged sexual assault and arguing that, from the defendant's alleged conduct, as described by K, the jury could infer intent; thus, the comment that "'[t]hat testimony was unrefuted" necessarily was a reference to K's testimony, in particular, her testimony that the defendant put his hand down her pants, inside her underwear. When we view the comment in the context in which it was made and with

Hamilton, 352 Conn. 317, 337–38, 336 A.3d 1188 (2025); we conclude that, in addition to the *Doyle* violation that we have found, the prosecutor further highlighted the defendant's silence in his closing remarks to the jury.[14] For example, during rebuttal argument, the prosecutor stated in relevant part: "The defense wants you to believe that . . . K concocted this detailed story about the defendant sexually assaulting her over the mom's punishment over her phone. She didn't say mom did it. It's over a phone that mom took away. It wasn't a phone that the defendant took away. . . . So, let's talk about the interview. You have no evidence there was anything wrong with that interview. . . . [L]et's look at what the defendant told you. . . . He told you that . . . K was right, that they did live in three different homes, that he was her stepdad. . . . [O]ne thing I can say about that interview is that . . . Karasik was right all along; the defendant had something he wanted to say, but he didn't want to say it. All he said, first thing he wanted to say is, nope, it didn't happen. Nope it didn't happen. And he said that a number of times, and I agree he said that a lot. Again . . . Karasik was like, you're trying to tell me something; you want to tell me something. . . .

consideration of the fact that, in this case, the defendant was the only person who could contradict K's testimony about the alleged sexual assault that formed the basis for the two charges; see *State* v. *Walker*, 206 Conn. 300, 307–308, 537 A.2d 1021 (1988); we cannot ignore the possibility that the jury could have interpreted the remark as a "veiled comment on the defendant's failure to testify," which is the precise harm our Supreme Court cautioned can occur when prosecutors make such comments. *State* v. *Ruffin*, supra, 34.

[14] We note that, although the defendant refers to these remarks in his appellate briefs, he has not claimed that they are separate *Doyle* violations; thus, we do not determine whether they constitute *Doyle* violations. Nevertheless, "the various instances in which the prosecutor mentions [postarrest] silence informs this [c]ourt's analysis as to the prejudicial effect on the jury. See *Brecht* [v. *Abrahamson*, 507 U.S. 619, 641, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)] (adopting *Kotteakos* v. *United States*, 328 U.S. 750, 762, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)) (finding that a [c]ourt on harmless error review should consider 'the proceedings in their entirety.')." *Jaradat* v. *Williams*, 591 F.3d 863, 868 n.3 (6th Cir. 2010).

"Did [the defendant] want to save his marriage? *He didn't tell you that.* Did he want to save his family? *He didn't* want to . . . *tell you that.* Did he want to save his freedom? *He didn't want to tell you that.* He didn't make up a story. *He didn't tell you about the phone incident*, all right, a perfect example of something that might be an issue. All right. It's here today as something that you should disbelieve . . . K about. All right. *He didn't tell you that.*" (Emphasis added.)

In making these statements during his closing remarks to the jury and repeatedly using the word "you," the prosecutor was speaking, and referring, to the jury; he was not suggesting that the defendant did not tell Karasik these things during the pre-*Miranda* interview, as the state contends. During the course of this argument, the prosecutor stated five times that the defendant did not tell the jury those various reasons for K's allegations. The inevitable conclusion, therefore, is that these five statements repeatedly highlighted the defendant's failure to testify and undeniably implicated the defendant's post-*Miranda* silence.[15] Moreover, by commenting on the defendant's failure at trial to explain why K should be disbelieved, the prosecutor was effectively continuing to call attention to the defendant's failure to "ever" proffer an alternative explanation as to why K would have made her allegations.

This conclusion is further reinforced when the prosecutor's reference to the "phone incident" is considered in connection with the defendant's theory of defense at trial, made through cross-examination of witnesses, that K made up the allegations in an effort to gain access to her cell phone that had been taken away from her

[15] Although the defendant, in his principal appellate brief, does not label these remarks as constituting a separate *Doyle* violation, he does claim that the remarks amounted to prosecutorial improprieties that infringed on, inter alia, his right to remain silent and improperly referred to facts not in evidence.

for one month as a punishment. When viewed in that light, the prosecutor's references to the defendant's theory of defense concerning the "phone incident," followed by statements that the defendant "didn't tell you"—i.e., the jury—about the phone incident and a suggestion that the jury should disbelieve it, "strike at the jugular" of the defendant's theory of defense that K made up the allegations in an effort to get her cell phone back. (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 592. As the defendant aptly points out in his principal appellate brief: "There [was] no trial evidence that, during the [police interview], the defendant knew about the cell phone being seized by [K's] mother for a month as [a] punishment. There [was] no trial evidence [that] the defendant knew about [K's mother's] concerns that her daughter was lying when he voluntarily went to the police [interview]. The defendant may have learned about . . . K's mother's information about her daughter lying at some point after his public defender showed him the disclosed police report, which mentions it. . . . When the prosecutor argues that the defendant 'didn't tell' [the jury] about the phone incident, it naturally and necessarily caused the jury to believe he should have testified in order to tell [the jurors] he learned about the cell phone incident after he was [interviewed]. This constitutes indirect commentary on the defendant's decision not to testify and his right to remain silent." (Emphasis omitted.) We agree with the defendant.

As our Supreme Court has explained: "When the defendant chooses not to testify, he takes the risk that the jury will view his silence with skepticism—a prosecutor's explicit reminders to the jury of the defendant's decision serves only to heighten this risk, burdening the defendant's constitutional right to remain silent." *State* v. *A. M.*, supra, 324 Conn. 203. "[P]rosecutors should not be allowed to sidestep the *Doyle* protections

by skirting the edge of the law with vague and imprecise references to a defendant's silence." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 584–85.

Given that a determination of the harmfulness of the *Doyle* violation "must be made in light of the entire record [including the strength of the state's case without the *Doyle* violation]"; (internal quotation marks omitted) *State* v. *Patrick M.*, supra, 344 Conn. 592; we next examine the strength of the state's case. Our Supreme Court has "described a child sexual abuse case lacking conclusive physical evidence, when the prosecution's case rests on the credibility of the victim [as] not particularly strong, even when otherwise sufficient to support a conviction." (Internal quotation marks omitted.) *State* v. *Angel T.*, supra, 292 Conn. 293.[16]

In *State* v. *Patrick M.*, supra, 344 Conn. 593 n.8, our Supreme Court, in addressing the harmfulness of a *Doyle* violation, stated: "Although the evidence was sufficient to support the defendant's conviction . . . we disagree with the state that it was overwhelming. As we previously noted, there was no direct, physical, or forensic evidence implicating the defendant in [the] murder; instead, the state's case against the defendant was largely circumstantial, resting on the defendant's motive, means, and opportunity to commit the crime

[16] We also note that, in the context of a prosecutorial impropriety claim, this court has stated: "[W]e must be mindful that [t]he sexual abuse of children is a crime [that], by its very nature, occurs under a cloak of secrecy and darkness. It is not surprising, therefore, for there to be a lack of corroborating physical evidence . . . . Given the rarity of physical evidence in [sexual assault cases involving children], a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse . . . . [Our Supreme Court has] never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive the defendant of a fair trial. . . . *State* v. *Courtney G.*, [339 Conn. 328, 365–66, 260 A.3d 1152 (2021)]." (Internal quotation marks omitted.) *State* v. *Henry B-A.*, 234 Conn. App. 197, 226, A.3d (2025).

and his flight from the scene. At trial, the defendant testified that his flight was motivated by fear, rather than guilt, because someone else killed [the victim] during the course of a robbery in which a large quantity of money and illicit drugs was stolen. As to the identity of the perpetrator, the defendant raised a third-party culpability defense [that was] . . . a plausible, alternative theory of culpability. On the present evidentiary record, we cannot conclude that the evidence of the defendant's guilt was overwhelming or that the defendant's exculpatory story was transparently frivolous. See *State* v. *Brunetti*, [279 Conn. 39, 82–86, 901 A.2d 1 (2006)] (*Doyle* violation was harmless beyond reasonable doubt because defendant confessed to crime, police found clothing soaked in victim's blood in defendant's home, and defendant's exculpatory story that he removed his clothing and that someone else dipped it in victim's blood was transparently frivolous); *State* v. *Montgomery*, supra, 254 Conn. 718–20 (*Doyle* violation was harmless beyond reasonable doubt, in part because of overwhelming evidence of defendant's guilt, which consisted of eyewitness testimony identifying him as perpetrator with 100 percent certainty, his purchase of murder weapon, his confession to his cellmate, and discovery of other incriminating evidence in [his] car, including a knife, a can of Mace, latex gloves, duct tape, and an ice pick)." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 593 n.8

With these considerations in mind, we conclude that the state's case against the defendant in the present case was not particularly strong. See, e.g., *State* v. *Angel T.*, supra, 292 Conn. 292–95. In addition to the fact that there was no physical or medical evidence of the alleged incident of sexual abuse, no expert testimony was offered;[17] there was no evidence presented of behavioral

[17] We note that, although expert testimony is not required in a child sexual assault case, the state often presents such testimony. See *State* v. *Taylor G.*, 315 Conn. 734, 761, 110 A.3d 338 (2015) ("in cases that involve allegations of sexual abuse of children, we have held that expert testimony of reactions

changes by K following the incident in April, 2013; and K testified that, at times following that incident, she asked to go on long road trips with the defendant in which the two of them were alone in his car. See *State* v. *Patrick M.*, supra, 344 Conn. 593 n.8 (state's case against defendant was not overwhelming when there was no direct, physical, or forensic evidence implicating defendant in murder). The evidence submitted by the state consisted of K's testimony setting forth her account of what had occurred in April, 2013; the testimony of K's mother, which corroborated K's testimony in part that, at some point in time when K was a teenager, the defendant had climbed into and slept in a bed with K and K's mother, although that incident was not the basis for the charges against the defendant, and which also included her acknowledgement that she initially thought that K was just trying to get her cell phone back; the testimony of Karasik regarding his interview of the defendant, which the jury viewed in its entirety; a photograph of K when she was eight years old; and a doctor's note indicating that K suffers from asthma. The defendant submitted the police report into evidence, which referenced K's statement to her mother, made after her mother had taken her cell phone away from her for one month, about her sexual orientation, the fact that K's mother thought that K might be telling her about her sexual orientation "just to get her phone back," and that, upon hearing the allegations of inappropriate touching by the defendant from K, K's mother also thought that K "could be attempting to have her phone returned to her."

In *State* v. *Angel T.*, supra, 292 Conn. 263–64, our Supreme court addressed a claim of prosecutorial

and behaviors common to victims of sexual abuse is admissible [because] . . . [s]uch evidence assists a jury in its determination of the victim's credibility by explaining the typical consequences of the trauma of sexual abuse on a child" (internal quotation marks omitted)).

impropriety stemming from the conduct of the prosecutor in "eliciting evidence of, and commenting during summations about, the fact that the defendant . . . had obtained representation by an attorney during the police investigation of the crimes at issue." In doing so, it conducted an analysis under the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987), concerning whether the prosecutorial impropriety deprived the defendant of his due process right to a fair trial; *State* v. *Angel T.*, supra, 292 Conn. 287–95; which we find instructive, especially with respect to its statements regarding the impact of the prosecutorial impropriety when the state's case involving a child sexual assault is not particularly strong. For example, the court concluded that the state's case, which consisted of the victim's testimony and testimony from the victim's mother and cousin, "was not sufficiently strong so as to not be overshadowed by the impropriety." Id., 293. As the court explained: "[A]lthough there exists evidence in the present case supporting the defendant's conviction despite the lack of direct physical evidence linking the defendant to the sexual assault of the victim—namely, the victim's testimony and the testimony of her mother and cousin—without independent physical evidence to prove that the defendant had sexually assaulted [the victim], or even that [the victim] had been sexually assaulted at all, the significance of the [prosecutor's] improper conduct increases considerably." (Internal quotation marks omitted.) Id. Our application of that reasoning to the present case, in which we similarly have determined that the state's case was not particularly strong and which also involves a credibility contest between the defendant and his accuser, leads us to an analogous conclusion regarding the impact of the *Doyle* violation.

The lack of physical evidence in the present case rendered the trial a credibility contest between K and

the defendant. The harm resulting from the state's *Doyle* violation is compounded when considered in conjunction with other comments of the prosecutor during closing and rebuttal argument. See *State* v. *Hamilton*, supra, 352 Conn. 337–38 (trial court's improper admission into evidence of witness' two interviews with police, in which witness identified defendant as person in surveillance footage, was harmful, and that conclusion was "buttressed by the way [the witness'] two interviews were used by the prosecutor during closing arguments"); *State* v. *Calderon-Perez*, 234 Conn. App. 228, 264, A.3d (2025) (harm resulting from court's exclusion of evidence in violation of defendant's constitutional right to present defense "could only have been compounded by" prosecutor's improper remarks in closing argument about excluded evidence); see also *State* v. *A. M.*, supra, 324 Conn. 203 (when prosecutor's comment "calls the jury's attention to the defendant's silence . . . such comment heighten[s] the jury's awareness of the defendant's silence, namely, his failure to answer to the state's charges" (internal quotation marks omitted)). That is, the *Doyle* violation, together with the prosecutor's other comments during closing and rebuttal arguments, conveyed and reinforced the idea that the defendant should not be believed because he never spoke up, either during the interview or at any time afterward, to provide a reasonable explanation for why K made her accusations against him.[18] As such,

[18] Compare *State* v. *Hughes*, 45 Conn. App. 289, 296, 696 A.2d 347 (1997) ("trial court's improper admission of the evidence of the defendant's post-*Miranda* silence was not harmless beyond a reasonable doubt" when "evidence of the defendant's post-*Miranda* silence was brought up repeatedly during the examination of [a police detective] and was then referred to during closing argument," and "defendant's post-*Miranda* silence was consistently equated with his guilt," and because "defendant did not testify at trial, there was a 'reasonable possibility' that the repeated use of evidence of [his] post-*Miranda* silence as affirmative proof of his guilt and consciousness of guilt contributed to his conviction") and *State* v. *Crosby*, 34 Conn. App. 261, 270, 641 A.2d 406 ("In this case, the state questioned the defendant about his postarrest silence and then argued three times during its closing remarks that, since the defendant had remained silent prior to trial, he had had time

the harm went to the core of the defendant's theory of defense, which was not "transparently frivolous." (Internal quotation marks omitted.) *State* v. *Patrick M.*, supra, 344 Conn. 593 n.8. Under such circumstances and in light of the entire record before us, which demonstrates that the state's case against the defendant was not strong, that the prosecutor, in addition to committing the *Doyle* violation, highlighted the defendant's post-*Miranda* silence multiple times during closing and rebuttal arguments, and that some of those references struck at the jugular of the defendant's theory of defense or suggested a connection between the defendant's silence and his guilt, we cannot conclude that the state's improper question and the detective's answer did not influence the outcome of the trial. Accordingly, the state has failed to meet its burden of proof that the *Doyle*

to fabricate an exculpatory story. Thus, the state repeatedly highlighted the defendant's postarrest silence and linked this silence to the defendant's explanation at trial. As a result, a reasonable possibility exists that the impermissible questions and comments contributed to the defendant's conviction, and the *Doyle* violation was not harmless beyond a reasonable doubt."), cert. denied, 230 Conn. 903, 644 A.2d 916 (1994), with *State* v. *Montgomery*, supra, 254 Conn. 718–19 (concluding that *Doyle* violation was harmless beyond reasonable doubt because "prosecutor did not attempt repeatedly to introduce evidence of the defendant's silence . . . [or] mention that evidence during his closing argument," "prosecutor focused on the state's strong case against the defendant, including the incriminating responses that the defendant gave to the police before terminating the [police] interview," and "other evidence introduced by the state overwhelmingly demonstrated the defendant's guilt beyond a reasonable doubt"), *State* v. *Alexis*, 194 Conn. App. 162, 173–77, 220 A.3d 38 (any *Doyle* violation was harmless because "the evidence introduced by the state unrelated to the defendant's post-*Miranda* silence established the defendant's guilt beyond a reasonable doubt"), cert. denied, 334 Conn. 904, 219 A.3d 800 (2019); *State* v. *Bereis*, 117 Conn. App. 360, 379, 978 A.2d 1122 (2009) (*Doyle* violation was harmless beyond reasonable doubt in view of "substantial evidence of the defendant's guilt" and fact that reference to defendant's silence "did not strike at the jugular of the defendant's version of events and was not equated with the defendant's guilt"), and *State* v. *Pepper*, 79 Conn. App. 1, 16–17, 828 A.2d 1268 (2003) (any alleged *Doyle* violation was harmless beyond reasonable doubt because there was substantial evidence supporting defendant's guilt, including physical evidence tying defendant to victim, alleged *Doyle* violation was isolated, and there were no repeated references to defendant's silence), aff'd, 272 Conn. 10, 860 A.2d 1221 (2004).

violation was harmless beyond a reasonable doubt. See id., 592, 593 n.8; *State* v. *Hughes*, 45 Conn. App. 289, 296, 696 A.2d 347 (1997); *State* v. *Crosby*, 34 Conn. App. 261, 270, 641 A.2d 406, cert. denied, 230 Conn. 903, 644 A.2d 916 (1994).

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

In this opinion the other judges concurred.

STACY SMITH *v.* COMMISSIONER OF CORRECTION (AC 47425)

Cradle, C. J., and Alvord and Wilson, Js.

Syllabus

The petitioner, who had been convicted of several crimes, appealed, on the granting of certification, from the habeas court's judgment denying his petition for a writ of habeas corpus. He claimed that the court improperly rejected his claim that his criminal trial counsel rendered ineffective assistance when advising him with respect to a pretrial plea offer from the state. *Held*:

The habeas court properly determined that the petitioner's criminal trial counsel did not render deficient performance in advising the petitioner regarding the state's plea offer, as the court credited counsel's testimony that he advised the petitioner about the offer, including that it contained a right to argue for a lesser sentence, which he explained to the petitioner, as well as the elements of the offenses at issue, the state's evidence and the maximum penalties the petitioner faced, and the petitioner did not indicate to the court or his counsel that he did not understand what a right to argue meant.

Argued March 26—officially released September 2, 2025

Procedural History

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

J. Patten Brown III, assigned counsel, for the appellant (petitioner).

Rebecca Z. Oestreicher, special deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott,* state's attorney, and *Elizabeth M. Moseley*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Stacy Smith, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly rejected his claim that his trial counsel had rendered ineffective assistance in advising him with respect to a pretrial plea offer from the state. We affirm the judgment of the habeas court.

On the basis of the evidence presented at the petitioner's criminal trial, the jury reasonably could have found the following facts, as set forth by this court in the petitioner's direct appeal. See *State* v. *Smith*, 174 Conn. App. 172, 166 A.3d 691, cert. denied, 327 Conn. 910, 170 A.3d 680 (2017). "The charged events occurred between October, 2007, and October, 2009, when the victim[1] was thirteen, fourteen and fifteen years old. At that time, she lived with her mother, M, two older brothers, and a younger sister. Until the end of 2009, the victim's family socialized 'almost every weekend' with D, who was the victim's godmother and M's best friend, and D's sons. In 2006, the victim met the [petitioner] for the first time at a Dunkin' Donuts store and learned that he was the father of D's oldest son. The [petitioner]

[1] "In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e." *State* v. *Smith*, supra, 174 Conn. App. 174 n.1.

was thirty-seven or thirty-eight years old at the time, recently had finished serving a prison sentence for federal narcotics violations, and was living in a halfway house and working at Dunkin' Donuts. Shortly thereafter, the [petitioner] and D resumed their previous relationship, and, in the winter of 2007, the [petitioner] moved into D's East Hartford home.

"In the summers of 2007, 2008 and 2009, the victim and her family regularly attended get-togethers at D's home with D, her sons, and the [petitioner]. During that time, the victim also frequently babysat for D's younger son at D's house. On those occasions, the [petitioner] would often be present. The [petitioner's] inappropriate behavior toward the victim started in 2007, when the victim was socializing with D's family and babysitting at D's house. Specifically, between 2007 and 2008, the [petitioner] began talking to the victim about sex, he would caress her calf while they were watching a movie, and he would show her 'in his phone . . . other girls he was messing with other than [D], telling [her] things that he would do with them and . . . what [she] should do with other guys if [she] was dating someone.'

"In 2008, the [petitioner] began kissing and touching the victim while she was babysitting or attending social gatherings at D's house. The [petitioner] put his fingers in her vagina and touched her breasts or buttocks multiple times between October, 2008 and October, 2009. On one occasion in the summer of 2008, the [petitioner] performed oral sex on the victim while she was babysitting for D. Although the victim asked him to stop and tried to push him off of her, he continued for about thirty seconds and stopped when he heard D's car pull into the driveway. On several occasions when the [petitioner] was kissing or touching the victim, he would unzip his pants and pull out his penis. Although the [petitioner] asked the victim to perform oral sex on

him two or three times, she refused, and he 'laughed it off.'

"In 2010, the victim's family stopped socializing with D's family because the [petitioner] 'was getting abusive' with D, and M did not want her daughters 'to be around all that arguing.' The last time the victim saw the [petitioner] was at a Fourth of July party at D's house in 2010, at which the [petitioner] tried to pull the victim into a room and to kiss her, but she was able to escape.

"In January, 2011, the victim told M about the [petitioner's] actions. The next day, M took the victim to the East Hartford Police Department, where they met with Officer Daniel Zaleski. Zaleski spoke with the victim separately for about twenty minutes, during which time the victim disclosed the pertinent details about the [petitioner's] repeated sexual conduct toward her. Zaleski then referred the case to a juvenile investigator, Detective Samuel Kelsey, who investigated sexual assaults involving minors, and reported the matter to the Department of Children and Families (department).

"On February 1, 2011, after receiving a phone call from Kelsey requesting to speak with him about the allegations against him, the [petitioner] voluntarily went to the East Hartford Police Department and gave a statement. According to Kelsey, the [petitioner] admitted to having had 'close contact' with the victim 'in an inappropriate nature, [such] as touching her breast and vagina.' Specifically, during this interview with Kelsey, the [petitioner] 'said at no time did he have sex with her; he said he was under the influence of alcohol and he can't remember all the events but he does admit having made contact with her; he said he was very sorry and that he would like to make amends in any way deemed necessary, this is not him . . . but that's no excuse.' After Kelsey reduced the [petitioner's] statement to writing, the [petitioner] initialed and signed it.

The entire interview lasted approximately forty minutes.

"After the interview, in the lobby of the police station, the [petitioner] was met by Betzalda Torres, an investigator employed by the department who was investigating the alleged physical neglect and sexual abuse of the victim by the [petitioner]. After Torres reviewed the allegations against [the petitioner] involving the physical neglect and sexual abuse of the victim, for the purposes of the investigation by the department, the [petitioner] 'basically, confirmed that what [the victim] said was correct, did not deny it, and . . . [he] was feeling apologetic to the family for what he ha[d] done.' The [petitioner] told Torres that he had been sexually inappropriate with the victim and that he had 'many' discussions with her regarding sex and her virginity. During this interview, the [petitioner] was not specific as to the details of the actual acts he performed, but he explained that his alcohol and drug use played a role and he 'took full responsibility' for being 'sexually inappropriate toward [the victim].' " Id., 174–77.

The petitioner subsequently was arrested. Id., 177. The petitioner was represented at his criminal trial by Attorney R. Bruce Lorenzen. Prior to trial, the state made a plea offer to the petitioner. The state offered a five year sentence of incarceration, with a right to argue for a lesser sentence, in exchange for a guilty plea to sexual assault.[2] The case was continued several times from December, 2011, through March, 2012, for the petitioner to consider the plea offer. During this period, the trial court informed the petitioner twice that the plea offer allowed the petitioner the right to argue for a lesser sentence. In March, 2012, the petitioner rejected the plea offer, and the trial court, *Alexander*,

[2] The record is unclear regarding the degree of sexual assault to which the petitioner would have pleaded guilty under the terms of the plea offer.

J., conducted a canvass of the petitioner.[3] The case then proceeded to trial.

"[F]ollowing a jury trial, [the petitioner] was convicted of two counts of sexual assault in the second degree, four counts of risk of injury to a child, and one count of sexual assault in the fourth degree. The [trial] court, *Dewey*, *J.*, subsequently sentenced the [petitioner] to a total effective sentence of thirty years incarceration, followed by five years of special parole." Id., 177. The petitioner's conviction was affirmed on direct appeal. Id., 174.

Thereafter, the petitioner filed a petition for a writ of habeas corpus, alleging that Lorenzen had rendered ineffective assistance of counsel. After a trial on the petitioner's single count, amended petition, the habeas court, *Bhatt*, *J.*, denied the petition on the ground that the petitioner had not proven deficient performance or prejudice with respect to his allegations that Lorenzen failed to advise the petitioner regarding his plea offer.[4] The habeas court granted the petitioner's petition for certification to appeal. This appeal followed.

[3] The following colloquy occurred between the trial court and the petitioner:

"The Court: . . . This was down for accept or reject on a plea agreement that did give [the petitioner] a right to argue for a lesser sentence on some reduced charges. Did he want to accept it or did he want to reject it.

"[Lorenzen]: Your Honor, we'd respectfully decline the offer.

"The Court: And you have gone over that pretrial offer with your attorney. Is that correct?

"[The Petitioner]: Correct.

"The Court: And you understand that when the case goes to trial the state can proceed on the original charges, which may have higher penalties after trial. You understand all that?

"[The Petitioner]: Um-hum.

"The Court: Yes? Okay."

[4] The habeas court also rejected the petitioner's claim that Lorenzen had rendered deficient performance with respect to alleged failures to present evidence of coercive police tactics and to locate favorable witnesses. The petitioner does not challenge those determinations on appeal.

We first set forth our standard of review. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Jamison* v. *Commissioner of Correction*, 167 Conn. App. 312, 319, 143 A.3d 1136, cert. denied, 323 Conn. 934, 151 A.3d 383 (2016).

"The petitioner bears the burden of proving ineffective assistance of counsel under the well established standard of *Strickland* v. *Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). . . . In cases . . . involving plea negotiations, to prevail on a claim of ineffective assistance of counsel the petitioner must establish that (1) counsel's performance was deficient, and (2) there was a reasonable probability that—but for the deficient performance—the petitioner would have accepted the plea offer, and that the trial court would have assented to the plea offer. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Citations omitted; internal quotation marks omitted.) *Bonds* v. *Commissioner of Correction*, 223 Conn. App. 645, 654–55, 309 A.3d 411, cert. denied, 348 Conn. 956, 310 A.3d 380 (2024).

On appeal, the petitioner claims that the habeas court improperly rejected his ineffective assistance of counsel claim. Specifically, the petitioner contends that the court improperly rejected his claim that Lorenzen, when advising the petitioner on the state's plea offer, failed to explain the elements of the charged offenses, the state's evidence against him, the petitioner's potential exposure, and the petitioner's right to argue for a lesser

sentence. The respondent, the Commissioner of Correction, argues that the court properly concluded that the petitioner had failed to demonstrate that Lorenzen rendered deficient performance. We agree with the respondent.

At the habeas trial, the petitioner and Lorenzen testified. The habeas court credited Lorenzen's testimony with respect to his discussions with the petitioner about the plea offer. Lorenzen testified that he had advised the petitioner with respect to the elements of the offenses, the state's evidence, and the petitioner's exposure to the maximum penalties.[5] Lorenzen told the petitioner, as he would with his other clients, that the plea offer included the right to argue.[6] Relatedly, Lorenzen advised the petitioner about how the sentencing judge viewed the right to argue and that there was a possibility of receiving a sentence of less than five years of incarceration.

On the basis of its factual findings, the habeas court determined that the petitioner had not proven that Lorenzen engaged in deficient performance with respect to advising him about the plea offer. In crediting Lorenzen's testimony, the court found that Lorenzen's performance was not deficient because "he advised [the peti-

[5] During the habeas trial, Lorenzen testified about his advice to the petitioner, which included meeting with the petitioner to review the plea offer; discussing the plea offer more than once with him; and requesting continuances for the petitioner to consider the plea offer, because the petitioner was reluctant to accept the plea offer. Lorenzen further testified that he did not "have a recollection of a verbatim discussion with [the petitioner]" but that he would have discussed, as he would have with other clients, the allegations, evidence, defenses, and penalties with the petitioner. Relatedly, Lorenzen testified that it was his practice to advise clients of the risks of going to trial; he told the petitioner that the plea was "the very safe play" and it "was likely to work out to his detriment to go to trial."

[6] Lorenzen testified that he had advised the petitioner that "[t]his is it," that the petitioner would have to go before a judge to say whether he was taking the plea offer, and that there may be a possibility of entering a plea pursuant to a plea agreement with the state if he changed his mind later, but that there was no guarantee.

tioner] of the offer, including the fact that it contained a right to argue for less—and also advised him of what that meant—as well as the elements of the offense, the state's evidence and the penalties [the petitioner] was exposed to." In addition, the court further supported its finding that Lorenzen had discussed what the right to argue meant by crediting Lorenzen's testimony that he had informed the petitioner of the presiding judge's position on the right to argue. The habeas court found that "[s]uch a conversation would only have been necessary if [Lorenzen] and [the petitioner] were discussing what a right to argue for less meant."

The habeas court also made other findings that supported its determination that Lorenzen did not perform deficiently. First, the court found that the petitioner did not indicate to Lorenzen that he did not understand what a right to argue meant. Second, the court referenced two separate occasions when the trial court stated in the presence of the petitioner that the plea offer called for a right to argue[7] and two occasions when the trial court stated that the state was modifying the plea offer slightly.[8] The habeas court found that,

[7] During a December 15, 2011 hearing, the trial court stated to the petitioner: "[T]here was some discussion of a plea agreement, and you have to decide whether you want to take a plea agreement or whether you want to have a trial. It did involve the change of charge by the state with a lesser sentence being argued for, and your next court date to decide is . . . January 19 [2012]. [Your counsel] will see you after court." During a March 29, 2012 hearing, the trial court stated to the petitioner: "[Come] on up, sir. This was down for accept or reject on a plea agreement that did give [the petitioner] a right to argue for a lesser sentence on some reduced charges."

[8] On January 19, 2012, the trial court stated: "[T]here's some additional information. Today was down for accept or reject. But the parties need to investigate it a little further. It may change your offer. . . . So, I'm going to give them until February 16 [2012] to see if what was indicated as the offer is going to stay or if it's going to change to something—it looks like more in your benefit."

On February 16, 2012, the trial court indicated that the "state modified the offer slightly or in some ways—at least as it relates to the amount of time that you could be exposed to as a maximum. You have to go over . . . whether you want the plea agreement, whether you want the trial."

during those four hearings, the petitioner never stated to the trial court that he did not know that his plea offer included a right to argue or that he did not understand what the right to argue meant.

On the basis of our review of the record, we conclude that the habeas court properly determined that Lorenzen's advice with respect to the plea offer was not deficient. The petitioner does not challenge any of the court's underlying factual findings as clearly erroneous. Instead, he directs this court to his own testimony at the habeas trial, which the habeas court did not credit. See *Bridges* v. *Commissioner of Correction*, 169 Conn. App. 742, 749–50, 152 A.3d 71 (2016) ("[T]his court does not retry the case or evaluate the credibility of the witnesses. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.)), cert. denied, 324 Conn. 917, 154 A.3d 1008 (2017). The petitioner did not demonstrate that Lorenzen's advice to the petitioner " 'fell below an objective standard of reasonableness.' " *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 518, 139 A.3d 798 (2016). We, therefore, agree with the habeas court's conclusion that the petitioner has not proven deficient performance.[9]

The judgment is affirmed.

CHARTER OAK HEALTH CENTER, INC., ET AL. *v.* VERONICA BARCELONA ET AL.
(AC 47732)

Suarez, Clark and Westbrook, Js.

Syllabus

The plaintiff nonstock corporation and five individual plaintiffs in their capacity as members of the corporation's board of directors and on the

[9] Because we have decided the petitioner's claim on the basis of the performance prong of *Strickland*, we need not discuss the prejudice prong. See *Bonds* v. *Commissioner of Correction*, supra, 223 Conn. App. 654–55

corporation's behalf appealed from the trial court's judgment dismissing their action against the defendants, three members of the corporation's board of directors, for lack of subject matter jurisdiction on the basis that the individual plaintiffs lacked standing to bring the action. The plaintiffs claimed that the court improperly dismissed the action, which sought declaratory and injunctive relief pursuant to the Connecticut Revised Nonstock Corporation Act (§ 33-1000 et seq.), because the individual plaintiffs have standing pursuant to statute (§ 33-1089 (a)). *Held*:

The trial court improperly dismissed the plaintiffs' action for lack of subject matter jurisdiction, as the individual plaintiffs were aggrieved persons within the meaning of § 33-1089 (a) and, therefore, had standing to bring the action.

Argued June 4—officially released September 2, 2025

Procedural History

Action for injunctive and declaratory relief with respect to the corporate governance of the named plaintiff and the validity of certain actions of its board of directors, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where Joel Cruz et al. were added as plaintiffs; thereafter, the court, *Noble*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Reversed*; *judgment directed*; *further proceedings*.

Patrick M. Fahey, for the appellants (plaintiffs).

Linda L. Morkan, with whom were *Kathleen E. Dion* and, on the brief, *Jenna M. Scoville*, for the appellees (defendants).

Opinion

WESTBROOK, J. In this corporate governance dispute, the plaintiffs, Charter Oak Health Center, Inc. (Charter Oak), and Adrian Wood, Joel Cruz, Martin John, Eileen Alvarado, and Leslie Arroyo, in their capacity as members of the board of directors of Charter

("[i]t is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier").

Oak and on behalf of Charter Oak, appeal from the judgment of the trial court dismissing their action against the defendants, Veronica Barcelona, Claudius McNish, and Lolita Young, for lack of subject matter jurisdiction on the basis that the individual plaintiffs lacked standing to bring the action. The plaintiffs claim that the court improperly dismissed the action because the individual plaintiffs have standing pursuant to General Statutes § 33-1089.[1] We agree and, accordingly, reverse the judgment of the court.

The following facts, as alleged by the plaintiffs and stipulated to by the parties, and procedural history are relevant to this appeal. Charter Oak is a federally qualified health center that serves underserved areas by providing outpatient primary care, specialty medical services, behavioral health services, and dental services. On November 15, 2023, the board of directors of Charter Oak held a regularly scheduled meeting. At that time, the nine elected members of Charter Oak's board of directors were Wood, Cruz, Alvarado, John, Arroyo, Barcelona, Joy-Lynn Hardy, McNish, and Young. Kimberly Evans, Charter Oak's general counsel, vice president, and chief of compliance and legal affairs, as well as Rick Markello, Charter Oak's interim chief financial officer, were also present at the meeting. During the meeting, "Markello repeatedly expressed that, in his view, some board members were beyond the term limits set forth in the Charter Oak bylaws and could not serve as board members." Wood, the chairperson of the board

[1] The plaintiffs also claim that the individual plaintiffs have standing to bring the action because (1) they are classically aggrieved, (2) Charter Oak waived the term limit provision of its bylaws, and (3) Charter Oak's bylaws do not authorize employees to remove board members. In light of our reversal on the basis that the individual plaintiffs have standing pursuant to § 33-1089 (a), we do not reach these claims.

In addition, with respect to Charter Oak, § 33-1089 (c) provides in relevant part that "[t]he corporation shall be made a party to any proceeding under this section . . . ."

of directors, stated that "the board would not address the term limits issue at that meeting, electing instead to move the question to the board's executive session."

Six days later, on November 21, 2023, Evans sent emails to Wood, Cruz, and John, each containing a letter stating that, "pursuant to Charter Oak's bylaws [he or she] had exceeded the six year term limit for service on the board of directors."[2] Later that day, Evans called Hardy and expressed her view that Wood, Cruz, and John "had been on the board for too long and were no longer board members." Evans asked Hardy to participate in a "shadow board meeting" the next day to elect a new chairperson of the board, but Hardy, believing that Wood, Cruz, and John were still legitimate members of the board of directors, "refused to participate in the board meeting . . . ." Despite Hardy's disagreement, Evans scheduled a meeting for the next day.

After her conversation with Evans, Hardy informed Wood that Markello, Evans, and Timothy Powers, Charter Oak's vice president of corporate compliance, were "trying to seize control of the board of directors by assembling a rogue board and electing a new chairperson and [chief executive officer (CEO)]." In response, Wood, Cruz, John, and Hardy held a meeting and voted to offer a permanent position to Thomas Maynor, Charter Oak's interim CEO, and to suspend Markello, Evans, and Powers. They also voted to remove the term limit provision from Charter Oak's bylaws. The next day, on November 22, 2023, Maynor emailed letters to Markello, Evans, and Powers, informing them that they had been suspended.

[2] Article four, § 2, of Charter Oak's bylaws provides in relevant part that the terms of board members "shall expire at the end of each [a]nnual [m]eeting . . . . Newly-elected [d]irectors shall hold office for a term of two . . . years or until their successors [are] elected, but in no event shall a [d]irector hold office for more than three . . . consecutive terms."

Later that day, the defendants held a meeting at which Evans and Markello also were present. After the meeting, Markello sent an email to all Charter Oak staff, stating in relevant part: "Five of our board members had their terms expire according to our bylaws, and so they are no longer on the board. They are [the individual plaintiffs]. . . . The four remaining board members, [the defendants and Hardy] currently make up our board, however, they plan to add new board members in the near future. Three of the four remaining members of the board held a duly authorized board meeting today and voted the following: 1. To elect . . . Barcelona as the new chair. 2. To suspend the CEO search and engage a professional search firm. 3. To appoint me . . . Markello, the new interim CEO." Markello subsequently used his authority as the new interim CEO to terminate several of Charter Oak's existing consulting contracts, as well as Maynor's interim CEO contract. The board also suspended the Charter Oak email accounts of Maynor, Wood, Cruz, John, and other Charter Oak consultants, and revoked John's access to Charter Oak's financial information.

On November 27, 2023, Wood, in his capacity as a member of the board of directors of Charter Oak and on behalf of Charter Oak, filed a one count complaint against the defendants, seeking injunctive relief pursuant to the Connecticut Revised Nonstock Corporation Act, General Statutes § 33-1000 et seq. In his complaint, Wood alleged that "[t]he actions of the rogue board members constitute legally invalid *ultra vires* actions. They did not have authority to act on behalf of the board and acted in violation of the company's bylaws, including the provisions directing notice of meetings and provisions regarding quorums for lawful action of the board." (Emphasis in original.) He also alleged that the individual plaintiffs "continue to serve as members of the board of directors until their successor[s] [are]

elected." In his prayer for relief, Wood sought a declaration that the individual plaintiffs are current and legitimate members of Charter Oak's board of directors until their successors are elected and installed. He also sought a temporary restraining order (1) declaring that the individual plaintiffs are current duly elected members of Charter Oak's board of directors, (2) voiding the defendants' actions concerning the operation of Charter Oak since November 15, 2023, (3) providing the individual plaintiffs a right to an accounting of Charter Oak's finances, and (4) restoring the individual plaintiffs' access to Charter Oak's facilities and information systems. Along with the complaint, Wood filed an application for an ex parte temporary restraining order consistent with his prayer for relief, which the court denied.

On December 4, 2023, the defendants filed a motion to dismiss Wood's complaint for lack of subject matter jurisdiction. They argued that, pursuant to Charter Oak's bylaws, Wood ceased being a board member upon the expiration of his third consecutive term, and, therefore, he lacked standing to bring the action on behalf of Charter Oak. Wood filed an opposition to the defendants' motion to dismiss, arguing that he has standing to bring the action on behalf of Charter Oak because, pursuant to General Statutes § 33-1085,[3] he remains a member of Charter Oak's board of directors until his successor is elected, or, alternatively, Charter Oak waived the term limit provision of its bylaws. In support of his opposition, Wood attached the meeting minutes from the board's annual meetings on October 26, 2022, and October 23, 2019. The defendants filed a reply, arguing that, pursuant to General Statutes § 33-1001,[4]

[3] General Statutes § 33-1085 provides in relevant part: "(e) Despite the expiration of a director's term, he continues to serve until his successor is elected and qualifies or until there is a decrease in the number of directors."

[4] General Statutes § 33-1001 provides in relevant part: "(a) Sections 33-1000 to 33-1290, inclusive, shall be so construed as to provide for a general corporate form for the conduct of lawful activities with such variations and modifications from the form so provided as the interested parties may agree

Charter Oak's bylaws, not § 33-1085, control whether Wood remained a board member after the expiration of his third consecutive term.

On December 28, 2023, the court, *Bellis*, *J.*, issued an order transferring the case to the complex litigation docket. On January 12, 2024, pursuant to Practice Book § 10-59, Wood filed an amended complaint in which he added as plaintiffs Cruz, John, Alvarado, and Arroyo, the other Charter Oak board members who allegedly were wrongfully removed.[5] On February 23, 2024, pursuant to Practice Book § 10-60, the plaintiffs moved for leave to file a second amended complaint. The trial court granted that request over the defendants' objection.[6]

upon . . . . Whether or not a section of said sections contains the words 'unless the certificate of incorporation or bylaws otherwise provide', or words of similar import, no provision of a certificate of incorporation or bylaw shall be held invalid on the ground that it is inconsistent with such section unless such section expressly prohibits variations therefrom, or prescribes minimum or maximum numerical requirements, or a substantial interest of the state or third parties is adversely affected thereby.

"(b) If the certificate of incorporation, in effect on January 1, 1997, of a corporation without capital stock . . . contains any provision contrary to, inconsistent with or in addition to any provision of sections 33-1000 to 33-1290, inclusive, but which provision was permitted to be contained in such certificate pursuant to the provisions of applicable law as in effect prior to January 1, 1997, the provisions contained in such certificate shall govern such corporation and the provisions of said sections shall not be held or construed to alter or affect any provision of the certificate of incorporation of such corporation inconsistent herewith . . . ."

[5] The defendants have not raised the issue of whether the additional plaintiffs were properly added. Whether the additional plaintiffs were properly added does not change our analysis and conclusions because the absence of the additional plaintiffs would not deprive this court or the trial court of jurisdiction over the controversy.

[6] The court, in its memorandum of decision dismissing the action, stated that, although "the complaint [that] was in effect at the time of filing of the motion to dismiss was the complaint that was filed on November 27, 2023 . . . no substantive changes have been made to the complaint, [and, therefore], the court treats the February 23, 2024 complaint as the operative complaint." Because the trial court is required to decide jurisdictional issues before addressing a request to amend the complaint; see, e.g., *Bellman* v. *West Hartford*, 96 Conn. App. 387, 392, 900 A.2d 82 (2006); and the defendants

On January 26, 2024, the parties filed a stipulation regarding the dates that the individual plaintiffs, the defendants, and Hardy served on Charter Oak's board of directors. The stipulation provides that (1) between 2012 and 2023, John was elected and reappointed to serve seven consecutive terms; (2) between 2013 and 2023, Wood was elected and reappointed to serve six consecutive terms; (3) between 2013 and 2023, Cruz was elected and reappointed to serve six consecutive terms; (4) between 2014 and 2022, Arroyo was elected and reappointed to serve five consecutive terms; (5) between 2016 and 2022, Alvarado was elected and reappointed to serve four consecutive terms; (6) between 2019 and 2022, McNish and Young were elected and reappointed to serve three consecutive terms; (7) on August 23, 2023, Barcelona was elected to serve her first term; and (8) on October 25, 2023, Hardy was elected to serve her first term. The stipulation additionally provides that John, Wood, and Cruz had been elected and reappointed to serve two year terms on October 25, 2023, and Arroyo and Alvarado had been elected and reappointed to serve two year terms on October 26, 2022.

Following a remote hearing,[7] on May 28, 2024, the court, *Noble*, *J.*, issued a memorandum of decision dismissing the action for lack of subject matter jurisdiction. In its memorandum of decision, the court first

filed an opposition to the plaintiffs' request for leave to file a second amended complaint, the court should not have granted the plaintiffs' request before ruling on the motion to dismiss. This error, however, does not impact our resolution of this appeal.

The first amended complaint, unlike the second amended complaint, was filed *as of right* pursuant to Practice Book § 10-59 and, therefore, was a permissible amendment notwithstanding the fact that the defendants had already moved to dismiss to action. See *Dauti* v. *Stop & Shop Supermarket Co.*, 90 Conn. App. 626, 640, 879 A.2d 507, cert. denied, 276 Conn. 902, 884 A.2d 1025 (2005).

[7] The record indicates that the court held a remote hearing regarding the defendants' motion to dismiss on January 16, 2024. The parties, however, have not provided us with the transcript of such hearing and, instead,

determined that Charter Oak's bylaws, rather than § 33-1085, govern the issue of whether the individual plaintiffs remained board members after the expiration of their third consecutive term. The court stated: "[T]he defendants rely on the bylaws for the proposition that the [individual] plaintiffs have exceeded their term limits and can no longer be members of the board of directors after they have exceeded three consecutive terms. The plaintiffs, however, argue that § 33-1085 applies because the bylaws are silent as to what occurs after a director's term expires. . . . The court finds that § 33-1001 is unambiguous in that it allows a corporation to deviate from the Connecticut [Revised] Nonstock Corporation Act statutory requirements. Moreover, article five of Charter Oak's articles of incorporation . . . states that 'the method of election of the [b]oard of [d]irectors and all other activities and business shall be managed as provided in the [bylaws].' . . . Charter Oak's articles of incorporation thus make it clear that the bylaws govern all activities of Charter Oak. Accordingly, the court finds that § 33-1085 is inapplicable in the present case because article four, § 2, of the bylaws varies permissibly from § 33-1085 (e) pursuant to § 33-1001." (Citation omitted.)

The court then determined that, pursuant to Charter Oak's bylaws, the individual plaintiffs were no longer members of the board of directors. It stated: "The court finds that, under the bylaws, the [individual] plaintiffs are no longer members because they have exceeded the bylaws' term limits. Under article four, § 2, of Charter Oak's bylaws, after the [individual] plaintiffs completed their first three consecutive terms, they were no longer eligible to be members of the board of directors. They therefore lack standing to assert claims concerning Charter Oak's corporate governance on their own

submitted a certificate indicating that no transcript is necessary. See Practice Book § 63-4 (a) (3).

behalf and, as former board members, have no authority to initiate a lawsuit on Charter Oak's behalf." (Footnote omitted.) The court further determined that "this application of the bylaws would not result in absurd or unworkable results" because the bylaws allow the board of directors to call special meetings to add members so that it may maintain nine directors as required by the bylaws. The court also found that the staggered nature of the directors' terms "is designed to prevent the board from lacking [a] quorum and the requisite number of directors."

The court next addressed the plaintiffs' argument that Charter Oak had waived the term limit provision of its bylaws. In rejecting that argument, the court stated: "[T]he plaintiffs have not put forth any evidence beyond the mere assertion that these provisions were waived to demonstrate that the board of directors actually intended to waive the term limitations as set forth in the bylaws. Therefore, the plaintiffs have failed to satisfy their burden of proving subject matter jurisdiction . . . . Moreover . . . the bylaws could have been amended . . . to remove the term limitations had it actually been the intention of the board of directors to remove term limits. . . . The actions taken by the [individual] plaintiffs on November 21, 2023, to remove the term limitation provision are not valid because they were no longer members in good standing of the board of directors."

Lastly, the court addressed the plaintiffs' argument that the individual plaintiffs have standing pursuant to § 33-1089 (a)[8] because they are board members and/or

[8] General Statutes § 33-1089 (a) provides in relevant part: "Upon application of any member, director or person aggrieved, the superior court . . . shall forthwith hear and determine the validity of any election or appointment of any director or officer of a corporation and the right of any person to hold such office, and, if any such office is claimed by more than one person, determine the person entitled thereto, and to that end shall determine the voting and other rights of persons claiming the same in respect of such election or appointment, and confirm the election or appointment, order a

aggrieved persons. The court stated: "[T]he [individual] plaintiffs are no longer members of the board of directors. Accordingly, they are not members or directors as required by § 33-1089 (a). . . . The [individual] plaintiffs, as former board of directors members who have exhausted their three consecutive terms, are no longer permitted to serve on the board of directors absent a change in the bylaws and would not be impacted by an appointment of new directors in a way that is distinct from any member of the public. Accordingly, they do not have standing under § 33-1089."

The court concluded: "[T]he [individual] plaintiffs lack standing because they are no longer board members pursuant to article four, § 2, of the bylaws, which varies permissibly from § 33-1085 (e) pursuant to § 33-1001, and, thus, they lack the authority necessary to bring this action. Accordingly, the court lacks subject matter jurisdiction." The court, therefore, rendered a judgment of dismissal. This appeal followed.

On appeal, the plaintiffs claim that the court improperly dismissed their action for lack of subject matter jurisdiction because the individual plaintiffs have standing pursuant to § 33-1089 (a). Specifically, the plaintiffs argue that the individual plaintiffs are aggrieved within the meaning of that statute and are entitled to a determination of their rights to hold office. We agree.

We begin by setting forth the relevant legal principles and standards that govern our review of this claim. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . In undertaking this review, we are mindful of the well established notion that, in

new election as provided in section 33-1063 or direct other relief as may be just and proper."

determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . .

"Our courts have acknowledged that [t]rial courts addressing motions to dismiss for lack of subject matter jurisdiction . . . may encounter different situations, depending on the status of the record in the case. . . . [L]ack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed. When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court

may dismiss the action without further proceedings. . . .

"It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. . . . One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Citations omitted; internal quotation marks omitted.) *Fountain of Youth Church, Inc.* v. *Fountain*, 225 Conn. App. 856, 867–69, 317 A.3d 106 (2024).

"Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . Importantly, [o]ur standing jurisprudence consistently has embodied the notion that there must be a colorable claim of a direct injury to the [complaining party], in an individual or representative capacity. . . . Standing focuses on whether a party is the proper party to request adjudication of the issues, rather than on the substantive rights of the aggrieved parties." (Citation omitted; internal quotation marks omitted.) *Pasciolla* v. *Pasciolla*, 230 Conn. App. 174, 182, 330 A.3d 222 (2025).

"It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general

types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features." (Internal quotation marks omitted.) *Perry* v. *Perry*, 312 Conn. 600, 620, 95 A.3d 500 (2014). "Aggrievement does not demand certainty, only the possibility of an adverse effect on a legally protected interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 487, 815 A.2d 1188 (2003).

"In order to determine whether a party has standing to make a claim under a statute, a court must determine the interests and the parties that the statute was designed to protect. . . . Essentially the standing question in such cases is whether the . . . statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. . . . [Stated differently, the] plaintiff must be within the zone of interests protected by the statute." (Internal quotation marks omitted.) *Saunders* v. *Briner*, 334 Conn. 135, 157, 221 A.3d 1 (2019); see also *7 Germantown Road, LLC* v. *Danbury*, 351 Conn. 169, 180, 329 A.3d 927 (2025) ("[w]ith statutory standing, we generally look at whether a person falls within the class of persons that the legislature has authorized to bring an action"). The issue of whether § 33-1089 authorizes the individual plaintiffs to bring an action challenging their removal "presents a question of statutory interpretation, over which we exercise plenary review, guided by well established principles regarding legislative intent."[9] *Saunders* v. *Briner*, supra, 157.

[9] "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words,

We begin with the language of § 33-1089 (a), which provides in relevant part: "Upon application of *any member*, *director or person aggrieved*, the superior court . . . shall forthwith hear and determine the validity of any election or appointment of any director or officer of a corporation and the right of any person to hold such office, and, if any such office is claimed by more than one person, determine the person entitled thereto . . . ." (Emphasis added.) The plain language of the statute thus indicates that a "member" or a "director" of a corporation, as well as any other "person aggrieved," may seek a determination in the Superior Court concerning the validity of any election or appointment of any director or officer of a corporation and the right of any person to hold office. General Statutes § 33-1089 (a). Our review of the record that was before the court when it decided the defendants' motion to dismiss leads us to conclude that the individual plaintiffs were aggrieved persons within the meaning of § 33-1089 and, therefore, had standing to bring the present action.[10]

we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Kasica* v. *Columbia*, 309 Conn. 85, 93, 70 A.3d 1 (2013).

[10] This interpretation is consistent with our Superior Court's decisions concerning actions brought pursuant to § 33-1089. See, e.g., *Sowell* v. *DiCara*, Docket No. CV-12-6016087-S, 2014 WL 7272522, *2 (Conn. Super. November 17, 2014) ("[§ 33-1089] speaks to the validity of an election [and] is specifically enacted to allow those persons who are aggrieved by the election process and directly impacted by the election to have the court review the process and provide relief" (emphasis omitted)); *Fosco* v. *Hickory Woods Assn.*, Docket No. CV-10-6006457-S, 2010 WL 2764707, *2 (Conn. Super. June 1, 2010) (plaintiff who lost corporation's board of directors election successfully brought action under § 33-1089 challenging voting procedure used in election); *Orange Landing Condominium Assn.* v. *Paul*, Docket No. CV-03-0476905-S, 2004 WL 2284302, *1 (Conn. Super. September 20,

It is undisputed that the individual plaintiffs had been elected and reappointed to serve on Charter Oak's board of directors in either October, 2022, or October, 2023, and, therefore, were in the midst of two year terms in November, 2023, when they were informed that they were no longer board members. It also is undisputed that a majority of the elected board members did not vote to replace the individual plaintiffs as board members at the time the plaintiffs commenced the present action. The plaintiffs brought the present action seeking, inter alia, a declaration that the individual plaintiffs have the right to hold office as members of the board of directors because (1) pursuant to Charter Oak's bylaws, they are holdover board members until their successors are elected or, alternatively, (2) Charter Oak waived the term limit provision of its bylaws by electing and reappointing the individual plaintiffs to serve more than three consecutive terms. It is clear, therefore, that the individual plaintiffs fall squarely within the zone of interests that the statute is designed to protect. The trial court, in concluding that the individual plaintiffs were no longer board members, improperly reached the merits of the underlying dispute rather than the threshold question of whether the individual plaintiffs had statutory standing to seek the very sort of determination § 33-1089 (a) is intended to afford.

In reaching the merits of the dispute and concluding as it did that the individual plaintiffs are no longer board members, the court improperly determined that Charter Oak's bylaws unambiguously prohibited the individual plaintiffs from serving as holdover board members and that the plaintiffs failed to meet their burden of proving

2004) (former members of corporation's board of directors brought action under § 33-1089 to challenge validity of special election and actions of board after election); *Royce* v. *Willowbrook Cemetery Assn., Inc.*, Docket No. CV-01-0185694-S, 2002 WL 31500984, *3 (Conn. Super. October 21, 2002) ("§ 33-1089 provides the exclusive remedy for determining validity of any election of any officer of a corporation").

that Charter Oak waived the term limit provision of its bylaws when the board elected the individual plaintiffs to serve more than three consecutive terms.

We begin with the plaintiffs' contention that the court improperly concluded that the bylaws unambiguously prohibited the individual plaintiffs from serving as holdovers following the expiration of their third terms. The court determined that, "[u]nder article four, § 2, of Charter Oak's bylaws, after the [individual] plaintiffs completed their first three consecutive terms, they were no longer eligible to be members of the board of directors." The plaintiffs, however, argue that the bylaws do not prohibit board members from serving in a holdover capacity after the expiration of a member's third consecutive term. Specifically, the plaintiffs contend that, putting the issue of waiver aside, the term limit provision, when read in context, only prohibits board members from being elected to a fourth consecutive term, but does not prohibit a board member from serving as a holdover until a successor is elected following the expiration of a board member's third consecutive term. The defendants, on the other hand, contend that the court properly determined that the provision of the bylaws stating that "in no event shall a [d]irector hold office for more than three . . . consecutive terms" unambiguously precludes a board member from serving once his or her third consecutive term expires.

"Courts construe bylaws according to the general rules of contract construction or statutory construction. . . . Generally, the rules governing the interpretation of contracts and statutes require courts to defer to the plain and ordinary meaning of language, unless such language gives rise to ambiguity." (Citations omitted; internal quotation marks omitted.) *Foundation for the Advancement of Catholic Schools, Inc.* v. *Blair*, 230 Conn. App. 793, 809–10, 332 A.3d 990, cert. denied, 351 Conn. 927, 333 A.3d 1108 (2025). "If the language of the

contract [or statute] is susceptible to more than one reasonable interpretation, the contract [or statute] is ambiguous." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 192, 112 A.3d 144 (2015). "When the language of a contract [or statute] is ambiguous, the determination of [its intended meaning] is a question of fact," and "[e]xtrinsic evidence is always admissible . . . to explain [the] ambiguity . . . ." (Internal quotation marks omitted.) Id. Under the general rules of contract and statutory construction, the threshold question of whether the language of the bylaws is itself ambiguous is a question of law over which our review is plenary. See, e.g., *Remillard* v. *Remillard*, 297 Conn. 345, 355, 999 A.2d 713 (2010); *McTiernan* v. *McTiernan*, 164 Conn. App. 805, 824, 138 A.3d 935 (2016).

Article four, § 2, of Charter Oak's bylaws provides in relevant part: "Newly-elected [d]irectors shall hold office for a term of two . . . years *or until their successors* [*are*] *elected*, but *in no event* shall a [d]irector hold office for more than three . . . consecutive terms." (Emphasis added.) We conclude that the relevant language of article 4, § 2, of Charter Oak's bylaws is open to more than one reasonable interpretation with respect to whether a board member may serve in a holdover capacity upon the expiration of a third consecutive term. The language providing that "in no event" shall directors hold office for more than three consecutive terms can reasonably be read to mean that directors cease being members in good standing upon the expiration of their third consecutive term. The language providing that directors shall hold office "until their successors [are] elected," however, can reasonably be read to mean that a director whose third consecutive term has expired may not be *elected* for an additional consecutive term but nevertheless remains a holdover board

member until his or her successor is elected. Accordingly, the individual plaintiffs have colorable claims to board membership, which is all that is required in order to prove that they are aggrieved persons for purposes of § 33-1089 (a). See *Fort Trumbull Conservancy* v. *New London*, 265 Conn. 423, 432, 829 A.2d 801 (2003). The court should have denied the motion to dismiss on that basis and proceeded to a trial on the merits during which it could consider extrinsic evidence to discern the meaning of the bylaws. See *Parisi* v. *Parisi*, 315 Conn. 370, 373, 107 A.3d 920 (2015); see also id., 386 (concluding that "case must be remanded to the trial court to resolve the ambiguity in the parties' separation agreement through a determination of their intent after consideration of all available extrinsic evidence and the circumstances surrounding the entering of the agreement").

In addition to determining that the individual plaintiffs were no longer board members pursuant to the bylaws, the trial court also determined that the plaintiffs' claim that Charter Oak had waived its term limit provision by electing the individual plaintiffs to more than three consecutive terms failed. In reaching that conclusion, the court stated that "the plaintiffs *have not put forth any evidence* beyond the mere assertion that these provisions were waived to demonstrate that the board of directors *actually intended* to waive the term limitations as set forth in the bylaws." (Emphasis added.)

As it did with respect to the plaintiffs' claim that the individual plaintiffs were holdover board members, the court conflated the issue of whether the individual plaintiffs had standing to pursue their waiver claim with the issue of whether the plaintiffs ultimately would prevail on the merits of that claim. At the motion to dismiss stage, the plaintiffs were required to prove only that they had a colorable claim that Charter Oak had

waived its bylaws and that the individual plaintiffs therefore were aggrieved persons for purposes of § 33-1089 (a). See *Fort Trumbull Conservancy* v. *New London*, supra, 265 Conn. 432.

"It is well established that [w]aiver is a question of fact." (Internal quotation marks omitted.) *Worth Construction Co.* v. *Dept. of Public Works*, 139 Conn. App. 65, 68, 54 A.3d 627 (2012). "[W]aiver is the intentional relinquishment or abandonment of a known right or privilege. . . . [T]o determine the presence of waiver, there must be evidence of intelligent and intentional action by the petitioner of the right claimed to be waived. . . . *Each case should be considered upon the particular facts and circumstances surrounding that case*, including the background, experience and conduct of the party that is waiving its rights." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 70–71.

The amended complaint and stipulation supported the plaintiffs' claim that, notwithstanding the provision of the bylaws prohibiting board members from holding office for more than three consecutive terms, each of the individual plaintiffs was elected to a term exceeding that limitation. On the basis of that record, we conclude that the plaintiffs produced sufficient evidence to prove a colorable claim of waiver, and, therefore, the individual plaintiffs are aggrieved persons within the meaning of § 33-1089 (a). The court should have denied the motion to dismiss on that basis and proceeded to hold a trial on the merits of that claim during which the parties would have had an opportunity to present additional evidence in support of their competing claims.

In sum, we conclude that the individual plaintiffs have standing as aggrieved persons pursuant to § 33-1089 (a), and, therefore, the court should have denied the defendants' motion to dismiss.

The judgment is reversed and the case is remanded with direction to deny the defendants' motion to dismiss and for further proceedings.

In this opinion the other judges concurred.

LINDA SOBIN, ADMINISTRATRIX (ESTATE OF PETER SOBIN), ET AL. *v.* ORTHOPAEDIC SPORTS SPECIALISTS, P.C.

(AC 46510)
(AC 46730)

Elgo, Suarez and Westbrook, Js.

Syllabus

The defendant appealed from the trial court's judgment for the plaintiffs, L in her individual capacity and as administrator of the estate of her deceased husband, P, on their claims for wrongful death due to medical negligence and loss of consortium in connection with P's death from a pulmonary embolism that occurred during his recovery from knee replacement surgery performed by an employee of the defendant. The defendant claimed, inter alia, that the court improperly failed to grant a mistrial based on the allegedly inflammatory and unduly prejudicial examination of B, a key witness, by the plaintiffs' counsel. The plaintiffs filed a separate appeal from the court's partial grant of their motion for offer of compromise interest, and the defendant cross appealed. The plaintiffs claimed that the court improperly declined to award offer of compromise interest with respect to L's loss of consortium damages, and the defendant claimed that the court should not have awarded any offer of compromise interest because the purported offer of compromise was invalid. *Held*:

The trial court did not abuse its discretion in declining to strike the responses of the plaintiffs' medical expert to certain hypothetical questions asked by the plaintiffs' counsel or to grant any other relief regarding such testimony, as there was ample evidence admitted from which the jury could find the foundational facts underlying the hypothetical questions posed.

The trial court did not abuse its discretion in denying the defendant's motion for a mistrial alleging that the limited examination of B by the plaintiffs' counsel was unnecessarily inflammatory and intended to prejudice the jury, as any potential prejudice to the defendant resulting from the challenged questioning of B was satisfactorily dissipated by the court's clear and concise curative instruction.

This court dismissed as moot the defendant's claim that the trial court improperly precluded its medical expert from providing certain opinion testimony, the defendant having failed to challenge all three independent grounds for precluding such testimony.

The trial court properly instructed the jury that, in assessing the damages to award for wrongful death, the jury could award damages for P's death itself, as the instruction was supported by the model civil jury instructions and case law, and, even if the defendant were correct that the court's instruction was improper, the defendant failed to demonstrate any harm.

The trial court properly denied the plaintiffs' motion for offer of compromise interest with respect to L's loss of consortium damages, as L was not named as a party to the offer of compromise in her individual capacity, nor was it signed by her or on her behalf, and, given the punitive nature of the offer of compromise statute (§ 52-192a), it was appropriate to strictly construe any such offers and it would be untenable to penalize a defendant for not agreeing to an offer of compromise with respect to a cause of action that was never mentioned in the offer of compromise and in favor of a party that was not a party to the offer.

The trial court properly granted the plaintiff's motion for offer of compromise interest with respect to the wrongful death damages, the defendant having cited no appellate legal authority that an offer of compromise is rendered invalid if, in addition to agreeing to settle the matter for a sum certain, it also includes an alternative offer to reach a stipulated judgment, and such a result was not mandated by any language in § 52-192a.

Argued January 9—officially released September 2, 2025

Procedural History

Action to recover damages for, inter alia, wrongful death, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Rosen*, *J.*; thereafter, the court, *Rosen*, *J.*, denied the defendant's motion for a mistrial; judgment and verdict for the plaintiffs, from which the defendant appealed to this court; subsequently, the court, *Rosen*, *J.*, granted in part the plaintiffs' motion to assess offer of compromise interest and rendered judgment thereon, from which the plaintiffs appealed to this court and the defendant cross appealed. *Affirmed.*

David J. Robertson, with whom, on the brief, were *Christopher L. Wagner* and *Keith M. Blumenstock*, for

the appellant in Docket No. AC 46510 and the appellee-cross appellant in Docket No. AC 46730 (defendant).

Alinor C. Sterling, with whom were *Christopher M. Mattei*, and, on the brief, *Colin S. Antaya*, for the appellees in Docket No. AC 46510 and the appellants-cross appellees in Docket No. AC 46730 (plaintiffs).

Opinion

WESTBROOK, J. Before us are two appeals and a cross appeal that arise out of an action for wrongful death and loss of consortium brought against the defendant, Orthopaedic Sports Specialists, P.C., by the plaintiffs—Linda Sobin (Sobin) as the administratrix of the estate of her husband, Peter Sobin (Peter), and Sobin in her individual capacity—following Peter's death from a pulmonary embolism that occurred during his recovery from knee replacement surgery.

In Docket No. AC 46510, the defendant appeals from the judgment rendered in favor of the plaintiffs on the jury's verdict awarding $5.5 million in damages for wrongful death due to medical negligence and $3 million in damages for loss of consortium. The defendant claims that the trial court improperly (1) failed to strike certain responses given by the plaintiffs' medical expert in response to hypothetical questions that, the defendant argues, relied on facts not in evidence; (2) failed to grant a mistrial based on the plaintiffs' counsel's allegedly inflammatory and unduly prejudicial examination of a key witness; (3) precluded the defendant's medical expert from testifying regarding the origin and size of the pulmonary embolism; and (4) instructed the jury that it could award damages for Peter's "death itself" in addition to damages for pain and suffering.

In Docket No. AC 46730, the plaintiffs appeal from the judgment of the trial court denying, in part, the plaintiffs' motion for offer of compromise interest. They

claim that the court improperly declined to award offer of compromise interest with respect to Sobin's loss of consortium damages. The defendant filed a cross appeal in which it claims that the court should not have awarded *any* offer of compromise interest. In particular, the defendant argues that the purported offer of compromise was not a proper offer to settle and withdraw the action but an offer to stipulate to a judgment, which, the defendant asserts, rendered it invalid as an offer of compromise.

We disagree with the claims raised by the parties in both appeals and the cross appeal. Accordingly, we affirm the judgments of the court.

The following facts, which the jury reasonably could have found on the basis of the evidence presented at trial, and procedural history are relevant to our consideration of the claims on appeal. On September 15, 2015, Peter, who was sixty-one years old, underwent surgery to replace his left knee. The surgery was performed by Michael E. Joyce, an orthopedic surgeon employed by the defendant. The surgery went well, and Peter was discharged from the hospital on September 17, 2015. The discharge instructions provided to Peter following the surgery advised him that he had the highest chance of developing deep vein thrombosis (DVT), a type of blood clot, in the days and weeks after surgery and that, "[i]f the clot breaks loose and travels to a lung, severe health problems and even death can result." The instructions further provided, inter alia, that he should "call [his] doctor right away if [he had] any of the following: [p]ain, swelling, redness, or warmth in the calf or thigh . . . [i]ncreased swelling in [his] leg . . . [i]ncreased redness, tenderness, or swelling in or around the incision . . . [or] [i]ncreased pain . . . ."

Beginning on September 23, 2015, Peter began to experience pain and swelling in his calf. The next day,

Peter told his son that his calf felt "hard" and that he "would kind of wince" if he touched it. Peter told his son that he would have his calf checked by Erik Libby, a physician's assistant (PA) employed by the defendant, immediately after his prescheduled September 25, 2015 appointment with his physical therapist, whose office shared a waiting room with the defendant. Peter attended his physical therapy session, during which the physical therapist examined the bruising on Peter's leg. The therapist told Peter that the bruising appeared normal and was due to a tourniquet used during surgery; Peter was instructed to continue to use cold therapy on his calf and other bruised areas of his leg and to monitor his calf for any increased tenderness or redness. Following his physical therapy appointment, Peter was seen by Libby. Libby did not order an ultrasound of the calf but told Peter to continue to monitor it. Peter texted Sobin after his appointments and relayed that neither the therapist nor Libby had thought his pain or bruising was abnormal and that Libby had instructed him to "ice the knee and the back of [his] calf."[1]

Between September 25 and 28, 2015, the swelling in Peter's calf worsened. On the morning of September 28, 2015, Peter called the defendant. Later that morning, he saw the physical therapist, who documented that Peter's "calf feels knotty." Peter then saw Libby. Libby again did not order an ultrasound. That same day, the

[1] Whether Libby saw and examined Peter on September 25, 2015, and again on September 28, 2015, was a hotly disputed issue at trial. During his testimony, Libby denied seeing Peter at all on those dates. In the defendant's response to discovery requests, the defendant did not produce any medical records or notes that memorialized a visit to its office by Peter on those dates. There was, however, circumstantial evidence admitted at trial from which the jury reasonably could have inferred that Libby saw Peter on September 25, 2015, and again on September 28, 2015. This evidence included Peter's communications with Sobin and his sons. The defendant does not challenge on appeal the sufficiency of the evidence with respect to those implicit findings of the jury.

defendant's office ordered a new hydrocodone prescription for Peter.

On September 29 and 30, 2015, Peter's calf continued to be painful and swollen. On October 1, 2015, Peter began to struggle to breathe. He was taken to a hospital, where he died shortly after arrival. According to a postmortem examination report, the cause of death was "acute pulmonary thromboembolism in the classic setting of previous surgery and decreased mobility."

The plaintiffs commenced the underlying civil action in September, 2017. The operative revised complaint was filed on April 27, 2018, and contained two counts. Count one was brought against the defendant by Sobin in her capacity as the administratrix of Peter's estate and sounded in wrongful death. Specifically, she alleged that Peter's death was the result of the medical negligence of the defendant in that it had unreasonably and carelessly failed (1) to perform an adequate evaluation of Peter's left knee and leg on September 25 and 28, 2015; (2) to identify a significant change in Peter's left extremity; (3) to perform a venous doppler study or ultrasound of the left leg on September 25 and 28, 2015; (4) to identify the significance of Peter's worsening postoperative pain, swelling, bruising, and redness in his left leg; (5) to identify the importance of the physical therapist having called the defendant's office regarding her concerns about Peter's left leg; and (6) to recognize signs and symptoms of a DVT. Count two was brought against the defendant by Sobin in her individual capacity and sounded in loss of consortium and companionship as a result of Peter's death.

On March 12, 2019, Sobin, in her capacity as the administratrix of Peter's estate, filed an offer of compromise with the court offering to enter into a settlement with the defendant for $1 million. The defendant did not accept the offer.

The court, *Rosen*, *J.*, conducted a jury trial over nine days in April, 2023. At trial, the plaintiffs' medical expert, Richard Santore, an orthopedic surgeon, testified that Libby had breached the applicable standard of care by failing to send Peter for an ultrasound of his calf when Peter presented with symptoms consistent with a possible DVT on both September 25 and 28, 2015. Moreover, he testified that if Libby had ordered an ultrasound, there was a high degree of probability that Peter would have survived. The jury returned a verdict against the defendant on both counts of the complaint and awarded damages of $5.5 million on the wrongful death count and $3 million on the loss of consortium count. In response to jury interrogatories, the jury found that (1) Libby was negligent because he failed to recognize the signs and symptoms of DVT and failed to order an ultrasound of Peter's leg on both September 25 and 28, 2015; (2) Libby's negligence was a substantial factor in causing Peter's death; and (3) Sobin proved her derivative claim for loss of consortium. The court rendered judgment in accordance with the jury's verdict. The defendant appealed.

The plaintiffs thereafter filed a postverdict motion seeking $4,844,161.52 in offer of compromise interest calculated on the full $8.5 million verdict. The defendant opposed the motion. After a hearing, the court issued an order awarding offer of compromise interest with respect to the wrongful death count only in the amount of $2,484,453.48, which resulted in a total judgment for the plaintiffs of $11,016,583.38. The court also awarded postjudgment interest of 7 percent per annum on the total judgment. The plaintiffs appealed from the court's judgment regarding the offer of compromise interest, and the defendant filed a timely cross appeal. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court improperly failed to strike certain responses Santore gave to hypothetical questions posed by the plaintiffs' counsel during Santore's direct examination. According to the defendant, the questions relied on facts not in evidence. Specifically, the defendant argues in its appellate brief that, although circumstantial evidence was admitted from which the jury reasonably could have inferred that Peter "*saw*" Libby on September 25 and 28, 2015, "[a]bsolutely no evidence was presented . . . that [Peter] ever *communicated* to [Libby] that he was experiencing calf pain and swelling." (Emphasis in original.) Therefore, the defendant argues, the court should have stricken Santore's testimony to the extent that the hypothetical questions he was asked assumed the existence of such communications. We disagree.

The following additional facts and procedural history are relevant to this claim. As part of their case-in-chief, the plaintiffs offered expert testimony from Santore regarding the applicable standard of care and whether it was breached in the present case. The plaintiffs' counsel asked Santore the following line of questions relevant to the present claim:

"[The Plaintiffs' Counsel]: [O]n September 25th, upon learning of complaint of tenderness in [Peter's] calf, what did the standard of care require [Libby] to do on that day?

"[Santore]: Since the diagnosis of DVT by healthcare providers . . . whether it be a vascular surgeon, an orthopedic surgeon, a PA, or a nurse practitioner, is notoriously unreliable, the only way to make sure it's not a DVT is to get an ultrasound.

"[The Plaintiffs' Counsel]: And is that what the standard of care required under those circumstances?

"[Santore]: Yes.

"[The Plaintiffs' Counsel]: And with respect to—I want you to assume for a moment . . . that the jury will hear evidence that on September 25th [Peter] reported swelling in his calf to [Libby]. Okay, you with me?

"[Santore]: Yes.

"[The Plaintiffs' Counsel]: Under those circumstances, what did the standard of care require [Libby] to do upon learning of calf swelling in [Peter]?

"[The Defendant's Counsel]: Objection, Your Honor, there's no evidence of anybody reporting that to [Libby], whatever.

"[The Plaintiffs' Counsel]: I'm offering that subject to connection tomorrow.

"The Court: All right, we discussed this at sidebar. The objection's overruled.

"[Santore]: The evidence we have is a text message—

"[The Plaintiffs' Counsel]: No, no, hold on a second.

"[Santore]: Oh, sorry.

"[The Plaintiffs' Counsel]: I don't want you to tell me what the evidence is.

"[Santore]: Okay.

"[The Plaintiffs' Counsel]: I want you to assume, okay, the evidence I'm giving you.

"[Santore]: Okay.

"[The Plaintiffs' Counsel]: I want you to assume that there will be evidence before this jury that [Peter] reported to [Libby]—or, I'm sorry, assume that there

will be evidence before this jury that [Peter] advised [Libby] on September 25th of a concern of calf pain. Under those circumstances, what did the standard of care require [Libby] to do at that moment?

"[Santore]: Get an ultrasound.

"[The Plaintiffs' Counsel]: I want you to assume there will be evidence presented to this jury that on September 25, [Peter] reported to [Libby] that he was experiencing pain in his calf. Under those circumstances, what did the standard of care applicable to [Libby] require him to do?

"[Santore]: Pain in the calf is certainly different than pain in the incisional knee area, and so an ultrasound is the only way to exclude a DVT.

"[The Plaintiffs' Counsel]: And you hold those conclusions to a reasonable degree of medical probability.

"[Santore]: I do.

"[The Plaintiffs' Counsel]: And . . . did you reach a conclusion, to [a] reasonable degree of medical probability, as to whether [Libby] met that standard of care?

"[Santore]: Yes.

"[The Plaintiffs' Counsel]: And what is your opinion?

"[Santore]: Unfortunately, he did not."

Just prior to the close of the plaintiffs' case-in-chief, the defendant's counsel raised to the court his belief that the plaintiffs had failed to make good on their promise to introduce evidence supporting the foundational facts asserted in their hypothetical questions to Santore. Particularly, the defendant's counsel argued that the plaintiffs had not produced "one shred of evidence" that Peter had conveyed information to Libby about his calf swelling and pain. The court declined to strike Santore's responses to the hypothetical questions

he was asked or to grant any other relief regarding Santore's testimony.[2]

Turning to the merits of the defendant's claim, we begin with the applicable standard of review and governing principles of law regarding the use of hypothetical questions in eliciting opinion testimony from expert witnesses and a jury's right to draw logical deductions and make reasonable inferences of facts. "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Citation omitted; internal quotation marks omitted.) *Rivera* v. *Saint Francis Hospital & Medical Center*, 55 Conn. App. 460, 468, 738 A.2d 1151 (1999).

[2] Counsel for the defendant never expressly asked the court to strike Santore's testimony at that time. Even assuming that the court understood from the context of their exchange that the defendant's counsel was making an oral motion to strike the testimony, the court seemed to indicate that it would defer any ruling until the defendant could provide the court with a complete record, which the defendant's counsel agreed to provide. Specifically, after the court listened to counsel's renewed concerns about Santore's testimony, the court indicated as follows: "Let me make this easy. I'm going to need to see the—if you're going to make that argument, I have to see the transcript, I need to see both the direct and the cross, all of it, on that point, because you're asking me to remember what was said from your perspective. I know [the plaintiffs' counsel] has a different view. I need to see the testimony to see whether or not . . . there's any relief to be accorded based on that." The defendant's counsel agreed to comply with the court's request, although it is unclear from the record whether the defendant did so. Nevertheless, we are persuaded that the present claim was preserved properly for appellate review because, just prior to the charging conference, the defendant "renewed" its request to strike Santore's responses, and the court responded: "I'm not gonna change my ruling on the motion to strike. The motion to strike was denied. I think there was sufficient evidence which [the plaintiffs' counsel] had articulated and I think the court had articulated previously, but if not, it is sufficient to go to the jury on that point."

Section 7-4 (c) of the Connecticut Code of Evidence provides that "[a]n expert may give an opinion in response to a hypothetical question provided that the hypothetical question: (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case; (2) is not worded so as to mislead or confuse the jury; and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence." Although evidence tending to establish the foundational facts on which a hypothetical question is based commonly is admitted prior to calling an expert, the trial court has the discretionary authority to admit responses subject to the later proof of such facts. See Conn. Code Evid. § 7-4 (a), commentary; E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.8.1, p. 467. If evidence supporting such facts is not later introduced, however, the trial court, upon request, may order the testimony stricken or instruct the jury not to rely on the expert's response. See Conn. Code Evid. §§ 1-3 (b), commentary, and 7-4 (a), commentary. As with other claims of evidentiary error, we review a trial court's determination regarding both the form of a hypothetical question and the admissibility of any response under the abuse of discretion standard. See *Smith* v. *Andrews*, 289 Conn. 61, 74–75, 959 A.2d 597 (2008), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

"[I]t is [the] function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence.

. . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts." (Internal quotation marks omitted.) *Curran* v. *Kroll*, 303 Conn. 845, 856–57, 37 A.3d 700 (2012).

On the basis of our thorough review of the record, we conclude that the defendant has failed to demonstrate that the court abused its discretion by declining to strike Santore's responses to the plaintiffs' counsel's hypothetical questions on the ground that the hypothetical questions were predicated upon facts never placed in evidence. As recognized by the trial court, there was

ample circumstantial evidence presented to the jury from which it reasonably could have inferred that Peter had told Libby about the swelling and pain in his calf. For example, the jury heard testimony from both Peter's son and from Sobin that Peter had been concerned by the pain and swelling in his calf and that he indicated to them that he was going to have his leg examined by Libby. Part of that testimony also included the admission of text messages between the family members and Peter that corroborated the family's testimony. Furthermore, the discharge instructions that were given to Peter following his knee surgery were submitted into evidence and had instructed Peter to seek medical advice if he experienced pain and swelling because these could be signs of a DVT. There was also testimony that Peter was a "highly compliant" patient. As this court has previously held, it is reasonable for a jury to infer that "persons generally seek to follow instructions of a medical nature concerning . . . serious symptoms . . . ." *Curran* v. *Kroll*, 118 Conn. App. 401, 417, 984 A.2d 763 (2009), aff'd, 303 Conn. 845, 37 A.3d 700 (2012).

The defendant concedes that the family's testimony and other circumstantial evidence was sufficient to support a factual inference that Peter *saw* Libby on September 25 and 28, and, notwithstanding the defendant's argument to the contrary, it would be entirely logical and reasonable for a jury to have drawn the additional inference that, if Peter was concerned enough to have seen Libby, he would have conveyed any potential symptoms of DVT to Libby, including the pain, redness and swelling in his calf. See *Curran* v. *Kroll*, supra, 303 Conn. 857 (it is proper for jury to draw factual inferences on basis of already inferred facts). Finally, Peter told Sobin that Libby had told him to monitor his leg for any *worsening* symptoms, from which the jury could also reasonably infer that Peter had communicated to Libby the symptoms he was experiencing at that time.

In short, we cannot conclude that the trial court abused its discretion when it concluded that evidence was admitted from which the jury could find the foundational facts underlying the hypothetical questions posed to Santore. Accordingly, the defendant's claim fails.

II

The defendant next claims that the court improperly denied its motion for a mistrial, in which it argued that the plaintiffs' counsel's examination of Libby was unnecessarily inflammatory and intended to unfairly prejudice the jury. In particular, the defendant argues that, during the plaintiffs' redirect examination of Libby, the plaintiffs' counsel improperly implied that Libby had committed a crime or otherwise acted unlawfully when Libby deleted a document from Peter's electronic medical record following his death, referring several times to Libby's actions either as "illegal" or "unlawful." The plaintiffs respond that any impropriety was unintentional and any potential resulting prejudice was cured by the court's subsequent instruction to the jury that there was no claim in this case that Libby's conduct had violated any criminal law and that the jury was not to consider the possibility of a violation of any criminal law in its assessment of his testimony. We agree with the plaintiffs.

The following additional facts and procedural history are relevant to our discussion of this claim. Prior to calling Libby as a witness, counsel for the plaintiffs alerted the court of his intention to question Libby about a document that Libby purportedly had deleted from Peter's electronic medical record. Counsel argued that the deleted medical record was relevant both substantively and for impeachment purposes. The deleted document was admitted as a full exhibit.[3] As the defendant

[3] The admissibility of the deleted record is not at issue on appeal. The defendant took the position that the deleted record was simply a prepopulated form that was generated due to a follow-up evaluation that had been scheduled prior to Peter's death for October 2, 2015. During his pretrial

concedes in its appellate brief, during the direct examination and cross-examination of Libby, both sides extensively questioned Libby about the deleted document, including the circumstances pertaining to Libby's deletion of it, with only minimal objections. It was not until the plaintiffs' redirect examination of Libby that the plaintiffs' counsel broached the subject matter that forms the basis of the defendant's appellate claim; namely, the legality or lawfulness of Libby's action. The defendant draws our attention to three specific instances in which this occurred.

The plaintiffs' counsel began his redirect by asking: "Mr. Libby, you know that it is illegal to delete a medical record, correct?" Libby answered, "[y]es," before the defendant's counsel objected to the question on the ground that it called for a legal conclusion. The court sustained the objection. Next, after establishing that Libby had received training regarding Connecticut statutes and regulations governing the retention of medical records, the plaintiffs' counsel asked: "[A]nd you know as a result of that training that it is against the law to delete any part of a patient's medical record, correct?" The defendant's counsel again objected, but the court

deposition, Libby stated that he had not accessed Peter's medical records after September 15, 2015, but the deleted form contained entries that could not have been prepopulated and thus tended to show that Libby made entries on the electronic form on the morning of October 1, 2015, and then, upon learning of Peter's death, deleted this form. An archived copy of the document nevertheless was retained in the records of the software company that supported the defendant's electronic medical records. In admitting a copy of the deleted form, the court indicated that the plaintiffs could question Libby about the contents of the record but that it was reserving a ruling on how much leeway the plaintiffs would have to question Libby about deleting or removing the record. The court clarified: "So you can take it up to the line of—you can use the postoperative evaluation, you can examine [Libby] about that. The deletion issue, I want to have a sidebar discussion or outside the presence of the jury after I've heard his testimony and then make a determination as to whether it's appropriate, relevant or any other objection that [the defendant] may have at that time."

overruled the objection, indicating that Libby could answer if he knew. Libby answered, "[y]es." The plaintiffs' counsel then asked Libby about the testimony he had given earlier in which he suggested he had been trained "to remove notes that were not completed if visits were not completed." Counsel asked: "Nobody at ChartLogic, the software company, ever told you that you could delete medical records that contained unique information on a patient, right?" Libby answered, "[c]orrect." Counsel then asked: "In fact, you know, as you just testified, that's against the law, correct?" The defendant's counsel objected, and the court sustained the objection. Shortly thereafter, the court adjourned for the day.

The next day, the defendant's counsel informed the court that it intended to file a motion for a mistrial on the ground that the jury had been left with the impression that Libby had done something illegal, which counsel argued was highly prejudicial and highly improper. The defendant argued, as it does on appeal, that the plaintiffs' questions concerning the legality of Libby's deletion or removal from the file of the record in question were calculated to "poison [Libby's] character in front of the jury" and were asked in direct violation of the court's instruction to counsel that matters that had the potential to be controversial should be raised first at a sidebar. The court stated that it understood the defendant's concerns and it would like to "find a way to address the concern with something that is short of a mistrial," such as issuing an instruction to the jury. The court instructed counsel to meet and discuss the issue. On recross-examination, the court permitted the defendant's counsel to ask Libby the following question: "[W]hen you removed the October 1, 2015 draft template for the postoperative initial visit for the total knee arthroplasty did you feel in any way that you were doing something wrong?" Libby responded: "No, I did not."

On April 14, 2023, the defendant elected to file its motion for a mistrial. The defendant stated that "[t]he overwhelming prejudicial effect of [the plaintiffs' counsel's] improper line of questioning warrants a mistrial because it irreversibly has poisoned the proceeding against the defendant on the basis of a demonstrable falsehood, and the defendant thus has been denied its right to a fair trial. If the court nonetheless deems a mistrial unwarranted, a comprehensive, detailed curative instruction must be given to correct the plaintiffs' counsel's misstatements and improper, false characterization of [Libby's] conduct." The plaintiffs filed an opposition to the motion for mistrial on April 17, 2023. The plaintiffs argued that the motion should be denied because the inquiry into whether Libby had failed to comply with Connecticut and federal legal requirements regarding the maintenance of health records was a fair one because such actions implicated his credibility on other issues, most importantly whether he had seen Peter on September 25 and/or 28; there was no undue prejudice to the defendant; and "[t]he record comes nowhere near the high standard for declaring a mistrial . . . ."

The court heard argument on the motion for a mistrial on April 18, 2023. Following argument, the court issued the following oral ruling: "[T]he court has reviewed the motion for mistrial dated April 14, 2023, as well as the objection to the defendant's motion for mistrial dated April 17, 2023. The court has had several conversations with counsel to discuss a possible curative instruction in lieu of the motion for mistrial, which is a rather drastic last resort that a court would consider if the court does not conclude that a curative instruction would be sufficient. Based on the circumstances of this case where [Libby] was examined by counsel contemporaneously with the questions that defense counsel feels were inappropriate and [Libby] was specifically

asked whether he thought he did anything wrong and he said no, and that was before the jury at that time, I don't find that there was any prejudice given.

"It's taken us to get to today to be able to actually have the hearing on the motion for mistrial, although I will say that this was an issue that [was] discussed multiple times. We talked about if the court were to deny the motion, that the court would want to work on a curative instruction. I instructed counsel to address that issue. I received drafts both in the motion for mistrial as potential alternative in the event that the court denied the motion. I received a version from the defense, I received a version from the plaintiffs, and I had prepared two versions on my own. And based on the law as I understand it, I do not feel that this trial has been inappropriately tainted by the references. I think the court did sustain two objections; the court did not sustain the objection as to . . . one of the questions because it was asking as a result of [Libby's] training, did he understand that it was against the law. So that was the distinction between that ruling and the others, but in any event, I do not find grounds for a mistrial here so I'm going to deny the motion for the reasons stated. And I will issue a curative instruction . . . ."

The court next heard argument from the parties regarding the language of the curative instruction and indicated that it would give an instruction the next day prior to the plaintiffs resting their case. The next day, the court instructed the jury as follows: "Ladies and gentlemen, you may recall that earlier in the trial [Libby] was asked a few questions regarding whether it was illegal, unlawful, or against the law for him to delete or remove a document entitled 'Postop Evaluation,' which was dated October 2, 2015, and the reference is plaintiff's exhibit 26. That testimony related only to issues regarding the preservation of medical records. I'm

instructing you that there is no claim in this case that [Libby's] conduct violated any criminal law, and you are not to consider the possibility of any violation of criminal law in your assessment of his testimony. I am further instructing you that no administrative agency has taken any civil action against [Libby] with respect to the deletion or removal of that document." That same instruction was repeated again during the court's jury instructions prior to deliberations.

"The standard for review of an action upon a motion for a mistrial is well established. [Although] the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances [that] may arise during the trial in which his function is to assure a fair and just outcome. . . . In [our] review of the denial of a motion for mistrial, [we recognize] the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *Wager* v. *Moore*, 193 Conn. App. 608, 635, 220 A.3d 48 (2019); see also *Ferino* v. *Palmer*, 133 Conn. 463, 466, 52 A.2d 433 (1947) ("[t]he trial court has a wide discretion in passing on motions for mistrial and when the objectionable matter is suitably explained to the jury it is rare that reversible error is found"). "Every reasonable presumption will be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Nevers* v. *Van Zuilen*, 47 Conn. App. 46, 51, 700 A.2d 726 (1997). If the motion

for a mistrial is premised on allegedly prejudicial remarks or questions by counsel made during the examination of a witness or during closing argument, "[t]he burden is on the [moving party] to establish that, in the context of the proceedings as a whole, the questions and arguments were so prejudicial that they deprived him of a fair trial." Id., 51–52.

Applying this standard to the present case, we are not convinced that the court abused its discretion by denying the defendant's motion for a mistrial. Any potential prejudice to the defendant resulting from the plaintiffs' counsel's brief questioning of Libby regarding the possible illegality or unlawfulness of his actions with respect to the deleted or removed document was satisfactorily dissipated by the court's clear and concise curative instruction. See id., 52 (any potential prejudice from challenged testimony was cured by court's curative instruction). The court instructed the jury that the issue of whether Libby's conduct violated any criminal or civil law was an issue that was not before the jury and that it should not consider the issue in evaluating his testimony. "It is well settled that the jury is presumed to follow the court's curative instructions in the absence of some indication to the contrary." (Internal quotation marks omitted.) *Modaffari* v. *Greenwich Hospital*, 157 Conn. App. 777, 785, 117 A.3d 508, cert. denied, 319 Conn. 904, 122 A.3d 1279 (2015). No such indication has been provided on appeal.

Given the entirety of the evidentiary record before the jury, the defendant simply has failed to meet its burden of demonstrating that any prejudice arising out of the plaintiffs' counsel's limited examination of Libby regarding the deleted document was the type of occurrence that mandates a mistrial or that any resulting prejudice was not adequately addressed and cured by

the trial court's limiting instruction. Because we conclude that the trial court properly exercised its discretion in denying the defendant's motion for a mistrial, we reject the defendant's claim to the contrary.

III

The defendant also claims that the court improperly precluded its medical expert, Richard Iorio, an orthopedic surgeon, from providing opinion testimony regarding the origin and size of the pulmonary embolism that killed Peter on the ground that the defendant had failed to disclose him properly as an expert with respect to those topics. The plaintiffs dispute the defendant's claim, arguing that Iorio did, in fact, testify that the pulmonary embolism found in Peter's lung was, in his opinion, too large to have originated in the calf as the plaintiffs' expert had testified and that it more likely originated in Peter's pelvis or high thigh. Moreover, the plaintiffs argue that the court only precluded Iorio from testifying about his attempt to measure the size of the embolism on the basis of certain autopsy photographs and that the court provided three grounds for so doing, only one of which was that such testimony was not a properly disclosed opinion. Because the defendant does not address the other two grounds for precluding such testimony in its principal brief, the plaintiffs argue that the defendant's claim is moot. We agree with the plaintiffs that this claim is moot.

The following additional facts are relevant to our disposition of this claim. After the plaintiffs rested their case, the defendant called Iorio as its expert witness regarding the applicable standard of care and causation. Iorio testified to the jury about DVTs generally and how the size of any resulting clot correlates with the size of the vein in which it forms, with veins increasing in size as you move from the foot to the upper thigh and pelvis. Iorio opined that certain studies showed that DVTs

significant enough to cause fatal pulmonary embolisms ordinarily do not originate in the lower leg below the knee. Outside the presence of the jury, the plaintiffs' counsel argued to the court that Iorio's testimony regarding how the vascular system functions was beyond the scope of what he was disclosed to testify about, and he orally moved the court to strike some of Iorio's testimony and to preclude him from giving further testimony regarding the vascular system including that "the calf and thigh is incapable of generating a clot of the size that took [Peter's] life, but the vascular system in the pelvis is." The defendant's counsel objected to the plaintiffs' motion, arguing that, as an experienced orthopedic surgeon with expertise in DVTs, Iorio was more than qualified to testify about the venous system. The court declined to strike any of the testimony Iorio had thus far provided and stated the following about upcoming testimony: "I will take it question by question as we get into issues, for example, about the size of the clot, whether it could've gone through—how do we know what the size was, whether it went through a particular vein, whether it can only have gone through something that originated in the pelvis or something else. We're going to take them question by question. If there are issues, we'll have sidebars and we'll figure it out. But this is not to be understood that I haven't stricken the testimony to say that he's going to have free rein to testify about everything having to do with where the clot may have originated. All right?"

Iorio's direct testimony resumed. The defendant's counsel eventually turned to questions about the autopsy report and two photographs that Iorio had reviewed that purportedly depicted the pulmonary embolism at issue. The photographs were not in evidence, the defendant's counsel having only marked them for identification purposes. The plaintiffs' counsel objected to the admissibility of the photographs on the

ground that they had not been previously disclosed to the plaintiffs and had not been properly authenticated.[4] The defendant's counsel responded that it was the plaintiffs' obligation to ensure that they had received all autopsy photographs along with the autopsy report and that the photographs were self-authenticating because the photographs contained a specimen number that corresponded with the autopsy report.[5]

After hearing additional arguments regarding the admissibility of the photographs and their use by Iorio

[4] The plaintiffs' counsel argued as follows: "What they're proposing to do now through a witness who has no personal knowledge of these photographs is to have him identify what they are, from where they came, and what they depict. And he's going to now base his opinion that this particular embolus could not have arisen in the lower extremity based on something that appears in the photo, which I understand to be dimensions. Again, we haven't looked at these photos prior to today. The witness has no personal knowledge about it. He cannot authenticate a document about which he has no personal knowledge. . . . [E]ven if there was proper authentication as to what this picture actually depicts, it would be overly prejudicial given the lack of explanation from the pathologist himself on the issue and given the lack of notice to us on this issue. So it's not admissible and none of his opinions that rely upon it, and in particular his opinions on the dimensions of the embolus itself, which they've obviously been trying to set up by having him describe the dimensions of the venous system, should be admissible."

[5] More specifically, the defendant's counsel argued as follows: "[I]t's actually the plaintiff's obligation to provide us these things in the first instance. The fact that [the plaintiffs' counsel] didn't have them, if that's what he's representing, you know, that's up to him to get the entirety of the autopsy report if that's what he wants. But nobody was hiding anything from anybody and he didn't ask [Iorio] at his deposition whether he had reviewed autopsy photos or anything along those lines. And with regard to the photos themselves . . . the photographs are self-authenticating because on the photographs it corresponds with the specimen number of the autopsy for [Peter] . . . . The idea as to where the clot originated and the size of it and all that other stuff, you know, obviously [Iorio] was gonna come in here and testify about that. At [Iorio's] deposition the questions were really brief about it. Basically, they were, [Iorio], is it your opinion that the clot arose from either the thigh or the pelvis, or something like that. He said yes. . . . And there were no questions about the venous system, tell me what the size of the clot was, or anything along those lines. So, they had every right to explore with him whatever it was he was relying on in testimony about it. And they didn't. And then to come in here and say . . . it hasn't been disclosed or we didn't know, it's not my obligation to go get your photographs. These guys have been doing this for a long time. They know almost

in his testimony to the jury, the court made the following ruling: "The photographs are not coming into evidence. I don't think there's a sufficient evidentiary basis for it. I also think they're potentially inflammatory to the jury. But that raises a separate issue, which is about the expert opinion and whether or not [Iorio] will be able to offer opinions with respect to the size of the emboli based on the photographs. He'll be able to offer—you can ask him those question[s] based on what he reviewed. He can say, I reviewed photographs. Did you take any measurements yourself? No, I—there was a scale on a photograph and I used that to measure and this is my estimate, and that's his opinion. . . . And then he'll be crossed on it." The plaintiffs' counsel then raised several additional objections. First, he argued that, at the time of Iorio's deposition, the plaintiffs had requested disclosure of any materials upon which Iorio would be relying in support of his opinions and the photographs at issue were never disclosed until trial. Second, he argued that Iorio was an orthopedic surgeon, not a pulmonologist, and he was never disclosed to testify as an expert regarding lung structures or the measuring of a clot within the lung. The defendant's counsel responded that Iorio had the necessary expertise and that "there's no reason" to preclude his testimony.

The court responded: "Well, there's several—there are several reasons to keep it out. One was the disclosure issue; the second is he's not a pulmonologist . . . and it's not a disclosed opinion." After hearing additional argument from the parties, the court agreed to allow the defendant to examine Iorio for the limited purpose of making an offer of proof "as to why [Iorio] as opposed to a pulmonologist or a vascular surgeon

with every autopsy there are photographs. . . . We had no reason to believe that they didn't have them."

is the appropriate person to talk about the measurements of the emboli . . . as depicted in the photographs." Following that offer of proof, and after hearing additional argument, the court ruled that Iorio could testify that, consistent with the medical examiner's report, the embolus that killed Peter was large, and on the basis of that and on the basis of his training, research and experience, it was his opinion that it had originated someplace other than from Peter's calf or lower leg. The court stated, however, that Iorio "can't testify about what the size was based on the photographs, based on the undisclosed opinion."

Having reviewed the entirety of Iorio's testimony, we agree with the plaintiffs that the only real limitation that the court placed on his testimony was with respect to his use of the autopsy photographs as a basis for providing an opinion as to the precise measurement of the embolus found in Peter's lung. The court provided the defendant with three reasons for excluding this testimony. First, the autopsy photographs on which such testimony would have been based were deemed inadmissible, both because of a lack of authentication of the photographs and because they were never properly disclosed to the plaintiffs. Second, the court concluded that Iorio had not established that he was qualified to provide expert testimony about what was depicted in the autopsy photographs because he was neither a pulmonologist nor a pathologist. Third, the court indicated that it agreed with the plaintiffs that Iorio's disclosure as an expert did not include providing testimony regarding measuring the size of an embolus from autopsy photographs.

"[I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful

appeal would benefit the plaintiff or defendant in any way. . . . [If] alternative grounds . . . unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant." (Citation omitted; internal quotation marks omitted.) *State* v. *Abushaqra*, 151 Conn. App. 319, 325, 96 A.3d 559 (2014).

On appeal, the defendant has only challenged the court's limitation of Iorio's testimony by arguing that the court was incorrect about the scope of his disclosure as an expert pursuant to Practice Book § 13-4, which the defendant argues does not require a party to disclose an exhaustive list of the specific topics about which an expert may testify. We need not reach this issue, however, because the defendant has failed to address the court's other independent bases for limiting Iorio's testimony; namely, his lack of qualifications to testify regarding subject matters outside his area of expertise and the defendant's purported failure to disclose to the plaintiffs the photographs that would have formed the basis for his opinion. Because we cannot provide any practical relief by reviewing only one of the court's reasons underlying the court's decision to partially limit Iorio's testimony, we dismiss the defendant's claim as moot.[6]

[6] Even if we were to agree with the defendant that the court improperly prevented Iorio from testifying to the jury regarding his precise measurement of the embolus found in Peter's lung, the defendant would not be entitled to the relief it seeks because we are unconvinced that the exclusion of such evidence was harmful in light of our review of the totality of the evidence presented. The autopsy report admitted into evidence described the embolus as "large" and Iorio was able to provide the jury with his opinion that an embolus large enough to result in Peter's death could not have originated from a DVT in Peter's calf as opined by the plaintiffs' expert. It is apparent from the jury's verdict that they believed the plaintiffs' expert over the defendant's expert as to causation, and the defendant simply has failed to show that any excluded testimony was reasonably likely to have altered that outcome.

IV

Finally, the defendant claims that the court improperly instructed the jury that, in assessing the damages to award for wrongful death, the jury could award damages for the "death itself." The defendant essentially argues that any damages awarded for the death itself in the present case would have been cumulative of other noneconomic damages and that, consistent with Connecticut's model jury instructions on damages for wrongful death, the plaintiffs were entitled to damages for "either the death itself or for pain and suffering, not both." We do not agree.

The following additional facts are relevant to our review of this claim.[7] The day before closing arguments, the court conducted an off the record charge conference in chambers. The court later gave the jury the following charge with respect to noneconomic damages: "In this case the estate is claiming noneconomic damages. Noneconomic damages are money damages awarded as compensation for nonmonetary losses and injuries which [Peter] suffered as a result of the defendant's negligence. They are awarded for such things as physical pain and suffering and the destruction of the ability to enjoy life's pleasures.

[7] In his closing argument, counsel for the plaintiffs gave the following brief description of what damages for "death itself" entail: "The next is damages for death itself. And this is the recognition that every human life, every human life, no matter how old you are, young you are, rich, poor, disabled, able-bodies, health problems, no health problems, life has a certain baseline value. And the fact that it was taken from Peter is a form of damage that if you find we've proven our case you're required to provide. What is the value of a life extinguished? Five million? Ten million? How much? The value of a life extinguished. Any life, no matter how great your life is, how fortunate you've been, how unfortunate you've been, what is the baseline value of a life, that's that."

The defendant's counsel, in his closing argument, provided no guidance regarding the proper measure of damages. Rather, he stated only: "So with regard to damages, you cannot . . . guess or speculate as to anything. And what we ask is that you use your common sense."

"We have a statute that governs damages in cases such as this where there is a death. It allows for just damages, including damages consisting of compensation for the destruction of [Peter's] capacity to carry on and enjoy life's activities in a way that he would have done had he lived; compensation for the death itself; and pain and suffering.

"Damages are allowed for the destruction of [Peter's] capacity to enjoy life's activities. Evidence has been presented as to those incidents of life that [Peter] enjoyed, including family, work, sports, recreation and other aspects of life. You may consider those areas in connection with this claim and award damages for this loss.

"The rule is that insofar as money can do it, the estate may be awarded for fair, just and reasonable compensation for [Peter's] loss of life. As in the other categories of damages, there is no precise mathematical formula for a jury to apply.

"The estate also seeks to recover damages for physical pain and suffering and emotional upset and anguish on October 1, 2015. A plaintiff who is injured by the negligence of another is entitled to be compensated for all physical pain and suffering, emotional upset and anguish, and loss of the ability to enjoy life's pleasures that the plaintiff proves by a fair preponderance of the evidence to have been proximately caused by the defendant's negligence. As far as money can compensate the estate for such injuries and their consequences, you must award a fair, just and reasonable sum. You simply have to use your own good judgment in awarding damages in this category. You should consider the nature and duration of any pain and suffering that you find."

After the court charged the jury, the court inquired whether the parties had any objections to the charge

as it was delivered and allowed counsel to make a record of their objections raised earlier during the charge conference. With respect to the instruction on damages, the defendant's counsel indicated as follows: "We take exception to the inclusion of the separated and identified claim of damage . . . for compensation for death itself. As we've argued and stated in our papers, that's not part of the statute that's applicable to wrongful death and that's not an appropriate charge, in our—that's our position." The court responded: "That's in the standard instructions. Right?" The defendant's counsel acknowledged: "Yes, Your Honor."

We begin with our standard of review and other relevant principles of law. "When reviewing [a] challenged jury instruction . . . we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper. . . . Instructions are adequate if they give the jury a clear understanding of the issues and proper guidance in determining those issues." (Internal quotation marks omitted.) *Perez* v. *Cumba*, 138 Conn. App. 351, 366, 51 A.3d 1156, cert. denied, 307 Conn. 935, 56 A.3d 712 (2012).

"The wrongful death statute; General Statutes § 52-555; is the sole basis upon which an action that includes as an element of damages a person's death or its consequences can be brought. At common law, the death of the injured person, whether contemporaneous with the

wrongful act or not, terminated liability of the wrongdoer because the right to enforce it ended with the death. . . . Death and its direct consequences can constitute recoverable elements of damages only if, and to the extent that, they are made so by statute. . . . Because it is in derogation of the common law, an action for wrongful death is limited to matters clearly within its scope." (Citations omitted.) *Lynn* v. *Haybuster Mfg., Inc.*, 226 Conn. 282, 295, 627 A.2d 1288 (1993).

Section 52-555 provides in relevant part: "In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses . . . ." Our Supreme Court has stated that " '[j]ust damages' include (1) the value of the decedent's lost earning capacity less deductions for her necessary living expenses and taking into consideration that a present cash payment will be made, (2) compensation for the destruction of her capacity to carry on and enjoy life's activities in a way she would have done had she lived, and (3) compensation for conscious pain and suffering." *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 149 n.12, 491 A.2d 389 (1985).

That damages for the "death itself" are also recoverable in an action for wrongful death was confirmed by our Supreme Court's decision in *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659, 136 A.2d 918 (1957). In *Floyd*, the court stated: "Damages for wrongful death, as such, are allowed as compensation for the destruction of the decedent's capacity to carry on life's activities, including his capacity to earn money, as he would have if he had not been killed. . . . In the case of one who is

gainfully employed, especially one who earns a relatively large income, as did the present decedent, the destruction of earning capacity may well be the principal element of recovery resulting from the death. . . . But we have consistently pointed out that damages for wrongful death are not restricted to those arising from the mere destruction of earning capacity. Some damages are recoverable *for death itself*, even though instantaneous, without regard to earnings or earning capacity." (Citations omitted; emphasis added.) Id., 669–70.

The defendant argues that damages for the "death itself" were intended to act as a "stop gap" measure to be utilized only in those cases in which "there is no claim of antemortem damages or no claim of postmortem damages." The defendant cites to no appellate case law post-*Floyd* that expressly interprets Connecticut law in this manner. Rather, the defendant draws our attention to the model civil jury instruction on damages for wrongful death, which provides in relevant part: "We have a statute that governs damages in cases such as this where there is a death. It allows for just damages which includes: [e]conomic damages of: 1) the reasonable and necessary medical and funeral expenses and 2) the value of the decedent's lost earning capacity less deductions for (his/her) necessary living expenses taking into consideration that a present cash payment will be made and [n]oneconomic damages of: 3) compensation for the destruction of the decedent's capacity to carry on and enjoy life's activities in a way that (he/she) would have done had (he/she) lived and, 4) compensation for the death itself, *or* 5) pain and suffering." (Emphasis added.) Connecticut Civil Jury Instructions 3.4-7, available at http://jud.ct.gov/JI/Civil/Civil.pdf (last visited August 20, 2025). The defendant argues that we must construe the model instruction's use of the conjunction "or" between "death itself" and "pain

and suffering" as an acknowledgment by the drafters that a party may not recover damages for the death itself *and* for pain and suffering.

As a preliminary matter, we note that Connecticut's civil model jury instructions, as published on the Judicial Branch website, are only intended as a guide and that their publication is no guarantee of their legal correctness or adequacy. See *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 761–63, 212 A.3d 646 (2019). "The language used in the model jury instructions, although instructive in considering the adequacy of a jury instruction . . . is not binding on this court." (Citation omitted; internal quotation marks omitted.) Id., 762.

Moreover, subsequent portions of the very same model instruction relied on by the defendant suggest that a plaintiff is entitled to recover for the death itself, i.e., for the loss of life, and, "[i]n the event the death was not instantaneous," also recover for antemortem pain and suffering.[8] Connecticut Civil Jury Instructions, supra, 3.4-7. The instruction seems to suggest that only if a death is instantaneous would a plaintiff's damages

[8] In the section of the instructions that provides more detailed discussion of each measure of noneconomic damages, the model instructions provide: "Now I will instruct you on noneconomic damages.

"3. Destruction of Capacity to Enjoy Life's Activities

"Damages are also allowed for the destruction of (Mr./Ms.) <name of decedent>'s capacity to enjoy life's activities.

"Evidence has been presented as to those incidents of life that (Mr./Ms.) <name of decedent> enjoyed, including family, work, sports, recreation and other aspects of life. You may consider those areas in connection with this claim and award damages for this loss.

"4. Compensation for the Death Itself

"The rule is that insofar as money can do it, the plaintiff may be awarded fair, just and reasonable compensation for the loss of life. As in the other categories of damages, there is no precise mathematical formula for a jury to apply.

"5. Pain and Suffering

"<In the event the death was not instantaneous, see relevant portions of Damages—General, Instruction 3.4-1.>" Connecticut Civil Jury Instructions, supra, 3.4-7.

be limited to compensation for the death itself, presumably because there could not have been any antemortem pain and suffering. If the death was not instantaneous, the model instruction directs the court to also instruct the jury as to damages for pain and suffering utilizing the same instruction for calculating such damages applicable in other tort actions. There would be no need for such an instruction if damages for pain and suffering were subsumed within damages for the death itself as suggested by the defendant.

The notion that a plaintiff may receive damages for both the death itself and for any pain and suffering that preceded the death is also consistent with our Supreme Court's explanation in *Floyd* that the wrongful death cause of action "is a continuance of [the cause of action that] the decedent could have asserted had he lived . . . . Our wrongful death statute *adds* to that cause of action, as an element of damage, the death itself, which was not recognized as an element of damage at common law." (Citations omitted; emphasis added; internal quotation marks omitted.) *Floyd* v. *Fruit Industries, Inc.*, supra, 144 Conn. 668; see also *Kling* v. *Torello*, 87 Conn. 301, 306, 87 A. 987 (1913) (explaining that Connecticut's wrongful death statute "operates to transfer to the representative the right of action [that] the deceased had for his sufferings and disability during life, while the death *enlarges his right of recovery* by permitting an award of *additional damages for the death itself* as one of the harmful results of the wrongful act" (emphasis added)).

Lastly, even if the defendant had convinced us, which it does not, that the court's instruction regarding the measure of damages was improper because it would have permitted the jury to award duplicative damages for pain and suffering and for the "death itself," we agree with the plaintiffs that the defendant's claim would nevertheless fail because the defendant cannot

demonstrate any harm on the basis of the record before us. The court only instructed the jury that it may, not must, award damages for the death itself. Furthermore, the jury was not asked to complete a jury interrogatory or to otherwise provide an accounting regarding the components of its award of noneconomic damages, nor did the defendant request the same in its proposed jury interrogatories and verdict forms. Accordingly, there is nothing in the record before us showing that the jury awarded damages for the death itself or that it did so in addition to awarding damages for pain and suffering. This court cannot and will not engage in speculation in evaluating an award of damages. See *Day* v. *Gabriele*, 101 Conn. App. 335, 347–48, 921 A.2d 692, cert. denied, 284 Conn. 902, 931 A.2d 262 (2007).

Having considered all of the arguments of the parties, and on the basis of our careful review of the case law cited, we are convinced that the court's instructions regarding damages were properly adapted to give the jury a clear understanding of the issues before it and proper guidance in determining an award of damages. Accordingly, the defendant's claim of instructional error fails.

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V

In the second appeal, the plaintiffs appeal from the judgment of the trial court denying in part the plaintiffs' motion for offer of compromise interest. Specifically, they challenge the court's refusal to award offer of compromise interest on the full amount of the judgment, including Sobin's loss of consortium damages. We are not persuaded.

The following additional facts are relevant to this claim. On March 12, 2019, Sobin, in her capacity as the administratrix of Peter's estate, filed an offer of

compromise with the court. The offer of compromise stated in relevant part: "Pursuant to [General Statutes §] 52-192a,[9] *the plaintiff*, *Linda Sobin*, *administratrix of the estate of Peter Sobin*, in the above-entitled matter, hereby makes an offer of compromise to settle with [the defendant] in the amount of [$1 million], which offer constitutes *the plaintiff's* offer to settle the claim underlying the above-captioned action against [the defendant] and further constitutes the plaintiff's willingness to stipulate to a judgment for the sum of [$1 million] against said defendant . . . ." (Emphasis added;

[9] General Statutes § 52-192a provides in relevant part: "(a) Except as provided in subsection (b) of this section, after commencement of any civil action . . . seeking the recovery of money damages . . . the plaintiff may . . . file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. . . . Within thirty days after being notified of the filing of the offer of compromise and prior to the rendering of a verdict by the jury or an award by the court, the defendant or the defendant's attorney may file with the clerk of the court a written acceptance of the offer of compromise agreeing to settle the claim underlying the action for the sum certain specified in the plaintiff's offer of compromise. Upon such filing and the receipt by the plaintiff of such sum certain, the plaintiff shall file a withdrawal of the action with the clerk and the clerk shall record the withdrawal of the action against the defendant accordingly. If the offer of compromise is not accepted within thirty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled. . . .

(b) In the case of any action to recover damages resulting from personal injury or wrongful death . . . in which it is alleged that such injury or death resulted from the negligence of a health care provider, the plaintiff may, not earlier than three hundred sixty-five days after service of process is made upon the defendant in such action, file with the clerk of the court a written offer of compromise pursuant to subsection (a) of this section and, if the offer of compromise is not accepted within sixty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled.

(c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's

footnote added.) The offer of compromise was signed by counsel on behalf of "the plaintiff" and did not include any reference to Sobin in her individual capacity or to her loss of consortium claim. The defendant did not object to the offer of compromise or seek clarification of its terms nor did it seek any additional time to respond. Because the defendant failed to accept the offer of compromise within the sixty day acceptance period, the offer was deemed rejected as a matter of law pursuant to § 52-192a (b). The plaintiffs did not refile or submit any other offer of compromise.

On May 4, 2023, after the jury returned its verdict in favor of the plaintiffs, the plaintiffs, collectively, filed a motion pursuant to § 52-192a and Practice Book § 17-18, asking the court to examine the record, to award offer of compromise interest, and to add such interest to the amount of the judgment. The defendant filed an objection to the plaintiffs' motion for assessment of offer of compromise interest on two grounds. First, it argued that the March 12, 2019 offer of compromise "was facially invalid" because, rather than being an offer "to settle the claim underlying the action for a sum certain," it was an offer "to stipulate to a judgment," which is at odds with the language of § 52-192a requiring a withdrawal of the action. (Internal quotation marks omitted.) Second, the defendant argued that, even if the court deemed the offer of compromise valid, it was not applicable with respect to the loss of consortium damages because the offer of compromise was only made on behalf of Sobin in her representative capacity, not by Sobin individually. The plaintiffs responded that the court should view the offer of compromise as having sought to settle the entire case because the loss of consortium count was derivative of the wrongful death count and settlement of the

offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ."

wrongful death case would have necessarily resolved the loss of consortium count.

The trial court conducted a hearing regarding costs, postjudgment interest, and offer of compromise interest, following which it issued an order awarding offer of compromise interest but only with respect to the wrongful death count. The court indicated in its order that it had set forth the basis for its decision on the record. After this appeal was filed, the court issued the following order in response to a motion for articulation filed by the plaintiffs that asked the court to specify the pages and line numbers of the transcript of the hearing that contained the court's factual and legal basis for its decision: "The transcript of the July 10, 2023 hearing regarding offer of compromise interest contains the factual and legal basis upon which the court rendered its decision . . . awarding offer of compromise interest to [Sobin], administratrix of the estate of Peter Sobin (and declining to award offer of compromise interest to [Sobin] in her individual capacity) at the following lines and pages: 24:2-7, 26:10-20, 29:8-10, 29:22-30:4, 30:15-27, 31:10-15, 31:25-32:11, 32:21-33:5, 33:8-13, and 33:26-34:3." Neither party filed a motion asking this court to review the court's articulation.

Having reviewed those portions of the transcript referenced by the trial court, we conclude that the court unequivocally rejected the defendant's argument that the offer of compromise contained conditional language that rendered the offer of compromise facially invalid,[10]

[10] The court explained: "[F]ocusing on . . . the specific language that was used . . . [the offer of compromise is] not conditioned on stipulating to a judgment. It's a willingness to stipulate. So, as I read it, there are two paths that one might go based on this offer. One is to accept the offer as a settlement. The other is to accept this and enter into a stipulation. There's no requirement, as I read that language, that it is both. That you have to agree to settle for a million dollars and stipulate to a judgment." The court further ruled, in the alternative, that "[i]f there were any ambiguities in the offer as far as the [defendant] was concerned, the [defendant] had a number of opportunities to address this. One, file an objection; two, file a motion

but it appears to have credited the defendant's argument that the offer of compromise was only filed on behalf of the plaintiff estate and not on behalf of Sobin individually and, as such, was inapplicable to her.[11]

"Our courts have consistently held that prejudgment interest is to be awarded by the trial court [if] a valid offer of judgment is filed by the plaintiff, the offer is rejected by the defendant, and the plaintiff ultimately recovers an amount greater than the offer of judgment after trial. . . . Moreover, an award of interest under § 52-192a is mandatory, and the application of § 52-192a does not depend on an analysis of the underlying circumstances of the case or a determination of the facts. . . . The statute is admittedly punitive in nature. . . . It is the punitive aspect of the statute that effectuates the underlying purpose of the statute and provides the impetus to settle cases. . . .

"The purpose of § 52-192a is to encourage pretrial settlements and, consequently, to conserve judicial resources. . . . [T]he strong public policy favoring the pretrial resolution of disputes . . . is substantially furthered by encouraging defendants to accept reasonable offers of judgment. . . . Section 52-192a encourages fair and reasonable compromise between litigants by penalizing a party that fails to accept a reasonable offer of settlement. . . . In other words, interest awarded under § 52-192a is solely related to a defendant's rejection of an advantageous offer to settle before trial and his subsequent waste of judicial resources. . . . Of

to strike it; three, file some other motion with the court asking the court to either have a status conference or somehow to engage and figure out what does this really mean, ask for an extension [of] time to do some analysis, look at case law, but the [defendant] didn't do anything. There was no acceptance. There was no rejection. There was silence . . . ."

[11] None of the record citations provided by the trial court in its articulation seems to provide direct insight regarding the court's reasoning with respect to this argument, although there is some indication that the court credited the arguments of the defendant.

course, the partial settlement of a case does little for the conservation of our limited judicial resources. Accordingly, the ultimate goal in a multiparty lawsuit is the fair and reasonable settlement of the case on a global basis." (Citation omitted; internal quotation marks omitted.) *Cardenas* v. *Mixcus*, 264 Conn. 314, 321, 823 A.2d 321 (2003). "The question of whether the trial court properly awarded [offer of compromise] interest pursuant to § 52-192a is one of law subject to plenary review." (Internal quotation marks omitted.) *Barton* v. *Norwalk*, 163 Conn. App. 190, 216, 135 A.3d 711 (2016), aff'd, 326 Conn. 139, 161 A.3d 1264 (2017).

Here, Sobin in her individual capacity was not named as a party to the offer of compromise nor was it signed by her or on her behalf. Sobin in her representative capacity as the administratrix of Peter's estate has fiduciary responsibilities and legal interests that are separate and distinct from her interests as an individual plaintiff. Certainly, the estate lacked any legal authority to settle or enter into an offer of compromise with respect to a cause of action brought by Sobin individually. The plaintiffs nevertheless argue that the court should have treated the offer of compromise as if it also was filed on behalf of Sobin in her individual capacity because her loss of consortium claim is wholly derivative of the wrongful death count asserted on behalf of the estate. See *Voris* v. *Molinaro*, 302 Conn. 791, 797, 31 A.3d 363 (2011) ("settlement of the predicate [injury] claim extinguishes the derivative claim for loss of consortium"); *Izzo* v. *Colonial Penn Ins. Co.*, 203 Conn. 305, 312, 524 A.2d 641 (1987) ("[l]oss of consortium, although a separate cause of action, is not truly independent, but rather derivative and inextricably attached to the claim of the injured spouse").

We agree with the trial court that the significant legal consequences of the defendant's failure to accept the offer of compromise should not accrue with respect to

the loss of consortium count. The derivative nature of the cause of action asserted by Sobin in her individual capacity is not a sufficient basis to overcome the clear pleading deficiencies with the offer of compromise. Even if the loss of consortium would likely have been resolved by operation of law upon settlement and withdrawal of the wrongful death action; see *Voris* v. *Molinaro*, supra, 302 Conn. 797–98; given the punitive nature of the offer of compromise statute, it is appropriate to strictly construe any such offers, and we believe it would be untenable to penalize a defendant for not agreeing to an offer of compromise with respect to a cause of action that was never mentioned in the offer of compromise and in favor of a party that was not a party to the offer. Accordingly, we reject the plaintiffs' claim.

VI

Finally, in its cross appeal, the defendant claims that the court should not have awarded any offer of compromise interest because the purported offer of compromise was invalid. The defendant points to the fact that, in the offer of compromise, the plaintiff estate indicated that it would be willing to "stipulate to a judgment," which the defendant argues is improper under § 52-192a because "the modern offer of compromise statute clearly states that the agreements are not judgments, but settlements, and that the plaintiff 'shall' withdraw the action after it is accepted by the defendant." The defendant contends that it could not have accepted the offer of compromise under § 52-192a because it was not a valid offer pursuant to the statute and thus the court should not have penalized it by awarding offer of compromise interest. We reject the defendant's claim for the reasons set forth by the trial court.

At issue is the proper construction of the following highlighted language in the offer of compromise: "The

plaintiff . . . hereby makes an offer of compromise to settle with [the defendant] in the amount of [$1 million], which offer constitutes the plaintiff's offer to settle the claim underlying the above-captioned action against [the defendant] *and further constitutes the plaintiff's willingness to stipulate to a judgment for the sum of* [*$1 million*] *against said defendant . . .*." (Emphasis added.) Although the defendant insists, as it did before the trial court, that the inclusion of the emphasized language effectively conditioned any acceptance of the offer of compromise on the defendant's agreement to stipulate to a judgment in favor of the plaintiff estate, we reject that interpretation. Rather than condition the settlement offer on the acceptance of a stipulated judgment, we read the additional language as indicating the plaintiff estate's willingness, *as an alternative to the offer of compromise*, to enter into a stipulated judgment.[12] Thus, as the court indicated on the record, "there are two paths that one might go based on this offer. One is to accept the offer as a settlement. The other is to accept this and enter into a stipulation."

The defendant has cited no appellate legal authority that an offer of compromise is rendered invalid if, in addition to agreeing to settle the matter for a sum certain, it also includes an alternative offer to reach a stipulated judgment. Moreover, such a result is not mandated by any language in § 52-192a. Because we conclude that the offer of compromise was not rendered invalid because of the inclusion of the language indicating the plaintiff estate's willingness, in the alternative, to reach a stipulated judgment, the defendant's claim to the contrary fails.

The judgments are affirmed.

In this opinion the other judges concurred.

[12] It is unclear from the record why the plaintiff estate elected to include such language in the offer of compromise, but those motivations are not germane to our consideration of this claim.

TIMOTHY BEGLEY *v.* STATE OF CONNECTICUT ET AL.
(AC 47188)

Cradle, C. J., and Suarez and Westbrook, Js.

Syllabus

The plaintiff state police trooper appealed from the trial court's judgment for the defendant R following the granting of R's motion for summary judgment on the plaintiff's complaint, which alleged that R had transferred the plaintiff from his job in a certain work unit in retaliation for having filed a report three years earlier about another officer's sexual harassment of a female officer. The plaintiff claimed that the court improperly concluded that no genuine issue of material fact existed as to whether he had established a prima facie case of retaliation. *Held*:

The trial court properly rendered summary judgment for R, as the plaintiff failed to establish a factual basis connecting R to the alleged retaliatory transfer, in that it was undisputed that R did not see the report until his deposition in this matter, that the plaintiff had not discussed the report with R or had any dealings at all with R, and the plaintiff's assertion that retaliatory animus on the part R could be inferred from an order that was given to another police unit to stop cooperating with the plaintiff's work unit was merely speculative, the plaintiff having presented no evidence that it was the defendant, rather than another supervisor, who gave the order or that the plaintiff was the target of the alleged retaliatory animus.

Argued June 4—officially released September 2, 2025

Procedural History

Action to recover damages for alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where Stavros Mellekas was added as a defendant; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, granted in part the defendants' motion for summary judgment; subsequently, the action was withdrawn in part as against the defendant James Rovella; judgment for the named defendant et al., from which the plaintiff appealed to this court. *Affirmed.*

Lewis H. Chimes, for the appellant (plaintiff).

Laura Vitale, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (defendant James Rovella).

Opinion

CRADLE, C. J. The plaintiff, Timothy Begley, appeals from the summary judgment rendered by the trial court in favor of the defendant James Rovella[1] on his claim alleging that he was transferred in retaliation for filing a report of another police officer's sexual harassment of a female officer in violation of General Statutes § 46a-60 (b) (4).[2] On appeal, the plaintiff claims that the court erred in rendering summary judgment in favor of the defendant because it improperly concluded that no genuine issue of material fact existed as to whether he had established a prima facie case of retaliation. We affirm the judgment of the trial court.[3]

The record before the trial court,[4] viewed in the light most favorable to the plaintiff as the nonmoving party,

[1] The state of Connecticut and Stavros Mellekas also are defendants in this action but are not parties to this appeal. We therefore refer in this opinion to Rovella as the defendant.

[2] General Statutes § 46a-60 (b) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . .(4) [f]or any . . . employer . . . to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice . . . has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

[3] Because we agree that the plaintiff failed to demonstrate that a genuine issue of material fact existed as to whether he had established a prima facie case of retaliation, we do not reach his additional claim that the trial court erred in concluding that he also failed to demonstrate that a genuine issue of material fact existed as to whether the defendant's proffered legitimate, nondiscriminatory reason for transferring him was pretextual.

[4] At oral argument, counsel for the defendant alerted this court that several pages of deposition transcripts that were included in the plaintiff's appellate brief were not presented to the trial court in opposition to summary judgment. Counsel for the plaintiff thereafter sent correspondence to this court, explaining: "On appeal, as [the plaintiff's] counsel was setting out the facts and arguments for the [a]ppellate [b]rief, counsel realized the error. The [a]ppellate [b]rief was largely identical to the statement of facts in the [o]bjection to [s]ummary [j]udgment, but the proper page references were

reveals the following facts and procedural history. The plaintiff began his employment as a state trooper with the Connecticut State Police in 2001. The state police is a division of the Department of Emergency Services and Public Protection (department). In 2013, the plaintiff was promoted to the position of sergeant and began working in that capacity in the Connecticut Intelligence Center (intelligence center) of the Counter Terrorism Unit of the state police in 2015.[5]

In February, 2016, the plaintiff received a report that Steven Citta, a detective with the Hartford Police Department (Hartford police) who was assigned to work in the intelligence center as a regional intelligence liaison officer and reported directly to the plaintiff, had behaved in a sexually inappropriate manner. At that time, the plaintiff reported directly to Lieutenant Shawn Corey,

made in the [plaintiff's] [b]rief, and the proper deposition pages were attached. In the [a]ppellate [a]ppendix, both the original erroneous deposition pages cited in [the] [p]laintiff's [o]bjection to [s]ummary [j]udgment for those depositions, as well as the proper deposition pages cited in the [a]ppellate [b]rief were included in the [plaintiff's] [a]ppendix. All the evidence cited by [the plaintiff] in [his] objection to summary judgment brief accurately reflected the actual deposition testimony, despite the erroneous page citations and attached deposition pages."

Our review of the record confirms that the plaintiff submitted in the appendix of his appellate brief evidence that he did not submit to the trial court in opposition to summary judgment. Of course, this court cannot, when assessing the propriety of a summary judgment ruling, consider evidence that was not before the trial court. See *Solon* v. *Slater*, 345 Conn. 794, 814 n.9, 287 A.3d 574 (2023). Because the plaintiff did not conform the materials in his appellate appendix to the evidence submitted to the trial court, this court was left with the task of determining which of the 575 pages of the appellate appendix were before the trial court. Although "[i]t is not the role of this court to scour the record in search of support for a party's claim on appeal"; *Weaver* v. *Sena*, 199 Conn. App. 852, 866, 238 A.3d 103 (2020); we nevertheless have carefully reviewed all the evidence submitted to the trial court on summary judgment.

[5] At that time, there were two other units in the Counter Terrorism Unit, namely, the Joint Terrorism Task Force and the Critical Infrastructure Protection Unit. We refer to the units collectively as the intelligence center for ease of reading.

who was the commanding officer of the intelligence center. Corey reported to Major Michael Darcy, the commander of special investigations. On March 3, 2016, at the direction of Corey and Darcy, the plaintiff filed a report of Citta's conduct with the department's Equal Employment Opportunity Office (report).

Citta thereafter was removed from the intelligence center and sent back to work with the Hartford police. The plaintiff did not make the decision, or have any input in the decision, to transfer Citta back to the Hartford police. The plaintiff did not communicate with anybody else at the Hartford police regarding the incident involving Citta. Upon Citta's return to the Hartford police, he was assigned to its Capitol City Crime Center (crime center unit).[6] Citta and another officer at the crime center unit stopped sending certain information to the intelligence center. Citta indicated to a fellow officer that he made the decision not to share information with the intelligence center until the plaintiff and Corey were removed from the intelligence center, but that was his own decision and he could not make that decision for other officers in the crime center unit. Citta had a discussion with Trooper Shawn Benoit regarding "what was happening with the complaint and everything going on" and stated that he told Benoit that "everything that's being handled is being handled at the top," meaning "[his] supervisors and . . . [his] command staff," consisting of the defendant and "the other deputy chiefs and everybody in the place at the time."

At that time, the defendant was the chief of the Hartford police. The report was not sent to the defendant, and he did not see it until he was deposed in this case. The plaintiff did not have any communications with the

[6] According to the plaintiff's second amended complaint, the crime center unit was a "newly formed intelligence unit [that] . . . would have to work collaboratively with . . . [the intelligence center]."

defendant regarding the report; nor did he have any other dealings with the defendant. The defendant learned from the deputy chief of the Hartford police, Brian Foley, that there was an investigation regarding Citta's conduct. The defendant did not speak to Citta regarding his transfer back to the Hartford police.

In September, 2016, the investigation into the incident involving Citta was completed, and it was determined that the allegations in the report could not be substantiated because neither of the two officers who reported the incident to the plaintiff, nor the alleged victim, were willing to participate in the investigation or give a statement. Shortly thereafter, Darcy met with the defendant and gave the defendant a copy of the report of the findings of the investigation and discussed with him the lapse of information sharing between the crime center unit and the intelligence center. The defendant subsequently instructed Foley that "there should be no lapse in intelligence sharing between [the crime center unit] and [the intelligence center]."

The defendant left the Hartford police in February, 2018. In February 2019, the defendant was confirmed as the commissioner of the department. On March 14, 2019, the plaintiff was transferred from the intelligence center to Troop H in Hartford where he was assigned to work the midnight shift.

The plaintiff initiated the present action against, inter alia, the defendant,[7] claiming that his transfer out of

[7] In count one of his operative second amended complaint, the plaintiff alleged that the state and the defendant violated § 46a-60 (b) (4) by transferring him out of the intelligence center. In count two, the plaintiff alleged that the state, the defendant, and Colonel Stavros Mellekas of the state police violated § 46a-60 (b) (4) by refusing to promote him to lieutenant and imposing a two day suspension that was excessive and unsupported by evidence and state police policies. In count three, the plaintiff alleged that the state failed to promote him and imposed a two day suspension in violation of 42 U.S.C. § 2000e-3 (a).

All of the defendants moved for summary judgment as to all three counts of the plaintiff's complaint. The trial court denied summary judgment as to

the intelligence center in March, 2019, was retaliatory, pursuant to § 46a-60 (b) (4), for his filing of the report in 2016.

On April 17, 2023, the defendant filed a motion for summary judgment on the grounds that the plaintiff had failed to establish a prima facie case for retaliation and that, even if he had, there existed legitimate, nonretaliatory reasons for the plaintiff's transfer, and the plaintiff could not establish that the articulated reasons were a pretext for unlawful retaliation. The defendant argued that the plaintiff failed to demonstrate any causal connection between the plaintiff's filing of the report and his transfer three years later. The defendant further argued that the plaintiff was transferred "due to operational need as part of a reorganization." Along with his memorandum of law in support of his motion, the defendant submitted several exhibits for the court's consideration.

The plaintiff filed an objection to the defendant's motion for summary judgment, arguing that genuine issues of material fact existed as to whether there was a causal connection between his filing of the report and his transfer. He argued that the lapse of three years between the two events does not defeat a causal connection because the defendant was not in a position to retaliate against the plaintiff until shortly before the plaintiff's transfer. The plaintiff further argued that there was a genuine issue of material fact as to whether the defendant's claim that he was transferred for manpower reasons stemming from reorganization was pretextual. Like the defendant, the plaintiff submitted several exhibits in support of his position.[8]

counts two and three. The plaintiff filed a motion for permission to file an interlocutory appeal, which the court denied. The plaintiff thereafter withdrew the second count of his complaint as to the defendant only, thereby disposing of all claims against the defendant, in order to proceed with this appeal. See Practice Book §§ 61-3 and 61-4.

[8] The defendant thereafter filed a reply brief. The defendant also moved to strike several of the plaintiff's exhibits. The trial court indicated to counsel

On November 15, 2023, following a hearing at which the trial court heard argument from counsel,[9] the court issued a memorandum of decision granting summary judgment in favor of the defendant as to count one alleging retaliation. The court concluded, inter alia: "There is a lack of evidence of a temporal or logical connection between the plaintiff's protected activity and the adverse employment action."[10]

The plaintiff thereafter filed a motion to reargue and for reconsideration on the grounds that "[t]he court misapplied the legal standard for providing retaliatory motive under the Fair Employment Practices Act [General Statutes § 46a-51 et seq.] and state and federal Supreme Court precedent, ignored or failed to consider much of the plaintiff's evidence, impermissibly invaded the province of the jury by improperly weighing the evidence, made credibility determinations and failed to consider all permissive inferences in a manner favorable to the plaintiff in its determination that no genuine

that it would consider the defendant's motion to strike certain of the exhibits submitted by the plaintiff in opposition to summary judgment simultaneously with the motion for and objection to summary judgment. The court indicated in its decision: "The [defendant] filed a motion to strike certain evidence submitted with the plaintiff's opposition to summary judgment, on the grounds that the items were not admissible evidence. See Docket Entry #172. The court did not utilize these contested items in ruling on this motion; consequently, it was not necessary to make a determination as to their admissibility." In arguing that the court "erroneously disregarded the plaintiff's summary judgment exhibits that had been the subject of the defendant's motion to strike," the plaintiff neither identifies those exhibits, why they should not have been disregarded nor how he was harmed by the court's decision not to consider them.

[9] Following oral argument on the motion for summary judgment, the plaintiff filed a supplemental response to the defendant's motion for summary judgment on August 14, 2023, and the defendant filed a reply memorandum of law on August 28, 2023.

[10] The trial court also concluded that the plaintiff failed to demonstrate that a genuine issue of material fact existed as to whether the defendant's proffered reason for the plaintiff's transfer was pretextual. As previously noted, we do not reach the plaintiff's challenge to this conclusion. See footnote 3 of this opinion.

issues of material fact existed [as to the plaintiff's claim that his transfer was retaliation by the defendant for the plaintiff's filing of the report]." Following a hearing, the court granted the plaintiff's motion to reargue but denied the relief requested in his motion. This appeal followed.

We begin by setting forth the following applicable legal principles. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are 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 party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 115–16, 49 A.3d 951 (2012). The standard of review of a trial court's decision granting a motion for summary judgment is plenary. Id., 116.

"[T]ypically [d]emonstrating a genuine issue requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . Moreover, [t]o establish the existence of a material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of

whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact. . . . Mere statements of legal conclusions . . . and bald assertions, without more, are insufficient to raise a genuine issue of material fact capable of defeating summary judgment." (Citation omitted; internal quotation marks omitted.) *Martin* v. *Westport*, 108 Conn. App. 710, 721–22, 950 A.2d 19 (2008).

"[I]t [is] incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists. . . . [M]aterial facts are those that will make a difference in the case, and they must be pleaded." (Citation omitted; internal quotation marks omitted.) *Martinez* v. *Premier Maintenance, Inc.*, 185 Conn. App. 425, 455, 197 A.3d 919 (2018).

"[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) Id., 456. "A mere assertion of fact in the affidavit of the party opposing summary judgment is not enough to establish the existence of a material fact that, by itself, defeats a claim for summary judgment." (Internal quotation marks omitted.) Id., 451.

"The standard applicable to the plaintiff's claim of . . . retaliation is the *McDonnell Douglas-Burdine*[11] model of analysis. . . . Under this framework, the

[11] See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

plaintiff first must establish a prima facie case, then the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision. . . . Once the defendant offers a legitimate, nondiscriminatory reason, then the plaintiff has the burden to prove by a preponderance of the evidence that the proffered reason is pretextual." (Citations omitted; footnote in original; footnote omitted; internal quotation marks omitted.) *Lassen* v. *Hartford*, 223 Conn. App. 285, 290–91, 308 A.3d 564 (2024).

The plaintiff claims that the trial court erred when it determined that no genuine issue of material fact existed as to whether he had failed to establish a prima facie case of retaliation in that he had not presented any evidence demonstrating a causal connection between his filing of the report and his transfer out of the intelligence center three years later.[12] We are not persuaded.

"To establish a prima facie case of retaliation, a plaintiff must show (1) that he participated in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action against him; and (4) a causal connection between the protected activity and the adverse employment action." (Internal quotation marks omitted.) Id., 290–91 n.5. Implicit in the requirement that the plaintiff show a causal connection between his participation in a protected activity and the alleged adverse action is a showing that the defendant knew or was otherwise aware that the plaintiff had engaged in that protected activity. See, e.g., *Forestier* v. *Bridgeport*, 223 Conn. App. 298, 319, 308 A.3d 102 (2024).

[12] The plaintiff claims that "[t]he court did not appear to read or review [his] exhibits" and "ignored much of the relevant factual detail and supporting arguments submitted by the plaintiff." Our review of the record reveals no basis for these claims.

"[P]roof of causation can be shown either: (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." (Internal quotation marks omitted.) *Ayantola* v. *Board of Trustees of Technical Colleges*, 116 Conn. App. 531, 539, 976 A.2d 784 (2009).

"Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination of whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive. . . . In the absence of any affirmative evidence of a causal connection between [the defendant's] discriminatory animus toward the plaintiff and the defendant's [alleged adverse action], no inference of the defendant's discriminatory intent can be made." (Citation omitted; internal quotation marks omitted.) *Martinez* v. *Premier Maintenance, Inc.*, supra, 185 Conn. App. 449–50.

The plaintiff argues that he presented direct evidence of causation by demonstrating the defendant's retaliatory animus toward the plaintiff in that "[the defendant] directed [the crime center unit] to stop sharing evidence with [the intelligence center] until [the plaintiff] was transferred from [the intelligence center] or apologized." The plaintiff's argument fails for the following reasons.

First, the plaintiff has failed to establish a factual basis connecting the defendant to the alleged retaliation. The plaintiff asserts that "[i]mmediately after Citta's removal from [the intelligence center] . . . [the

crime center unit] . . . immediately stopped sharing information with . . . [the intelligence center]." Citta was transferred from the intelligence center on March 3, 2016. Although the defendant learned of Citta's transfer from Foley in March, 2016, the undisputed evidence demonstrates that the defendant did not see the report until he was deposed in this case.[13] As noted herein, it is undisputed that the plaintiff did not discuss the report with the defendant or anybody else at the Hartford police, nor did the plaintiff have any dealings at all with the defendant. After the investigation into Citta's conduct was completed in September, 2016, the defendant received a copy of the report of the investigation from Darcy. Although that report listed the plaintiff as the complainant, there is no evidentiary basis on which a reasonable fact finder could infer that the defendant knew before September, 2016, that the plaintiff had filed the report. Therefore, there also is no evidentiary basis on which one could infer that any alleged retaliation that occurred immediately following Citta's transfer in March, 2016, could be attributed to the defendant. See *Mele* v. *Hartford*, 270 Conn. 751, 778, 855 A.2d 196 (2004) (discrimination complaint dismissed where insufficient evidence to prove that plaintiff had exercised rights under Workers' Compensation Act, General

[13] In support of his argument that the defendant "had knowledge of [the plaintiff's] protected conduct," the plaintiff cited, in his memorandum of law in opposition to summary judgment, an excerpt of the defendant's deposition testimony wherein he purportedly testified that he had received a copy of the report in March, 2016, which allegedly caused the defendant to retaliate by directing the Hartford police to cease sharing information with the intelligence center. The pages cited by the plaintiff, however, do not support the plaintiff's assertion that the defendant received a copy of the report filed by the plaintiff in March, 2016. The testimony cited by the plaintiff refers to the report of the completed investigation of the incident involving Citta, which was provided to the defendant by Darcy in September, 2016. The defendant submitted excerpts of the defendant's deposition testimony wherein the defendant testified that he did not see the report until he was deposed in this case. The plaintiff has not cited to any evidence disputing that testimony.

Statutes § 31-275 et seq., and that defendants knew that she had exercised those rights and discriminated against her based on that knowledge); *Knoblaugh* v. *Marshall*, 64 Conn. App. 32, 38, 779 A.2d 218 (plaintiff failed to meet burden of proving that defendant violated General Statutes § 31-290a of Workers' Compensation Act where defendant was unaware of her intention to exercise rights under that act), cert. denied, 258 Conn. 916, 782 A.2d 1243 (2001).

The plaintiff likewise has failed to demonstrate that a genuine issue of material fact exists as to whether the defendant directed the crime center unit to stop sharing information with the intelligence center. The defendant testified that neither he nor anybody else "in the executive team of the [Hartford police] ever [told] Citta that . . . [the crime center unit] was not going to cooperate with [the intelligence center] until there were new people in command at the organization." The defendant testified that he "spoke with . . . Foley and instructed him that there should be no lapse in intelligence sharing between [the crime center unit] and [the intelligence center]." The plaintiff argues that Citta stated that the crime center unit's refusal to share information with the intelligence center after his removal came from "the top," and "[w]hen [Citta] referenced 'the top' he was referring to [the defendant]." In so arguing, the plaintiff mischaracterizes the evidence in the record. Citta testified that the decisions involving his investigation and whether to discontinue sharing information with the intelligence center were being handled "at the top . . . it's my supervisors and it's my command staff." When asked whether "the top" was the defendant, Citta responded, "yeah, [the defendant] and . . . the other deputy chiefs and everybody in the place at the time."[14] Although Citta included the defendant in his reference to "the top," the plaintiff presented

[14] In his principal appellate brief, the plaintiff asserts that, "on August 16, 2016, Citta explicitly also told . . . Trooper [Benoit] that he was under

no evidence that it was the defendant, versus the other deputy chiefs or any of Citta's other supervisors or command staff, who directed him to stop sharing information with the intelligence center.[15] The plaintiff's assertion that it was the defendant who gave the order to stop cooperating with the intelligence center is based merely on speculation, which is insufficient to create an issue of fact to defeat summary judgment.[16]

Even if the plaintiff had demonstrated that a genuine issue of material fact exists as to whether the defendant ordered the crime center unit to stop cooperating with the intelligence center, that fact is immaterial to the plaintiff's burden to prove retaliatory animus by the defendant toward *the plaintiff*. The plaintiff has failed to identify any evidence that the alleged retaliatory animus that may be inferred by the lack of cooperation with the intelligence center following Citta's removal was targeted at the plaintiff versus the intelligence center. This is particularly evident in light of the undisputed facts that the plaintiff filed the report at the direction of Corey and Darcy and that the plaintiff had no role in the decision to transfer Citta back to the Hartford police.[17]

orders from [the defendant] not to cooperate with [the intelligence center] until he received a written apology or command staff changed." He then cites to a memo sent to him by Benoit regarding a conversation that Benoit had with Citta. The plaintiff's citation to the trial court record is "Pl. Ex. 16." That memo is not plaintiff's exhibit 16. Our review of the record reveals that that memo was not submitted to the trial court. Moreover, we have reviewed that memo, which the plaintiff improperly included in the appendix to his principal appellate brief, and it makes no mention of the defendant.

[15] Indeed, Citta also indicated that it was his decision that he, himself, would not share information with the intelligence center and that he could not make that decision for his unit.

[16] The plaintiff also argues that "[a] reasonable fact finder could infer retaliatory intent from the subsequent threats and warnings that were given to [him] not to pursue his claims and grievances." The plaintiff has failed to provide any evidence that these alleged threats and warnings came from or were directed by the defendant.

[17] The plaintiff also argues that the defendant demonstrated retaliatory animus when he refused to replace Citta after he was transferred back to

Although we are mindful that questions of causal connection and the existence of retaliatory animus are ordinarily issues of fact best determined by the fact finder, the plaintiff, on summary judgment, must at least proffer some factual predicate grounded in evidence rather than mere assertions based on speculation and conjecture to establish the existence of a genuine issue of material fact. Here, the plaintiff has failed to do so.

The judgment is affirmed.

In this opinion the other judges concurred.

STEVEN BERGLASS, TRUSTEE (STEVEN BERGLASS REVOCABLE LIVING TRUST) *v.* HEIDI DWORKIN ET AL.
(AC 46424)

Moll, Westbrook and Pellegrino, Js.

Syllabus

The plaintiff appealed from the trial court's judgment dismissing his action, which sought, inter alia, an injunction requiring the defendants to cease construction on an inground pool at their property, which adjoined property owned by the plaintiff. The plaintiff claimed, inter alia, that the court improperly dismissed his action without providing notice and an opportunity to be heard following a hearing on his motion for a temporary injunction, to which the defendants had filed an objection. *Held*:

The trial court improperly dismissed, sua sponte, the entirety of the plaintiff's complaint as moot, an issue that was not raised in the defendants' objection to the plaintiff's motion for a temporary injunction, as, although the court could have raised the issue of mootness sua sponte regarding the plaintiff's action rather than considering only the motion for a temporary injunction, the court expressly informed the parties that it would decide only whether the plaintiff's motion for a temporary injunction was moot and that the merits of the complaint would be determined at a later date, and, therefore, the plaintiff had no warning or notice that his entire action, rather than his

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the Hartford police. Again, even if this were true, it is immaterial to the issue of whether the defendant demonstrated retaliatory animus toward the plaintiff.

motion for a temporary injunction, was subject to dismissal by the court, which deprived the plaintiff of due process.

The trial court's factual findings regarding the merits of the plaintiff's complaint were clearly erroneous, as the court did not hold a hearing and no evidence was presented to support such findings.

Argued June 2—officially released September 2, 2025

Procedural History

Action seeking, inter alia, an injunction requiring the defendants to cease certain construction on their property until a proper coastal site plan review and engineered design has been obtained, and other relief, brought to the Superior Court in the judicial district of New Haven, where the plaintiff filed a motion for a temporary injunction, to which the defendants filed an objection; thereafter, the court, *Wilson*, *J.*, rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Michael S. Taylor, with whom were *Brendon P. Levesque* and, on the brief, *Corinne A. Burlingham* and *Keith R. Ainsworth*, for the appellant (plaintiff).

Michael T. Cretella, with whom, on the brief, was *Samantha R. Guere*, for the appellees (defendants).

Opinion

PELLEGRINO, J. The plaintiff, Steven Berglass, trustee of the Steven Berglass Revocable Living Trust, appeals from the judgment of the trial court dismissing his complaint against the defendants, Heidi Dworkin and Jay Dworkin. On appeal, the plaintiff claims that the court improperly dismissed his action without providing notice and the opportunity to be heard following a hearing on the plaintiff's motion for a temporary injunction, to which the defendants had filed an objection. He further claims that the court improperly made findings of fact in the absence of any evidence. We

agree with the plaintiff as to both of his claims, and, accordingly, reverse the judgment of the trial court.

The following facts, as alleged in the plaintiff's complaint and construed in his favor,[1] and procedural history are relevant to our resolution of this appeal. In count one of his complaint dated April 5, 2022, the plaintiff alleged that the defendants own property adjacent to property owned by the plaintiff. Both properties are located on King's Highway in Milford. On or about March 30, 2022, the defendants began the construction of an inground swimming pool within a few feet of a seawall that ran contiguous to the properties. The plaintiff alleged that the construction of the pool presented a reasonable likelihood of impairment to both coastal resources and neighboring properties, as the pool was not designed to minimize interference with sediment and the deflection of wave energy or to be anchored to the subsurface ledge so as to prevent the pool from becoming dislodged during flooding, which could potentially damage the nearby structures. Additionally, this pool was within the definition of a flood and erosion control structure as defined by the Connecticut Coastal Management Act, General Statutes § 22a-109 (b) and (c) (act), but had not been subject to the required coastal site plan review. The plaintiff further alleged that the defendants' planned pool posed a threat that would impact sediment transport and potentially cause greater erosion.

In count two of the complaint, the plaintiff incorporated most of the allegations set forth in count one and further asserted that the proposed pool, in the absence of a coastal site plan review and appropriate engineering design, was an unreasonable act and violated

[1] See *Hepburn* v. *Brill*, 348 Conn. 827, 831 n.2, 312 A.3d 1 (2024); *SG Pequot 200, LLC* v. *Fairfield*, 223 Conn. App. 333, 339, 308 A.3d 123, cert. denied, 348 Conn. 954, 309 A.3d 304 (2024).

the public trust protected by the act. In his demand for relief, the plaintiff sought, inter alia, injunctive relief and reasonable attorney's fees.[2]

On April 6, 2022, the plaintiff filed a motion for a temporary injunction and an order to show cause pursuant to General Statutes §§ 52-471[3] and 22a16.[4] Specifically, he requested that the court issue an order directing the defendants, their agents, and any person under their control to cease all construction related to the pool. In support of this motion, the plaintiff asserted that the construction of the defendants' pool would violate the General Statutes and Milford zoning regulations and that there was a reasonable likelihood that the construction would endanger the public trust in coastal resources and the plaintiff's home during a

[2] Specifically, the plaintiff requested:

"1. Declaratory and injunctive relief against the defendants, requiring [them] to refrain from construction of their in-ground pool structure until a proper coastal site plan review and engineered design has been obtained pursuant to General Statutes §§ 22a-16 and 52-471.

"2. The reasonable attorney's fees and costs of this action pursuant to General Statutes § 22a-18 (e).

"3. That the court exercise its continuing jurisdiction to ensure that the defendants [restore] the buffer area in between the seawall and the [defendants'] home and [reorient] the pool structure.

"4. Any other legal or equitable relief which the court in its discretion deems proper."

[3] General Statutes § 52-471 (a) provides: "Any judge of any court of equitable jurisdiction may, on motion, grant and enforce a writ of injunction, according to the course of proceedings in equity, in any action for equitable relief when the relief is properly demandable, returnable to any court, when the court is not in session. Upon granting of the writ, the writ shall be of force until the sitting of the court and its further order thereon unless sooner lawfully dissolved."

[4] General Statutes § 22a-16 provides in relevant part: "[A]ny person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business . . . for declaratory and equitable relief against . . . any person . . . acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction . . . ."

coastal storm event. The plaintiff further stated that there was no adequate remedy at law other than an injunction to prevent the defendants from causing immediate and irreparable harm.[5]

A remote hearing regarding the plaintiff's motion for a temporary injunction was scheduled for May 3, 2022, and then for June 20, 2022, but did not occur on either of those dates. On November 16, 2022, the defendants filed an objection to the plaintiff's motion for a temporary injunction. Therein, they argued that, prior to hearing evidence from the parties regarding the injunction sought by the plaintiff, the court needed to determine whether his motion was moot. The defendants asserted that the construction of the pool had been completed, and, therefore, the court "[could not] grant the specific relief requested in [the plaintiff's] motion for temporary injunction." As a result, the court lacked subject matter jurisdiction with respect to the plaintiff's motion for a temporary injunction.

[5] This court has recited the following well settled standard regarding a motion for a temporary injunction. "In general, a court may, in its discretion, exercise its equitable power to order a temporary injunction pending final determination of the order, upon a proper showing by the movant that if the injunction is not granted he or she will suffer irreparable harm for which there is no adequate remedy at law. . . . A party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor. . . . The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm as a result of that violation. . . . Moreover, [t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm. . . . Further, [a] party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. The allegations and proof are conditions precedent to the granting of an injunction." (Citation omitted; internal quotation marks omitted.) *United Public Service Employees Union, Cops Local 062* v. *Hamden*, 209 Conn. App. 116, 123–24, 267 A.3d 239 (2021); see also *Aqleh* v. *Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 97–98, 10 A.3d 498 (2010).

The same day, the plaintiff filed a response to the defendants' objection. At the outset, the plaintiff claimed that the defendants' objection was, in effect, a motion to dismiss.[6] Next, he disputed the defendants' claim that the court could not provide the plaintiff with any practical relief. The court conducted a hearing on November 17, 2022.

At the outset of the hearing, the court established the scope of the proceeding: "*This is a hearing specifically on, as it has been docketed, the plaintiff's motion for a temporary injunction. I want to be clear I'm not hearing the merits of the underlying complaint.* . . . [T]here is an objection to the motion for temporary injunction based on mootness which implicates the court's subject matter jurisdiction." (Emphasis added.) The defendants' counsel represented that the construction of the pool had been completed,[7] and, therefore, the court could not grant the specific relief that had been requested by the plaintiff in his motion for a temporary injunction, that is, an order stopping the construction of the pool. The defendants' counsel emphasized that the only relief sought in the plaintiff's motion was an order that the construction of the pool cease. He agreed with the court, however, that the complaint sought additional relief beyond that which was stated in the motion for a temporary injunction.

In addressing the plaintiff's counsel, the court remarked: "Pursuant to your motion for a temporary injunction . . . you indicated that the scope of the relief requested is a temporary injunction. That's what this is down for

[6] See, e.g., *State* v. *Taylor*, 91 Conn. App. 788, 791–92, 882 A.2d 682 (numerous cases have recognized that motion is to be decided on basis of substance of relief sought rather than on form or label affixed to motion), cert. denied, 276 Conn. 928, 889 A.2d 819 (2005).

[7] The defendants' counsel represented to the court that construction of the pool had been completed substantially by July, 2022, and that the final inspections of the construction had occurred in September, 2022.

today. I'm not here to hear the merits of the case. You're [going to] get your trial on that." Following a colloquy regarding the reasons for the delay of the hearing, the court asked the plaintiff's counsel to identify where in the motion for a temporary injunction he had requested injunctive relief in addition to stopping the construction of the pool. The plaintiff's counsel responded that, at the time that his motion was filed, the construction of the pool was ongoing. The court responded: "That may be and you may . . . have redress as to that, but today . . . it's down for a hearing on a temporary injunction pursuant to the motion for the temporary injunction. You may very well get injunctive relief as you so frame it to be in the underlying case . . . . You may get all of that. You may be successful. That's the merits. I'll get you a quick hearing on the merits, too, but I'm talking specifically about the requested relief in the motion for temporary injunction."

During his response, the plaintiff's counsel indicated that he was requesting the court to consider ordering the defendants to "tear down" the pool structure. The court noted that this request was not part of the motion for a temporary injunction. The plaintiff's counsel maintained that destruction of the pool was "one of the potential solutions" to the matter. The court iterated that such a request was not part of the temporary injunction that presently was before it and that the relief requested in the plaintiff's motion was "very, very specific."

The court further explained to counsel that it was "not taking one step further on the merits of the injunction until the—the jurisdictional issue is resolved." Later, the court stated to the plaintiff's counsel that it would consider any authority to support the claim that it had jurisdiction over the motion for a temporary injunction seeking to have the defendants cease and

desist construction of the pool, even though such construction had been completed. It cautioned the plaintiff's counsel, however, that the only matter it would consider would be whether the court had jurisdiction as to the plaintiff's efforts to obtain a temporary injunction and the relief requested in that particular motion. The court further indicated that, after the jurisdictional question regarding the motion for a temporary injunction had been decided, a hearing on the merits of the plaintiff's case would be scheduled shortly thereafter. The court then discussed additional matters with counsel. The defendants' counsel remarked that they had not conducted any discovery. Additionally, although the plaintiff had disclosed two expert witnesses, the defendants had not yet retained any experts.

At the conclusion of the hearing, the court indicated that the plaintiff's counsel would have one week to file a supplemental memorandum of law regarding the defendants' efforts to dismiss his motion for a temporary injunction.[8] The defendants' counsel would then have one week to file a response. The court issued a written order regarding the deadlines for the parties' supplemental briefing and scheduled a court trial on the merits of the plaintiff's complaint for February 8, 2023.[9] The supplemental memoranda were filed on November 23 and December 2, 2022, by the plaintiff and the defendants, respectively.

On March 15, 2023, the court issued its memorandum of decision. At the outset, the court iterated that the defendants' objection to the plaintiff's motion claimed a lack of subject matter jurisdiction on the ground of mootness and therefore would be treated as a motion to dismiss. The court then noted that the plaintiff argued

[8] The court acknowledged, at that point in the hearing, that the defendants' objection was "actually a motion to dismiss . . . ."

[9] A trial on the merits did not occur on the scheduled date of February 8, 2023.

that the relief he requested in his motion was broader than stopping the construction of the pool, which had been completed. The court explained that the plaintiff claimed that his complaint included a request to enforce state statutes protecting coastal resources and to protect his property from coastal erosion. The plaintiff further sought to restore the buffer area between the seawall and the defendants' home.

The court reasoned that a cause of action for injunctive relief to stop construction is moot if that project has been completed.[10] It then determined that, "[i]n the present action, the construction of the defendants' pool . . . has been finished for several months; therefore, there can be no injunctive relief to stop the construction. As the pool has been fully constructed, the claims for injunctive relief are moot." After discussing various cases, the court stated that the plaintiff was not seeking an order to prevent the defendants from using their pool and that the destruction of the pool would not provide the plaintiff with any practical relief.

The court expanded its consideration of the jurisdictional analysis to the plaintiff's complaint, going beyond the question of whether the motion for a temporary injunction was moot. It concluded that it was not practical to order the defendants to anchor the pool to the

[10] "Connecticut courts have rejected injunctive remedies on the ground of mootness where the issue before the court has been resolved or has lost its significance because of intervening circumstances. See *Waterbury Hospital* v. *Connecticut Health Care Associates*, 186 Conn. 247, 249–52, 440 A.2d 310 (1982) (court dismissed as moot plaintiff's request for injunctive relief to restrain picketing during strike because strike and picketing had ended while appeal was pending); *Daley* v. *Gaitor*, 16 Conn. App. 379, 381 n.2, 547 A.2d 1375 (court dismissed as moot plaintiff's request to enjoin city of Hartford from administering promotional examination to police officers following city's promotion of officers during pendency of appeal), cert. denied, 209 Conn. 824, 552 A.2d 430 (1988)." *Connecticut Coalition Against Millstone* v. *Rocque*, 267 Conn. 116, 126, 836 A.2d 414 (2003).

seawall, as the plaintiff had suggested in his supplemental memorandum. Without having conducted an evidentiary hearing, the court found that such anchoring "would not prevent the type of harm such as erosion, flooding, and potential damage to property that [the plaintiff] seeks to prevent. If a storm dislodged the pool, anchors might also be dislodged. Anchoring to the seawall could potentially damage the seawall, which would lead to a greater threat of flooding and erosion. Reorientation of the pool is also not practical because it would require destruction of the pool [which would be impractical]." Ultimately, the court concluded that the plaintiff's entire case was moot because it could not afford the plaintiff any practical relief and dismissed the plaintiff's complaint.

On March 28, 2023, pursuant to Practice Book § 11-11, the plaintiff moved for reargument and reconsideration of the court's order and entry of judgment. Specifically, the plaintiff asserted that the sole issue raised in the defendants' objection was whether the motion for a temporary injunction was moot because the construction of the pool had been completed and the plaintiff could not obtain any practical relief in that regard. He also claimed that no affidavits had been filed to provide a basis for the court to find facts in its memorandum of decision regarding the practicality and potential negative effects of anchoring the pool to the seawall. The plaintiff further contended that such facts could not be judicially noticed. The defendants filed an opposition on April 6, 2023.

On April 10, 2023, the court issued an order denying the plaintiff's motion for reconsideration and reargument. Citing to Practice Book § 11-12 (c), and this court's decision in *Opoku* v. *Grant*, 63 Conn. App. 686, 692–93, 778 A.2d 981 (2001), the trial court concluded: "Because this court did not overlook any controlling

principles of law or misapprehend any facts in its decision, [the plaintiff's] motion for reconsideration is denied." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff principally claims that the court improperly dismissed the case on the basis of grounds not raised in the defendants' opposition to his motion for a temporary injunction and that this deprived him of notice and an opportunity to respond. Specifically, the plaintiff argues that our rules of practice and due process require that he be afforded notice and a meaningful opportunity to be heard on the issues before the court dismissed the complaint. We agree.

"We begin our discussion by setting forth the well settled standard of review that governs an appeal from a judgment granting a motion to dismiss on the ground of a lack of subject matter jurisdiction. A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide. . . . [B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Lewis* v. *Freedom of Information Commission*, 202 Conn. App. 607, 612, 246 A.3d 507 (2021); see also *Derblom* v. *Archdiocese of Hartford*, 203 Conn. App. 197, 206, 247 A.3d 600 (2021), aff'd, 346 Conn. 333, 289 A.3d 1187 (2023).

"Mootness . . . implicates subject matter jurisdiction, which imposes a duty on the [trial] court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance

wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists." (Citations omitted; internal quotation marks omitted.) *We the People of Connecticut, Inc.* v. *Malloy*, 150 Conn. App. 576, 581, 92 A.3d 961 (2014).

In this appeal, the plaintiff asserts that he was denied his rights to notice and the opportunity to be heard in violation of his due process rights and our rules of practice. This court recently stated: "Whether a party was deprived of his [or her] due process rights is a question of law to which appellate courts grant plenary review. . . . The core interests protected by procedural due process concern the opportunity to be heard at a meaningful time and in a meaningful manner. . . . Fundamental tenets of due process require that all persons directly concerned in the result of an adjudication be given reasonable notice and opportunity to present their claims or defenses. . . . It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard. . . . It is fundamental in proper judicial administration that no matter shall be decided unless the parties have fair notice that it will be presented in sufficient time to prepare themselves upon the issue. . . .

"Our Supreme Court has stated that, [f]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may

enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Instead, due process is a flexible principle that calls for such procedural protections as the particular situation demands. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his [or her] own arguments and evidence orally." (Citations omitted; internal quotation marks omitted.) *Cameron* v. *Santiago*, 223 Conn. App. 836, 842–43, 310 A.3d 391 (2024); see also *Pritchard* v. *Pritchard*, 103 Conn. App. 276, 287–88, 928 A.2d 566 (2007). Simply stated, "[a] party also has a right to fair notice that a court may render a judgment with respect to a given issue." (Internal quotation marks omitted.) *Haynes Construction Co.* v. *Cascella & Son Construction, Inc.*, 36 Conn. App. 29, 36, 647 A.2d 1015, cert. denied, 231 Conn. 916, 648 A.2d 152 (1994).

We are guided by this court's decision in *Jackson* v. *Pennymac Loan Services, LLC*, 205 Conn. App. 189, 257 A.3d 314 (2021). In that case, the plaintiffs alleged that the defendant had failed to provide a timely release of their mortgage in violation of General Statutes § 49-8 (c). Id., 191. After filing an answer and special defenses, the defendant moved to dismiss the action on the basis of lack of subject matter jurisdiction because the plaintiffs were not aggrieved classically or statutorily. Id., 193. In the alternative, the defendant moved for summary judgment. Id. The trial court granted the defendant's motion to dismiss, not on a basis raised in that motion, but on the basis that the plaintiffs failed to comply with the provisions of § 49-8 as alleged in the complaint. Id. "Although the court

never notified the plaintiffs that it was considering granting the motion to dismiss on grounds that it had raised sua sponte concerning the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c), it, nonetheless, did so." Id.

On appeal, the plaintiffs claimed that, in dismissing their action on a basis it raised sua sponte, the court violated their right to due process. Id., 194. "The plaintiffs specifically contend that the defendant did not raise in its motion to dismiss the issue of their alleged failure to satisfy the statutory demand notice requirements in § 49-8 (c), and that the court did not give them notice or an opportunity to be heard and present evidence of their compliance on that issue before it determined that their failure to satisfy those statutory requirements caused them to lack standing." Id. In agreeing with the plaintiffs, we first observed that the question of whether a party has been deprived of due process presents a question of law. Id., 194–95. Next, this court explained that the issue of the plaintiffs' purported failure to comply with the requirements of § 49-8 was not raised by the defendant in its motion to dismiss, the accompanying memorandum of law, or during argument on the motion to dismiss. We then stated: "A fundamental premise of due process is that a court cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. . . . We conclude that the court improperly addressed, sua sponte, the issue of the plaintiffs' alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) without first providing the plaintiffs with notice or a reasonable opportunity to

submit evidence of their compliance with those requirements. Additionally, the plaintiffs did not have an opportunity to contest whether they were required to demonstrate on the notice that was attached to the complaint that the notice had been received by the defendant mortgagee or its attorney." (Citations omitted; internal quotation marks omitted.) Id., 195–96. Finally, we noted that, if the defendant wanted to place the plaintiffs on notice that it sought to have its motion granted on the basis of noncompliance with the requirements of § 49-8, "it needed to raise the issue in connection with its motion to dismiss." (Emphasis omitted.) Id., 197; see also *Brownstone Exploration & Discovery Park, LLC* v. *Borodkin*, 220 Conn. App. 806, 820, 299 A.3d 1189 (2023) (trial court generally acts in excess of its authority when it sua sponte raises and considers issues not raised or briefed by parties); *Haynes Construction Co.* v. *Cascella & Son Construction, Inc.*, supra, 36 Conn. App. 36–37 (when trial court surprises party by deciding case on claim that was not presented to it, that party obviously is not in position to counter said claim).

In the present case, the defendants filed an objection to the plaintiff's motion for a temporary injunction, which the court and the parties treated as a motion to dismiss. During the hearing, the court frequently and unequivocally indicated that the scope of the proceedings would be limited to whether the motion for a temporary injunction was moot and that it would not consider the merits of the underlying complaint. For example, the court stated: "What's only [going to] be considered is [the] motion for [a] temporary injunction and the relief requested therein [and the defendants' objection thereto] . . . ." Later, the court noted that its decision would be "on the present motion for a temporary injunction that's before me." The court also instructed the plaintiff's counsel to identify where in the motion for a temporary injunction he had requested injunctive relief

other than ceasing the construction of the pool. It distinguished the relief requested in the motion for a temporary injunction as compared with that sought in the complaint. Finally, the court discussed with counsel scheduling another hearing to address the merits of the plaintiff's complaint. It is clear, therefore, that the plaintiff had no warning or notice that his entire complaint, rather than this motion for a temporary injunction, was subject to dismissal by the court.

We acknowledge that the trial court certainly could have sua sponte raised the issue of mootness regarding the plaintiff's complaint rather than considering only the motion for a temporary injunction. As this court has stated, "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings . . . ." (Internal quotation marks omitted.) *Cameron* v. *Santiago*, supra, 223 Conn. App. 845; see also *Stafford* v. *Commissioner of Correction*, 207 Conn. App. 85, 94, 261 A.3d 791 (2021). Nevertheless, "a court must still comply with the requirements of due process and provide the parties with notice that the issue is being raised and a meaningful opportunity to be heard thereon." *Cameron* v. *Santiago*, supra, 846.

In the present matter, the court expressly informed the parties, in no uncertain terms, that it would decide only whether the plaintiff's motion for a temporary injunction was moot and that matters pertaining to the complaint would be determined at a later date. For example, at the conclusion of the November 17, 2022 hearing, the court twice told the parties that, following its ruling on the motion to dismiss the motion for a temporary injunction, the parties would receive notice of a subsequent hearing to consider the merits of the complaint. Thus, contrary to the defendants' appellate

argument, the plaintiff lacked notice that his entire complaint was subject to dismissal as moot. Accordingly, we conclude that it was improper for the court, sua sponte, to dismiss the plaintiff's complaint, and this action cannot stand. See, e.g., *Pritchard* v. *Pritchard*, supra, 103 Conn. App. 288.

As a secondary matter, the plaintiff also claims that the court made "critical factual findings without any support in the record . . . ." Specifically, he asserts that the court improperly found that it was impractical to anchor the pool, anchoring would not prevent harm such as erosion, flooding, and potential damage to property, the anchors might also be dislodged in the event of a storm, anchoring the pool could cause damage to the seawall, which would lead to a greater threat of flooding and erosion, and reorientation of the pool would require the destruction of the pool and thus be impractical. The court concluded that "an order to anchor or reorient the pool would not offer practical relief." The plaintiff maintains that the court did not hear any evidence to support these findings and, in the absence of such evidence, these findings are improper. We agree.

Our Supreme Court has stated that when issues of fact are necessary to the determination of the court's jurisdiction, due process requires that a trial-like hearing be held in which the parties are provided with an opportunity to present evidence and to cross-examine adverse witnesses. See *Conboy* v. *State*, 292 Conn. 642, 652–53, 974 A.2d 669 (2009); see also *Ruisi* v. *O'Sullivan*, 132 Conn. App. 1, 5, 30 A.3d 14 (2011); *Oxford House at Yale* v. *Gilligan*, 125 Conn. App. 464, 473, 10 A.3d 52 (2010). Such a proceeding did not occur. In the absence of a hearing and the presentation of any evidence, the court's findings regarding the anchoring of the pool to the seawall and reorientation of the pool

are clearly erroneous. See *De Almeida-Kennedy* v. *Kennedy*, 207 Conn. App. 244, 253 n.8, 262 A.3d 872 (2021); see also *Goshen Mortgage, LLC* v. *Androulidakis*, 205 Conn. App. 15, 34, 257 A.3d 360, cert. denied, 338 Conn. 913, 259 A.3d 653 (2021); see generally *Nassra* v. *Nassra*, 180 Conn. App. 421, 430, 183 A.3d 1198 (2018) (court's determination is clearly erroneous when record contains no evidence to support it or reviewing court is left with definite and firm conviction that mistake has been made); *Success, Inc.* v. *Curcio*, 160 Conn. App. 153, 162, 124 A.3d 563 (same), cert. denied, 319 Conn. 952, 125 A.3d 531 (2015). Accordingly, we conclude that the court's findings are clearly erroneous in the absence of any evidentiary basis and, therefore, are vacated.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.