WILLIAM FRANCINI *v.* GOODSPEED AIRPORT, LLC, ET AL.
(SC 19705)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Espinosa, Js.

Syllabus

The plaintiff landowner, who enjoyed a deeded right-of-way over certain real property owned by the defendant, sought, inter alia, a judgment declaring the existence of an easement by necessity for the purpose of underground commercial utilities. The trial court rendered summary judgment in favor of the defendant, concluding that Connecticut law does not permit the creation of easements by necessity for commercial utilities. The plaintiff appealed to the Appellate Court, which determined that the case law of this state and other jurisdictions, as well as treatises,

supported the creation of easements by necessity for commercial utilities and, accordingly, reversed the trial court's judgment. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court properly concluded that the trial court should not have rendered summary judgment in favor of the defendant, as a genuine issue of material fact existed as to whether an easement by necessity over the defendant's property should be granted for the installation of commercial utilities: consistent with the broad principle that easements by necessity require only a reasonable necessity, the public policy favoring the effective use of land, the implied conveyance of rights necessary to reasonable enjoyment of property, and the law of other jurisdictions, this court concluded that public policy favors recognition of easements by necessity for utilities over a preexisting deeded right-of-way; furthermore, when a right-of-way already exists, an expansion of that easement for commercial utilities will be allowed as long as it is reasonably necessary for the beneficial enjoyment of the dominant estate and does not unreasonably impair the beneficial enjoyment of the servient estate, and trial courts should balance the intent of the parties regarding use at the time of severance, the relative enjoyment of the properties, and the burdens imposed by the easement in order to determine the overall costs and benefits to the parties.

Argued September 18, 2017—officially released January 2, 2018

Procedural History

Action for, inter alia, a judgment declaring an easement by necessity over certain real property owned by the named defendant, brought to the Superior Court in the judicial district of Middlesex, where the plaintiff withdrew certain counts of the amended complaint; thereafter, the court, *Aurigemma*, *J.*, granted the named defendant's motion for summary judgment and rendered judgment thereon; subsequently, the plaintiff withdrew the remaining count of the amended complaint and appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Lavine* and *Lavery*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to deny the defendant's motion for summary judgment and for further proceedings, and the named defendant, on the granting of certification, appealed to this court. *Affirmed.*

Mary Mintel Miller, with whom was *John R. Bashaw*, for the appellant (named defendant).

William Francini, self-represented, the appellee (plaintiff).

Opinion

EVELEIGH, J. In this certified appeal, we are tasked with determining whether easements by necessity can be granted for commercial utilities. More specifically, we consider whether an easement that affords ingress and egress to an abutting property can later be expanded, by necessity, for utilities. The plaintiff, William Francini, commenced the present action seeking, inter alia, a judgment declaring that he is entitled to an easement by necessity for underground utility lines across the property of the named defendant, Goodspeed Airport, LLC, and an injunction permitting use of the easement.[1] The defendant appeals from the judgment of the Appellate Court, which reversed trial court's award of summary judgment in favor of the defendant. We affirm the judgment of the Appellate Court.

The Appellate Court's opinion and the record contain the following facts and procedural history. "The following facts, as alleged by the plaintiff and admitted by the defendant, are not in dispute for the purpose of this motion for summary judgment. The plaintiff owns a parcel of land in East Haddam. The parcel's only access to a public highway is over an abutting property, owned by the defendant. [Both properties were originally part

[1] The complaint names seven additional defendants who reside on certain nearby properties. These additional defendants previously entered into an agreement with Goodspeed Airport, LLC, granting utility line access to their respective properties. The plaintiff claims in his complaint to have named these additional defendants for purposes of notice pursuant to General Statutes § 52-102. We note that the plaintiff subsequently withdrew the action with respect to these additional defendants and that they are not parties to the present appeal. For the sake of simplicity, we refer to Goodspeed Airport, LLC, as the defendant.

of a single parcel of land, subsequently divided into many parcels for residential use and conveyed through a series of transfers over the years to various individuals or entities.] The defendant took title to its property by warranty deed in 1999, subject to a right-of-way easement now enjoyed by the plaintiff as well as several of the plaintiff's neighbors, landowners who also own land abutting the defendant's property. The 1999 warranty deed expressly described the right-of-way, in general terms and without limitations on its use, by providing for '[s]uch rights as others may have to a [right-of-way] over a passway or driveway as set forth in a deed from [the property's prior owner], dated August 16, 1963 and recorded in . . . the East Haddam [l]and [r]ecords . . . .'[2]

"In 2001, the defendant entered into an agreement with several of the plaintiff's neighbors, who also share the plaintiff's right-of-way across the defendant's property, to allow the neighbors to improve the right-of-way by installing and maintaining a utility distribution system under the existing right-of-way easement. As a result, a commercial utility system was constructed under the existing right-of-way and now provides electricity to the plaintiff's neighbors. In exchange for this utility easement, each of the plaintiff's neighbors paid the defendant $7500. The plaintiff offered to pay the defendant the same $7500 that his neighbors had paid for use of the utility easement, but the defendant requested that the plaintiff not only pay the $7500, but also grant it the power to move the location of the easement at will. The plaintiff declined the additional terms and the two parties never reached an agreement. Without an agreement, the plaintiff does not enjoy an easement for commercial utilities and his property is

[2] The right-of-way for the benefit of abutting properties had been acknowledged in various deeds throughout the years preceding the defendant's 1999 warranty deed.

currently landlocked from access to commercial electricity. Currently, the plaintiff's house is powered by a generator, but the generator is alleged to be insufficient to run and maintain the basic requirements of the plaintiff's house such as powering security devices, turning on automatically in the event of a flood, and running a refrigerator to preserve perishable food without constant operation of the generator." (Footnote added.) *Francini* v. *Goodspeed Airport, LLC*, 164 Conn. App. 279, 281–82, 134 A.3d 1278 (2016).

In 2012, the plaintiff filed an amended complaint seeking a judgment declaring the existence of an easement by necessity for commercial utilities across the defendant's property and seeking an injunction requiring the defendant to permit use of that easement.[3] The defendant, in response, filed a motion for summary judgment claiming that, although Connecticut law permits easements by necessity for ingress and egress to landlocked parcels, it does not permit similar easements for commercial utilities. The trial court granted the defendant's motion, and the plaintiff appealed to the Appellate Court. The Appellate Court determined that, although there was no precedent in this state favoring the grant of an easement by necessity for commercial utilities, the prior language of this court regarding easements by necessity, multiple treatises on the subject, and precedent from other jurisdictions throughout the country support expanding the scope of easements by necessity to include commercial utilities. Id., 284–93. The Appel-

[3] The plaintiff originally filed a complaint in 2011 alleging the creation of an easement by necessity *and* implication. The trial court granted the defendant's motion to strike these claims, and, thereafter, the plaintiff filed an amended complaint. The plaintiff's amended complaint omitted the claim alleging the creation of an easement by implication, retained the claim alleging the creation of an easement by necessity, and added claims alleging a violation of General Statutes § 52-480, negligence, nuisance, and obstruction of a right-of-way. The plaintiff later withdrew all claims except the count alleging the creation of an easement by necessity for commercial utilities.

late Court remanded the case to the trial court to deny the motion for summary judgment and for further proceedings. Id., 296. In reaching this conclusion, the Appellate Court did not specify the appropriate test to be used by the trial court to determine whether an easement by necessity existed. Instead, the Appellate Court concluded that easements by necessity for utilities are permissible, generally, and that "the facts as alleged by the plaintiff, viewed in the light most favorable to the plaintiff and undeveloped by any evidence, prevent the defendant from prevailing on its motion [for summary judgment]." Id. This appeal followed.[4]

We begin with the standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set

[4] The defendant filed a petition for certification to appeal from the judgment of the Appellate Court, which we granted, limited to the following question: "Did the Appellate Court properly determine that the trial court incorrectly concluded, as a matter of law, that an easement by necessity may be granted to a landlocked parcel only for the purpose of ingress and egress?" *Francini* v. *Goodspeed Airport, LLC*, 321 Conn. 919, 137 A.3d 764 (2016).

out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 426, 165 A.3d 148 (2017). Although the scope of an easement is normally a question of fact; *Deane* v. *Kahn*, 317 Conn. 157, 166, 116 A.3d 259 (2015); the issue raised in the present case is whether an easement by necessity can be granted for commercial utilities, a question of law over which our review is plenary. See id., 175.

In the context of easements by necessity for access to a landlocked parcel, this court's precedent directs us to engage in a three-pronged analysis, considering (1) the cost of obtaining enjoyment from, or access to, the property by means of the easement in relation to the cost of other substitutes, (2) the intent of the parties concerning the use of the property at the time of severance, and (3) the beneficial enjoyment the parties can obtain from their respective properties with and without the easement. See id., 181–82; *Hollywyle Assn., Inc.* v. *Hollister*, 164 Conn. 389, 398–99, 324 A.2d 247 (1973); *Marshall* v. *Martin*, 107 Conn. 32, 38, 139 A. 348 (1927); *Robinson* v. *Clapp*, 65 Conn. 365, 385, 32 A. 939 (1895); *Collins* v. *Prentice*, 15 Conn. 39, 44 (1842).

In the present case, however, the plaintiff is not seeking an easement by necessity for physical access for the purpose of ingress and egress to his property, but an easement by necessity for utility access along that preexisting right-of-way. Although this court has never directly addressed this question, it has recognized the broader principle that an easement by necessity may arise from a reasonable, but not strict, necessity. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 164 Conn. 399.

Consistent with this broad principle, scholarly treatises generally agree that the scope of an easement by necessity includes those uses that are for the beneficial enjoyment of the property. See J. Bruce & J. Ely, Law

of Easements and Licenses in Land (2017) § 8:7, p. 8-32; R. Powell, Real Property (M. Wolf ed., 2017) §§ 34.07 and 34.13, pp. 34-45 and 34-149; G. Thompson, Real Property (J. Grimes ed., 1980) § 336, pp. 419–23; 25 Am. Jur. 2d 688, Easements and Licenses § 18 (2014).[5]

This view is consistent with the Restatement (Third) of Property, Servitudes, which provides: "A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights *necessary to reasonable enjoyment of the land* implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights." (Emphasis added.) 1 Restatement (Third) Property, Servitudes § 2.15, p. 202 (2000). The commentary to this section discusses the policy rationales for easements by necessity, specifically, promoting the effective use of land and giving effect to the presumed intent of the parties. Id., comment (a), pp. 203–204. The commentary further observes that the rights necessary for the enjoyment of property are normally related to access to the property; however, it further provides: "a servitude will be implied to do whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise

[5] The defendant contends that the reliance upon many of these treatises, insofar as they discuss implied easements and not easements by necessity, is misplaced. We disagree. Both easements by implication and easements by necessity are inherently "implied" easements, because they are not "express." Thus, many of the treatises cited within this opinion use the term "implied" easements to refer to both easements by implication and easements by necessity and, thereafter, distinguish between the two types of implied easements. See 25 Am. Jur. 2d, supra, § 18, p. 688; see also J. Bruce & J. Ely, supra, §§ 4:1 and 4.2, pp. 4-2 through 4-7; 1 Restatement (Third) Property, Servitudes § 2.11, p. 153 (2000). Indeed, the first Restatement of Property did not distinguish the two types of easements, but instead provided a list of varying factors to consider with implied easements generally. See, e.g., 5 Restatement, Property §§ 474 through 476, pp. 2972–89 (1944).

eliminate the property owner's right to do those things." Id., comment (b), pp. 204–205. The commentary also specifically addresses the scope of an easement of necessity beyond just access to property, providing: "[U]ntil recently, access for foot and vehicular traffic tended to be the only rights regarded as necessary for the enjoyment of surface possessory estates. However, the increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justif[ies] the conclusion that implied servitudes by necessity will be recognized for those purposes. Whether access for other utilities and services has also become necessary to reasonable enjoyment of property depends on the nature and location of the property and normal land uses in the community." Id., comment (d), p. 208.

Support for this view is also reflected in case law of other jurisdictions that have recognized easements by necessity for utilities, especially where a preexisting right-of-way existed. The earliest case involving a utility easement by necessity was *Davis* v. *Jefferson County Telephone Co.*, 82 W. Va. 357, 95 S.E. 1042 (1918). In *Davis*, several property owners utilized a shared right-of-way, and one of these owners wished to construct telephone lines along that easement for his own use. Id., 358. The plaintiff in that case, the property owner of the servient estate, challenged the construction of the telephone lines, claiming that the initial grant of the right-of-way did not also give that owner the right to construct utility lines. Id. The West Virginia Supreme Court of Appeals examined the necessity of having electricity as follows: "If then those living in a rural district with only such unlimited private ways as that involved here are to enjoy any of the modern conveniences, such as electric light, natural gas, telephones, and the like, they must of necessity rely upon such ways by which to obtain them. To deny them such right would be

to stop to some extent the wheels of progress, and invention, and finally make residence in the country more and more undesirable and less endurable." Id., 360. Insofar as the plaintiff in *Davis* also challenged the additional burden on the original right-of-way due to digging and installing telephone poles, the court observed that there was no additional burden on the land so long as it was reasonable to do so and in accordance with private, rather than public, use. Id., 360–61.

The Court of Appeals of Maryland has also determined that an easement by necessity may permit modifications and repairs to property in order to conform to modern conditions. Specifically, in *Tong* v. *Feldman*, 152 Md. 398, 136 A. 822 (1927), the plaintiff had obtained a lease for a portion of a building in Baltimore that he attempted to adapt into a restaurant, but needed to modify gas lines that passed through another tenant's property. Although the court observed that easements by necessity "are more familiarly met [within] rights of way . . . they are not confined to such rights." Id., 402. The court looked to the purpose for which the original right or easement was established and held: "Whenever it has arisen from necessity it would seem to be [coextensive] with the reasonable needs, present and future, of the dominant estate for such a right or easement, and to vary with the necessity, [insofar] as may be consistent with the full reasonable enjoyment of the servient tenement." Id., 405. The only restriction upon the plaintiff's easement was that any modifications cannot "materially interfere with [the defendant's] reasonable enjoyment of the cellar, in which they are located." Id.

Davis and *Tong* provided the background for many subsequent cases from other jurisdictions recognizing the necessity of utility access. The Indiana Supreme Court reached a similar conclusion in *New York Central Railroad Co.* v. *Yarian*, 219 Ind. 477, 485, 39 N.E.2d

604 (1942), stating: "The same public policy which requires that a way of necessity will be implied where none is expressly reserved, requires that an express reservation of a way shall be construed to grant rights sufficient for the full reasonable enjoyment of the estate if the language of the reservation will permit such a construction. Electricity is largely used for power and light and for the operation of refrigerating and labor-saving machines on farms and in farm homes, and that its use contributes to the full and profitable enjoyment of a farm can hardly be doubted." Likewise, in *Dowgiel* v. *Reid*, 359 Pa. 448, 460, 59 A.2d 115 (1948), the Supreme Court of Pennsylvania also permitted an easement by necessity for utilities along an express right-of-way. The court observed that erecting poles and wires is "something which is essential to the livableness of the home, to wit, electricity . . . . Such a use is in this modern era one of the ordinary purposes of such a way . . . . Poles and wires along the highways are concomitants of this mechanized age and the sensitivity of those who find the sight of them offensive is somewhat beyond the pale of a court of equity's protection. Civilization has its burdens as well as its benefits and those who enjoy its benefits must philosophically bear its burdens." Id. The Supreme Judicial Court of Maine also granted an easement by necessity for utilities in *Morrell* v. *Rice*, 622 A.2d 1156, 1160 (Me. 1993), explaining that "[a]n easement created by necessity can include not only the right of entry and egress, but also the right to make use of the easement for installation of utilities, essential for most uses to which property may reasonably be put in these times." Accord *Fleming* v. *Napili Kai, Ltd.*, 50 Haw. 66, 70, 430 P.2d 316 (1967); *Brown* v. *Miller*, 140 Idaho 439, 443, 95 P.3d 57 (2004); *Gacki* v. *Bartels*, 369 Ill. App. 3d 284, 293, 859 N.E.2d 1178 (2006); *Cline* v. *Richardson*, 526 N.W.2d 166, 169 (Iowa App. 1994); *Stroda* v. *Joice Holdings*, 288 Kan. 718,

728–29, 207 P.3d 223 (2009); *Ashby* v. *Maechling*, 356 Mont. 68, 78, 229 P.3d 1210 (2010); *Firstenberg* v. *Monribot*, 350 P.3d 1205, 1218 (N.M. App.), cert. denied, 367 P.3d 850 (N.M. 2015); *Regan* v. *Pomerleau*, 197 Vt. 449, 465, 107 A.3d 327 (2014); *Atkinson* v. *Mentzel*, 211 Wis. 2d 628, 639, 566 N.W.2d 158 (App. 1997).[6]

Several state legislatures have weighed in on this issue as well. In 1973, the Massachusetts legislature enacted a law granting owners of express easements for ingress and egress an additional easement for utilities, provided that the utilities do not unreasonably obstruct the existing easement. See Mass. Ann. Laws c. 187, § 5 (LexisNexis 2011); 1973 Mass. Acts 930. The Massachusetts Court of Appeals extended this statute to include access easements granted by implication and necessity, but not to those easements granted by prescription. *Adams* v. *Planning Board*, 64 Mass. App. 383, 392, 833 N.E.2d 637 (2005). Florida has also enacted legislation to address easements by necessity and the use of the easement for utilities. See Fla. Stat. Ann. § 704.01 (West 2013). The first subdivision in that statute codifies the common-law right to easements by necessity. Fla. Stat. Ann. § 704.01 (1) (West 2013). The second subdivision expands the scope of easements by necessity to include uses for "cable television service, and any utility service,

[6] The defendant contends that many of these cases should not be relied upon, as they interpret the necessity of utilities in the context of a preexisting right-of-way and that the courts in these cases looked to the scope of the original deed granting the right-of-way. We disagree. Although these cases arose in the context of a preexisting right-of-way, they stand for the proposition that access to utilities is indeed necessary in modern times, and examine the scope of the original easement in relation the purpose for which the dominate estate was intended to be used. See *Fleming* v. *Napili Kai, Ltd.*, supra, 50 Haw. 69–70; *Cline* v. *Richardson*, supra, 526 N.W.2d 169; *Dowgiel* v. *Reid*, supra, 359 Pa. 460; *Davis* v. *Jefferson County Telephone Co.*, supra, 82 W. Va. 360; *Atkinson* v. *Mentzel*, supra, 211 Wis. 2d 639–40. The defendant's attempt to distinguish these cases carries even less weight considering that the present case also involves a preexisting right-of-way and otherwise extremely similar facts.

including, but not limited to, water, wastewater, reclaimed water, natural gas, electricity, and telephone service . . . .'' Fla. Stat. Ann. § 704.01 (2) (West 2013).

As the foregoing summary demonstrates, the majority of jurisdictions that have considered the issue have recognized that easements by necessity for utilities may arise when there is a preexisting right-of-way. The rationale among these jurisdictions is to support the continued use of property, while also giving effect to the intent of the parties when granting the original conveyance for the beneficial enjoyment of the property owner. This rationale is consistent with our own precedent regarding the creation of easements by necessity, which likewise recognizes the importance of allowing the productive use of property and accomplishing its intended use. See *Deane* v. *Kahn*, supra, 317 Conn. 176–77. We are persuaded by these authorities and conclude that public policy favors recognizing easements by necessity for utilities over an existing right-of-way when the requisite necessity is established.[7]

Having thus concluded, we take this opportunity to provide guidance on the proper standard to apply when determining whether an easement by necessity for utilities has been established. When an easement of physical access already exists, an expansion of that easement will be allowed so long as it is reasonably necessary

[7] We underscore that our holding in the present case is limited to the expansion of an existing access easement for ingress and egress to allow for the provision of utilities, a commodity recognized as essential to most property uses. This opinion should not be read to suggest that expanding an access easement for the provision of every modern convenience would likewise be viewed as a reasonable necessity. See *Robinson* v. *Clapp*, supra, 65 Conn. 396 (stating ''that enjoyment is not reasonable which deprives the defendant of any use of his property, in order merely that the plaintiff may, by reason of such deprivation, have a more comfortable, convenient and better use of his own'' and finding error where trial court applied ''the wrong standard, substituting convenience for necessity as the test by which to determine the existence of the right claimed'').

for the beneficial enjoyment of the dominant estate and does not unreasonably impair the servient estate owner's beneficial enjoyment of his or her property. *New York Central Railroad Co.* v. *Yarian*, supra, 219 Ind. 485; *Tong* v. *Feldman*, supra, 152 Md. 404; *Davis* v. *Jefferson County Telephone Co.*, supra, 82 W. Va. 359–60.

With regard to determining what is reasonably necessary for the beneficial enjoyment of the property, this court's jurisprudence has routinely recognized that the intent of the parties regarding the use of the property at the time of severance of the parcels is a factor of vital importance in determining the existence and scope of easements by necessity for access. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 164 Conn. 398–401; *Marshall* v. *Martin*, supra, 107 Conn. 36; *Robinson* v. *Clapp*, supra, 65 Conn. 385.[8] We conclude that the parties' intent as to the use of the property at the time of severance should also be considered for easements by necessity for utilities along a preexisting right-of-way for two reasons. First, it fairly accounts for the expectations of both property owners as to the general use of the property. See *Ashby* v. *Maechling*, supra, 356 Mont. 76 ("easements by necessity cannot be used at will, but must be exercised with due regard to the rights of both

[8] The defendant contends that examining the intent of the parties and the beneficial enjoyment of property are factors in examining easements by implication, and that the test for easements by implication and easements by necessity have been confused by both trial and appellate courts through the years. Although we agree that the line between the two kinds of implied easements has been blurred, the intent of the parties and the beneficial use of property are still key components of both types of easements. The distinction between the two arises from the way the intent is determined: by examination of the express terms of the deed in cases of easements by implication, and by examination of the presumed intent of the parties by the circumstances of the conveyance in cases of easements by necessity. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 164 Conn. 401; *D'Amato* v. *Weiss*, 141 Conn. 713, 717, 109 A.2d 586 (1954); *Marshall* v. *Martin*, supra, 107 Conn. 36; *Robinson* v. *Clapp*, supra, 65 Conn. 385.

parties so that the use does not encroach upon the land of his grantor further than circumstances render it necessary" [internal quotation marks omitted]). Second, it furthers public policy insofar as it assumes that the parties reasonably would not have intended for the land to be left incapable of being put to beneficial use. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 400 ("the presumption as to the intent of the parties is a fiction of law . . . and merely disguises the public policy that no land should be left inaccessible or incapable of being put to profitable use").

Although prior use of the property may evidence the parties' intentions, when the original conveyance was made long before the advent of modern utilities, such as electricity, a question arises as to whether the parties could have intended for the property's future use to include such developments. Some jurisdictions gauge the necessity in relation to the time of the original conveyance. See *Gacki* v. *Bartels*, supra, 369 Ill. App. 3d 293; see also 1 Restatement (Third), supra, § 2.15, comment (c), p. 206. Courts in other jurisdictions, however, interpret the prior use to include those uses that could have been reasonably foreseen by the other party at the time of severance. See, e.g., *Stroda* v. *Joice Holdings*, 288 Kan. 718, 722–23, 207 P.3d 223 (2009) ("[p]rior use, as a factor in determining the intent of the parties, includes not only uses that were known at the time of the conveyance, but also those that had a possibility of being known at that time and those that a party might reasonably have foreseen the other party . . . expected" [internal quotation marks omitted]); id., 728 ("[e]ven when the use of the easement at the time of creation has not included utility support, courts have found that the reasonable use of the property in current times requires utility services" [internal quotation marks omitted]); *Ashby* v. *Maechling*, supra, 356 Mont. 78 ("[T]he scope of an implied easement should consider the actual uses being made [of the dominant

estate] at the time of the severance, such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance, and such uses as the parties might reasonably have expected from future uses of the dominant tenement. . . . [I]f the severance occurred at a time prior to the general use of motor vehicles and electric power, an easement by necessity may still allow for reasonable technological developments . . . .'' [Internal quotation marks omitted.]); see also 1 Restatement (Third), supra, comment (d), pp. 207–208.

We agree with those jurisdictions that permit the expansion of preexisting access easements to include a new easement by necessity for changes in technology. Their position is more in accord with our case law, which has never determined the scope of an implied easement solely by examining what was necessary at the time of severance. See *Marshall* v. *Martin*, supra, 107 Conn. 36–37; see also *Deane* v. *Kahn*, supra, 317 Conn. 175–77. Accordingly, when examining the intent of the parties when the conveyance was made and the extent to which the property was intended to be used, our courts must also consider modern technological developments to ensure that ''the wheels of progress and invention'' do not stop and society can continue to change and improve. *Davis* v. *Jefferson County Telephone Co.*, supra, 82 W. Va. 360. To not do so would ignore the public policy of encouraging the profitable use of property, and leave property to be underutilized or even abandoned. See *Deane* v. *Kahn*, supra, 317 Conn. 177; *Robinson* v. *Clapp*, supra, 65 Conn. 385; see also 1 Restatement (Third), supra, § 2.15, comment (d), pp. 207–208.[9]

[9] This opinion should not be interpreted as granting unrestricted rights across any person's land in order to satisfy the needs of another property owner. The only rights reserved in an easement by necessity are those between the original and subsequent owners and the new owners of the severed parcel. See *Robinson* v. *Clapp*, supra, 65 Conn. 385; 1 Restatement (Third), supra, § 2.15, comment (c), p. 206.

When evaluating the relative enjoyment of the respective properties and the burden on those properties, courts must examine not only what enjoyment the dominant tenement's owner can obtain from the expansion of the access easement to include utilities, but also what effect the installation of utilities would have on the servient tenement and its owner's beneficial enjoyment of his or her own property. See *Collins* v. *Prentice*, supra, 15 Conn. 44. In many cases, courts have concluded that installing the utilities, such as through electrical poles and underground electrical access, would not significantly burden the servient estate to foreclose imposing the easement. *New York Central Railroad Co.* v. *Yarian*, supra, 219 Ind. 484–87; *Morrell* v. *Rice*, supra, 622 A.2d 1160; *Ashby* v. *Maechling*, supra, 356 Mont. 78–79; *Dowgiel* v. *Reid*, supra, 359 Pa. 460; *Regan* v. *Pomerleau*, supra, 197 Vt. 465; *Davis* v. *Jefferson County Telephone Co.*, supra, 82 W. Va. 361. Easements for utilities will not, however, always trump the servient estate owner's right to beneficial enjoyment of his or her own property. In *Fleming* v. *Napili Kai, Ltd.*, supra, 50 Haw. 70, the Hawaii Supreme Court rejected the proposed utility easement, which was to be used as a drainage ditch, as it unreasonably interfered with the use of the road. The court still recognized, however, that an easement was necessary, and tasked the trial court with determining the proper placement of the easement to benefit both parties. Id. This approach evidences that courts may impose conditions to account for the interest of both estates.

In sum, to evaluate properly the beneficial enjoyment of the parties' respective properties, the court must engage in a balancing test. The court must examine the relative enjoyment of the respective properties and the burden on those properties, and determine whether the burden is disproportionately weighted toward one party. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 164

Conn. 401; *Robinson* v. *Clapp*, supra, 65 Conn. 385; see also Restatement (Third), supra, § 2.15, comment (d). An easement by necessity for utilities should be granted over an existing physical access easement when the dominant estate has a reasonable need for the utility, in accordance with the intention of the parties as to the use of the property, unless the burden interferes with that owner's beneficial enjoyment of the property. See *Hollywyle Assn., Inc.* v. *Hollister*, supra, 401; *Robinson* v. *Clapp*, supra, 385; Restatement (Third), supra, § 2.15, comment (d), pp. 207–208. In the event use of the easement for utilities does impair the enjoyment of the servient estate, the court must then determine whether the need of the dominant estate is so great that the easement should still be granted or if it could be altered so as to limit the burden on the servient estate. See *Fleming* v. *Napili Kai, Ltd.*, supra, 50 Haw. 70.

Having reached this conclusion, we briefly explain why we are not persuaded by the defendant's arguments, which effectively advocate for a test of strict necessity. The defendant substantially relies upon *Deane* v. *Kahn*, supra, 317 Conn. 157, and its predecessors. Simply put, those cases relate to a different question, namely, the right to physical access for ingress and egress when no easement previously exists. Such physical access, by its very nature, involves a substantial infringement on the rights of the owner of the servient estate. An expansion of an existing easement to accommodate additional use for the beneficial enjoyment of property is of a different nature. It is true that our case law has restricted the granting of easements by necessity to property that is truly landlocked; however, as explained previously in this opinion, this court has never been presented with a situation involving an easement by necessity for commercial utilities over a preexisting right-of-way easement.

For similar reasons, we also disagree with the defendant that the court must necessarily engage in an analysis of whether other substitutes exist to provide utilities to the dominant estate. In *Marshall* v. *Martin*, supra, 107 Conn. 37, this court stated that if the cost of finding another substitute to access the parcel would exceed the value of the property, then an easement by necessity could be granted. In *Marshall*, this court emphasized the proportionality of the cost when finding a suitable substitute, and that an easement will be granted only if a substitute could be obtained at a disproportionate cost. Id., 38. When an easement by necessity for utilities is being considered, however, it would not be prudent to examine the cost of finding a substitute compared to the overall value of the property—the cost of obtaining access to utilities would rarely, if ever, exceed the value of the property. This is in accord with many other jurisdictions that have examined this same issue, and avoids the thorny evaluation of cost and how it relates to the value of the property. See *New York Central Railroad Co.* v. *Yarian*, supra, 219 Ind. 484–87; *Morrell* v. *Rice*, supra, 622 A.2d 1160; *Dowgiel* v. *Reid*, supra, 359 Pa. 448, 453; *Davis* v. *Jefferson County Telephone Co.*, supra, 82 W. Va. 360–61. Nonetheless, the availability of alternative reasonable methods of obtaining utilities for the dominant estate may be relevant, as such considerations could bear on the question of reasonable necessity in some cases—for example, examining the need for cable lines where satellite would provide the same services without intruding on the servient estate.

Applying the foregoing standards to the present case, we conclude that the motion for summary judgment should have been denied. Taking all evidence in favor of the nonmoving party, the plaintiff, we conclude that a genuine issue of material fact exists as to whether an easement by necessity over the defendant's property

should be granted for the instillation of commercial utilities.

It is without question that the plaintiff's property was, and is, intended to be used as a residential lot, simply from the surrounding lots and the residential character of the neighborhood. Even if the original conveyance did not anticipate the availability of modern conveniences, easements by necessity for utilities can accommodate those needs reasonably necessary for the beneficial enjoyment of property in the modern era. The defendant has proffered no evidence at this stage to demonstrate that it would be burdened by granting the easement, as it appears that the plaintiff need only connect to an existing electrical conduit.[10]

Indeed, although we conclude that the trial court should not have rendered summary judgment in favor of the defendant because a genuine issue of material fact exists, we make no determination as to whether the plaintiff has satisfied his burden of establishing that he is entitled to an easement by necessity for utilities. The record at this stage in the proceedings is inadequate to make that determination. On remand, the trial court must make factual determinations about the intent of the parties regarding the use of the property at the time of severance, the relative enjoyment of the respective properties, and the burden that would be placed on those properties by the easement. The court should then balance those factors in order to determine the overall costs and benefits to the parties and arrive at an equitable solution.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[10] We observe that this conduit appears to exist because of costs borne by other property owners who are currently using the utility lines. Should the trial court determine that the plaintiff has an easement by necessity for utility access, it would be free to fashion an equitable remedy regarding the plaintiff's share in those costs, but we will not comment on that matter in this opinion.

STATE OF CONNECTICUT *v.* PEDRO L. MIRANDA (SC 19597)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

Convicted of the crime of murder in connection with the death of the victim, the defendant appealed to this court. At trial, the victim's mother was asked, on direct examination by the state, whether she had heard information relating the defendant to the victim's disappearance. The defendant objected on the basis of relevancy, and the trial court overruled that objection. The victim's mother responded in the affirmative, and the defendant did not raise any additional objections. Subsequently, another state's witness, D, testified that he had seen the victim get into a car on the day of her disappearance and that, although he did not see the driver's face, that person had a light complexion, a mustache, and curly brown or black hair. D then testified that he had relied on guidance from God in identifying the driver in a photographic array presented by the police. The defendant objected, and the jury was excused. Thereafter, the trial court ruled that the testimony regarding the photographic array was inadmissible. The jury returned, and D's testimony concluded without further discussion of his identification. Subsequently, the trial court, noting its concern that the defendant's objection was not sustained in the jury's presence, indicated that D's improper testimony could be addressed in the jury charge and offered to address the matter prior to the charge if requested. Defense counsel then indicated to the court that he was working on language for an instruction. The trial court subsequently received the defendant's request to charge and reviewed its proposed instructions with the parties. The trial court ultimately instructed the jury that it had sustained the objection to D's testimony and that any answer given after that objection should be disregarded. On appeal, the defendant claimed that the trial court incorrectly failed to strike D's improper testimony. The defendant further claimed that the trial court improperly permitted the victim's mother to testify that she had heard information relating the defendant to the victim's disappearance because that testimony constituted inadmissible hearsay. *Held*:

1. The defendant expressly waived his claim that the trial court incorrectly failed to strike D's improper testimony; the defendant had approved of the trial court's proposed remedy for D's improper testimony by expressing satisfaction with the trial court's plan to use an instruction, by declining to request action by the trial court before it issued that instruction, and by ultimately approving of the trial court's proposed instruction.

2. The defendant's claim that the trial court improperly permitted the victim's mother to testify that she had heard information relating the defendant to the victim's disappearance on the ground that it constituted inadmissible hearsay was unpreserved and, accordingly, unreviewable; the defendant objected to that testimony on the basis of relevancy, and, thus, the trial court had no notice or opportunity to consider the issue of hearsay.

(*Two justices concurring separately in one opinion*)

Argued September 13—officially released January 2, 2018

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before the court, *Hon. John F. Mulcahy*, judge trial referee; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Daniel J. Foster, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, J. The defendant, Pedro L. Miranda, appeals[1] from the judgment of conviction, rendered after a jury trial, of one count of murder in violation of General Statutes § 53a-54a. On appeal, the defendant claims that the trial court improperly, (1) failed to strike the testimony of a witness who claimed that guidance from God, rather than his own recollection, had led him to identify the perpetrator in a photographic array, after the court ruled, in the jury's absence, that this testimony was inadmissible, and (2) permitted the victim's mother to testify that she had heard that the defendant was connected to the victim's disappearance. We

[1] The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3).

conclude that the defendant waived his first claim and failed to preserve his second claim. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On October 8, 1987, the thirteen year old victim, Mayra C., left her apartment in Hartford, where she lived with her mother, Norma C., and siblings, and began walking to school. Although the victim ordinarily walked to school with friends, that morning she had left early to work on a school project and was traveling alone. At about the same time, Jose Diaz and his brother, who were both employed as maintenance workers in a nearby building, were walking on Sigourney Street in Hartford. Diaz' brother recognized the victim because he had frequently seen her walking by on her way to school. That morning, Diaz and his brother heard a car horn sound and noticed a yellow Nissan Datsun stopped at an intersection approximately twenty feet away. Diaz and his brother saw the driver of the Datsun lower the window and speak with the victim. Diaz' brother explained that, based on the expression on the victim's face, it appeared that she knew the driver. Diaz and his brother saw only the driver's profile, but were able to describe him as a Hispanic male with light or medium complexion, brown or black curly hair, and a mustache. Diaz and his brother then saw the victim get into the Datsun, which then drove away.

Later that day, when the victim did not return home, the victim's mother became concerned and went to the victim's school. After the school informed her that the victim had never arrived at school that day, she called the police. While the victim was still missing, the defendant contacted the victim's mother and informed her that he had nothing to do with the victim's death. Although the victim's mother had known the defendant

for several years, because the two lived in the same apartment building, she did not know him well.

On November 8, 1987, two hikers found the victim's body in a wooded area adjacent to Gardner's Nurseries in the town of East Windsor, where the defendant had once been employed. The victim's body had suffered from extensive decomposition. An autopsy of the victim revealed several fractures to the left side of her skull that resulted from two or more blows to her head with a blunt object. Although the victim's brain tissue was too decomposed to develop a full understanding of what had happened, bloody tissue found between her skull and her brain indicated that the blunt force trauma to her skull caused bleeding of the brain, which resulted in her death.

Thereafter, the police interviewed employees of the nursery. Employees of the nursery testified that the defendant had been employed there and that he drove a yellow Datsun to work. Moreover, the employees reported seeing a yellow Datsun coming down a dirt road in the nursery on a Saturday in October, 1987, between 1 and 1:30 p.m. They were unable to see the driver, but they assumed it was the defendant. The Datsun disappeared over a hill near the wooded area where the victim's body was ultimately discovered. The Datsun was out of sight for about ten minutes, and then it reappeared on the dirt road and drove off the property.

After the victim's body was found, the police established surveillance of her wake to look for a vehicle matching the one described by Diaz and his brother. The police observed a yellow Datsun parked on the street near the funeral home with a Hispanic male driver, who turned out to be the defendant. Officers approached the vehicle and asked the defendant if he would be willing to accompany them to the police sta-

tion for an interview. The defendant agreed. The defendant was ultimately interviewed by the police three times, on November 12, November 14, and December 3, 1987.

During those interviews, the defendant informed the police that he lived in Springfield, Massachusetts, but, at the time the victim had gone missing, he had been staying at his girlfriend's residence on Dexter Street in Hartford. He also told the police that, on October 8, 1987, he had gone to work at an insurance company in Simsbury at approximately 6 a.m. and had come home around noon. The police later learned from his employer, however, that he had not reported to work that day. The defendant later stated that he had not gone to work that day because he was feeling sick to his stomach. The defendant explained that he had been parked near the funeral home because he had given two people a ride from Massachusetts to Hartford, although he did not know their names. He further explained to the police that he had been visiting a man named Juan who lived in Hartford. Despite these interviews, the investigation into the victim's death went cold.

Twenty-one years later, the police reinitiated their investigation and, on December 5, 2008, arrested the defendant for the victim's murder. The state charged the defendant with one count of murder in violation of § 53a-54a. The case was tried to a jury, which subsequently returned a verdict of guilty. The trial court rendered a judgment of conviction in accordance with the jury's verdict and sentenced the defendant to sixty years of imprisonment to be served consecutively to a life sentence that he was already serving in connection with an unrelated case. This appeal followed. See footnote 1 of this opinion. Additional relevant facts will be set forth as necessary.

I

We begin with the defendant's claim that the trial court improperly failed to strike certain testimony from a witness who stated that guidance from God, rather than his own recollection, had led him to identify the perpetrator in a photographic array, after the court ruled, in the jury's absence, that this testimony was inadmissible.

The following additional facts and procedural history are relevant to our resolution of this claim. At the defendant's trial, Diaz testified about what he had seen on the morning of October 8, 1987. Diaz testified that he had not seen the face of the driver of the yellow Datsun that morning because he had observed the driver from the side only. He was, however, able to describe the driver as having a light complexion, a mustache, and curly brown or black hair. The state then showed Diaz eight photographs, which were marked as an exhibit for identification purposes, and Diaz confirmed that the police had shown him those photographs in 2008 while questioning him about what he had seen on October 8, 1987. The following colloquy then occurred:

"[The Prosecutor]: Based on reviewing the pictures . . . were you able to identify anyone in that set of pictures?

"[The Witness]: Look, it was the same that I told them. I sat down, they brought the album, and I'm a Christian, I asked God for direction. When I looked at the pictures, my eyesight was brought to this one picture and I started crying and the officer asked me what was going [on], and I told him I asked God for direction. And I pointed to picture number [five].

"[Defense Counsel]: Your Honor . . . I would object. I don't know that I have ever had an identification based upon direction from God, and I'm going to object to

this entire line of inquiry or any identification that this witness may have made based on divine intervention. Your Honor, it's clear that there are practices and procedures that need to be followed, and this is not one of them.

"The Court: The question has been answered. Fair to be cross-examined, I suppose. Yes. Do you wish to be heard or do you want the jury excused?

"[Defense Counsel]: I would ask that they be excused, Your Honor."

The trial court then excused the jury, and the state sought to rehabilitate Diaz' identification as being based in part on his recollection of seeing the driver, but Diaz repeatedly stated that his identification was based on a divine message, and not his own recollection. The defendant did not ask Diaz any questions, but reiterated his objection that the testimony was improper and prejudicial. After further argument and discussion, the court ruled, in the jury's absence, as follows: "[The witness] says that [his] identification [was] not based on recollection of the appearance of the person. Under those circumstances, I don't feel I can allow it." The court then took a brief recess during which it requested to see both attorneys in chambers. After the recess, the jury returned, and the state finished its examination of Diaz without further discussion of the identification of the driver. The court did not inform the jury that it had sustained the defendant's objection, and the defendant did not ask the court to notify the jury or to instruct the jury to disregard Diaz' answer.

Two days later, on February 25, 2015, the trial court noted the following outside the presence of the jury: "We did have a conversation this morning in chambers regarding the identification or lack of identification by [Diaz], and I did indicate that that could be addressed in the charge to the jury, *but if there was anything*

you felt should be addressed preliminarily, just let me know, that is, prior to the charging conference. My concern was and I'm not sure that the objection was sustained in the presence of the jury." (Emphasis added.) The defendant did not object to the procedure proposed by the court or ask that the issue be remedied prior to the jury charge. To the contrary, defense counsel indicated that he was working on language for the court to use in its jury instruction.

Thereafter, on March 2, 2015, the defendant filed a written request to charge regarding Diaz' testimony, in which the defendant argued that, although he had "objected to [Diaz'] testimony and no specific identification of the defendant was made by [Diaz] in front of the jury, [the] defendant believes that some instruction is needed so that the jury understands that the [c]ourt sustained [the] objection to the proffered testimony." The defendant's proposed instruction provided in relevant part: "Since the [c]ourt sustained this objection, whatever you may have heard of [Diaz'] answer at that time, you must disregard that testimony and it is not to be considered by you at any time during your deliberations on the evidence in this case."

On March 3, 2015, during a charging conference, the parties indicated that they had an opportunity to review the trial court's proposed jury instructions. The court's instruction with respect to Diaz' improper testimony was substantially similar to the defendant's proposed instruction, providing in relevant part: "Accordingly because the Court sustained this objection, whatever you may have heard of [Diaz'] answers *after* [*the defendant*] *objected* must be disregarded and not be considered by you at any time during your deliberations." (Emphasis added.) The defendant indicated no objection to this instruction. Specifically, when the court asked whether this instruction was "okay," defense counsel responded, "[r]ight."

On March 4, 2015, at a second charging conference, the defendant raised issues with respect to some of the trial court's instructions regarding eyewitness identification,[2] but did not object to the proposed instruction regarding Diaz' testimony. As such, during its final charge to the jury, the court gave the instruction regarding Diaz' testimony that the parties had previously approved. Additionally, at the defendant's request, the court instructed the jury that "there was no direct evidence identifying the defendant as the perpetrator of the murder of [the victim]."

On appeal, the defendant claims that the trial court should have stricken Diaz' testimony that God had directed him to identify the perpetrator in the photographic array.[3] Specifically, the defendant contends

[2] Specifically, the defendant objected to the jury instruction regarding an identification made by another witness, Frederick Quinones. The defendant claimed that, because Quinones' identification was based on familiarity with the defendant, the word "suspect" in the instruction should be changed to "subject." The court agreed to the change. The defendant also objected to the use of the phrase "eye witness," because he believed that it conveyed to the jury that the witness had seen the defendant at the crime scene. The court agreed to omit the word "eye." The defendant made no other objections to the jury instructions.

[3] The defendant also argues that it is not necessary to move to strike evidence after a party has objected to it in order to preserve a claim of error. The defendant is correct that, ordinarily, when an objection to a question is sustained in the presence of the jury, the objecting party is not required to move to strike an answer given by the witness prior to that objection. *Hackenson* v. *Waterbury*, 124 Conn. 679, 684, 2 A.2d 215 (1938); see also *State* v. *Lewis*, 303 Conn. 760, 779, 36 A.3d 670 (2012). Specifically, in *Hackenson*, this court explained that "[t]here is authority that where the court in sustaining an objection to the question has not directed the jury not to consider the reply given, a motion to strike it out is essential to its proper elimination. . . . We adopt, however, a rule . . . which is less technical, yet sufficient for the ample protection of the parties' rights. . . . The only basis upon which [a party] can claim error in the ruling of the trial court in setting aside the verdict is that the jury could, in the absence of a motion to strike out, properly consider the testimony. That is not the law in this jurisdiction." (Citations omitted.) *Hackenson* v. *Waterbury*, supra, 684. Recently, we observed that, under *Hackenson*, once a court sustains an objection to a question in the presence of the jury, the witness' response may not be considered even in the absence of a motion to strike. *State* v.

that, because the court sustained the defendant's objection outside the presence of the jury, Diaz' improper testimony remained in the case, and the jury could therefore have drawn reasonable inferences from it. Moreover, the defendant contends that the court's instruction to the jury regarding Diaz' improper testimony did not adequately remedy the issue. Specifically, the defendant takes issue with the portion of the instruction that directed the jury to disregard testimony given by Diaz *after* the objection. Given that the improper testimony occurred prior to the objection, the defendant contends that the instruction improperly directed the jury to disregard testimony given after the objection, not prior to it.

In response, the state argues, inter alia, that the defendant's claim is unreviewable because he waived this claim before the trial court.[4] Specifically, the state contends that not only did the defendant fail to request that the court notify the jury that it had sustained the

Lewis, supra, 779. This case presents an unusual situation in which the jury was excused at the defendant's request prior to the court's ruling on the objection. Outside the presence of the jury, the court sustained the defendant's objection and did not notify the jury until giving the jury instructions. We need not reach the defendant's claim that he was not required to move to strike the improper testimony because we conclude that, by agreeing with the trial court's proposed course of action, he waived any argument with respect to the trial court's remedy for Diaz' improper testimony.

[4] The state also argues that the defendant is not aggrieved by the trial court's ruling because he prevailed on his objection and, additionally, received the jury instruction that he sought. The state contends that, because the defendant is not aggrieved, his claim is not justiciable. This contention can be disposed of quickly. Questions of justiciability implicate this court's subject matter jurisdiction. *Statewide Grievance Committee* v. *Burton*, 282 Conn. 1, 6, 917 A.2d 966 (2007). In the present case, the defendant was found guilty, and, although the trial court sustained his objection, it did so outside the presence of the jury. The defendant argues on appeal that he did not obtain an adequate remedy for Diaz' improper testimony. As such, we conclude that the defendant is aggrieved for purposes of appeal. Cf. *In re Allison G.*, 276 Conn. 146, 158, 883 A.2d 1226 (2005) (noting, in different context, that prevailing party can be aggrieved "if the relief awarded to that party falls short of the relief sought" [internal quotation marks omitted]).

objection or strike Diaz' improper testimony, but he also explicitly approved of the court's proposed remedy through the issuance of instructions to the jury.

The defendant's claim on appeal ultimately centers on the adequacy of the remedy the trial court implemented to address Diaz' improper testimony. Specifically, the defendant argues that the trial court should have directed the jury to disregard the improper testimony and that the court's subsequent instruction did not remedy the issue because it directed the jury to disregard only testimony given *after* the objection, when the objectionable testimony occurred *prior* to the objection. We conclude that the defendant waived any argument with respect to the remedy fashioned to address Diaz' improper testimony because the defendant expressly approved of the trial court's proposed course of action.

Waiver is the voluntary relinquishment of a known right. See, e.g., *State* v. *Kemah*, 289 Conn. 427, 957 A.2d 852 (2008); *State* v. *Fabricatore*, 281 Conn. 469, 482 n.18, 915 A.2d 872 (2007). To determine whether a party has waived an issue, the court will look to the conduct of the parties. *State* v. *Hampton*, 293 Conn. 435, 449, 978 A.2d 1089 (2009). "[W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.) *State* v. *Foster*, 293 Conn. 327, 337, 977 A.2d 199 (2009). Likewise, a defendant is not permitted to induce a potentially harmful error at trial and then ambush the trial court with that claim on appeal. *State* v. *Fabricatore*, supra, 482.

In the present case, the defendant approved of the court's proposed course of action on at least two occasions. First, on February 25, 2015, when the court asked whether either party believed that the issue should be

addressed prior to the jury instructions, defense counsel expressed satisfaction with the court's proposed remedy by replying that he had been working on language for the instruction. Specifically, the court offered to intervene prior to the jury charge should a party request it. The defendant made no such request. Second, on March 3, 2015, the defendant affirmatively agreed with the court's proposed jury instruction during the first charging conference. Accordingly, given that the defendant never requested earlier action from the trial court, affirmatively indicated that the court could remedy the issue through the final charge to the jury, and then ultimately approved of the court's proposed instructions, the defendant expressly waived any claim that the court inadequately addressed Diaz' improper testimony.[5]

II

We next turn to the defendant's claim that the trial court improperly admitted testimony that the victim's

[5] Although the defendant has conceded that, by accepting the court's proposed instruction he "may [be] prevent[ed] . . . from pursuing a claim that the jury instruction was improper," he nevertheless argues that the jury instruction did not cure the evidentiary problem. To the extent that the defendant challenges the jury instruction itself, we conclude that he impliedly waived any such argument under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). Where, as here, "the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83. Here, all of the foregoing criteria were satisfied. During the first charging conference, defense counsel informed the court that he had reviewed the court's proposed jury instruction on the matter and that the defendant had no objection to it. Thus, the defendant waived any claim of instructional error. See *State* v. *Bellamy*, 323 Conn. 400, 404–410, 147 A.3d 655 (2016) (holding that defendant impliedly waived claim that trial court's jury instruction on witness identification was deficient when the defendant was provided copy of proposed jury instructions and indicated that he understood and accepted trial court's proposed identification instruction).

mother had heard that the defendant was connected to the victim's disappearance. The following additional facts and procedural history are relevant to our resolution of this claim. During direct examination by the state, the victim's mother testified that she knew the defendant through her sister-in-law and that, although she had known him for many years, she did not know him well. The victim's mother further testified that the defendant was familiar with her children because he had once lived in the same apartment building. Although the defendant was not still living in that building in October, 1987, the victim's mother testified that she would occasionally see the defendant driving his Datsun in the neighborhood. The following exchange then occurred:

"[The Prosecutor]: Now, during that month, from when [the victim] went missing until her body [was] found, did you ever hear anything about [the defendant] as it related to the disappearance of [the victim]?

"[Defense Counsel]: Objection, Your Honor, as to the relevance of what they heard about that.

"[The Prosecutor]: I would claim its relevance, Your Honor, and I'm asking just yes or no.

"The Court: Yes or no, I allow that. Objection is overruled.

"[The Prosecutor]: During that month did you ever hear any information about [the defendant] as it related to [the victim's] disappearing?

"[The Witness]: Yes, sir.

"[The Prosecutor]: With that information, did you ever tell the police about that information?

"[The Witness]: Yes."

The defendant did not raise any additional objections and did not cross-examine the victim's mother.

On appeal, the defendant claims that the testimony indicating that the victim's mother had heard that the defendant was connected to the victim's disappearance constituted hearsay. In particular, the defendant contends that, because the victim's mother testified as to the content of a statement made by a third party that was offered to establish the truth of the matter asserted, it constituted hearsay. Finally, the defendant claims that by ruling that the victim's mother could testify with a yes or no answer, the court treated the objection as being based on hearsay. In response, the state argues, inter alia, that the defendant's hearsay claim is unpreserved. Specifically, the state argues that the claim is not reviewable because the defendant objected on the basis of relevancy and not hearsay. We agree with the state and conclude that, because the defendant did not object on the basis of hearsay before the trial court, he is foreclosed from doing so on appeal.[6]

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an eviden-

[6] We note that defendant's brief also asserts that the challenged testimony lacked probative value. Although the defendant's relevancy objection arguably includes such an argument, we conclude that this claim is inadequately briefed. We have explained that "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016). Here, the defendant devotes only one paragraph to a general argument that rumors are inadmissible because they lack probative value. The defendant offers no analysis on this point beyond a string citation to precedent from other states. Consequently, we decline to reach the defendant's claim regarding the probative value of the challenged testimony, to the extent that it is subsumed in the relevancy objection at trial, because that claim is inadequately briefed on appeal.

tiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . *Once counsel states the authority and ground of* [*the*] *objection, any appeal will be limited to the ground asserted.*" (Emphasis added; internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013); see also Practice Book § 67-4 (3). We have explained that these requirements are not simply formalities. "[A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). Thus, because the essence of preservation is fair notice to the trial court, "the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." *State* v. *Jorge P.*, supra, 754.

At trial, defense counsel objected to the prosecution's question to the victim's mother, stating "[o]bjection, Your Honor, as to the *relevance* of what they heard about that." (Emphasis added.) The prosecutor responded: "I would claim its *relevance* . . . ." (Emphasis added.) The court then overruled the defendant's relevancy objection. The defendant never expounded upon this objection and never raised another objection, based on hearsay or otherwise. The defendant's attempt, on appeal, to characterize the relevancy objec-

tion at trial as one based on hearsay finds no support in the record. Pursuant to Practice Book § 5-2, "[a]ny party intending to raise any question of law which may be the subject of an appeal *must . . . state the question distinctly* to the judicial authority on the record . . . ." (Emphasis added.) Not only did the defendant fail to raise the issue of hearsay "distinctly," he failed to raise it entirely. Given that the defendant objected only to the relevance of the prosecution's question, the trial court had no notice or opportunity to consider the issue of hearsay. Accordingly, we conclude that the defendant's hearsay claim is unpreserved.

The judgment is affirmed.

In this opinion ROGERS, C. J., and EVELEIGH, McDONALD and VERTEFEUILLE, Js., concurred.

D'AURIA, J., with whom PALMER, J., joins, concurring in the judgment. I concur in this court's judgment affirming the conviction of the defendant, Pedro L. Miranda, of one count of murder in violation of General Statutes § 53a-54a. I agree fully with part I of that opinion. As to part II, I would not hold that the defendant failed to adequately preserve the claim that the trial court improperly permitted the victim's mother to testify that she had heard that the defendant was connected to the victim's disappearance. *Mather* v. *Griffin Hospital*, 207 Conn. 125, 138, 540 A.2d 666 (1988) (claim "distinctly raised" although "not well articulated"); see also *Fadner* v. *Commissioner of Revenue Services*, 281 Conn. 719, 729 n.12, 917 A.2d 540 (2007) (court will address issues " 'functionally' " raised in trial court). I believe that reviewing his claim would neither offend this court's preservation principles nor ambush either the trial court or the opposing party. I also do not agree that the defendant failed to adequately brief any part of his argument as to this claim. Because the defendant

has not demonstrated that the scant evidence elicited from the victim's mother by the state's question resulted in harm, however, I concur in the majority's decision to affirm the trial court's judgment. See *State* v. *Urbanowski*, 327 Conn. 169, 172, 172 A.3d 201 (2017) (affirming judgment without reaching merits of defendant's evidentiary claim because lack of any demonstrated harm).

CORSAIR SPECIAL SITUATIONS FUND, L.P. *v.* ENGINEERED FRAMING SYSTEMS, INC., ET AL.
(SC 19953)

Rogers, C. J., and Palmer, McDonald, Robinson and D'Auria, Js.

Syllabus

Pursuant to statute (§ 52-261 [a] [F]), a state marshal is entitled to a fee of 15 percent of the amount of the execution "for the levy of an execution, when the money is actually collected and paid over, or the debt . . . is secured by the officer . . . ."

The plaintiff obtained a judgment of more than $5 million against four defendants in a federal district court in Maryland and, in attempting to enforce that judgment, discovered that one of the defendant judgment debtors, D, had signed a contract with a third party, N Co., from Connecticut, entitling D to the payment of more than $3 million. On the basis of that information, the plaintiff obtained a writ of execution to enforce its judgment in the United States District Court for the District of Connecticut that required N Co. to deliver to the marshal the amount of the debt it owed to D. The plaintiff engaged a Connecticut state marshal, P, to serve the writ on N Co. Although P timely and properly served the writ, N Co. ignored the writ and paid D and another creditor $2,308,504. The plaintiff obtained an order from the District Court directing N Co. to turn over $2,308,504 to the plaintiff. N Co. appealed from that order, which was upheld by the Second Circuit Court of Appeals. When the plaintiff and P could not reach an agreement on the amount of P's fee for serving the writ, P intervened in the plaintiff's action, claiming that, pursuant to § 52-261, he was entitled to a fee of 15 percent of the amount of the execution, not the $30 flat fee the plaintiff claimed that P was due. Reasoning that the levy of an execution under § 52-261

was established through P's constructive seizure of the money via the properly executed writ, the District Court ordered the plaintiff to pay P a fee of $346,275.60. The plaintiff appealed to the Second Circuit, which determined that § 52-261 was ambiguous as applied to the facts of the present case and certified to this court the questions of whether P was entitled to a 15 percent fee under § 52-261 (a) (F) and whether, in making that determination, it matters that the writ was ignored and that the money that was the subject of the writ was procured only after the plaintiff, not P, pursued further enforcement proceedings in the courts. *Held* that, because P levied the execution, he was entitled to a 15 percent fee under the terms of § 52-261 (a) (F) even though the money was not paid directly to P but was procured only after the plaintiff pursued further enforcement proceedings: after determining that the statutory text of § 52-261 (a) (F) was ambiguous, this court applied settled rules of statutory construction, rules of grammar and common sense, and looked to the genealogy of the statute in concluding that the phrase "by the officer" in § 52-261 (a) (F) applied only to the condition that the debt be secured, and in concluding that, when an execution is levied on a debt owed that is in the possession of a third party, constructive seizure is effectuated when the writ of execution is properly served on, and the demand of payment is made to, the third party; the District Court found that P had properly served the writ on N Co., as a legal consequence of N Co.'s knowing violation of that writ in paying the debt to D and another creditor rather than directly to P, the plaintiff had the right to seek a turnover order from the District Court that resulted in N Co.'s obligation to pay more than $2 million to the plaintiff, P's proper service and demand were essential predicates to the recovery of that debt, and, as a result of the writ of execution and subsequent turnover order premised on N Co.'s violation of the writ, the money referred to in the writ was collected from N Co. and paid over to the plaintiff, and, thus, all of the statutory predicates to P's entitlement to the 15 percent fee were satisfied.

Argued October 20, 2017—officially released January 2, 2018

Procedural History

Application for a writ of execution to enforce a judgment rendered against the defendants in the United States District Court for the District of Maryland, brought to the United States District Court for the District of Connecticut, where the court, *Hall*, *J.*, granted the plaintiff's motion for a turnover order for funds paid to or on behalf of the defendant EFS Structures, Inc.; thereafter, the court, *Hall*, *J.*, granted the motion to intervene and for fees filed by Mark A. Pesiri, and the

plaintiff appealed to the United States Court of Appeals for the Second Circuit, *Sack* and *Raggi*, *Js.*, with *Leval*, *J.*, concurring, which certified certain questions of law to this court concerning whether the intervenor was entitled to certain fees.

Matthew S. Sturtz, pro hac vice, with whom were *Paul G. Ryan* and, on the brief, *Gregory J. Spaun*, for the appellant (plaintiff).

Neal L. Moskow, with whom, on the brief, was *Deborah M. Garskof*, for the appellee (intervenor).

Opinion

McDONALD, J. The United States Court of Appeals for the Second Circuit sought this court's advice as to whether a Connecticut state marshal is entitled to the statutory fee of 15 percent on the amount of the execution "for the levy of an execution, when the money is actually collected and paid over, or the debt . . . is secured by the officer"; General Statutes § 52-261 (a) (F);[1] when the marshal properly served the writ of execution on a third party holding a debt owed to the judgment debtor, but the judgment creditor received money from the third party only after a court issued a turnover order.

Pursuant to General Statutes § 51-199b (d), we accepted certification on the following questions from the Second Circuit:

"(1) Was [intervenor Connecticut State] Marshal [Mark A.] Pesiri entitled to a [15] percent fee under the terms of [§ 52-261 (a) (F)]?

[1] Section 52-261 has been amended twice since the revision in effect at the time of the underlying proceeding. See, e.g., Public Acts 2016, No. 16-64, §1. General Statutes (Rev. to 2013) § 52-261 (a) (6) was subsequently codified at subsection (a) (F). As there is no substantive difference between these versions of the relevant provisions for purposes of the certified issues, we refer to the current revision.

"(2) In answering the first question, does it matter that the writ was ignored and that the monies that were the subject of the writ were procured only after the judgment creditor, not the marshal, pursued further enforcement proceedings in the courts?" *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, 863 F.3d 176, 183 (2d Cir. 2017).

We answer the first question: Yes. We answer the second question: No.

The Second Circuit's order sets forth the following facts that provide the backdrop to these issues. In the United States District Court for the District of Maryland, the plaintiff, Corsair Special Situations Fund, L.P., obtained a judgment of more than $5 million jointly and severally against four defendants (judgment debtors). See id., 177. While attempting to enforce its judgment, Corsair learned that one of the judgment debtors had signed a contract with a Connecticut based third party, National Resources,[2] entitling that judgment debtor to a payment of more than $3 million. See id., 178. On the basis of that information, Corsair caused its judgment to be certified for registration in another district and thereafter enrolled its judgment in the United States District Court for the District of Connecticut, which issued a writ of execution. See id.

Corsair then engaged Pesiri, a Connecticut state marshal, to serve the writ of execution on National Resources. See id. That writ stated in relevant part: " 'Pursuant to [General Statutes] § 52-356a, you are

[2] In one of several decisions in the underlying action, the United States District Court for the District of Connecticut found that National Resources is not itself a legal entity, but instead effectively functions as the trade name of a cluster of companies, including certain limited liability corporations named in the writ of execution. See *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, Docket No. 3:11-CV-1980 (JCH), 2013 WL 5423677, *2 (D. Conn. September 26, 2013), aff'd, 595 Fed. Appx. 40 (2d Cir. 2014).

required to deliver to the [marshal] property in your possession owned by the judgment debtor or pay to the marshal the amount of a debt owed by you to the judgment debtor, provided, if the debt owed by you is not yet payable, payment shall be made to the marshal when the debt becomes due within four months after the date of issuance of this execution.' " Id.

Pesiri timely and properly served the writ on National Resources on September 30, 2011. National Resources not only ignored the writ, but, between October 3, 2011, and November 25, 2012, it paid Corsair's judgment debtor and another of its creditors $2,308,504. See id. Following protracted postjudgment discovery, Corsair obtained an order from the District Court commanding National Resources to turn over $2,308,504 to Corsair. See id. National Resources appealed from the order, which was affirmed by the Second Circuit. See *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, 595 Fed. Appx. 40 (2d Cir. 2014).

As the dispute between Corsair and National Resources was drawing to a close, a dispute arose between Corsair and Pesiri regarding Pesiri's fee. Pesiri moved to intervene in the action, claiming a right to the statutory fees under § 52-261 (a) (F) for levying an execution. See *Corsair Special Situation Funds, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 863 F.3d 178. Pesiri claimed that Corsair had expressed an intention to pay him only the flat fee for service of process, when he was owed 15 percent of the amount of the execution that had been paid to Corsair. See id., 179. Thus, Corsair claimed Pesiri was owed $30, plus mileage, whereas Pesiri claimed that he was owed $346,275.60. The District Court granted Pesiri's motion to intervene and ruled in his favor, ordering Corsair to pay Pesiri $346,275.60 in fees. See id. The court reasoned that the "levy of an execution" under § 52-261 was established through Pesiri's constructive seizure

of the money by way of the properly executed writ. See id.

Corsair appealed from the order to the Second Circuit. That court examined the few Connecticut cases addressing this subject, none of which directly addressed the particulars of the present case, surveyed the statutory scheme, and determined that § 52-261 is ambiguous as applied to the facts of the present case. See id., 179–82. Two members of the panel viewed the term "levy" to be ambiguous as to whether it requires an actual or constructive seizure of the money/debt. See id., 182. They were troubled by the large fee in relation to Pesiri's efforts and by the prospect that the District Court's construction could "encourage a levying officer to do no more than serve a writ of execution with the hope that this will be credited as the 'levy of an execution' and rewarded accordingly." Id. A third member of the panel agreed with the District Court's construction of "levy of an execution" but found ambiguity elsewhere. That judge questioned whether the subsequent phrase in § 52-261 (a) (F), requiring action "by the officer," might modify both of the alternative conditions precedent to payment of the fee. See id., 186 (Leval, J., concurring). Accordingly, the Second Circuit certified the two questions to this court.

To answer those questions, we begin with the statutory text. Section 52-261 governs the payment of fees and expenses of officers serving process or performing other duties. After providing flat fees for process served, the statute provides in relevant part: "The following fees shall be allowed and paid . . . for the levy of an execution, when the money is actually collected and paid over, or the debt or a portion of the debt is secured by the officer, fifteen per cent on the amount of the execution, provided the minimum fee for such execution shall be thirty dollars . . . ." General Statutes § 52-261 (a) (F). We agree with the Second Circuit's conclu-

sion that the statute is ambiguous as applied to the facts of the present case. Therefore, we are not constrained in our review by the plain meaning rule codified in General Statutes § 1-2z. Nonetheless, our objective is to ascertain the legislature's intention, applying settled rules of statutory construction. See, e.g., *Lieberman* v. *Aronow*, 319 Conn. 748, 756–57, 127 A.3d 970 (2015); *In re Tyriq T.*, 313 Conn. 99, 104–105, 96 A.3d 494 (2014).

We begin with the meaning of the phrase "levy of an execution." As our Appellate Court previously has recognized; see *Nemeth* v. *Gun Rack, Ltd.*, 38 Conn. App. 44, 52–53, 659 A.2d 722 (1995); it is generally accepted that a levy of an execution may be satisfied by a constructive seizure of the property that is the subject of the execution. See 30 Am. Jur. 2d 202, Executions and Enforcement of Judgments § 192 (2005) ("A levy on personal property is generally defined as a seizure of the property. Thus, in most jurisdictions, it is essential to the completion of a levy of execution upon personal property that there be a seizure, either actual or constructive, of the property." [Footnote omitted.]); Ballentine's Law Dictionary (3d Ed. 1969) p. 728 ("At common law a levy on goods consisted of an officer's entering the premises where they were and either leaving an assistant in charge of them or removing them after taking an inventory. Today courts differ as to what is a valid levy, but by the weight of authority there must be an actual or constructive seizure of the goods.").

What constitutes a constructive seizure under our law depends on the circumstances, i.e., the nature of what is to be seized and from whom it is to be seized. See General Statutes § 52-356a (a) (setting forth procedures for execution against nonexempt personal property and levying officer's responsibilities).[3] Those circumstances

[3] General Statutes § 52-356a (a) provides in relevant part: "(2) The property execution shall require a proper levying officer to enforce the money judgment and shall state the names and last-known addresses of the judgment creditor and judgment debtor, the court in which and the date on which

dictate the levying officer's authority, set forth in the writ of execution. When levying an execution on debt owed that is in the possession of a third party, constructive seizure is effectuated when the writ of execution is properly served on, and the demand of payment made to, the third party, provided that the debt has or will mature within the statutory term. See General Statutes § 52-356a (a) (4) (B). Compliance with such conditions establishes that the marshal has undertaken all of the measures legally available to the marshal to levy the execution. Cf. General Statutes § 52-356a (a) (4) (A) (requiring levying officer, upon failure of *judgment debtor* to make immediate payment upon demand, to levy on and take possession of nonexempt personal

the money judgment was rendered, the original amount of the money judgment and the amount due thereon, and any information which the judgment creditor considers necessary or appropriate to identify the judgment debtor. The property execution shall notify any person served therewith that the judgment debtor's nonexempt personal property is subject to levy, seizure and sale by the levying officer pursuant to the execution . . . .

"(3) A property execution shall be returned to court within four months after issuance. . . .

"(4) The levying officer shall personally serve a copy of the execution on the judgment debtor and make demand for payment by the judgment debtor of all sums due under the money judgment. On failure of the judgment debtor to make immediate payment, the levying officer shall levy on nonexempt personal property of the judgment debtor, other than debts due from a banking institution or earnings, sufficient to satisfy the judgment, as follows:

"(A) If such nonexempt personal property is in the possession of the judgment debtor, the levying officer shall take such property into his possession as is accessible without breach of the peace;

"(B) With respect to a judgment debtor who is not a natural person, if such personal property, including any debt owed, is in the possession of a third person, the levying officer shall serve that person with a copy of the execution and that person shall forthwith deliver the property or pay the amount of the debt due or payable to the levying officer, provided, if the debt is not yet payable, payment shall be made when the debt matures if within four months after issuance of the execution . . . .

"(5) Levy under this section on property held by, or a debt due from, a third person shall bar an action for such property against the third person provided the third person acted in compliance with the execution. . . ." (Emphasis added.)

property in possession of judgment debtor if accessible without breach of peace). By so doing, the marshal has exposed the third party to legal consequences for noncompliance with the writ. See General Statutes § 52-365a (a) (5) (recognizing right of action against third party); see also 30 Am. Jur. 2d 573, Executions § 221 (1967) ("[g]enerally, it may be stated that a levy under a writ of execution to enforce a judgment for money is an act of dominion over specific property by an authorized officer of the court . . . which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his judgment creditor, to the exclusion of others whose rights are inferior").

The proper service of the writ of execution alone, however, does not entitle the marshal to the statutory commission. Proper service of the writ of execution entitles the marshal to a statutory flat fee. Compare General Statutes § 52-261 (a) (1) and (2) (providing $30 and $40 fee, respectively, for process served). The right to the commission fee accrues only after either of two conditions is satisfied: "when the money is actually collected and paid over, or the debt or a portion of the debt is secured by the officer . . . ." General Statutes § 52-261 (a) (F). We therefore turn to the question of whether the phrase "by the officer" modifies the former, as well as the latter, condition.

Construing the phrase "by the officer" to apply only to the latter condition is supported by rules of grammar, the genealogy of the statute, and simple common sense. Under the last antecedent rule, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." (Footnote omitted; internal quotation marks omitted.) 2A N. Singer & J. Singer, Sutherland

Statutory Construction (7th Ed. 2007) § 47:33, pp. 487–89; see, e.g., *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 786, 2 A.3d 823 (2010) (applying rule); *LaProvidenza* v. *State Employees' Retirement Commission*, 178 Conn. 23, 27, 420 A.2d 905 (1979) (same). There is not clear evidence of a contrary intention in the statutory text, as "collected" may refer to the debtor/third party from whom the money is being collected or the person collecting the money. Moreover, had the legislature intended for "by the officer" to apply to the first condition as well, it could have expressed such an intention more clearly by inserting a comma between the second condition and that phrase (when the money is actually collected and paid over, or the debt or a portion of the debt is secured, by the officer).

Application of the last antecedent rule also is confirmed by a review of predecessors of § 52-261. For more than a century, the statute provided for the fee "when the money is actually collected and paid over, or the debt secured by the officer *to the acceptance of the creditor* . . . ." (Emphasis added.) General Statutes (1902 Rev.) § 4850; accord General Statutes (Rev. to 2001) § 52-261 (a) (6). It is clear that the italicized phrase would not have applied to the first condition. That phrase necessarily reflected that the officer exercises some discretion in the means or manner by which the debt is secured. The officer exercises no similar discretion when money is collected from the third party or debtor; the officer merely accepts the money that is provided.[4] Accordingly, if the phrase "to the acceptance

[4] The only discretion that we can envision a marshal exercising when money has been collected would be the subsequent timing of paying over the money to the creditor. However, for many years, this subject has been addressed by another statute. See General Statutes § 6-35 (requiring state marshal to pay over money collected by marshal within thirty days from date of collection and prescribing interest from date of collection for noncompliance); see also General Statutes (1902 Rev.) § 1761 (same, except interest accrues any time after demand for payment made); Public Acts

of the creditor" did not modify the first condition, then the preceding phrase "by the officer" similarly would not modify that condition. Although the legislature recently excised the phrase "to the acceptance of the creditor" from the statute; Public Acts 2003, No. 03-224, § 10; it gave no indication that this change was intended to expand application of the phrase "by the officer" to the collection of money or that it understood the previous statute to have such a meaning. See 46 H.R. Proc., Pt. 17, 2003 Sess., p. 5443, remarks of Representative Michael P. Lawlor (explaining that proposed changes "will make it easier for the marshals to carry out their responsibilities and for the [State Marshal] Commission to conduct the oversight that is called for under the reforms of a number of years ago").

Finally, common sense dictates that we should not construe the statute to limit the fee to only those circumstances in which the marshal has personally collected the money and paid it over to the creditor, as Corsair suggests. See *Christopher R.* v. *Commissioner of Mental Retardation*, 277 Conn. 594, 608–609, 893 A.2d 431 (2006) ("[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended" [internal quotation marks omitted]). Granted, in the present case, National Resources knowingly disobeyed the writ not only in its failure to pay the money to Pesiri, but also in its transfer of the money levied upon to someone other than Cor-

1984, No. 84-108, § 2 (amending § 6-35 to eliminate demand requirement and prescribe time period for payment before interest accrued). We note that, although § 6-35 governs obligations following the execution of a levy and clearly links the same terms at issue here—"collected" and "paid over"—to actions by the marshal, we are not persuaded that a similar linkage is compelled for purposes of fees under § 52-261 (a) (F). A deadline for payment and a penalty for noncompliance necessarily would apply only when the marshal has personally collected the money because there would be no concern about untimely payment if the money were collected by the court or judgment creditor.

sair. However, Corsair's construction of the statute also would deprive a levying officer of the statutory commission if the third party violated the order in the writ by paying the levied upon funds directly to the creditor instead of the officer, whether mistakenly or intentionally. See, e.g., *Fair Cadillac Oldsmobile Corp.* v. *Allard*, 41 Conn. App. 659, 660, 677 A.2d 462 (1996) (after sheriff levied bank execution, bank paid funds directly to creditor, instead of to sheriff, at direction of creditor);[5] see also *Masayda* v. *Pedroncelli*, Docket No. CV-94-01200878-S, 1998 WL 420779, *1 (Conn. Super. July 20, 1998) (after deputy sheriff served bank execution, judgment debtor paid judgment creditor from source other than bank account). Under Corsair's interpretation of the statutory scheme, the officer would not be entitled to the fee, even though the creditor received the benefit of the officer's service because the third party's obligation to the judgment creditor arose only as a result of the proper service of the writ of execution. Corsair's construction would create an incentive for judgment creditors to circumvent the statutory commission, a process that could inure to the benefit of both creditor and debtor by an agreement to reduce the debt by an amount less than the 15 percent fee in exchange for direct payment.[6] Our courts previously have applied

[5] As that procedure was not relevant to the issue in the case, the Appellate Court noted that it took no position as to its legality or propriety. See *Fair Cadillac Oldsmobile Corp.* v. *Allard*, supra, 41 Conn. App. 660 n.1.

[6] We view this concern to be a more troubling one than the one expressed by two members of the Second Circuit panel that construing "levy of an execution" to mean proper service of the writ under the circumstances of the present case would encourage the marshal "to do no more than serve a writ of execution with the hope that this will be credited as the 'levy of an execution' and rewarded accordingly." *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, supra, 863 F.3d 182. Corsair conceded at oral argument before this court that there was no more that Pesiri lawfully could have done to collect the debt. When the writ authorizes the marshal to take further measures, then he or she will not have levied the execution merely by serving the writ. Moreover, as action by the marshal increases the likelihood of payment, there is still a greater incentive for the marshal to act than to do nothing and take his or her chances.

common sense constructions to the facts of a given case involving the levy of an execution when a possible reading of the statute would have yielded a result that the legislature reasonably could not have intended. See *Preston* v. *Bacon*, 4 Conn. 471, 479–80 (1823) (sheriff entitled to fee when sheriff had substantially performed, and agreement by creditor and debtor's attorney prevented sheriff from completing final action statute required to be entitled to fee);[7] *Nemeth* v. *Gun Rack, Ltd.*, supra, 38 Conn. App. 54–55 (applying expansive interpretation of time limitation for applying for turnover order when facts made it impossible for judgment creditor to commence and complete levy on goods within period prescribed, and creditor had done everything that could reasonably be required under statute). "The unreasonableness of the result obtained by the acceptance of one possible alternative interpretation of an act is a reason for rejecting that interpretation in favor of another which would provide a result that is reasonable." (Internal quotation marks omitted.) *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 407, 780 A.2d 903 (2001).

The requirements that we have articulated were met in the present case. The District Court found that Pesiri had properly served the writ of execution on National Resources. As a legal consequence, when National Resources knowingly violated the writ by paying the debt to the judgment debtor rather than to the marshal,

[7] We note that the fee statute at the time *Preston* was decided expressly referred to the officer's collection of money. See General Statutes (1821 Rev.) tit. 83, § 12 ("[f]or levying and collecting every execution, where the money is actually collected and paid over, or where the debt is secured and satisfied by the officer, to the acceptance of the creditor, when the amount of the execution does not exceed [specified amount], the officer collecting the same, shall be allowed [specified amount]"). Because that condition had not been satisfied in *Preston*, the court looked to other conditions under which the officer could be entitled to the fee for levying the execution. See *Preston* v. *Bacon*, supra, 4 Conn. 479–80. In the absence of legislative history to explain the elimination of such express terms, we assume that the legislature intended to allow for a more expansive reading of the statute.

Corsair had the right to seek a turnover order. That order resulted in National Resources having to pay more than $2 million to Corsair even though National Resources already had paid the judgment debtors. Pesiri's proper service and demand were essential predicates to recovery of that debt, a fact made evident by Corsair's own statements in its application for, and memorandum in support of, the turnover order. Therefore, under the facts of the present case, Pesiri levied the execution.

As a result of the writ of execution and subsequent turnover order premised on the violation of the writ, the money described in the writ of execution was "collected" from National Resources and "paid over" to Corsair. Hence, all of the statutory predicates to entitlement to the statutory commission ultimately were satisfied.

We recognize that Corsair would not have been paid but for its substantial additional efforts, and that Pesiri undertook no further risk or efforts than he would have had the money never been collected from National Resources. However, marshals have exposure to substantial liability for improper or ineffective service of the writ, as such actions may deprive the judgment creditor of the ability to collect on the debt.[8] See General Statutes § 6-30a (a) (requiring state marshals to carry personal liability insurance for damages caused by reason of marshal's tortious acts, including erroneous service of civil papers); General Statutes § 6-32 (a) (requiring marshal to pay double damages for damages

[8] In the context of service of process to commence a civil action, as opposed to service of a writ of execution, the accidental failure of suit statute would avoid liability in most cases. See General Statutes § 52-592 (a) ("[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed . . . the plaintiff . . . may commence a new action, except as provided in subsection (b) of this section, for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment").

arising from marshal's failure to duly and promptly execute and return process); see also *Miller* v. *Egan*, 265 Conn. 301, 329–30, 828 A.2d 549 (2003) (concluding that insurance requirement indicates that liability is marshal's personally, and not liability of state); *Smith* v. *Yale*, 50 Conn. 526, 528 (1883) (action against sheriff for damages arising from his deputy's failure to make timely demand, which resulted in creditor's loss of security previously acquired).

We also recognize that a fee in excess of $300,000 is quite substantial in relation to the services actually performed by Pesiri. However, Corsair conceded at oral argument that it would have been obligated to pay Pesiri that same sum if National Resources had complied with the writ upon being served. Concerns about excessive fees in outlier cases should be directed to the legislature. The legislature could, as it has in other circumstances, set a cap on fees. See, e.g., General Statutes § 52-251c (setting caps on attorney contingency fee agreements); see also, e.g., General Statutes § 37-3a (setting cap on interest rates); General Statutes § 52-572 (a) (setting cap on damages for parent of minor tortfeasor). It would not be appropriate for this court to allow such a concern to dictate an interpretation of the statute, which would govern all executions, not only those for large sums of money.[9]

The answer to the first certified question is: Yes.

The answer to the second certified question is: No.

No costs shall be taxed in this court to any party.

In this opinion the other justices concurred.

[9] According to written testimony from the president of the Connecticut State Marshal's Association, Inc., submitted in support of the 2003 bill proposing to increase the marshal's fee from 10 percent to 15 percent, the vast majority of executions are small and uncollectible, thus often leaving marshals with no commission fees after investing significant time and effort. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 2003 Sess., p. 1964, remarks of Robert S. Miller.