DOMINICK BOCCANFUSO ET AL. *v.* NADER DAGHOGHI ET AL.
(SC 20397)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiff landlords sought to regain possession of certain real property from the defendant tenants on the ground of nonpayment of rent. The parties had executed a commercial lease for the property. The property previously had been used as an automobile sales and repair facility, but the defendants intended to operate a retail rug gallery and a restaurant on the premises. The defendants started making monthly rent payments but stopped approximately five months later. At that time, the defendants had not completed their planned renovations to the premises and had not obtained the certificates of occupancy required to open the businesses. Meanwhile, without informing the defendants, the plaintiffs had been remediating the property of certain environmental contamination in accordance with a stipulated judgment with the Department of Energy and Environmental Protection. After the defendants failed to pay rent for three consecutive months, the plaintiffs served them with a notice to quit, and, when the defendants failed to vacate the premises, the plaintiffs commenced this summary process action. The defendants asserted several special defenses, including equitable nonforfeiture. At trial, two of the defendants testified that the defendants had stopped paying rent because it was the only way they could stay in business and to draw the plaintiffs' attention to their difficulties. The trial court rendered judgment of possession for the plaintiffs, concluding, inter alia, that the equitable nonforfeiture defense did not apply because the defendants had intentionally breached the lease. Specifically, the court rejected the defendants' claims that they had a good faith intent to comply with, and a good faith dispute over the meaning of, the lease. The court found that the defendants' alleged concerns about environmental contamination, which the defendants claimed justified their withholding of rent, were pretextual, and that the defendants' nonpayment actually was motivated by the costs and difficulties arising from the delay in renovating and occupying the premises. The Appellate Court affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court. *Held* that the trial court did not abuse its discretion in rejecting the defendant's equitable nonforfeiture defense, and, accordingly, the Appellate Court properly affirmed the trial court's judgment; because the defendants intentionally withheld

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

rent on pretextual grounds and in the absence of any good faith dispute over the terms of the lease, it was within the trial court's equitable discretion to determine that the defendants acted wilfully in not paying rent and to deny them equitable relief from forfeiture of the premises.

Submitted on briefs May 8—officially released September 30, 2020**

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, and tried to the court, *Rodriguez, J.*; judgment for the plaintiffs, from which the defendants appealed to the Appellate Court; thereafter, the court, *Rodriguez, J.*, issued articulations of its decision; subsequently, the Appellate Court, *Keller*, *Prescott* and *Pellegrino*, *Js.*, affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court. *Affirmed.*

Ryan P. Driscoll filed a brief for the appellants (defendants).

Matthew B. Woods filed a brief for the appellees (plaintiffs).

Opinion

ECKER, J. The issue in this certified appeal is whether the trial court properly rejected the defendants' claim that the doctrine of equitable nonforfeiture should have operated to prevent their eviction in a summary process action for nonpayment of rent under the terms of a commercial lease. The defendants, Nader Daghoghi (Nader), Sassoon Daghoghi (Sassoon), and 940 Post Road East, LLC, doing business as Savoy Rug Gallery, appeal from the judgment of the Appellate Court, which affirmed the trial court's judgment of possession rendered in favor of the plaintiffs, Dominick Boccanfuso (Dominick), Crescienzo Boccanfuso, and Boccanfuso Bros., Inc. (plaintiff corporation). The defendants claim

** September 30, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

that the Appellate Court improperly affirmed the judgment of the trial court denying the defendants equitable relief from forfeiture of their tenancy. We affirm the judgment of the Appellate Court.

I

The following facts[1] and procedural history are relevant to this appeal. The plaintiff corporation owns commercial property located at 936-940 Post Road East in Westport. From 1970 until January 14, 2014, the premises were used as an automotive repair and sales shop. Two underground storage tanks were located on the property: a 2000 gallon tank used to store gasoline and a 330 gallon tank used to store waste oil.

On May 4, 2010, an inspector from the Department of Energy and Environmental Protection (DEEP)[2] conducted a compliance inspection of the 2000 gallon tank. The inspector found that an automatic tank gauging system and probes needed to be installed and that "no annual cathodic protection test [is] being conducted on the tank and associated product line piping." The inspector's report identified nine "potential violations" of state law on the basis of these findings. On July 15, 2010, the DEEP inspector conducted a "[f]ollow-up" compliance audit during which the inspector informed the plaintiffs that the cathodic protection of the tank needed to be tested annually. The inspector's report indicated that one of the plaintiffs "stated [that] he will call [a] contractor and inform me who[m] he selected to [test the cathodic protection]." On March 3, 2011, a second DEEP inspector found that the violations had

[1] The facts as recited are those stipulated to by the parties, those found by the court in its original decision or subsequent articulations, or those the court reasonably could have found.

[2] At that time, the department was named the Department of Environmental Protection. Effective July 1, 2011, the legislature established DEEP as the successor agency to the Department of Environmental Protection. See Public Acts 2011, No. 11-80, § 1. For ease of reference, we refer to the department as DEEP.

not been addressed. The inspector had a conversation with Dominick, during which Dominick stated that he would hire a contractor to test the tank and piping for corrosion protection. The inspector informed Dominick that the tank was in "temporary closure status" until it was either brought into compliance or permanently removed. (Internal quotation marks omitted.) The inspector cited six "potential violations" on the basis of his findings.

On April 27, 2011, the plaintiffs hired Absolute Tank Testing, Inc. (Absolute Tank), to conduct a cathodic protection test of the 2000 gallon tank. Absolute Tank subsequently sent a letter to Dominick on May 1, 2011, advising him that the tank had "passed" the test but that the lines connected to the tank had "fail[ed]" the test. Absolute Tank recommended that the plaintiffs retain a cathodic protection engineer to confirm the readings and make recommendations accordingly. On October 31, 2011, Dominick received a second letter from Absolute Tank advising him that soil samples taken from the area surrounding the 2000 gallon tank contained "detectable concentrations of [Extractable Total Petroleum Hydrocarbons at] 540 parts per million" and that DEEP had been notified.[3]

In March, 2013, Giuseppe Boccanfuso (Giuseppe), Dominick's nephew, removed the 2000 gallon tank. Afterward, Connecticut Tank Removal, Inc. (Connecticut Tank), conducted soil sampling of the area where

[3] Despite these letters and the earlier DEEP inspections of the tank, Dominick testified that he was not aware of any environmental contamination on the premises at the time the parties signed the lease in November, 2013. Dominick explained that, after he received the test results from Absolute Tank, he spoke to an official at DEEP who informed him that the results were not significant and "[didn't] mean a thing in contamination." Dominick testified that he became aware of the contamination only after DEEP issued an order to the plaintiffs in July, 2014, to remediate the contamination. The trial court found that neither the plaintiffs nor the defendants were aware that the premises contained contaminants "above action levels" prior to a subsequent order issued by DEEP in July, 2014.

the tank had been located. The sample "indicate[d] elevated levels of contaminants . . . ." Approximately one year later, in March or April of 2014, Giuseppe removed the 330 gallon tank, as well. Giuseppe was not licensed to remove these tanks, and neither he nor the plaintiffs notified DEEP of their removal.

Meanwhile, in 2012, the parties began discussing a potential lease of the premises and the defendants' intention to operate a retail rug gallery and a Subway sandwich restaurant thereon. The parties agreed that the defendants would make significant renovations to the premises in preparation for operating these businesses. To undertake these renovations, the defendants were required to obtain building permits and certificates of occupancy for each business. At some point during the discussions over the proposed lease, Nader asked Dominick whether any environmental contamination was present on the property. Nader and his brother Sassoon had experienced environmental issues in the past with a different property that, like the premises at issue, also had been an automobile repair business, and they wanted to ensure there would be no similar problems with the leased premises. Dominick did not inform Nader of the presence of the tanks, the results of the DEEP inspections, the testing performed by Absolute Tank, or any potential contamination on the site.[4]

Richard H. Girouard, Sr., the property manager for the plaintiffs, served as the leasing agent for the premises. Girouard drafted and negotiated the terms of the lease on behalf of the plaintiffs. In addition, distinct from his role as the plaintiffs' leasing agent, Girouard offered to consult with the defendants regarding the renovation

[4] Dominick's response to Nader's inquiry was in dispute at trial. Nader testified that Dominick told him that "[t]here was no contamination, there was no trace of any violations whatsoever. . . . There [were] never any violations." Dominick testified that he told Nader, "if this property is contaminated, [the defendants will] take care of all the contamination . . . ."

and permitting of the premises. Prior to the execution of the lease, the defendants and Girouard memorialized, in a letter dated October 29, 2013, their agreement that Girouard would provide "consulting [and] design services" for the renovations and permitting process.[5] These services included "[a]ssist[ing] [the] owners[6] in overseeing demolition [and] renovation of [the premises]," "[s]chedul[ing] and oversee[ing] necessary inspections," facilitating the "[p]ermitting process for [e]ngineering, [b]uilding, [z]oning [and] [f]ire [d]epartments," and "[p]repar[ing] for permits, inspections, etc." (Footnote added.) The defendants agreed to pay Girouard $22,500 for these services.

On November 22, 2013, the parties entered into a lease for the premises. The term of the lease was for five years, with an option to extend for five additional five year terms. Under the lease, the defendants would assume "the sole responsibility for all expenses and costs associated with the [p]remises . . . ." The lease provided, however, that the plaintiffs were "responsible for any environmental issues which may arise with the [premises]." The monthly rent was $16,388, payment of which would commence on the earlier of (1) the date on which the defendants opened for business, or (2) the 180th day after a fully executed lease was delivered to the defendants.

After the execution of the lease, the defendants began preparations to renovate the premises. In December, 2013, Girouard provided renovation plans to the defendants, which they approved. Girouard also solicited bids from prospective contractors for the renovation project. As work on the renovations progressed, Girouard signed applications for the relevant permits and

[5] Girouard printed this letter on stationery with the letterhead "Klein New England." From the testimony adduced at trial, it appears that Klein New England is a sole proprietorship owned by Girouard.

[6] Girouard testified that the term "owners" referred to the defendants. Sassoon testified that he understood the term to refer to the plaintiffs.

had discussions with various officials, including representatives of Westport's planning and zoning, conservation, and engineering departments.

The 180th day following the delivery of the executed lease to the defendants occurred on May 21, 2014. At that point, no building permit for the retail rug gallery or the Subway restaurant had yet been issued. Consequently, no construction renovations had begun. On May 28, 2014, Girouard sent a letter to Nader and Sassoon indicating that the first rent payment was due on June 1, 2014. Thereafter, the plaintiffs agreed to grant the defendants a five week rent concession. In a letter dated June 27, 2014, Girouard informed the defendants that the first rent payment was due by July 10, 2014. Girouard also informed the defendants that the plaintiffs wanted Girouard to "exclusively handle all future lease and building matters and do not want to be called or visited at their residences or place of business." In a letter dated July 1, 2014, the plaintiffs informed the defendants that "[n]o further concessions of any kind will be granted and [the plaintiffs] are fully expecting rental payments to begin July [1]." The defendants made the July rent payment and continued paying rent through November, 2014.

On June 11, 2014, the defendants obtained a building permit for the retail rug gallery portion of the premises. Renovations on that portion of the site began some time in July, 2014. On July 1, 2014, however, DEEP issued an enforcement order finding environmental contamination on the property based on the results of the tests performed by Absolute Tank and Connecticut Tank. The order expressed DEEP's conclusion that "an unpermitted discharge has occurred at the [s]ite, constituting violations of [state regulations and state law]," and ordered the plaintiffs to retain a licensed environmental professional to oversee the remediation of the contamination. The plaintiffs did not notify the defendants of DEEP's order. The plaintiffs addressed the con-

tamination at their own expense, and the property was remediated in accordance with a stipulated judgment that had entered in a separate civil action commenced by DEEP against the plaintiff corporation.

A letter dated August 1, 2014, memorialized a second agreement between Girouard and the defendants for "additional services to be rendered" on the Subway portion of the premises. This letter established that Girouard would procure various approvals and permits, including planning and zoning approval, for modifications made to the previously approved building plans. Girouard would also "[o]btain planning [and] zoning approval for retail food use." In exchange, the defendants would pay Girouard an additional $9000.

On September 15, 2014, the defendants obtained a building permit for the Subway portion of the premises. The defendants continued to pay monthly rent through November, 2014, but stopped paying rent in December. At that point, the renovations of the premises remained incomplete, and the defendants, through Girouard, still had not yet obtained certificates of occupancy for either the retail rug gallery or the Subway portions of the premises. The defendants also failed to pay rent in January and February, 2015. On January 7, 2015, the plaintiffs served a notice to quit on Sassoon, thereby terminating the lease.

Despite the notice to quit, the defendants did not vacate the premises. Renovations continued, and the defendants obtained a certificate of occupancy for the rug gallery portion of the premises in February, 2015. They opened the rug gallery for business on March 1, 2015. Also in March, the defendants began making monthly use and occupancy payments to the plaintiffs in the amount of $16,338 per month. They obtained a certificate of occupancy for the Subway portion of the premises on June 5, 2015.

The plaintiffs initiated this summary process action after the defendants did not vacate the premises by the date specified in the notice to quit. The defendants raised six special defenses in response to the plaintiffs' complaint, including the special defense of equitable nonforfeiture. The parties filed a joint stipulation of facts on May 19, 2015, and a trial occurred over three days. At trial, Nader and Sassoon testified that they decided to stop paying rent for a number of reasons, including that "this was the only way [they] could stay in business," that they "were trying to draw [the plaintiffs'] attention to what [they were] facing," and that they "were fearful [that], if [their franchisor] Subway for any reason [got] involved with this contamination and violations, where would [they] stand?"

The trial court rendered judgement of possession for the plaintiffs. The trial court's written order explained: "The court finds [that] the defendant[s] [have] breached the lease for nonpayment of rent. . . . The elements necessary to sustain the defense of equitable nonforfeiture do not exist in this case because the defendant[s] caused the breach intentionally. That finding alone negates any finding of equitable nonforfeiture." The defendants appealed to the Appellate Court. The defendants filed a motion for articulation, seeking, among other things, clarification of the factual basis for the trial court's determination that they had failed to meet their burden of proof on their special defense of equitable nonforfeiture. The motion for articulation included a request that the trial court articulate whether the court considered evidence that the defendants' failure to pay rent was accompanied by a good faith intent to comply with the terms of the lease or a good faith dispute over the meaning of the lease. The trial court denied the motion for articulation without comment.

The defendants filed a motion for review of the trial court's denial of their motion for articulation with the

Appellate Court. The Appellate Court granted the motion for review in part, ordering the trial court to, inter alia, "articulate . . . whether it considered the defendants' good faith intent to comply with the lease and their good faith dispute over the meaning of the lease in reaching its decision on the special defense of equitable nonforfeiture and, if so, how its consideration of these matters impacted its decision on the defendants' special defense of equitable nonforfeiture . . . ." The trial court issued an articulation in which it articulated a number of factual findings and explained: "The trial court considered and rejected [the] defendants' claimed good faith intent to comply with the lease and also rejected the defendants' alleged good faith dispute over the meanings of the lease. The defendants were well-advised of the property and were ill-advised by their counsel to withhold rent and breach their obligation to pay rent to the plaintiff[s]."

Unsatisfied, the defendants filed a second motion for review of the trial court's articulation. The Appellate Court thereafter issued a second order for articulation, in terms substantially similar to the first order. The trial court responded with a supplemental articulation. The supplemental articulation stated: "The defendants' alleged concerns about the contamination [were] pretextual, since neither the contamination nor the remediation had any effect on the critical path of the defendants' renovations to the property. The defendants' real issue centers on the delays in renovation and, therefore, in openings of business operations, beyond the rental grace period, thereby obligating them to pay rent under the lease and to their existing landlords. The plaintiffs were not responsible for the delays [under the terms of the lease].

* * *

"The defendants failed to prove that they were justified in withholding the rent because of the contamina-

tion issues affecting the subject premises. . . . [T]he plaintiffs . . . did promptly take steps to address the environmental issues affecting the exterior of the property, as required by [the lease]. . . . The defendants suffered no detriment as a result of the contamination and remediation. They failed to offer any evidence that they ever even complained about the contamination and remediation until they filed their answer in this case on March 24, 2015." In support of its conclusion that the contamination and remediation did not cause any detriment to the defendants, the trial court explained that "[n]either the contamination itself nor the remediation thereof affected the renovation time line of the retail [rug gallery] space or the Subway space; nor did the contamination and remediation affect the operation of either business."

The Appellate Court affirmed the judgment of the trial court. See *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 140, 171, 219 A.3d 400 (2019). The defendants petitioned for certification to appeal to this court, and we granted certification, limited to the following issue: "Did the Appellate Court properly uphold the trial court's judgment in favor of the plaintiffs and the denial of the defendants' special defense of equitable nonforfeiture?" *Boccanfuso* v. *Daghoghi*, 333 Conn. 943, 219 A.3d 373 (2019).

II

On appeal, the defendants claim that the Appellate Court improperly affirmed the trial court's judgment rejecting their special defense of equitable nonforfeiture and granting possession of the premises to the plaintiffs. The defendants argue that their failure to pay rent was not properly considered "wilful," as that term is understood under the doctrine of equitable nonforfeiture. The plaintiffs contend in response that the Appellate Court properly affirmed the trial court's judgment

because the defendants' failure to pay rent was wilful. We agree with the plaintiffs that the trial court did not abuse its discretion when it rejected the defendants' defense of equitable nonforfeiture on the facts of this case and, therefore, affirm the judgment of the Appellate Court.

Our standard of review is clear. "We employ the abuse of discretion standard when reviewing a trial court's decision to exercise its equitable powers. . . . Although we ordinarily are reluctant to interfere with a trial court's equitable discretion . . . we will reverse where we find that a trial court acting as a court of equity could not reasonably have concluded as it did . . . or to prevent abuse or injustice. . . . In reviewing claims of error in the trial court's exercise of discretion in matters of equity, we give great weight to the trial court's decision. . . . [E]very reasonable presumption should be given in favor of its correctness." (Citations omitted; internal quotation marks omitted.) *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 407, 158 A.3d 772 (2017). We remain mindful that "[o]ur practice in this [s]tate has been to give a liberal interpretation to equitable rules in working out, as far as possible, a just result . . . ." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 630, 987 A.2d 1009 (2010).

"The doctrine of equitable nonforfeiture is a defense implicating the right of possession that may be raised in a summary process proceeding, and is based on the principle that [e]quity abhors . . . a forfeiture." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Lighthouse Landings, Inc.*, 279 Conn. 90, 106 n.15, 900 A.2d 1242 (2006). "Equitable principles barring forfeitures may apply to summary process actions for nonpayment of rent if: (1) the tenant's breach was not [wilful] or grossly negligent; (2) upon eviction the tenant will suffer a loss wholly disproportionate to the

injury to the landlord; and (3) the landlord's injury is reparable." *Cumberland Farms, Inc.* v. *Dairy Mart, Inc.*, 225 Conn. 771, 778, 627 A.2d 386 (1993). Regarding the first requirement, we have explained that "[wilful] or gross negligence in failing to fulfill a condition precedent of a lease bars the application of the doctrine of equitable nonforfeiture. . . . In circumstances involving the nonpayment of rent, we have construed strictly this threshold requirement in deciding whether to grant equitable relief." (Citations omitted.) Id.

The leading modern case on equitable nonforfeiture in summary process actions is *Fellows* v. *Martin*, 217 Conn. 57, 584 A.2d 458 (1991). In *Fellows*, we addressed whether a residential tenant who deliberately withheld $25.01 from her monthly rent of $500.01 because of a dispute with her landlord over parking accommodations should be granted equitable relief from forfeiture. Id., 58–60, 67. We began by noting the large disparity between the landlord's loss of $25.01 and the plaintiff's potential loss of a ninety-nine year lease and an advance payment of $9900. Id., 67. Applying the maxim "de minimis non curat lex,"[7] we concluded that, under the facts presented in *Fellows*, "the underpayment of $25.01 is insufficient, as a matter of law, to justify such a forfeiture." (Internal quotation marks omitted.) Id., 68. We explained that the de minimis nature of the tenant's breach meant that "eviction of the tenant would work a forfeiture wholly disproportionate to the injury suffered." (Internal quotation marks omitted.) Id., 67. Moreover, we noted that the record suggested that, after service of a notice to quit, the tenant had resumed monthly payments of her regular rental amount, plus the $25.01 she had previously withheld. Id., 69.

We also addressed the issue of wilfulness. We noted the general principle that "[a] court of equity will apply the doctrine of clean hands to a tenant seeking . . .

[7] De minimis non curat lex means "[t]he law does not concern itself with trifles." Black's Law Dictionary (11th Ed. 2019) p. 544.

equitable relief; thus, a tenant whose breach was [wilful] or grossly negligent will not be entitled to relief." (Internal quotation marks omitted.) Id., 67. The tenant's withholding of $25.01 from her rent in *Fellows* was indisputably intentional. We determined, however, that "[w]e need not decide whether a tenant who deliberately refuses to pay rent may yet claim relief under the equitable doctrine against forfeitures [when] the forfeiture is as grossly disproportionate as it is in this case." Id., 68. It was unnecessary to decide that issue because the trial court had determined that the tenant's nonpayment was prompted by a good faith dispute over the meaning of a lease term, which we said is a ground that may excuse deliberate nonpayment if the trial court determines that the equities so require. See id., 69 ("[t]he doctrine against forfeitures applies to a failure to pay rent in full when that failure is accompanied by a good faith intent to comply with the lease or a good faith dis-
pute over the meaning of a lease"). We explained that "the trial court found that the tenant withheld the rent in a dispute over her parking accommodations. She apparently believed that she had the right to withhold rent if her landlord breached the lease. While her belief was erroneous . . . her misconception amounts to a mistake of law, rather than the type of wilfulness disapproved by [our case law] and other authorities." (Citation omitted; internal quotation marks omitted.) Id., 68. Chief Justice Peters made this same point in a concurring opinion, in which she concluded that, "[because] the tenant's breach was not [wilful], *but was premised on a good faith dispute*, forfeiture of her interest would be wholly disproportionate to the gravity of her default." (Emphasis added.) Id., 72 (*Peters, C. J.*, concurring). To summarize, *Fellows* demonstrates that a tenant's intentional nonpayment of rent does not require a finding that the nonpayment is wilful under the equitable nonforfeiture doctrine if nonpayment "is accompanied by

a good faith intent to comply with the lease or a good faith dispute over the meaning of a lease." Id., 69.

In the present case, the trial court found that the defendants' intentional nonpayment of rent was not accompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. In its first articulation, the trial court explained that it "considered and rejected [the] defendants' claimed good faith intent to comply with the lease and also rejected the defendants' alleged good faith dispute over the meanings of the lease." The trial court elaborated in its supplemental articulation, explaining: "The defendants' alleged concerns about the contamination [were] pretextual, since neither the contamination nor the remediation had any effect on the critical path of the defendants' renovations to the property. . . .

* * *

"The defendants failed to prove that they were justified in withholding the rent because of the contamination issues affecting the subject premises. . . . [T]he plaintiffs . . . did promptly take steps to address the environmental issues affecting the exterior of the property, as required by [the lease]. . . . The defendants suffered no detriment as a result of the contamination and remediation. They failed to offer any evidence that they ever even complained about the contamination and remediation until they filed their answer in this case on March 24, 2015." Instead, the court explained: "The defendants' real issue centers on the delays in renovation and, therefore, in openings of business operations, beyond the rental grace period, thereby obligating them to pay rent under the lease and to their existing landlords. The plaintiffs were not responsible for the delays [under the terms of the lease]." In so finding, the court referenced paragraph 31 of the lease, which provides that the "[l]essee, at his expense shall make all necessary repairs and replacements to the [l]leased

[p]remises," and paragraph 32, which provides that "[a]ll alterations and improvements to the [p]remises are the [l]essee's sole responsibility. All expenses and costs associated with the required zoning change of use are the [l]essee's sole responsibility."

The trial court found, in other words, that the defendants' decision not to pay rent was motivated by the difficulties arising from the delay in the renovation and occupancy of the premises, and, in fact, had nothing to do with a dispute over the terms of the lease, which explicitly placed the responsibility for renovations and alterations on the defendants. If the delay implicated any good faith dispute over contractual terms, that dispute involved the contract between the defendants and Girouard for "consulting" and "design services" regarding the renovations. The trial court found, however, that the agreement between the defendants and Girouard "was entered into separate from and independent of the agreement between the plaintiffs . . . and the defendants . . . ."

Our review of the record leads us to conclude that the trial court did not abuse its discretion in determining that the defendants' withholding of rent was unaccompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. We find Sassoon's testimony at trial particularly illuminating on this point. When asked why the defendants stopped paying rent, Sassoon explained: "[I]t was [an] act of desperation. Because we were trying to draw [the plaintiffs'] attention to what we [were] facing, [how] we [were] hurting. Because [Girouard] was not taking our orders. He was not returning our phone calls. He was not taking our orders. So this was [the] only way we could stay in business and pay for our rent.[8] Because we were deep into the project, without being into the

[8] The defendants were obligated to pay rent on a lease for another property, where their businesses previously had been located and remained located while renovations progressed.

building. And we just wanted the project to finish so we could get into the building." (Footnote added.) Withholding rent in order to "stay in business" and to "draw [the plaintiffs'] attention" to the defendants' difficult financial situation demonstrates neither a good faith intent to comply with the lease nor a good faith dispute over the meaning of the lease.[9]

Our analysis does not end there, however, because this case requires us to address the issue left open in *Fellows*, that is, whether a defendant's intentional nonpayment of rent must *necessarily* be deemed wilful, for purposes of the equitable nonforfeiture doctrine, if the tenant cannot show that the withholding was the result of a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. See *Fellows* v. *Martin*, supra, 217 Conn. 68 ("[w]e need not decide whether a tenant who deliberately refuses to pay rent may yet claim relief under the equitable doctrine against forfeitures [when] the forfeiture is as

[9] The defendants point out that they deposited the withheld rent in an escrow account and argue that this demonstrates their good faith intent to comply with their obligation to pay monthly rent. The defendants cite our decision in *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 294 Conn. 611, in support of their argument. Although the payment of the withheld rent into escrow may be a fact warranting consideration by the trial court, it does not alone compel a finding of good faith. In *19 Perry Street, LLC*, the defendant water company learned that its landlord had sold the leased premises but did not know to whom. Id., 618–19. The defendant undertook efforts to determine the identity of the new owner and began stockpiling funds for purposes of paying rent once the owner was identified. Id. The defendant learned the identity of the new owner only when that owner served a notice to quit on the defendant. Id., 619. At that point, the defendant offered to pay all past due rent using its stockpiled funds. Id. We determined that the defendant's stockpiling of rent while it sought to determine the identity of its new landlord demonstrated a good faith intent to comply with the lease, explaining that "[s]etting aside . . . or stockpiling funds *in the event they became due* contraindicates any intentional or purposeful failure to pay rent . . . ." (Emphasis added.) Id., 634. This holding has little relevance in the present case, in which the defendants plainly knew the identity of their landlord but nonetheless decided to stockpile funds *in lieu of* paying rent that had already become due under the undisputed terms of the lease.

grossly disproportionate as it is in this case"). Without foreclosing the likelihood that this question may not be susceptible to a categorical answer applicable to all cases and all circumstances, we have no difficulty answering it in the affirmative in the present case, on this record, given the trial court's finding that the defendants' purported reason for withholding rent—their concerns about environmental contamination—was "pretextual." "A court of equity will apply the doctrine of clean hands to a tenant seeking . . . equitable relief; thus, a tenant whose breach was [wilful] or grossly negligent will not be entitled to relief." (Internal quotation marks omitted.) Id., 67; see also *Fairchild Heights, Inc.* v. *Dickal*, 118 Conn. App. 163, 178–79, 983 A.2d 35 (2009) (denying tenants equitable relief from forfeiture because of unclean hands), aff'd, 305 Conn. 488, 45 A.3d 627 (2012). It is axiomatic that, "[when] a [party] seeks equitable relief, he must show that his conduct has been fair, equitable and honest as to the particular controversy in issue." (Internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310, 777 A.2d 670 (2001). Withholding rent on pretextual grounds is outside the bounds of the "fair, equitable and honest" conduct expected of a party seeking equitable relief. (Internal quotation marks omitted.) Id. Because the defendants intentionally withheld rent on pretextual grounds in the absence of any good faith dispute over the terms of the lease, it was within the trial court's equitable discretion to determine that the defendants acted wilfully and were ineligible for equitable relief from forfeiture. See 2 S. Symons, Pomeroy's Equity Jurisprudence (5th Ed. 1941) § 452, pp. 287–88 ("While a defaulting party may thus acquire a right to the equitable relief from the conduct of the other party, he may also lose the right, which otherwise would have existed, as a consequence of his own conduct. . . . He who asks help from a court of equity must himself be free from inequitable conduct with respect to the same [subject matter].").

We are not persuaded by the defendants' argument that conduct is wilful within the meaning of the doctrine of equitable nonforfeiture only if it is "intentional conduct designed to injure . . . ." (Internal quotation marks omitted.) In support of this argument, the defendants cite a footnote in *19 Perry Street, LLC* v. *Unionville Water Co.*, supra 294 Conn. 611, in which we stated that "[w]ilful misconduct has been defined as intentional conduct designed to injure for which there is no just cause or excuse. . . . [Its] characteristic element is the design to injure either actually entertained or to be implied from the conduct and circumstances. . . . Not only the action producing the injury but the resulting injury also must be intentional. . . . [T]he term wilful has [also] been used to describe conduct deemed highly unreasonable or indicative of bad faith." (Citation omitted; internal quotation marks omitted.) Id., 630–31 n.10. Although *19 Perry Street, LLC*, concerned the doctrine of equitable nonforfeiture, we did not confront the question of when a tenant's nonpayment of rent is wilful in the absence of a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. Instead, we determined that the tenant's nonpayment had not been wilful because it had been accompanied by a good faith intent to comply with the lease. See id., 634. We reject the suggestion that the generic definition of wilful contained in *19 Perry Street, LLC*, which we borrowed, perhaps without adequate consideration, from the tort and employment law contexts,[10] was intended to serve as a definitive statement of the meaning of "wilful" for the doctrine of equitable nonforfeiture. Indeed, we have previously noted that "wilful is a word of many mean-

[10] The footnote in *19 Perry Street, LLC*, cited the definitions of wilfulness provided in *Dubay* v. *Irish*, 207 Conn. 518, 533, 542 A.2d 711 (1988), a tort action, and *Saunders* v. *Firtel*, 293 Conn. 515, 531, 978 A.2d 487 (2009), an appeal construing a number of employment statutes and statutes governing limited liability companies. See *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 294 Conn. 631 n.10.

ings, and its construction [is] often . . . influenced by its context"; (internal quotation marks omitted) *State* v. *Newton*, 330 Conn. 344, 362, 194 A.3d 272 (2018); and that observation is fitting here. Upon reflection, it is clear to us that the definition of wilfulness connoting an injurious intent, although apt in other contexts, serves no productive role in the equitable nonforfeiture analysis. A tenant's nonpayment can be wilful within the meaning of the equitable nonforfeiture doctrine in the absence of any "design" on the tenant's part to cause harm to the landlord; indeed, most summary process actions based on nonpayment involve tenants who intend no harm but simply find themselves without the financial means to meet their obligations. We therefore disavow the definition of wilfulness contained in the footnote in *19 Perry Street, LLC*, to the extent that it would require a finding of injurious intent to trigger a finding of wilfulness under the equitable nonforfeiture doctrine.

The defendants intentionally withheld rent payments unaccompanied by a good faith intent to comply with the lease or a good faith dispute over the meaning of the lease. As previously discussed, the trial court found that the defendants' purported environmental concerns were "pretextual" and that their actual reasons for withholding rent were their dissatisfaction with the delays in their renovations to the premises—delays not attributable to the plaintiffs' conduct—and the difficulty in paying rent to both their previous landlords and the plaintiffs. Under these facts, it is clear that the trial court did not abuse its discretion in refusing to grant the defendants equitable relief from forfeiture.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

JACQUELINE RODRIGUEZ *v.* KAIAFFA, LLC, ET AL. (SC 20274)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to statute (§ 31-60 [b]), the Commissioner of Labor shall adopt regulations that carry out the purposes of the minimum wage laws, and such regulations shall entitle employers, as part of the minimum fair wage, to a tip credit by including gratuities in an amount equal to a certain percentage of the minimum fair wage per hour for persons, other than bartenders, who are employed in the hotel and restaurant industry and who regularly and customarily receive gratuities.

Pursuant further to a Department of Labor regulation (§ 31-62-E4), "[i]f an employee performs both service and non-service duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category," but, "[i]f an employee performs both service and non-service duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

The defendants, K Co. and its single member, C, appealed from the trial court's order certifying for class action status an action brought by the plaintiff, who was employed at one of the six restaurants in Connecticut operated by the defendants under the name Chip's Family Restaurants. In addition to waiting tables, servers at the restaurants were required to perform "side work," such as cleaning tables and appliances, restocking, slicing lemons, and preparing food toppings. The plaintiff alleged in her complaint that the defendants violated Connecticut wage laws when they failed to pay their servers, during a certain time period, the minimum hourly wage mandated by § 31-60 (b) by unlawfully deducting a tip credit from the servers' wages for the time they spent on side work, which the plaintiff claimed was nonservice in nature under § 31-62-E4 of the regulations. The trial court granted the plaintiff's motion for class certification and certified a class consisting of all individuals employed as servers "at any Connecticut Chip's Family Restaurant" during a certain time period. In so doing, the court declined to define the terms "service" and "nonservice," as used in § 31-62-E4 of the regulations, and, instead, found that, regardless of whether the side work constituted a service or nonservice duty, the class members' claims were all the same, namely, that each server performed side work during every shift and was entitled

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

to the full minimum wage because the defendants failed to segregate and record the time servers spent performing services and nonservice duties. The court specifically noted that the proposed class included several hundred servers employed at six different restaurants and that they shared the same claim, irrespective of variations in the type, amount, or manner of side work tasks performed by individual servers at each restaurant. Accordingly, the court concluded that each requirement for class certification—numerosity, commonality, typicality, and adequacy of representation—set forth in the applicable rule of practice (§ 9-7) had been satisfied and that the predominance and superiority considerations under the applicable rule of practice (§ 9-8 (3)) also had been met. Thereafter, the defendants appealed from the court's order granting class certification pursuant to the statute (§ 52-265a) permitting the Chief Justice to certify an interlocutory appeal involving a matter of substantial public interest. *Held*:

1. The defendants could not prevail on their claim that the trial court improperly declined to inquire into the merits of the plaintiff's legal theory and to decide that the tasks assigned as side work constituted service duties under § 31-62-E4 of the regulations in determining whether the commonality and predominance requirements for class certification had been met; the court should inquire into the merits of a case only to the extent necessary to ensure that a plaintiff has met the requirements of the class action rules, and, in the present case, the defendants failed to demonstrate how the trial court's determining the meanings of "service" and "nonservice" would affect whether common issues predominate.
2. The trial court did not abuse its discretion in concluding that the four class certification requirements of Practice Book § 9-7 had been satisfied: the defendants did not challenge the trial court's finding that the numerosity requirement was satisfied by the proposed class of several hundred servers employed at the six restaurants; moreover, the commonality requirement was satisfied, as the defendants used a single, common side work policy that was applicable at all six restaurants, the evidence demonstrated an overarching policy of the servers' performing generally consistent side work tasks, and any factual variations in how servers at the different locations performed side work were likely to be insubstantial; furthermore, the adequacy of representation and typicality requirements were satisfied because the plaintiff asserted a cognizable claim against the defendants, namely, violations of Connecticut wage laws and regulations, and her standing in this case allowed her to typically and adequately represent class members with claims against the defendants.
3. The trial court did not abuse its discretion in concluding that the predominance and superiority requirements of Practice Book § 9-8 had been satisfied: common issues of law or fact predominated over questions affecting only individual members, as much of the proof necessary to establish the contested element of the plaintiff's claim, namely, whether the servers performed both service and nonservice duties, was apparent

from the defendants' own admissions, and the plaintiff was not required to prove the precise nature of the servers' side work duties because, under the minimum wage laws, it is the employer's burden to establish that the servers were service employees who were subject to the tip credit; moreover, the trial court correctly determined that the plaintiffs could use representative testimony, rather than individual testimony, to prove that the tasks assigned as side work were nonservice in nature, as the evidence indicated that all servers were trained in a similar manner, the tasks assigned to servers were relatively uniform, and a common side work policy was used at all six restaurants, despite minor variations in the manner and frequency that individual servers may have performed certain tasks; furthermore, in light of this court's conclusion that the use of representative testimony was proper, the trial court correctly determined that a class action was superior to other available methods for the fair and efficient adjudication of the controversy, especially as it would promote judicial efficiency and provide many individuals, who likely would not bring such a claim, an opportunity for relief.

4. There was no merit to the defendants' claim that the trial court improperly defined the class by referring to "Connecticut Chip's Family Restaurant," which is not a legal entity, in its certification order; the court used a term that clearly encompassed all six restaurants operated by the defendants, allowing for individual servers to easily recognize whether they qualify as class members based on their employment at a Chip's restaurant and for their eligibility to be readily ascertained and definitively verified.

Argued January 14—officially released October 6, 2020**

Procedural History

Action to recover damages for the defendants' alleged violations of Connecticut wage laws and regulations, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the case was transferred to the judicial district of Hartford, Complex Litigation Docket; thereafter, the court, *Schuman*, *J.*, granted the plaintiff's motion for class certification, and the defendants, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed to this court. *Affirmed.*

Jeffrey J. White, with whom were *Wystan M. Ackerman*, *Stephen W. Aronson*, and, on the brief, *Denis J. O'Malley*, for the appellants (defendants).

** October 6, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Richard E. Hayber, with whom was *Thomas J. Durkin*, for the appellee (plaintiff).

David R. Golder and *Allison P. Dearington* filed a brief for the Restaurant Law Center as amicus curiae.

Keren Salim and *James Bhandary-Alexander* filed a brief for the Connecticut Employment Lawyers Association as amicus curiae.

Opinion

ROBINSON, C. J. This public interest appeal requires us to consider the extent to which a trial court should consider the merits of a party's legal theory before certifying a class action pursuant to Practice Book §§ 9-7 and 9-8. The defendants, Kaiaffa, LLC, and George Chatzopoulos, appeal from the order of the trial court certifying a class action of servers employed by Chip's Family Restaurant (Chip's).[1] The plaintiff, Jacqueline Rodriguez, alleged in her class action complaint that the defendants had violated Connecticut wage laws; see General Statutes § 31-58 et seq.; and regulations by improperly deducting a tip credit from her earnings and paying her and other class members below the minimum wage for the performance of "nonservice" tasks in connection

[1] The defendants appeal pursuant to the Chief Justice's grant of their petition to file an expedited public interest appeal pursuant to General Statutes § 52-265a. Although this court has considered whether other class action procedural positions are appealable final judgments; see, e.g., *Palmer* v. *Friendly Ice Cream Corp.*, 285 Conn. 462, 463, 940 A.2d 742 (2008); *Rivera* v. *Veterans Memorial Medical Center*, 262 Conn. 730, 733–36, 818 A.2d 731 (2003); we have not specifically decided whether a trial court's order granting class certification is appealable outside of the appellate review permitted by General Statutes § 42-110h for class actions brought under the Connecticut Unfair Trade Practices Act. See *Collins* v. *Anthem Health Plans, Inc.*, 266 Conn. 12, 29–30, 836 A.2d 1124 (2003). We have appellate jurisdiction, however, because it is well established that "appeals from interlocutory orders may be taken pursuant to § 52-265a." *Foley* v. *State Elections Enforcement Commission*, 297 Conn. 764, 767 n.2, 2 A.3d 823 (2010).

with their duties as servers.[2] The defendants claim that, in certifying the class, the trial court improperly assumed the legal sufficiency of the plaintiff's claim when it failed to determine if she relied on an incorrect interpretation of one of the regulations implementing Connecticut wage laws. See Regs., Conn. State Agencies § 31-62-E4.[3] The defendants also contend, inter alia, that the trial court abused its discretion in concluding that the plaintiff met the various class certification requirements of Practice Book §§ 9-7 and 9-8. We disagree and, accordingly, affirm the trial court's order granting class certification.

The record reveals the following facts and procedural history. See, e.g., *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 43, 191 A.3d 147 (2018) (reciting facts "assumed to be true by the trial court for purposes of the certification issues or otherwise undisputed"). The plaintiff was employed at Chip's in Wethersfield as a server from 2015 until October, 2017. In October, 2017, the plaintiff commenced this action against the defendants, on behalf of herself and other Chip's servers employed during the class period, seeking recovery under a single count that alleged a violation of Connecticut wage laws and regulations. The plaintiff alleged that Kaiaffa, LLC, owned and operated Chip's and that Chatzopoulos, as the single member of Kaiaffa, LLC, was her employer for purposes of Connecticut

[2] The Restaurant Law Center filed an amicus brief in support of the defendants' position, and the Connecticut Employment Lawyers Association filed an amicus brief in support of the plaintiff's position.

[3] Section 31-62-E4 of the Regulations of Connecticut State Agencies, which was repealed this year; see footnote 12 of this opinion; provided: "If an employee performs both service and non-service duties, and the time spent on each is definitely segregated and so recorded, the allowance for gratuities as permitted as part of the minimum fair wage may be applied to the hours worked in the service category. If an employee performs both service and non-service duties and the time spent on each cannot be definitely segregated and so recorded, or is not definitely segregated and so recorded, no allowances for gratuities may be applied as part of the minimum fair wage."

wage laws.[4] The plaintiff further alleged that, in addition to serving customers, servers were required to perform nonservice duties called "side work." The side work duties varied somewhat among the restaurants but generally included tasks such as cleaning the server's table section, cutting lemons, wiping menus, restocking, cleaning various appliances such as coolers and drink machines, and preparing toppings like butter and icings.[5] The plaintiff claimed that the defendants improperly took a "tip credit" for the time servers spent performing side work and, therefore, failed to pay the servers the full minimum wage. The plaintiff sought back pay and double damages pursuant to General Statutes § 31-68 (a).[6] In their answer, the defendants admitted to taking the tip credit but averred that they had used the tip credit properly. Additionally, they asserted several special defenses, including a contention that any minimum wage violations were made in good faith.[7]

[4] There are six Chip's restaurants in Connecticut, located in Trumbull, Fairfield, Orange, Wethersfield, Southbury, and Southington. Each Chip's restaurant is operated by a separate limited liability company. Those limited liability companies are not named as defendants in this action.

[5] Most of the restaurants' side work lists were included as exhibits attached to the server declarations accompanying the plaintiff's motion for class certification.

[6] General Statutes § 31-68 (a) provides in relevant part: "If any employee is paid by his or her employer less than the minimum fair wage or overtime wage to which he or she is entitled under sections 31-58, 31-59 and 31-60 or by virtue of a minimum fair wage order he or she shall recover, in a civil action, (1) twice the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court, or (2) if the employer establishes that the employer had a good faith belief that the underpayment of such wages was in compliance with the law, the full amount of such minimum wage or overtime wage less any amount actually paid to him or her by the employer, with costs and such reasonable attorney's fees as may be allowed by the court. . . ."

[7] The trial court granted the plaintiff's motion to strike some of the defendants' special defenses, including the special defense that less than 20 percent of the servers' time was spent performing side work, rendering the utilization of the tip credit permissible under federal and state labor regulations. This decision is not at issue in this appeal.

After class discovery, the plaintiff moved for class certification. The plaintiff supported her motion with numerous exhibits, including deposition excerpts from the defendants' corporate representative, Laura Robertson, and affidavits by several Chip's servers discussing their restaurants' respective side work policies. See footnote 5 of this opinion. The defendants filed an objection to class certification, along with their own supporting exhibits. After a hearing, the trial court issued a memorandum of decision granting the plaintiff's motion for class certification. In that decision, the trial court concluded that the plaintiff had easily satisfied three of the four elements of Practice Book § 9-7, namely, adequacy of representation, numerosity, and typicality. Specifically, because the plaintiff's proposed class included several hundred servers from six different restaurants, numerosity was clearly established. As to typicality, the court concluded that all servers, regardless of the restaurant they worked at, shared the same claim as the class representative. The trial court determined, however, that the commonality element of Practice Book § 9-7 and the predominance element of Practice Book § 9-8 (3) presented more difficult inquiries.

The trial court began by explaining the tip credit and the applicable regulations, including § 31-62-E4 of the Regulations of Connecticut State Agencies. See footnote 3 of this opinion. The court noted the significant disagreement between the parties about the meanings of the terms "service" and "non-service" in § 31-62-E4 but declined to decide the merits of either party's interpretation of the regulation at the class certification stage. After considering the plaintiff's evidence, the court concluded that the claims of the various class members were the same and that the individualized inquiries contemplated by the defendants were not essential to determining liability. Instead, the court concluded that "[w]hat is critical is that servers performed some side work on every shift at locations other than

the tables and booths. The defendants do not present or identify any evidence negating that general proposition." As a result, the court concluded that the plaintiff had met the requirements of the class action rules and certified the class.[8] This public interest appeal followed. See footnote 1 of this opinion.

On appeal, the defendants principally claim that, in certifying the class, the trial court improperly assumed the plaintiff's legal theory was correct without testing its legal sufficiency and, as a result, did not define what the class needed to prove in order to prevail. Additionally, the defendants argue that the trial court (1) incorrectly concluded that the class presents common questions and that such questions predominated over individualized inquiries, (2) did not perform a sufficiently "rigorous analysis" when considering the superiority requirement under Practice Book § 9-8 (3), and (3) improperly failed to decide whether the defendants were the plaintiff's employers for the purpose of determining her standing. We address each claim in turn and conclude that the trial court did not abuse its discretion in certifying this class action.

I

Before turning to the defendant's specific claims in this appeal, we note the applicable standard of review and certain general principles governing class certification under our rules of practice, which "set forth a two step process for trial courts to follow in determining whether an action or claim qualifies for class action status. First, a court must ascertain whether the four prerequisites to a class action, as specified in Practice Book § 9-7, are satisfied. These prerequisites are: (1) numerosity—that the class is too numerous to make joinder of all members feasible; (2) commonality—that

[8] Both the plaintiff and the defendants filed motions for summary judgment prior to the trial court's class certification decision. These motions are currently pending.

the members have similar claims of law and fact; (3) typicality—that the [representative] plaintiffs' claims are typical of the claims of the class; and (4) adequacy of representation—that the interests of the class are protected adequately. . . .

"Second, if the foregoing criteria are satisfied, the court then must evaluate whether the certification requirements of Practice Book § 9-8 [3] are satisfied. These requirements are: (1) predominance—that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) superiority—that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

"It is the class action proponent's burden to prove that all of the requirements have been met. . . . To determine whether that burden has been met, we have followed the lead of the federal courts; see *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 161, 102 S .Ct. 2364, 72 L. Ed. 2d 740 (1982); directing our trial courts to undertake a rigorous analysis. . . .

"[A] rigorous analysis ordinarily involves looking beyond the allegations of the plaintiff's complaint. The [rigorous analysis] requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of the [class action] rule. . . .

"In applying the criteria for certification of a class action, the [trial] court must take the substantive allegations in the complaint as true, and consider the remaining pleadings, discovery, including interrogatory answers, relevant documents, and depositions, and any other pertinent evidence in a light favorable to the plaintiff. However, a trial court is not required to accept as true bare assertions in the complaint that [class certification] prerequisites were met. . . . Class determination generally involves considerations that are

enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . .

"Consequently, a rigorous analysis frequently entail[s] overlap with the merits of the plaintiff's underlying claim. . . . In determining the propriety of a class action, [however] the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met." (Citations omitted; internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 47–50. "Although no party has a right to proceed via the class mechanism . . . doubts regarding the propriety of class certification should be resolved in favor of certification." (Internal quotation marks omitted.) *Collins* v. *Anthem Health Plans, Inc.*, 275 Conn. 309, 321, 880 A.2d 106 (2005).

"We apply an abuse of discretion standard both [to] the lower court's ultimate determination on certification of a class as well as to its rulings that the individual [class certification] requirements have been met. . . . While our review of the legal standards applied by the [trial] court and the court's other legal conclusions is de novo . . . the [trial] court's application of those standards to the facts of the case is again reviewed only for abuse of discretion . . . . This standard means that the [trial] court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions, and we will . . . find abuse [only] when the [trial] court's decision rests on an error of law . . . or a clearly erroneous factual finding, or . . . its decision . . . cannot be located within the range of permissible decisions." (Emphasis in original; internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 51.

II

The primary issue in this appeal is whether the trial court conducted a sufficiently rigorous legal analysis in certifying the plaintiff's class. Specifically, the defendants argue that the trial court failed to interpret the meanings of "service" and "non-service," as used in § 31-62-E4 of the Regulations of Connecticut State Agencies.[9] See footnote 3 of this opinion. According to the defendants, such a determination is required under the predominance standard in *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 60–61. Because the trial court did not decide which party's interpretation was legally correct, the defendants contend that the trial court could not properly decide whether the plaintiff met the class certification requirements. In response, the plaintiff argues that the trial court sufficiently reviewed the elements of the cause of action and determined whether those elements could be proven by generalized evidence in assessing the predominance factor of the class certification inquiry.[10]

[9] We discuss the trial court's decision in two parts in order to best accommodate the varying legal standards applicable to our review of the trial court's class certification decision. See *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 51 ("[w]hile our review of the legal standards applied by the [trial] court and the court's other legal conclusions is de novo . . . the [trial] court's application of those standards to the facts of the case is again reviewed only for abuse of discretion" (internal quotation marks omitted)). In part II of this opinion, we first discuss the plaintiff's underlying claim and the trial court's application of the legal standard under de novo review; in part III of this opinion, we analyze the trial court's application of that legal standard under an abuse of discretion review.

[10] The plaintiff also contends that the defendants did not properly preserve this argument before the trial court. We disagree. The defendants repeatedly requested that the trial court articulate the meanings of service and non-service during the hearing on class certification. This adequately raised the issue. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 738 n.7, 183 A.3d 611 (2018) (concluding that defendant preserved defense because it could be inferred from his motions and because "the sine qua non of preservation is fair notice" to trial court and to parties (internal quotation marks omitted)). Additionally, the defendants immediately appealed from the class certification decision. As a result, there was no occasion, and no additional necessity, for the defendants "to challenge those findings" before the trial court.

A

In considering whether the trial court applied the correct legal principles in certifying the class in the present case, we begin with some background principles governing claims under Connecticut wage laws. General Statutes § 31-60 (b) provides an exception to the state's minimum wage requirements that permits employers to take a tip credit[11] for gratuities earned by employees that "customarily and regularly receive gratuities," such as restaurant servers. See *Amaral Brothers, Inc.* v. *Dept. of Labor*, 325 Conn. 72, 80–84, 155 A.3d 1255 (2017) (discussing history of Connecticut's tip credit laws). Regulations promulgated by the Department of Labor (department) further outline the obligations of an employer seeking to utilize the tip credit. See generally Regs., Conn. State Agencies § 31-62-E1 et seq. "Those regulations (1) draw a distinction between service and nonservice employees, (2) disallow a tip credit for nonservice employees, and (3) provide that restaurant employees who engage in both service and nonservice duties may be subject to a tip credit on the service portion, but only insofar as time spent on the two types of duties is properly segmented and recorded." *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 87. We also note that "the minimum wage law should receive a liberal construction in order that it may accomplish its purpose." *West* v. *Egan*, 142 Conn. 437, 442, 115 A.2d 322 (1955).

Section 31-62-E4 of the Regulations of Connecticut States Agencies, which is the regulation at issue in this appeal,[12] provides that, "[i]f an employee performs both

[11] A tip credit allows "employers [to] take a credit for tips received by a tipped employee for up to a stated percentage or portion of the minimum wage." J. Lockhart, Annot., "Tips as Wages for Purposes of Federal Fair Labor Standards Act," 46 A.L.R. Fed. 2d 23, 40, § 2 (2010).

[12] We note that our legislature recently enacted legislation requiring the department to repeal § 31-62-E4 of the Regulations of Connecticut State Agencies and to adopt regulations in accordance with the 80/20 rule. See Public Acts, Special Sess., July, 2019, No. 19-1, § 5 (Spec. Sess. P.A. 19-1)

service and non-service duties," and the employer segregates and records such time, the employer may utilize the tip credit for time spent performing service duties. But, if the employer fails to segregate and record time spent on the two types of duties, the employer is unable to utilize the tip credit. As a result, an employer would violate the regulation if it took the tip credit but failed to segregate and record the employee's time.

Claims seeking recovery for a restaurant's improper use of the tip credit are rare in Connecticut, so the terms "service" and "nonservice" are largely undefined outside of limited administrative guidance provided by the department.[13] Superior Court decisions that have

("[r]egulations adopted pursuant to this section shall be . . . [i]n accordance with the Fair Labor Standards Act, 29 [U.S.C. §] 203 (m) (2) and 29 [C.F.R. §] 531.56 (e), as interpreted by [§] 30d00 (e) of the federal Department of Labor's Field Operations Handbook, prior to November 8, 2018, which was previously referred to as the '80/20 rule' "). Although Spec. Sess. P.A. 19-1 was signed by the governor on January 6, 2020, after the parties had submitted their briefs to this court, the matter was discussed during oral argument before this court. The defendants stated that the recent legislation does not render the case moot but that it does have an impact on pending cases, as it added requirements for class certification. The plaintiff agreed that the repeal of § 31-62-E4 does not affect the present case and that the new class action requirements of Spec. Sess. P.A. 19-1 do not change the plaintiff's burden in the present case. If there was a remand, however, the plaintiff would be bound by the new class action rules.

As the legislation does not retroactively repeal § 31-62-E4, we conclude that Spec. Sess. P.A. 19-1 does not impact our analysis in the present case. Compare Spec. Sess. P.A. 19-1, § 5 ("Not later than April 1, 2020, the Labor Commissioner shall post on the eRegulations System a notice of intent to adopt regulations . . . concerning employees who perform both service and nonservice duties and allowances for gratuities permitted or applied as part of the minimum fair wage pursuant to section 31-60 of the general statutes. . . . Such notice shall also provide for the repeal of section 31-62-E4 of the regulations of Connecticut state agencies *upon the effective date of regulations adopted pursuant to this section*." (Emphasis added.)), with Public Acts 2019, No. 19-198, § 7 ("(*Effective from passage and applicable to actions pending on or filed on or after said date*) Notwithstanding the provisions of chapter 54 of the general statutes, section 31-62-E4 of the regulations of Connecticut state agencies is repealed." (Emphasis in original.)).

[13] See *Stevens* v. *Vito's by the Water, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-15-6062506-S (November 9, 2017) (65 Conn. L. Rptr. 430, 432–33) (considering examples of service and nonservice duties

denied class certification in past actions brought under Connecticut wage laws also have not clearly defined the two terms. See, e.g., *Bucchere* v. *Brinker International, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-04-4000238-S (June 6, 2006), appeal dismissed, Connecticut Appellate Court, Docket No. AC 27748 (September 26, 2006), aff'd, 287 Conn. 704, 950 A.2d 493 (2008); *Galbreth* v. *Briad Restaurant Group, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-04-4000676-S (November 29, 2005) (40 Conn. L. Rptr 402, 404). As a result, the central legal dispute between the parties in the present case turns on the question of whether the regulations treat side work tasks performed by the servers as service duties or merely incidental to service duties, such that the employer was permitted to take the tip credit.[14] The defendants' arguments in this appeal require us to consider the extent to which that unresolved legal question informs the class certification decision as to the elements of commonality and predominance.

B

We now consider the defendants' contention that the trial court was required to "determine and apply the underlying substantive law" to resolve the dispute regarding the proper construction and application of § 31-62-

in department issued guidance document and concluding that plaintiff demonstrated that "majority" of side work was nonservice); see also *Labor Dept.* v. *America's Cup*, Superior Court, judicial district of Hartford, Docket No. CV-92-0516750 (April 21, 1994) (11 Conn. L. Rptr. 379, 380–81) (determining whether bartenders are service or nonservice employees under department's regulations).

[14] The plaintiff interprets "nonservice" to include all side work tasks that a server performs away from the tables and booths. The defendants contend that § 31-62-E4 of the Regulations of Connecticut State Agencies does not actually distinguish between types of duties but, instead, refers to different occupations within the restaurant industry, and, therefore, "the intent of the regulation was not to regulate the assignment of tasks . . . ." Alternatively, they contend that all of the side work tasks alleged by the plaintiff are incidental to service, and, therefore, taking the tip credit was permissible under the regulation.

E4 of the Regulations of Connecticut State Agencies, because, "without such resolution, a named plaintiff can obtain class certification merely by formulating a plausible, even if erroneous, legal theory." The defendants argue that the language in *Standard Petroleum Co.* requiring the trial court to review the elements of the cause of action demands a determination of which party's legal theory is correct for proper adjudication of the commonality and predominance factors of the class certification inquiry. In other words, they argue that the trial court should have determined the merits of the plaintiff's cause of action before certifying the class. We disagree.

Before addressing the defendants' claim, we must revisit and clarify the standard of review outlined in *Standard Petroleum Co*. "In applying the criteria for certification of a class action, the [trial] court must take the substantive allegations in the complaint as true, and consider the remaining pleadings, discovery, including interrogatory answers, relevant documents, and depositions, and any other pertinent evidence in a light favorable to the plaintiff. However, a trial court is not required to accept as true bare assertions in the complaint that [class certification] prerequisites were met. . . . Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . . [A] rigorous analysis frequently entail[s] overlap with the merits of the plaintiff's underlying claim. . . . In determining the propriety of a class action, [however] the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met." (Citations omitted; internal quotation marks omitted.) *Standard Petroleum Co*. v. *Faugno Acquisitions, LLC*, supra, 330 Conn. 49–50.

We emphasize that a trial court should not assume the truth of the plaintiff's allegations if the allegations

bear on an issue of class certification. See *Bell* v. *PNC Bank, National Assn.*, 800 F.3d 360, 376–77 (7th Cir. 2015) ("[T]he default rule is that a court may not resolve merits questions at the class certification stage. . . . This does not mean, however, that *on issues affecting class certification*, a court must simply assume the truth of the matters as asserted by the plaintiff." (Citations omitted; emphasis added.)). But inquiries into the merits of a plaintiff's case should be performed only to the extent necessary to ensure the plaintiff has met the requirements of the class action rules. See *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 641–42, 894 A.2d 240 (2006) (trial court abused its discretion when "[i]t improperly postponed a critical inquiry on the class certification issue, namely, choice of law, and as a result relieved the plaintiff of her burden to establish all of the requirements for certification"). The same analytical framework is used under federal class action law.[15] See *Amgen, Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013) ("[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the . . . prerequisites for class certification [in rule 23 of the Federal Rules of Civil Procedure] are satisfied"); *In re Initial Public Offerings Securities Litigation*, 471 F.3d 24, 41 (2d Cir. 2006) ("a district judge may certify a class only after making determinations that each of the [r]ule 23 requirements has been met . . . the obligation to make such determinations is not lessened by overlap between a [r]ule 23 requirement and a merits issue . . . [and] in making such determina-

[15] "Because our class certification requirements are similar to those embodied in rule 23 of the Federal Rules of Civil Procedure, and our jurisprudence governing class actions is relatively undeveloped, we look to federal case law for guidance in construing the provisions of Practice Book §§ 9-7 and 9-8." (Footnote omitted.) *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 322–23.

tions, a district judge should not assess any aspect of the merits unrelated to a [r]ule 23 requirement").

The defendants correctly observe that the trial court did not inquire into the merits of the plaintiff's core legal theory and assumed its viability in ruling on the motion for class certification, specifically stating that, "if the plaintiff is correct about the categorization of side work as nonservice duties, she would be entitled to the full minimum wage, without any tip credit, for all of her work," and declining to define the terms service or nonservice because "it is not necessary or appropriate to resolve these claims at the class action certification stage." As a result, we must determine whether an inquiry into the merits of the plaintiff's legal theory was necessary in order to determine whether the plaintiff established commonality and predominance.

In order to establish commonality, the plaintiff must demonstrate that "there are questions of law or fact common to the class," which "is easily satisfied because there need only be one question common to the class . . . the resolution of which will advance the litigation." (Internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 54. The common question asserted by the plaintiff in the present case is whether the defendants improperly took a tip credit for time that servers were performing nonservice duties while being paid the minimum wage. The plaintiff asserts that the approximately thirty-five tasks assigned to servers as side work are nonservice duties because they are performed away from the tables and booths.

Commonality is unaffected by a determination of which particular tasks are nonservice in nature because the defendants' liability may still be determined on a class-wide basis. See *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d. 374 (2011) ("[t]hat common contention . . . must be of

such a nature that it is capable of [class-wide] resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke"). For example, if even one of the thirty-five tasks identified as side work qualified as a nonservice task under the trial court's definition, the defendants' liability as to that task is still a common question as to all servers who performed side work. See *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 324 ("[t]he commonality test is met when there is at least one issue [the] resolution [of which] will affect all or a significant number of the putative class members" (internal quotation marks omitted)). Although the number of qualifying tasks could affect the ultimate *scope* of the defendants' potential liability, determination of the legal meaning of a "service" task would not remove the common nature of the question.

A more searching merits inquiry may be necessary in considering whether common questions *predominate* over individual questions, of course, because the predominance element of the class certification analysis relates to the nature of the actual proof necessary to establish the claims. Under the predominance test set forth in *Standard Petroleum Co.*, a court should "[first] review the elements of the causes of action that the plaintiffs seek to assert on behalf of the putative class. . . . Second, the court should determine whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to monetary or injunctive relief. . . . Third, the court should weigh the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate. . . . Only when common questions of law or fact will be the object of most of the

efforts of the litigants and the court will the predominance test be satisfied." (Internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 61.

The defendants argue that, by failing to interpret the pertinent regulations, the trial court abdicated its responsibility to determine what the plaintiff would need to prove in order for the class to prevail at trial. In their analysis of predominance, the defendants raise several possible individualized issues, such as how each server performed a task, how long a server spent on side work during a particular shift, and what tasks were performed during particular shifts. The defendants have not, however, explained how a determination of the meanings of service or nonservice would change the plaintiff's proof with respect to the claims of the class. Put differently, if the trial court interpreted the regulations and determined that the defendants are correct and that either the regulation is not referring to a server's occupational duties, or that all of the side work is incidental to service as a matter of law, this interpretation would not eliminate the issues that are subject to generalized proof. Instead, that interpretation would bear on the ultimate outcome on the merits of the parties' pending motions for summary judgment. See footnote 8 of this opinion. "[A] court can never be *assured* that a plaintiff will prevail on a given legal theory prior to a dispositive ruling on the merits, and a full inquiry into the merits of a putative [class'] legal claims is precisely what . . . the [United States Supreme Court has] cautioned is not appropriate for a [r]ule 23 certification inquiry." (Emphasis in original.) *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC* v. *ConocoPhillips Co.*, 593 F.3d 802, 809 (9th Cir. 2010).

In *Lassen* v. *Hoyt Livery, Inc.*, Docket No: 3:13-cv-01529 (JAM), 2014 WL 4638860 (D. Conn. September 17,

2014), the United States District Court for the District of Connecticut provided a persuasive explanation for not deciding a similar issue on class certification. In *Lassen*, the plaintiff alleged that the defendants had violated both the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (FLSA), and Connecticut's minimum wage laws, and the court certified both an FLSA conditional collective action and a rule 23 class of limousine drivers.[16] Id., *1. The limousine drivers alleged that they had not been paid properly when they performed certain compensable functions, such as waiting at the airport for passengers. Id., *1–2. When certifying the FLSA action, the court declined to decide "which activities are properly categorized as compensable 'work time' " because "these arguments are not relevant to the conditional collective action certification inquiry." Id., *5. With respect to the rule 23 class, the court disagreed with the defendants that "individual inquiries will be necessary to determine which activities . . . constitute compensable work time . . . ." Id., *12. The court stated that these issues would be "best resolved on a [class-wide] basis" and, therefore, did not decide at the class certification stage whether the various activities should have been compensated under Connecticut wage laws. Id.

Looking beyond Connecticut, we observe that other federal district courts presented with the question of whether certain tasks are related to a server's tipped duties often do *not* decide the question at an early stage in the litigation. See *Black* v. *P.F. Chang's China Bistro, Inc.*, Docket. No. 16-cv-3958, 2017 WL 2080408, *8 (N.D. Ill. May 15, 2017) ("[w]hether . . . these tasks are

[16] Under federal law, collective actions seeking recovery for an employer's improper use of the tip credit are frequently brought in federal court pursuant to the FLSA. See, e.g., *Schaefer* v. *Walker Bros. Enterprises, Inc.*, 829 F.3d 551, 553 (7th Cir. 2016); *Fast* v. *Applebee's International, Inc.*, 638 F.3d 872, 876 (8th Cir. 2011), cert. denied, 565 U.S. 1156, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (2012).

'related' or 'unrelated' [to tipped work] is a merits issue and cannot be resolved at the conditional certification stage"); *Ide* v. *Neighborhood Restaurant Partners, LLC*, Docket No. 1:13-CV-509-MHC, 2015 WL 11899143, *6–8 (N.D. Ga. March 26, 2015) (deciding whether server's duties were "incidental" to tipped occupation in connection with motions for summary judgment); *Driver* v. *AppleIllinois, LLC*, 890 F. Supp. 2d 1008, 1029–33 (N.D. Ill. 2012) (concluding that servers were engaged in unrelated, nontipped duties in ruling on summary judgment motions).

We conclude that the trial court properly deferred its ruling on the merits of the parties' legal theories until after its decision to certify the class in the present case.[17] If the plaintiff's legal theory is correct, she must prove that the servers performed nonservice work during every shift and that the defendants did not separate and record the time spent performing the nonservice work. The defendants have not presented a persuasive reason as to why a determination of the meanings of "service" or "nonservice" would affect whether common issues predominate, despite the variety of tasks at

[17] The trial court did state during the hearing on class certification that it "would have to presume the plaintiff's arguments or claims are true" and that the plaintiff's definition of nonservice is correct for class certification. As we clarified previously in this opinion, that proposition is accurate to a point, as a trial court must "probe behind the pleadings before coming to rest on the certification question . . . and . . . certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of [r]ule 23 (a) have been satisfied." (Internal quotation marks omitted.) *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). In the trial court's memorandum of decision, the court considered the factual disputes identified by the defendants when concluding that it would not decide whether side work qualified as nonservice. We have concluded, however, that the trial court did not have to interpret the regulations in determining whether to certify the class, meaning that the trial court properly assumed the truth of the plaintiff's allegations, as there was no factual dispute that affected certification. Instead, the trial court properly deferred considering the merits of the plaintiff's legal theory until after class certification.

issue in this case, because the proposed, individualized inquiries envisioned by the defendants are unaffected by such a definition. If the trial court determines, for example, that cutting lemons is a nonservice task, the plaintiff may need to prove that the servers performed this task, among other nonservice tasks, at trial. As a result, the trial court properly declined to decide the merits of the plaintiff's legal theory in certifying the class in the present case.[18]

III

We next consider whether the trial court abused its discretion in deciding that the plaintiff had satisfied the requirements of Practice Book §§ 9-7 and 9-8. The defendants largely challenge the trial court's conclusions on commonality and predominance but also contend that the trial court incorrectly decided the elements of typicality, adequacy of representation, and superiority. We conclude that the trial court did not abuse its discretion.

A

As we previously discussed, Practice Book § 9-7 requires a plaintiff to affirmatively demonstrate that "there are questions of law or fact common to the class . . . ." The trial court considered predominance and commonality jointly but determined that each server possessed the same claim, namely, that they performed "nonservice" duties and are entitled to the full minimum wage because the defendants failed to segregate and record the time spent on those duties. The defendants,

[18] Moreover, if, after deciding the parties' motions for summary judgment, the trial court's interpretation of the regulation narrows the plaintiff's claims to the point that class certification is no longer appropriate, the court has the authority to decertify or modify the class. See *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 235–36, 947 A.2d 320 (2008) ("in the event that circumstances change as discovery proceeds and the trial court determines that class certification is improper, it may issue an order modifying its prior certification order or decertifying the class altogether").

however, argue that, "[g]iven the numerous tasks to be analyzed and the differences in how they were performed at different locations and at different times by different individuals, there was no single question satisfying commonality . . . ." We disagree.

The defendants construe the commonality factor too narrowly in their focus on the numerous side work tasks performed by the putative class members at varying times and locations. First, "most courts have held that factual variations among class members will not prevent a finding of commonality." *Collins* v. *Anthem Health Plans, Inc.*, supra, 275 Conn. 325. Second, the plaintiff alleges and supports the claim that a common side work policy was used at all of the defendants' restaurants. The existence of such a policy is instrumental in supporting a finding of commonality. See id., 324 ("[t]he commonality requirement is satisfied as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation" (internal quotation marks omitted)); see also *Shahriar* v. *Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 252 (2d Cir. 2011) (concluding that server class established commonality because their claims "all derive from the same compensation policies and tipping practices"); *Chime* v. *Peak Security Plus, Inc.*, 137 F. Supp. 3d 183, 208 (E.D.N.Y. 2015) ("[c]ommonality is usually satisfied in wage cases '[when] the plaintiffs allege that [the] defendants had a common policy or practice of unlawful labor practices' ").

Although the defendants note some factual differences between the various Chip's restaurants, such as variations in the types of tasks assigned and each restaurant's layout, the plaintiff's evidence at this stage demonstrates an overarching policy of servers performing generally consistent side work tasks at the direction of restaurant managers. This restaurant-wide policy is

supported by the fact that Robertson, the defendants' corporate representative, testified as to the policy applicable in all six restaurants. Additionally, the plaintiff's server affidavits support the finding of a consistent policy throughout the restaurants. Each of the server affidavits discusses how the server performed side work at the Chip's restaurant where the server was employed. For instance, the Wethersfield affidavit described the "expo cooler" side work as (1) wiping down the cooler, (2) restocking, (3) and " 'flip[ping]' " the contents of the cooler. This practice is substantially similar to those described in the affidavits of the servers who work in the Trumbull, Orange, Fairfield, and Southbury restaurants.[19] Although the defendants are correct that servers might perform such side work tasks differently, we conclude that any differences would likely be insubstantial and do not affect commonality. See *Mooney* v. *Domino's Pizza*, *Inc.*, Docket No. 1:14-cv-13723-IT, 2016 WL 4576996, *6 (D. Mass. September 1, 2016) (concluding that "[w]hether answering phones, folding boxes, preparing deliveries, and any other task performed by class members while inside [are] 'related' to delivering pizzas is a legal question that will be common to all class members," despite defendant's objections that such determinations would involve individualized inquiries).

The defendants contend that a different result is compelled under the commonality standard outlined in *Wal-Mart Stores*, *Inc.* v. *Dukes*, supra, 564 U.S. 350. In *Dukes*, the United States Supreme Court concluded that the class, numbering 1.5 million individuals, failed to dem-

[19] The plaintiff's evidence lacks an affidavit dedicated to the Southington restaurant, although the plaintiff herself occasionally worked there. Nevertheless, Robertson, the current general manager at the Southington restaurant, did not indicate that Southington side work varied substantially from that at the other restaurants, so it is reasonable to assume that Southington operated in accordance with the general policy.

onstrate commonality in their Title VII gender discrimination claims. Id., 357, 359. The court stated that "[t]heir claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of [class-wide] resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Id., 350. Additionally, the class members must "have suffered the same injury . . . ." (Internal quotation marks omitted.) Id. As the alleged discrimination could not be linked to an overarching employment policy by the plaintiff but, instead, manifested in decisions of local supervisors, the court reversed the District Court's decision certifying the class. Id., 343, 355–57.

Dukes is distinguishable and affords the defendants no assistance because the plaintiff in the present case presents a singular question of liability common to all class members. Unlike the plaintiffs in *Dukes*, who sued for gender discrimination, which entails a consideration of discrete employment decisions in thousands of locations as to specific persons with no evidence that a common policy had resulted in the disparate treatment, the plaintiff in the present case is seeking to recover damages for a company-wide practice of assigning nonservice duties and improperly taking the tip credit. Proof of the "truth or falsity" of this policy will answer the question of liability as to all class members. Id., 350. As a result, we are not persuaded that *Dukes* dictates a different conclusion. See *Zivkovic* v. *Laura Christy, LLC*, 329 F.R.D. 61, 70 (S.D.N.Y. 2018) (concluding that *Dukes* was "markedly different" from case concerning minimum wage violations and that defendant's argument pointing to "individual questions regarding each employee's schedules and compensation" involved damages questions that "do not defeat class certification").

B

Along with their challenge to the commonality determination under Practice Book § 9-7, the defendants also assert that the trial court improperly failed to decide whether the defendants were the plaintiff's employers. The defendants claim that they are not the plaintiff's employers and that there is no legal entity named "Connecticut Chip's Family Restaurant," which was the employer named in the plaintiff's proposed class definition. For these reasons, the defendants argue that the plaintiff lacks standing and, therefore, that her claims are not typical and that she is not an adequate class representative. In response, the plaintiff contends that she has demonstrated numerosity[20] and that this question with respect to the employing party relates to the merits and is not properly decided at the class certification stage. In the alternative, the plaintiff argues that any error in this respect would be harmless because the defendants are in fact her employers. We conclude that the trial court did not abuse its discretion in determining that the plaintiff satisfied both her adequacy as a class representative and typicality.

[20] The defendants did not argue before the trial court that whether the plaintiff was employed by the defendants affected her standing; instead, they argued that such an inquiry was relevant to the plaintiff's showing of numerosity. Nevertheless, we will review the merits of the defendants' argument.

Although the defendants have changed the focus of their argument on appeal to different Practice Book requirements, "[w]e may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial." *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009). Additionally, "standing implicates the court's subject matter jurisdiction, [so] the issue of standing is not subject to waiver and may be raised at any time." *Equity One, Inc.* v. *Shiver*s, 310 Conn. 119, 126, 74 A.3d 1225 (2013). Because the legal argument is a variation of one raised before the trial court and invokes the court's subject matter jurisdiction, we review the merits of the defendants' argument. Additionally, we note that the plaintiff did not object to our review on appeal.

"Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009). "The issue of standing implicates subject matter jurisdiction . . . ." (Internal quotation marks omitted.) Id., 113.

"The requirements of justiciability and controversy are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. . . . As long as there is some direct injury for which the plaintiff seeks redress, the injury that is alleged need not be great. . . . Where the nexus between the injury and the claim sought to be adjudicated is obvious and direct, a plaintiff has standing to maintain the claim." (Citations omitted; internal quotation marks omitted.) *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 463–64, 673 A.2d 484 (1996).

We conclude that the trial court did not need to decide whether the defendants were the plaintiff's employers to determine standing at the class certification stage. Whether the defendants are the correct party is an issue of misjoinder and does not implicate the court's subject matter jurisdiction. See General Statutes § 52-108 ("An action shall not be defeated by the nonjoinder or mis-

joinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require.''); *Bloom* v. *Miklovich*, 111 Conn. App. 323, 329, 958 A.2d 1283 (2008) (''[n]aming an improper person as a party in a legal action constitutes misjoinder'' (internal quotation marks omitted)). If the defendants are the incorrect parties to this action, they must file a motion to strike. See Practice Book § 11-3 (''[t]he exclusive remedy for misjoinder of parties is by motion to strike''). Although the defendants are correct that the plaintiff failed to name the individual limited liability companies that operate each of the Chip's locations; see footnote 4 of this opinion; ''the failure to give notice to or to join an indispensable party does not impact the court's subject matter jurisdiction.'' *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 288, 914 A.2d 996 (2007). Instead, the plaintiff may seek an order from the trial court adding those entities as parties, if ''the interests of justice require.'' Practice Book § 9-19.

''It is well established that a representative plaintiff must have individual standing to assert claims against all the members of a defendant class.''[21] *Macomber* v. *Travelers Property & Casualty Corp.*, supra, 277 Conn. 632. The plaintiff in the present case possesses standing, as she is seeking recovery for a cognizable injury, namely, violations of Connecticut wage laws and regulations, and has the statutory right of action against her employer for such violations. See General Statutes § 31-68 (a). In *Macomber*, the plaintiff sued several defendants, alleging that they had improperly used structured

[21] ''Thus, both standing and mootness also frequently appear as threshold requirements for the maintenance of federal class actions and must be considered in addition to the requirements of [r]ule 23 when deciding whether a particular action may be certified.'' 7AA C. Wright et al., Federal Practice and Procedure (3d Ed. 2005) § 1785.1, p. 385.

settlements to resolve certain personal injury claims. *Macomber* v. *Travelers Property & Casualty Corp.*, supra, 620, 623 The plaintiff's own complaint did not, however, advance a legally valid claim against one of the corporate defendants, Solomon Smith Barney Holdings, Inc. (Smith Barney), because Smith Barney's alleged participation in the scheme did not occur until after the plaintiff had entered into her structured settlement. Id., 634. The court concluded that "[t]he plaintiff can have no standing to assert a claim against Smith Barney and, therefore, cannot be a typical class representative, because she cannot typically and adequately represent those class members with such claims. Put another way, she has no incentive aggressively to litigate any claims against Smith Barney and, therefore, is not an appropriate class representative." Id.

The plaintiff in the present case alleged facts, which the trial court assumed to be true for class certification purposes, demonstrating that the defendants were her employers. See id., 634 (considering plaintiff's own allegations to determine standing). Unlike the plaintiff in *Macomber*, who could not assert a cognizable claim against Smith Barney, the plaintiff in the present case faces no such legal impediment and has every incentive to litigate her claim aggressively against the defendants. The nexus between the injury and the claim against the defendants named in this case is "obvious and direct"; (internal quotation marks omitted) *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 236 Conn. 464; as Kaiaffa, LLC, and Chatzopoulos are the members of all of the limited liability companies that operate the restaurants at issue in the present case, and, according to the plaintiff, Chatzopoulos implemented the policies at issue. See footnote 4 of this opinion.

Although the defendants characterize their argument as a challenge to the plaintiff's standing, a determination as to whether the defendants meet the definition of

an "employer" under Connecticut's wage laws is more accurately analyzed as a merits inquiry. See *Butler* v. *Hartford Technical Institute, Inc.*, 243 Conn. 454, 463–64, 704 A.2d 222 (1997) (individual was "an employer," as defined by General Statutes § 31-71a (1), and, therefore, could be liable under General Statutes § 31-72 for unpaid overtime wages, "if the individual is the ultimate responsible authority to set the hours of employment and to pay wages and is the specific cause of the wage violation"). The defendants argue in their brief that wage payments and the assignment of tasks were made by individual managers and not Chatzopoulos. A determination on this question affects liability, and the defendants do not explain how its resolution affects the plaintiff's adequacy or typicality. Although each restaurant is run by an individual limited liability company, it is either Kaiaffa, LLC, or Chatzopoulos (whether through his membership in Kaiaffa, LLC, or individually) who is the member of those limited liability companies. Because the business structure is the same for all of the restaurants, the question that the defendants present as particular to the plaintiff's standing is a question best determined on a class-wide basis.[22]

C

We next address the defendants' claim that the trial court abused its discretion in determining that the plaintiff satisfied the predominance and superiority requirements of Practice Book § 9-8. Because the defendants make interrelated arguments regarding both predominance and superiority, we consider those claims together.

The defendants argue that the plaintiff has not demonstrated predominance because the jury will need to

[22] We note that the trial court may well subsequently determine that the operational structure of the Chip's business renders it appropriate to divide the class into subclasses by restaurant location. See Practice Book § 9-9 (a) (4) ("[w]hen appropriate . . . a class may be divided into subclasses and each subclass treated as a class").

decide several individualized issues, such as whether each of the thirty-five side work tasks was either service related or incidental to service when performed by each server, whether each individual server performed nonservice tasks, how long these tasks took each server to perform, and during what shifts each server performed these nonservice tasks. Also, the defendants and the amicus curiae the Restaurant Law Center contend that the trial court's decision represents a "steep departure" from several previous Connecticut trial court decisions, which they argue correctly decided the issue of predominance. Specifically, as to superiority, the defendants argue that the trial court did not examine how the plaintiff's claim would be proven at trial and that, if the trial court had performed such a rigorous analysis, it would have concluded that the class members could prove their claims only through individualized testimony.

In response, the plaintiff contends that the class' claims may be proven by generalized evidence because the defendants produced no evidence demanding individualized inquiries. The plaintiff argues that the earlier Superior Court decisions declining to certify classes of servers were wrongly decided in that they (1) failed to account for the defendants' burden to prove their entitlement to the tip credit, and (2) failed to apply the burden shifting framework outlined in *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64 (2003). Additionally, the plaintiff claims that she has sufficiently outlined her trial plan and demonstrated that adjudicating these claims as a class action is superior. Similarly, she contends that any individualized damages questions may be proven by representative evidence. We conclude that the trial court did not abuse its discretion in determining that common issues predominate and that a class action is superior to individually litigating the claims.

"In order to determine whether common questions predominate, [a court must] . . . examine the [causes] of action asserted in the complaint on behalf of the putative class. . . . Whether an issue predominates can . . . be determined [only] after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action. . . . Common issues of fact and law predominate if they ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to . . . relief. . . . [When], after adjudication of the [class-wide] issues, [the] plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual[ized] claims, such claims are not suitable for class certification . . . .

"[When] cases [involve] individualized damages . . . [and those] damages can be computed according to some formula, statistical analysis, or other easy or essentially mechanical methods, the fact that damages must be calculated on an individual basis is no impediment to class certification. . . . It is primarily when there are significant individualized questions going to liability that the need for individualized assessments of damages is enough to preclude [class] certification." (Internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 60–61. As outlined in our earlier discussion of predominance; see part II B of this opinion; a trial court is first required to review the elements of the cause of action, then decide whether those elements may be proven by generalized or individualized proof, and, finally, it must weigh whether those common issues predominate over individual issues. Id., 61.

Practice Book § 9-8 (3) provides that, when deciding whether a class action is superior, the trial court should consider "(A) the interest of members of the class in

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of class action." "Superiority . . . is intertwined with the predominance requirement. . . . If the predominance criterion is satisfied, courts generally will find that the class action is a superior mechanism even if it presents management difficulties." (Citation omitted; internal quotation marks omitted.) *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, supra, 330 Conn. 74.

In its discussion of predominance, the trial court began by examining the plaintiff's claim. The court first quoted § 31-62-E4 of the Regulations of Connecticut State Agencies, which details the elements of a cause of action under § 31-68 (a).[23] Although the trial court did not break down the regulation into elements, it is evident that the plaintiff must show that, on any given shift (1) she performed both service and nonservice duties, (2) the employer did not segregate and record the time spent on each type of duty, and (3) the employer took the tip credit. See *Stevens* v. *Vito's by the Water, LLC*, Superior Court, judicial district of Hartford, Docket No. CV-15-6062506-S (November 9, 2017) (65 Conn. L. Rptr. 430, 433). The defendants do not contest elements two and three. As a result, the trial court properly dedicated its analysis to whether the first element could be proven by generalized proof. The trial court concluded that the plaintiff's proof included gen-

[23] "Administrative regulations have the full force and effect of statutory law and are interpreted using the same process as statutory construction, namely, under the well established principles of General Statutes § 1-2z." (Internal quotation marks omitted.) *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 603, 89 A.3d 841 (2014).

eralized evidence, such as the defendants' own admissions via their corporate representatives, and that individualized evidence demonstrating the type and amount of side work was unnecessary to prove the plaintiff's claim. According to the trial court, if the plaintiff's legal interpretation is correct, the plaintiff's claim can be proven by generalized evidence.

Previous Connecticut trial court decisions, which declined to certify classes in earlier tip credit cases, concluded that individual issues predominated because the nature of the work performed and the time spent on the duties were individual questions. See *Bucchere* v. *Brinker International, Inc.*, supra, Superior Court, Docket No. CV-04-4000238-S; *Palmer* v. *Friendly Ice Cream Corp.*, Docket No. CV-04-4001612-S, 2006 WL 361339, *4–5 (Conn. Super. January 25, 2006), appeal dismissed, Connecticut Appellate Court, Docket No. 27669 (July 12, 2006), aff'd, 285 Conn. 462, 940 A.2d 742 (2008); *Galbreth* v. *Briad Restaurant Group, LLC*, supra, 40 Conn. L. Rptr. 404; see also *Orozco* v. *Darden Restaurants, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-04-4022118-S (August 3, 2006) (41 Conn. L. Rptr. 717, 718) ("[i]n [*Bucchere*, *Galbreth*, and *Palmer*], the court found that individualized issues regarding the nature of the duties that plaintiffs were required to perform at each of the restaurants and the extent to which each of the plaintiffs had to perform these duties during each of their shifts at the various restaurants predominated over issues that would require generalized proof"), appeal dismissed, Connecticut Appellate Court, Docket No. AC 27937 (September 26, 2006), aff'd sub nom. *Bucchere* v. *Brinker International, Inc.*, 287 Conn. 704, 950 A.2d 493 (2008). The plaintiff contends that these trial court decisions reached the incorrect result by failing to correctly apply this court's decision in *Schoonmaker*.

In *Schoonmaker* v. *Lawrence Brunoli*, *Inc.*, supra, 265 Conn. 234, this court adopted the burden shifting analysis first outlined in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). Under this burden shifting scheme, "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli*, *Inc.*, supra, 239–40.

This burden shifting analysis assists the plaintiff in establishing the *amount* of improperly paid work. See *Anderson* v. *Mt. Clemens Pottery Co.*, supra, 328 U.S. 688 ("[H]ere we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies *only in the amount of damages* arising from the statutory violation by the employer." (Emphasis added.)); see also *Kuebel* v. *Black & Decker*, *Inc.*, 643 F.3d 352, 364–65 (2d Cir. 2011) ("[t]he *Anderson* test simply addresses whether there is a reasonable basis for calculating damages, assuming that a violation has been shown"); *Evans* v. *Tiger Claw*, *Inc.*, 173 Conn. App. 409, 420, 163 A.3d 1282 ("[t]he purpose of the *Anderson* [burden shifting] scheme is simply to prevent an employer from complaining that 'the damages lack the exactness and precision of measurement that would be possible had [it] kept records' "), cert. denied, 327 Conn. 976, 174 A.3d

800 (2017). Accordingly, in our view, the reasoning of the previous Superior Court cases was incorrectly based on the conclusion that the *extent* of the plaintiff's side work was an individual issue. Under § 31-62-E4 of the Regulations of Connecticut State Agencies, the plaintiff has to establish only that she performed nonservice and service work together, not that she performed nonservice work for any specific length of time; *Schoonmaker* does not require plaintiffs to establish with certainty the amount of uncompensated work performed.

That having been said, we observe that *Schoonmaker* does not lower the plaintiff's burden of proving whether she performed such work in the first instance. The plaintiff contends, however, that the class is not required to prove the precise nature of the employees' side work duties because it is the employer's burden to prove "that they are entitled [to] any exception to the minimum wage laws." The defendants disagree and argue that it is the plaintiff's burden to prove the type of side work performed during each shift. We agree with the plaintiff. In order to take advantage of a statutory exception to minimum wage laws, such as the exclusion of certain individuals under the definition of "employee" in § 31-58 (e), an employer has the burden of proving that an employee qualifies under that exception. See *Butler* v. *Hartford Technical Institute, Inc.*, supra, 243 Conn. 465–66; see also *Shell Oil Co.* v. *Ricciuti*, 147 Conn. 277, 283, 160 A.2d 257 (1960) ("[t]he burden rests on the employer to establish that his employees come within an exemption"). The tip credit functions in the same manner as an exception to the minimum wage, as it permits employers to pay their employees less than the minimum wage. See *Amaral Brothers, Inc.* v. *Dept. of Labor*, supra, 325 Conn. 74 (explaining that § 31-60 (b), tip credit statute, "carves out certain exceptions to Connecticut's minimum wage laws"); see also

Perez v. *Lorraine Enterprises*, *Inc.*, 769 F.3d 23, 27 (1st Cir. 2014) (characterizing FLSA tip credit as "[an exception] to the minimum wage rate"). As a result, it is the employer's burden to establish that the employees qualified for the tip credit. See *Stokes* v. *Norwich Taxi*, *LLC*, 289 Conn. 465, 481–83, 958 A.2d 1195 (2008) (placing burden on employer to prove application of fluctuating workweek exception under FLSA); see also *Pedigo* v. *Austin Rumba*, *Inc.*, 722 F. Supp. 2d 714, 724 (W.D. Tex. 2010) ("[the] [d]efendants, as the employers, bear the burden of proving that they are entitled to taking tip credits" (internal quotation marks omitted)); *Driver* v. *AppleIllinois*, *LLC*, 265 F.R.D. 293, 298 (N.D. Ill. 2010) (same). But see *Fast* v. *Applebee's International*, *Inc.*, 638 F.3d 872, 882 (8th Cir. 2011) ("the employees . . . must establish that they spent a *substantial amount of time* performing nontip-producing duties such that they were not performing a tipped occupation for at least portions of their shifts" (emphasis added)), cert. denied, 565 U.S. 1156, 132 S. Ct. 1094, 181 L. Ed. 2d 977 (2012).

The question remains whether the plaintiff may prove the class' performance of nonservice duties with representative evidence or whether the nature of side work requires individual testimony, as the defendants contend.

In *Tyson Foods*, *Inc.* v. *Bouaphakeo*, 577 U.S. 442, 454, 136 S. Ct. 1036, 1049, 194 L. Ed. 2d 124 (2016), the United States Supreme Court permitted an FLSA class to prove the amount of time spent performing an uncompensated task through the use of representative testimony. According to the court, whether representative proof is permitted "to establish [class-wide] liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action." Id., 460. Representative proof was permitted in *Tyson Foods*, *Inc.*, because of the burden shifting analysis from *Anderson*. See id., 456–57 ("In this suit, as in

[*Anderson*], [the] respondents sought to introduce a representative sample to fill an evidentiary gap created by the employer's failure to keep adequate records. . . . Rather than absolving the employees from proving individual injury, the representative evidence . . . was a permissible means of making that very showing."). As each individual employee could have used the representative evidence to prove liability given the discrete nature of the task at issue in *Tyson Foods, Inc.*, such evidence was properly used for the class. See id., 457.

The defendants contest the use of representative testimony in the present case because, they contend, the class members do not share the same tasks. We disagree. In the present case, the tasks expected of servers are relatively uniform, although certain tasks may have been performed by different servers on different shifts. See *Secretary of Labor* v. *DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) ("an employee can . . . represent other employees only if all perform substantially similar work"). But see *Ferreras* v. *American Airlines, Inc.*, 946 F.3d 178, 186–87 (3d Cir. 2019) (concluding that *Tyson Foods, Inc.*, did not apply as there was "substantial variability" in employees' tasks). Based on the depositions of the defendants' corporate representative, the trial court could reasonably have found, for purposes of certifying the class, that the plaintiffs demonstrated a common policy of similar side work tasks that could be used to show that all Chip's servers performed nonservice duties. For example, when asked how Wethersfield side work differed from the side work at other restaurants, Robertson stated: "*I would say it has the same tasks*, but the way it's written, the way it's categorized, the way things are stored, the layout, it's all different." (Emphasis added.) So, although there is some variation in the performance of these tasks, they are outlined and described similarly by the defendants themselves in their own policies and deposition testi-

mony. Additionally, the defendants admit that all servers are trained in a similar manner and perform some of their side work away from the tables and booths.[24]

The defendants also contend that representative testimony is improper because class members must individually prove how frequently and during what shifts specific duties were performed, and the record lacks evidence to that effect. We again disagree. As in *Tyson Foods*, *Inc.*, the plaintiff may use inference to bridge an evidentiary gap in this regard. The defendants did not record which duties servers performed during each shift. As a result, it would be unfair to require plaintiffs to prove facts for which there is no individual proof. See *Mooney* v. *Domino's Pizza*, *Inc.*, supra, 2016 WL 4576996, *4 ("[the] [d]efendants' proposed interpretation would make the [Massachusetts] Tips Act effectively unenforceable even in [single plaintiff] litigation, as no employee would be able to litigate the specific circumstances of the individual customer interactions, undoubtedly resulting in situations in which employees were improperly deprived of tips"). But see *In re Autozone*, *Inc.*, Docket No. 3:10-md-02159-CRB, 2016 WL 4208200, *15 (N.D. Cal. August 10, 2016) ("[t]he representational evidence [in *Tyson Foods*, *Inc.*] did not depend on individual employees' memories, it simply filled in a gap"), aff'd, 789 Fed. Appx. 9 (9th Cir. 2019).

In light of *Schoonmaker*, which permits employees to shift the burden to the employer to establish the precise amount of improperly paid work, and the statutory framework making it the employer's burden to prove its entitlement to the tip credit, we conclude that the trial court did not abuse its discretion in determining that the nature of the side work performed by the class

[24] Robertson testified that all servers (1) were trained according to the same training packet, and (2) performed side work on every shift. Throughout her depositions, she also detailed how specific tasks were performed away from the tables and booths.

can be proven by representative testimony. See *Secretary of Labor* v. *DeSisto*, supra, 929 F.2d 792 (permitting Secretary of Labor to establish "the initial burden of proof requirement" with representative testimony in FLSA case); *Mooney* v. *Domino's Pizza, Inc.*, supra, 2016 WL 4576996, *7 (permitting class to prove "how many hours class members typically spent performing particular duties" with representative testimony); see also *Vaquero* v. *Ashley Furniture Industries, Inc.*, 824 F.3d 1150, 1156 (9th Cir. 2016) (permitting employee to use representative evidence in form of company policies and class member declarations to prove liability, as defendant "may challenge the viability" of evidence later in proceedings). The class can establish what tasks were performed, and how frequently they were performed, through testimony offering the servers' recollection of these facts. For example, if all cleaning tasks are determined to be nonservice in nature, a group of servers may testify regarding how, and with what frequency, they cleaned the restaurant. *Tyson Foods, Inc.* "tells us that representative evidence include[s] employee testimony, video recordings, and expert studies. . . . So testimony from [the defendant's employees] can amount to representative evidence." (Citation omitted; internal quotation marks omitted.) *Ridgeway* v. *Walmart, Inc.*, 946 F.3d 1066, 1087 (9th Cir. 2020). A defendant may still mount individual defenses against representative testimony. See *Tyson Foods, Inc.* v. *Bouaphakeo*, supra, 136 S. Ct. 1047.

For these reasons, we conclude that the trial court did not abuse its discretion in permitting the plaintiff to use representative evidence to prove that class members performed service and nonservice work. "As long as there is a basis to conclude that the trial court reached a reasoned conclusion that common issues will outweigh others, predominance is properly established." *Standard Petroleum Co.* v. *Faugno Acquisi-*

tion, LLC, supra, 330 Conn. 65. If and when the trial court determines that certain tasks qualify as nonservice duties, the plaintiffs will be required to demonstrate that the class performed those duties for which they were improperly compensated, with the burden then shifting to the defendants to prove that they were permitted to take the tip credit for the performance of those tasks.[25] Whether an individual server performed nonservice tasks during a particular shift presents an individualized question of damages[26] that generally does not defeat predominance.[27] See *Zivkovic* v. *Laura Christy, LLC*, supra, 329 F.R.D. 75 ("the types of individual questions that exist in wage-and-hour cases, such as the hours worked or the exact damages to which each plaintiff might be entitled, [are] inevitable and [do] not defeat the predominance requirement" (internal quotation marks omitted)); *Whitehorn* v. *Wolfgang's Steakhouse, Inc.*, 275 F.R.D. 193, 199 (S.D.N.Y. 2011) (differences in "job duties and thus the projected shift hours" required individualized determinations of damages); see also 2 W. Rubenstein, Newberg on Class Actions (5th Ed. 2020) § 4:54 ("the black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate"). This framework may present the trial court with administrative challenges relating to case management, but such difficulties are inevitable in complex litigation of this type.

[25] See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196–97, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974) ("the general rule [is] that the application of an exemption under the [FLSA] is a matter of affirmative defense on which the employer has the burden of proof").

[26] See *Haschak* v. *Fox & Hound Restaurant Group*, Docket No. 10 C 8023, 2012 WL 5509617, *5 (N.D. Ill. November 14, 2012) ("[the] [d]efendants' liability for the policy will be independent of the possibility that certain individual class members will be unable to recover because the time they spent performing tasks mandated by the otherwise improper policy may happen to prove de minimis" (emphasis omitted)).

[27] We note that, if the court determines, after defining nonservice during the summary judgment proceedings, that there are too few qualifying tasks to support predominance, the court may decertify the class.

Our conclusion that the plaintiff may use representative testimony to establish predominance also supports a conclusion that litigating these claims as a class is superior. We recognize that the trial court's memorandum of decision addressed superiority only briefly and did not expressly consider many of the difficulties that the defendants argue militate against the superiority of a class action. Given our conclusion that the plaintiff may use representative testimony to prove liability, however, we are not persuaded by the defendants' arguments on this point. Although further testimony or other evidence may be required for the class to succeed on the merits of its claim, the absence of such evidence at this stage does not establish a lack of superiority.

Litigating the claims of hundreds of servers in this fashion promotes judicial efficiency and provides many individuals, who would likely not bring such a claim, an opportunity for relief. See *Grimes* v. *Housing Authority*, 242 Conn. 236, 244, 698 A.2d 302 (1997) ("[c]lass action suits: (1) promote judicial economy and efficiency; (2) protect defendants from inconsistent obligations; (3) protect the interests of absentee parties; and (4) provide access to judicial relief for small claimants"). This class, which is limited to six restaurants located within our state, does not include different restaurant types or restaurants across state lines. Claims such as those presented in the present case are ideally suited for class certification. The defendants themselves may also be the ultimate beneficiaries of class treatment when the claim rests, at bottom, on the validity of a single theory of liability because, if that theory fails as a matter of law, the decision may operate to foreclose recovery for hundreds of plaintiffs.

D

The defendants also claim that the trial court improperly defined the class in its certification order, as

required under Practice Book § 9-9.[28] The defendants assert that the trial court improperly certified the class utilizing the name "Connecticut Chip's Family Restaurant," which is not a legal entity. We reject this contention. Although "Connecticut Chip's Family Restaurant" is not a legal entity, that term clearly encompasses the six Chip's restaurants, rendering readily ascertainable and verifiable the individuals employed at those restaurants. Put differently, individual servers will easily recognize whether they qualify as a class member based on their employment at a Chip's restaurant during the stated time period, and their eligibility as such will be subject to definitive verification. See 3 W. Rubenstein, supra, § 7:27 ("Courts confront at least three recurring issues in overseeing the class definition. First, the class must be defined in a manner that makes its membership 'ascertainable.' . . . Second, the class definition must be clear and precise. . . . Third, a court certifying a class may have to certify more than one class or subclasses." (Emphasis omitted; footnotes omitted.)) Accordingly, it was not an abuse of discretion to describe the class using the name "Connecticut Chip's Family Restaurant."[29]

The order granting class certification is affirmed.

In this opinion the other justices concurred.

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[28] We are also not persuaded that the trial court failed to define the class. The trial court's decision clearly states that it is certifying the class, as requested by the plaintiff: "All individuals employed as [s]ervers at any Connecticut Chip's Family Restaurant from October 25, 2015, until March 1, 2018." (Internal quotation marks omitted.)

[29] We note that a class definition mentioning the six Chip's restaurant locations would be more specific, and the trial court may deem it advisable to amend the definition accordingly on remand. See *Rivera* v. *Veterans Memorial Medical Center*, 262 Conn. 730, 744, 818 A.2d 731 (2003) ("it is within the purview of the trial court to revisit the issue of class certification, and, if circumstances require, alter the definition of the class as developments dictate").