STATE OF CONNECTICUT *v.* MICHAEL T.*
(SC 20230)

McDonald, D'Auria, Mullins, Ecker, Keller and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 54-84 (b)), "[u]nless the accused requests otherwise, the court shall instruct the jur[ors] that they may draw no unfavorable inferences from the accused's failure to testify."

Convicted of multiple counts of first degree sexual assault and risk of injury to a child in connection with the sexual abuse of the victim, the daughter of his girlfriend, the defendant appealed to this court. The victim, who

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

was eleven years old at the time of trial, was reluctant to testify about the sexual assaults. On direct examination, the victim indicated that the defendant had hurt her "private" with "[h]is private." Shortly thereafter, the prosecutor reworded the victim's testimony and referred to the victim's testimony that the defendant had "put his private in [the victim's] private." In response to a question about whether anything had come out of either her private or the defendant's private, the victim responded that blood had come out of "[h]is" private, but the prosecutor subsequently referred to the blood that came out of the victim's, not the defendant's, private parts. The defendant did not testify at trial, and defense counsel requested that the trial court instruct the jury that the defendant "elected not to testify" rather than use the specific language in § 54-84 (b) regarding his "failure to testify," which counsel claimed has a negative connotation and suggested that the defendant had an obligation that he did not fulfill. The trial court denied counsel's request, indicating that its failure to use the statutory language might constitute plain error. The trial court subsequently instructed the jury that it could draw no unfavorable inference from the defendant's failure to testify. On appeal, the defendant claimed that he was denied his due process right to a fair trial by virtue of certain improprieties the prosecutor made while questioning the victim and during closing and rebuttal arguments. The defendant also challenged the trial court's jury instruction regarding his "failure" to testify. *Held*:

1. There was no merit to the defendant's claim that the prosecutor improperly relied on facts not in evidence by referring to the victim's testimony that the defendant had "put his private in [the victim's] private" and that blood had come out of her private: although it would have been preferable for the prosecutor to ask the victim clarifying questions rather than rephrase her words to correct the victim's plainly mistaken testimony, the prosecutor's statement that the defendant penetrated the victim was a reasonable and necessary inference drawn from the victim's testimony that the defendant had hurt her private with his private, the victim expressly testified on redirect examination that the defendant's private went into her private, and defense counsel did not object to the prosecutor's questions rephrasing the victim's testimony or contest the ample evidence that the victim had suffered a traumatic penetrating injury, contending only that the defendant was not the perpetrator; moreover, the salient point of the victim's testimony was the presence, not the source, of blood in her genital area after the assault, and the jury could reasonably infer that, at her young age, the victim simply did not know the source of the blood; furthermore, in light of the victim's age and reluctance to testify, it was within the trial court's discretion to allow the use of leading questions during the prosecutor's examination of the victim, and the prosecutor's remarks rephrasing the victim's testimony were not significantly more suggestive of independent knowledge of facts than a leading question would have been or deliberately

intended to distort the victim's testimony or to suggest that the prosecutor had knowledge of facts that could not be presented to the jury.

2. The defendant could not prevail on his claim that the prosecutor engaged in certain improprieties during closing and rebuttal arguments: the prosecutor did not improperly argue facts not in evidence or appeal to the jurors' emotions by thanking the jurors for paying attention to the evidence, apologizing to them for any anxiety the evidence, particularly certain photographs, had caused, and remarking on the difficulty of viewing evidence and hearing testimony of such a nature, as those statements were based on facts in evidence and the reasonable inferences that could be drawn therefrom, defense counsel did not object to those remarks and thanked the jurors during his own closing argument, acknowledging that the case was difficult, emotionally compelling, and "disgusting," and the prosecutor's remark that the state had "tried to keep it to a minimum" was, at most, a comment on the state's effort not to present cumulative evidence rather than a suggestion that the state possessed additional photographic evidence that would strengthen its case; moreover, the prosecutor did not improperly appeal to the jurors' emotions or vouch for the victim's credibility when she asked whether the victim looked like the type of child who would have made up the sexual assault, by characterizing the victim as extremely shy and passive, and by noting that the victim had been tearful and embarrassed during a video-recorded forensic interview, as those remarks were in response to an argument initially raised by the defense, namely, that the victim had lied about the sexual assault allegations because she did not want to live with the defendant, and simply attempted to rebut that argument on the basis of the evidence before the jury of the victim's appearance and demeanor; furthermore, although it was a closer question as to whether the prosecutor improperly vouched for the victim's credibility by asking if her emotions were real, answering that question in the affirmative, and stating that such emotion is hard to fake, in context, those remarks did not improperly induce the jurors to trust the state's judgment in lieu of their own views of the evidence but, rather, referred to evidence that had been presented at trial and appealed to the jurors' common sense and life experiences; furthermore, the prosecutor's comments concerning the victim's injuries to her genital area, namely, that she had been "ripped" and torn without the benefit of pain medication, although approaching an impermissible plea for sympathy, did not materially mischaracterize the testimony of the pediatrician who had examined the victim or exaggerate the severity of the victim's suffering and, therefore, were not improper.

3. The defendant could not prevail on his claim that the trial court improperly denied defense counsel's request that the court deviate from the language of § 54-84 (b) and his alternative claim that § 54-84 (b) is unconstitutional insofar as it violates the constitutional right to remain silent by referring to the defendant's "failure" to testify:

a. The trial court did not violate § 54-84 (b) by denying defense counsel's request that it instruct the jury that it could draw no adverse inference from the fact that the defendant elected not to testify: contrary to the defendant's claim that the phrase "[u]nless the accused requests otherwise," as used in § 54-84 (b), required the trial court to give the requested instruction, a review of relevant case law, including *State* v. *Casanova* (255 Conn. 581), revealed that, although a trial court may grant a defendant's request for an instruction that deviates from the specific wording of § 54-84 (b) if the instruction would not materially alter the substantive meaning of the statute, it is not required to grant such a request but may give any instruction that accurately states the law, and, in the absence of a request by a defendant that the court give no instruction concerning the fact that he did not testify, the court's failure to give an instruction pursuant to § 54-84 (b) constitutes plain error; accordingly, although the trial court incorrectly determined that any deviation from the specific wording of § 54-84 (b) would be plain error, and the trial court could have given the instruction that defense counsel requested, as it would not have mischaracterized the defendant's conduct or altered the substantive meaning of the statute, it was not improper for the trial court to instruct the jury using the statute's specific wording; moreover, the defendant's claim that *Casanova* should be overruled was unreviewable, as it was inadequately briefed.

b. This court rejected the defendant's claim that § 54-84 (b) was unconstitutional to the extent that it authorized the trial court to refer to the defendant's "failure" to testify; although this court agreed with the defendant that more neutral language is preferable to the use of the word "failure," which has a relatively negative connotation and tends to confirm the jurors' natural assumption that an innocent person would take the stand to respond to accusations against him, there is no completely neutral way to characterize the fact that the defendant did not take the stand, and the semantic difference between the phrase "failure to testify" and other wordings was too slight to have constitutional significance in the overall context of the instruction in the present case.

(*One justice concurring separately*)

Argued October 14, 2020—officially released April 22, 2021**

Procedural History

Substitute information charging the defendant with three counts each of the crimes of sexual assault in the first degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Blue*, *J.*; verdict and judgment

** April 22, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

of guilty, from which the defendant appealed to this court. *Affirmed.*

Julia K. Conlin, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Maxine Wilensky* and *Lisa D'Angelo*, senior assistant state's attorneys, for the appellee (state).

Opinion

VERTEFEUILLE, J. A jury found the defendant, Michael T., guilty of three counts of first degree sexual assault in violation of General Statutes § 53a-70 (a) (1) and three counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The trial court rendered judgment in accordance with the verdict and sentenced the defendant to a total effective sentence of sixty years imprisonment. The defendant appeals directly to this court pursuant to General Statutes § 51-199 (b) (3), claiming that the prosecutor engaged in prosecutorial impropriety, thereby depriving him of his constitutional due process right to a fair trial, by (1) assuming facts not in evidence while questioning the victim, and (2) during closing argument, assuming facts not in evidence, vouching for the victim's credibility and appealing to the jurors' emotions. The defendant further claims that the trial court violated General Statutes § 54-84 (b)[1] and infringed on his constitutional right to remain silent when it denied his request to instruct the jury that he *elected not* to testify and, instead, referred to his *failure* to testify. We affirm the judgment of conviction.

[1] General Statutes § 54-84 (b) provides in relevant part: "Unless the accused requests otherwise, the court shall instruct the jury that they may draw no unfavorable inferences from the accused's failure to testify. . . ."

The record reveals the following facts, which the jury reasonably could have found, and procedural history. The victim was born in December, 2006, and was eleven years old at the time of trial. In 2014 and 2015, when the victim was seven and eight years old, respectively, she lived on Orchard Street in New Haven with her biological mother, her four younger sisters and the defendant. The defendant was the boyfriend of the victim's mother, and the victim referred to him as her "stepfather." On a number of occasions during that period, the defendant called the victim into his bedroom, undressed her,[2] lay her on his bed and penetrated her with his penis vaginally, orally and anally. The defendant told the victim not to tell anyone about the assaults and threatened to kill her if she disobeyed him.

In August, 2015, the victim and her sisters were removed from the Orchard Street residence as the result of an investigation by the Department of Children and Families (department) that was unrelated to the sexual assaults of the victim. The victim and one of her sisters were placed in June Turpin's licensed foster home. After they had been there for several days, Turpin found in their bedroom a pair of the victim's underwear with a clean sanitary napkin stuck to it and another pair of underwear covered in dried blood. Turpin called Quentin Scott, an investigative social worker for the department, who referred Turpin to Cherise Rowan, a physician at the Fair Haven Community Health Center.

Rowan examined the victim on August 27, 2015. The victim denied that she was still bleeding but nodded her head when Rowan asked her if the defendant had done anything to "her private area." Rowan determined that the victim was prepubertal and that menstruation would not have been possible.

[2] There was conflicting evidence as to whether the defendant undressed the victim or directed her to undress herself.

The day after Rowan's examination of the victim, Monica Vidro, a forensic interviewer at the Yale Child Abuse Clinic (clinic), conducted a forensic interview of the victim. During the interview, the victim reported that the defendant had assaulted her vaginally, orally and anally. The victim was extremely reluctant to speak to Vidro during the interview; her speech was frequently inaudible, and she wept almost continuously.

Rebecca Moles, a child abuse pediatrician with the clinic, examined the victim immediately after the forensic interview. Moles determined that a portion of the victim's hymen was missing as the result of a tearing injury to the adjacent skin and mucosa,[3] resulting in a purplish discoloration of the area. The injury, which Moles likened to "an episiotomy[4] or [the] tearing that can happen with childbirth," was severe and would have caused pain to the victim. (Footnote added.) In addition, because that area of the body is highly vascular, i.e., permeated by blood vessels, the injury would have caused bleeding. Moles concluded that the victim's injury was diagnostic of a prior penetrating trauma. Moles recorded her examination of the victim using a video colposcope, and a still image of the victim's injury taken from the video recording was presented to the jury as an exhibit. Moles again examined the victim two months after her initial examination to assess whether the injury was healing, and a photograph of the injury that she took during that examination was also presented to the jury.

[3] Mucosa is the moist tissue that lines certain parts of the inside of the body. See National Institutes of Health, United States National Library of Medicine, MedlinePlus, "Mucosa" (last modified February 26, 2021), available at https://medlineplus.gov/ency/article/002264.htm (last visited April 19, 2021).

[4] Moles testified that an episiotomy is a medical procedure performed by an obstetrician during childbirth whereby the obstetrician cuts the tissue between the opening of the vagina and the anus in order to prevent a tearing injury.

The defendant was charged in a six count information with (1) compelling the victim to engage in vaginal/penile intercourse by the use of force in violation of § 53a-70 (a) (1), (2) having contact with the victim's genital area in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2), (3) compelling the victim to engage in fellatio by the use of force in violation of § 53a-70 (a) (1), (4) causing the victim to have contact with his genital area in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2), (5) compelling the victim to engage in anal intercourse by the use of force in violation of § 53a-70 (a) (1), and (6) having contact with the victim's anus in a sexual and indecent manner likely to impair her health or morals in violation of § 53-21 (a) (2).

Before trial, the trial court granted the prosecutor's request that the victim's stepmother sit with her on the witness stand pursuant to General Statutes § 54-86g (b).[5] The trial court observed that "there's no compelling necessity test [for granting such a request], it's just simply the question of whether it will help [the victim] to testify completely and reliably . . . ." The court further observed, however, that, based on its interview of the victim on the stand in the absence of the jury, "if there were a stronger requirement, [it] would find that in this case, because it's very clear [that the victim] will clam up otherwise."

During trial, the prosecutor asked the victim what the defendant had done to her. The victim responded,

[5] General Statutes § 54-86g (b) provides in relevant part: "In any criminal prosecution of an offense involving assault, sexual assault or abuse of a child twelve years of age or younger, the court may, upon motion of the attorney for any party, order that the following procedures be used when the testimony of the child is taken . . . (2) an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact . . . ."

"[h]e hurt me." The prosecutor then asked her, "how did he hurt you? Did he hurt your private?"[6] The victim responded, "[y]es." After the victim responded, defense counsel made an objection, which the trial court overruled. The prosecutor then asked the victim, "what did [the defendant] hurt your private with?" The victim responded, "[h]is private." A short time later, the prosecutor asked the victim, "[w]hat does he do . . . when you're on the bed? You said he put his private in your private." After the victim responded "[y]es," defense counsel objected, and the trial court again overruled the objection. During subsequent questioning of the victim, the prosecutor indicated on several occasions that the defendant had "put his private in [the victim's] private."[7] On redirect examination, the prosecutor asked the victim: "[J]ust so everybody understands, where did [the defendant's] private go, in or outside of your private?" The victim responded, "[i]n."

The prosecutor also asked the victim whether anything had "come out of [her] private or [the defendant's] private . . . ." She responded "[h]is" and indicated that the substance was blood. The prosecutor then asked: "And where did the blood—it came out of your private and went where? The bed, your underwear, his—on him, where?" The victim responded, "[b]ed." The victim also testified that the defendant had put his "private" in her "private" on multiple occasions, that he had put his "private" inside her mouth, that he had put his "pri-

[6] During the forensic interview of the victim, the victim indicated that she referred to genitals as "privates." A redacted video recording of the interview was presented to the jury.

[7] The prosecutor asked the following questions: "[W]here was [the defendant] when he put his private in your private?" "[W]hen he put his private in your private . . . how did it feel?" "Did [the defendant put his private in your mouth] on the same day he put his private in your private or a different day?" "When [the defendant] put his private in your private, were you on your stomach, your back, your side, which?" And "when [the defendant] put his private in your private, did he tell you that this was okay because he did it to your mom, too?"

vate" inside her "butt," and that, during one of the assaults, he held her face down on the bed so that she had difficulty breathing.[8]

The victim further testified that she was frightened of the defendant. The victim's aunt testified that, when the victim came to stay with her, the victim would not want to return home because she was scared and that, when they saw the defendant at a store once during an outing, the victim cried and tried to hide behind her.

Lisa Melillo, a school psychologist and trained forensic interviewer, testified as an expert witness for the state about behaviors that are typical for children who have been sexually abused. Melillo testified that trauma can heighten a child's memory of an event and that sexual abuse by a person known to the child can increase the trauma.

During closing argument, the prosecutor stated to the jury: "I . . . want to thank you for the attention that you have paid to the evidence in this case, and I could see sometimes it wasn't as easy as it either would've been, should've been, if it were a different type of trial, and I apologize for any anxiety any of the evidence may have caused you. . . . I also want to apologize for the photos that you had to view. The state tried to keep it to a minimum. Unfortunately, it was necessary that you viewed them."

Defense counsel stated to the jury during closing argument that "[t]his is an exceptionally difficult and disappointing and disgusting case, and I am very thankful that you came down here and sat through this . . . . [I]t's a very emotionally compelling case; it's a case that gets you fired up . . . ." Defense counsel also argued that the victim had fabricated the allegations that the

[8] The victim stated during the forensic interview that this occurred when the defendant penetrated her anally.

defendant had sexually assaulted her because "she wanted out of that house . . . ." Defense counsel further argued that the victim might have identified the defendant as the person who assaulted her because of Rowan's suggestive question to the victim during her initial examination at the Fair Haven Community Health Center whether the defendant had done anything to her "private area."

During rebuttal argument, the prosecutor stated that "[defense counsel] . . . asked you to assume, not draw a reasonable inference, but assume that the reason [the victim] brought all of this up is that she wanted out of the house. Did you hear anyone on that witness stand say anything about her wanting out of the house? Does she look like the type of child who would have been evil enough to make this up to get out of the house?" The prosecutor further stated that "[the victim] is an extremely passive, helpless girl folding in on herself, shy, painfully shy. She was highly uncomfortable. In the forensic [interview], there were tears, she was embarrassed. Were those emotions real? The state submits to you absolutely they were. It's easy to fake facts. It's much harder to fake emotion like you saw [in] the forensic [interview] and on that witness stand."

Later during rebuttal, the prosecutor stated: "Moles talked about that scar below where the hymen is missing. She said it's a scar, it was a tearing injury similar to an episiotomy. [The victim] did not have the luxury of an episiotomy and a doctor who could give her . . . some sort of pain medication. She was ripped. You heard the doctor say that was a tearing injury."

The prosecutor also asked, with reference to the victim's testimony that the defendant had held her head against the bed during one of the assaults: "Does she look like a child who's sophisticated enough to give you that kind of facts? If wishes could come true, this

would never have happened, but it did. [The victim] told people in 2015, and she told them and told you in 2018, and, if wishes could come true, we wouldn't have to have witnesses like [the victim], children, who have to be—who have to become embarrassed, they have to show you their pain, they have to describe to you their betrayal of trust, and show you [their] tears, all when she was seven and eight."

During the course of the trial, the trial court conducted a conference with the prosecutor and defense counsel to review the court's proposed jury instructions. Defense counsel objected to the proposed instruction that the jury could draw no unfavorable inference from the defendant's "failure" to testify, arguing that "[the word failure] gives a negative connotation, and it makes it seem as though he had an obligation and he failed to do it." Defense counsel requested that the trial court instead instruct the jury that the defendant "elected not to testify." The trial court stated that "the legislature mandates this charge" and indicated that, if the court did not give the instruction in "the way that the legislature mandates, that itself may be plain error." Accordingly, the trial court denied the defendant's request. The court ultimately instructed the jury that "[t]he defendant has not testified in this case. An accused person has the option to either testify or not testify at trial. He's under no obligation to testify. He has a constitutional right not to testify. You must draw no unfavorable inference from the defendant's failure to testify."

The jury found the defendant guilty on all counts. The court rendered judgment in accordance with the verdict and sentenced the defendant to twenty years imprisonment on each count, with the first two counts to run concurrently with each other, the third and fourth counts to run concurrently with each other, and the fifth and sixth counts to run concurrently with each

other. The first, third and fifth counts were to run consecutively to each other, for a total effective sentence of sixty years imprisonment.

This appeal followed. The defendant claims on appeal that the prosecutor, while questioning the victim and during closing and rebuttal arguments, improperly assumed facts not in evidence, vouched for the victim's credibility and appealed to the jurors' emotions, and that these improprieties deprived him of his due process right to a fair trial. The defendant also contends that the trial court violated § 54-84 (b) when it denied his request to instruct the jury that it could draw no unfavorable inference from the fact that he "elected" not to testify and, instead, referred to his "failure" to testify. He further contends that, if we conclude that § 54-84 (b) authorized the trial court to refer to his "failure to testify," even though he requested alternative language, the statute infringed on his constitutional right to remain silent. We reject all of these claims.

I

We first address the defendant's claims that the prosecutor improperly referred to facts not in evidence when she asked the victim (1) "[y]ou said [the defendant] put his private in your private," and other questions using that phrase, and (2) "the blood . . . came out of your private and went where," and other questions using that phrase. We conclude that these questions did not constitute prosecutorial impropriety.

At the outset, we address the state's assertion that these claims are not reviewable because they are not constitutional in nature, as the defendant contends, but are instead unpreserved evidentiary claims insofar as defense counsel did not properly object to the prosecutor's questions at trial.[9] This court has repeatedly held

[9] The state acknowledges that defense counsel objected when the victim responded "[y]es" to the prosecutor's question, "[y]ou said he put his private in your private . . . [i]s that when it happened," but contends that the

that, "[i]n cases of unpreserved claims of prosecutorial [impropriety] . . . it is unnecessary for the defendant to seek to prevail under the specific requirements of . . . [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn 733, 781, 120 A.3d 1188 (2015)] . . . and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. The reason for this is that the touchstone for appellate review of claims of prosecutorial [impropriety] is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)." (Internal quotation marks omitted.) *State* v. *Spencer*, 275 Conn. 171, 178, 881 A.2d 209 (2005). We also have held, however, that "unpreserved evidentiary claims masquerading as constitutional claims will be summarily dismissed" as unreviewable. *State* v. *Golding*, supra, 241.

In the present case, the state contends that the defendant's claims that the prosecutor engaged in prosecutorial impropriety during her questioning of the victim are actually evidentiary claims because he is challenging the manner in which the prosecutor phrased the questions, not the information that the prosecutor sought to elicit. The state further contends that the questions that the defendant is challenging were permissible leading questions. We conclude that we need not resolve this issue because the defendant cannot prevail on the merits of his claims. See, e.g., *State* v. *William L.*, 126 Conn. App. 472, 483 n.11, 11 A.3d 1132 ("[w]e do not need to decide whether the defendant waived his claim, as we resolve the claim on other grounds"), cert. denied, 300 Conn. 926, 15 A.3d 628 (2011). Indeed,

claims related to this question are unreviewable because defense counsel did not object until after the victim answered and did not indicate the basis for the objection.

to determine whether the defendant's claims are reviewable constitutional claims or unreviewable evidentiary claims, we would have to determine whether the prosecutor's questions improperly assumed facts not in evidence or reflected reasonable inferences from the evidence, which is precisely the same analysis that we apply to the claims on their merits.[10] Cf. *State* v. *Spencer*, supra, 275 Conn. 178 (application of *Golding* test is superfluous when considering claim of prosecutorial impropriety because determining whether due process rights were violated requires court to consider "the fairness of the entire trial, and not the specific incidents of [impropriety] themselves" (internal quotation marks omitted)).

We turn, therefore, to the merits of the defendant's claims. "In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Cita-

[10] Although the state cites authority for the proposition that the prosecutor may ask leading questions of certain state witnesses; see, e.g., Conn. Code Evid. § 6-8 (b), commentary (under § 6-8 (b) (3), "the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent"); "a prosecutor is not permitted to pose a question that implies the existence of a factual predicate when the prosecutor knows that no such factual basis exists." *State* v. *Salamon*, 287 Conn. 509, 564, 949 A.2d 1092 (2008). We further note that there are circumstances under which even an evidentiary error can rise to the level of a constitutional violation. See, e.g., *State* v. *Turner*, 334 Conn. 660, 675, 224 A.3d 129 (2020) ("[a] claim of evidentiary error . . . premised on a generalized violation of a party's due process right is constitutional in nature [only] if the harm resulting from the error is sufficient to require a new trial" (internal quotation marks omitted)).

tions omitted; internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 36–37, 975 A.2d 660 (2009).

"A prosecutor, in fulfilling his duties, must confine himself to the evidence in the record. . . . Statements as to facts [that] have not been proven amount to unsworn testimony . . . ." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 544; see also *State* v. *Fauci*, 282 Conn. 23, 49, 917 A.2d 978 (2007) ("[w]e long have held that a prosecutor may not comment on evidence that is not a part of the record"). "[W]hen a prosecutor suggests a fact not in evidence, there is a risk that the jury may conclude that he or she has independent knowledge of facts that could not be presented to the jury." *State* v. *Singh*, 259 Conn. 693, 718, 793 A.2d 226 (2002).

In the present case, the defendant contends that the prosecutor improperly referred to facts not in evidence during her examination of the victim when she stated that (1) the defendant "put his private in [the victim's] private," and (2) "blood . . . came out of [the victim's] private . . . ." We disagree. With respect to the first claim, we note that the victim had testified that the defendant hurt her "private" with his "private." We cannot conceive how the defendant could have done so without penetrating the victim's genital area with his penis. Accordingly, although it may have been preferable for the prosecutor to ask the victim a question to clarify this issue instead of stating "[y]ou said he put his private in your private," this statement was not just a reasonable inference from the victim's testimony; it was a necessary inference. Moreover, the victim expressly testified on redirect examination that the defendant's "private" went "[i]n" her "private." In addition, later witnesses provided ample evidence that the victim had suffered a traumatic penetrating injury to her genital

area.[11] Indeed, the defendant did not dispute that that was the case but contended only that he was not the perpetrator. We further note that defense counsel raised no objection to the prosecutor's questions rephrasing the victim's testimony. See *State* v. *Medrano*, 308 Conn. 604, 612, 65 A.3d 503 (2013) ("defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time" (internal quotation marks omitted)). Finally, we note that the child victim was, quite understandably, a very challenging witness who was extremely reluctant to provide details of the sexual assaults to which she allegedly had been subjected. Under these circumstances, we cannot conclude that the prosecutor's reframing of the victim's testimony that the defendant had hurt her "private" with his "private" as testimony that the defendant had put his "private" in her "private" was a deliberate attempt to distort the testimony or to suggest that the prosecutor had knowledge of facts that could not be presented to the jury. We conclude,

[11] The Appellate Court has observed that "it is not improper for a prosecutor, when using leading questions to examine a hostile witness, to include facts in those questions—as to which no other evidence has yet been introduced—as long as the prosecutor has a good faith basis for believing that such facts are true." *State* v. *Marrero*, 198 Conn. App. 90, 105, 234 A.3d 1, cert. granted, 335 Conn. 961, 239 A.3d 1214 (2020); see also *State* v. *Payne*, 233 Ariz. 484, 512, 314 P.3d 1239 (2013) (prosecutor's use of leading question was proper when prosecutor had "a good faith basis for the question"), cert. denied, 572 U.S. 1004, 134 S. Ct. 1518, 188 L. Ed. 2d 454 (2014); cf. *Commonwealth* v. *Wynter*, 55 Mass. App. 337, 339, 770 N.E.2d 542 (prosecutor's use of leading questions was improper when questions had no "mooring in evidence in the trial record or a presented good faith basis"), review denied, 438 Mass. 1102, 777 N.E.2d 1264 (2002). We similarly conclude that, if a prosecutor has a good faith basis to believe that evidence of a fact will be later admitted, courts may consider that circumstance when determining whether the prosecutor's reference to the fact while questioning a witness was improper, even if the reference was not part of a leading question. Because the question is not before us, we express no opinion on what other circumstances might constitute a good faith basis for a prosecutor's reference to a fact not in evidence while questioning a witness.

therefore, that the prosecutor did not improperly refer to facts not in evidence.

For similar reasons, we conclude that the prosecutor's questions that were premised on her statement that blood came out of the victim's "private" were not improper. Again, it would have been preferable for the prosecutor to ask additional questions allowing the witness to clarify and correct her plainly mistaken testimony that the blood came out of the defendant, or to ask the victim if, at any point after the assaults, blood had come out of her "private," instead of making a statement to that effect. The question "it came out of your private and went where" was not significantly more suggestive of independent knowledge of facts, however, than the leading question "isn't it true that blood came out of your private" would have been, and it would have been well within the trial court's discretion to allow the prosecutor to lead this young, apprehensive and reluctant witness on this point. See Conn. Code Evid. § 6-8 (b), commentary (under § 6-8 (b) (3), "the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent"); see also *State* v. *Salamon*, 287 Conn. 509, 560, 949 A.2d 1092 (2008) (trial court properly permitted prosecutor to use leading questions when examining victim, who was sixteen years old, nervous, very soft-spoken, uneasy and reticent); *State* v. *Marrero*, 198 Conn. App. 90, 105, 234 A.3d 1 ("it is not improper for a prosecutor, when using leading questions to examine a hostile witness, to include facts in those questions—as to which no other evidence has yet been introduced—as long as the prosecutor has a good faith basis for believing that such facts are true"), cert. granted, 335 Conn. 961, 239 A.3d 1214 (2020). This is particularly so because it is within the knowledge of an ordinary juror that blood does not come out of a penis during intercourse. The salient point of the victim's testimony was

that there was blood in her genital area immediately after the assault, not her belief as to the source of the blood. Indeed, the prosecutor acknowledged during her rebuttal argument to the jury that the victim had stated that blood came out of the defendant's penis and argued that the jury could reasonably infer that, at the age of seven or eight, the victim simply did not know where the blood in her genital area came from. We further note that other witnesses provided evidence that the traumatic, penetrating injuries to the victim's genital area had resulted in copious bleeding; the defendant never disputed that fact, and he raised no objection to the questions to the victim at the time of trial. We conclude, therefore, that the prosecutor did not engage in prosecutorial impropriety during her questioning of the victim.

II

We next address the defendant's claim that the prosecutor engaged in prosecutorial impropriety during closing and rebuttal arguments by arguing facts not in evidence, appealing to the jurors' emotions and vouching for the victim's credibility. We disagree.

"As we previously have recognized, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however] [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prose-

cutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . .

"Nevertheless, the prosecutor has a heightened duty to avoid argument that strays from the evidence or diverts the jury's attention from the facts of the case. [The prosecutor] is not only an officer of the court, like every attorney, but is also a high public officer, representing the people of the [s]tate, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused [is] guilty, he should [nonetheless] be convicted only after a fair trial, conducted strictly according to the sound and [well established] rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury ha[s] no right to consider." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 727–28, 127 A.3d 164 (2015).

"Furthermore, a prosecutor may not express her own opinion, either directly or indirectly, as to the credibility of a witness or the guilt of the defendant. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony. . . . These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. . . . A prosecutor's voucher for a witness is particularly dangerous for two reasons. First, such comments may convey the impression that the prosecutor is aware of evidence supporting charges against the defendant of

which the jury has no knowledge. . . . Second, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . [I]t is axiomatic that a prosecutor may not advance an argument that is intended solely to appeal to the jurors' emotions and to evoke sympathy for the victim or outrage at the defendant. . . . An appeal to emotions, passions, or prejudices improperly diverts the jury's attention away from the facts and makes it more difficult for it to decide the case on the evidence in the record. . . . When the prosecutor appeals to emotions, he invites the jury to decide the case, not according to a rational appraisal of the evidence, but on the basis of powerful and irrelevant factors [that] are likely to skew that appraisal. . . . An improper appeal to the jurors' emotions can take the form of a personal attack on the defendant's character . . . or a plea for sympathy for the victim or her family." (Citation omitted; internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 554–55, 78 A.3d 828 (2013).

The defendant in the present case first claims that the prosecutor engaged in prosecutorial impropriety during closing argument when she stated: "I . . . want to thank you for the attention that you have paid to the evidence in this case, and I could see sometimes it wasn't as easy as it either would've been, should've been, if it were a different type of trial, and I apologize for any anxiety any of the evidence may have caused you. . . . I also want to apologize for the photos that you had to view. The state tried to keep it to a minimum. Unfortunately, it was necessary that you viewed them." The defendant contends that these comments argued facts not in evidence, namely, that viewing the evidence had been difficult and caused anxiety to the jurors, and that the state had additional evidence that it did not present at trial. The defendant further contends that

the comments appealed to the jurors' emotions and were intended to evoke outrage at the defendant.

We are not persuaded. As we have explained, "a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper." (Internal quotation marks omitted.) *State* v. *Martinez*, supra, 319 Conn. 727. Indeed, the Appellate Court has found even more forceful rhetoric to be proper in a case involving very similar facts. In *State* v. *Williams*, 65 Conn. App. 449, 783 A.2d 53, cert. denied, 258 Conn. 927, 783 A.2d 1032 (2001), "[t]he defendant subjected the victim [the young daughter of the defendant's girlfriend] to repeated sexual acts, including vaginal intercourse, digital penetration, fellatio and cunnilingus." Id., 452. During closing argument, the prosecutor stated that "[the] case involves many brutal, violent and unpleasant facts. . . . The six year old . . . was the victim of horrible and repulsive crimes and she suffered this degradation at the hands of the defendant . . . . She was humiliated in the worst way imaginable." (Internal quotation marks omitted.) Id., 467. The Appellate Court concluded that these comments were "not improper in view of the evidence presented." Id. Moreover, in the present case, defense counsel himself stated during closing argument that "[t]his is an exceptionally difficult and disappointing and disgusting case, and I am very thankful that you came down here and sat through this . . . . [I]t's a very emotionally compelling case; it's a case that gets you fired up . . . ." It is also significant that defense counsel did not object to the prosecutor's remarks, thereby indicating that he did not believe that they were improper in light of the evidence at the time. See, e.g., *State* v. *Medrano*, supra, 308 Conn. 612. We conclude,

therefore, that the remarks were not improper. For the same reasons, we conclude that the prosecutor did not improperly appeal to the jurors' emotions or vouch for the victim's credibility when she stated, "[i]f wishes could come true, this would never have happened, but it did. . . . [A]nd, if wishes could come true, we wouldn't have to have witnesses like [the victim], children, who have to . . . become embarrassed, they have to show you their pain, they have to describe to you their betrayal of trust, and show you [their] tears, all when she was seven and eight."

With respect to the defendant's claim that, by stating that, with respect to the photographs of the victim's injury, "[t]he state tried to keep it to a minimum," the prosecutor suggested that the state had additional evidence that it did not produce at trial, we conclude that this comment merely indicated that, although, in order to prove its case, the state was required to present evidence that an ordinary person would find difficult to view, the state had made an effort to minimize any discomfort by not dwelling on the most disturbing evidence or making it a focal point throughout the case. At most, the comment could be understood to mean that the state made an effort not to present cumulative evidence. The prosecutor did not suggest that the state was in possession of additional photographic evidence that would strengthen the case against the defendant.

The defendant also claims that the prosecutor improperly appealed to the jurors' emotions and vouched for the victim's credibility when she asked the jurors, "[d]oes [the victim] look like the type of child who would have been evil enough to make this up to get out of the house?" The defendant cites *State* v. *Alexander*, 254 Conn. 290, 755 A.2d 868 (2000), in support of this claim. In *Alexander*, the prosecutor "implied that the victim testified truthfully because she is young and therefore honest. The summation further con-

tended that no child would possibly make up a story regarding sexual abuse." Id., 305. This court concluded that the remarks were "improper vouchers for the victim's credibility. Statements such as these [were] likely to sway a jury in favor of the prosecutor's argument without properly considering the facts in evidence. This [was] especially significant in [*Alexander*], [in which] the credibility of the victim and the defendant comprised the principal issue of the case. Improper comments on the part of the prosecutor regarding the veracity of one party over the other can easily skew a proper jury deliberation." Id.; see also *State* v. *Singh*, supra, 259 Conn. 708 (it is improper for prosecutor to suggest that, "in order to acquit the defendant, [the jury] must find that the witness has lied").

We conclude that the prosecutor's remark in the present case was not improper under *Alexander* and *Singh*. The prosecutor made the remark in response to defense counsel's argument that the victim had fabricated the allegations that the defendant had sexually assaulted her because "she wanted out of that house . . . ." Thus, it was defense counsel who initially suggested that the victim was not merely confused or mistaken about the identity of her assailant, but that she had deliberately lied about the defendant's conduct for personal gain. Although we generally disapprove of remarks suggesting to the jury that it must conclude that a witness is deliberately lying and, by implication, evil, before it may question the witness' credibility, the prosecutor here was simply attempting to rebut the defendant's claim to that effect by arguing that the victim's appearance and demeanor did not support the claim. See, e.g., *State* v. *O'Brien-Veader*, 318 Conn. 514, 547, 122 A.3d 555 (2015) ("a prosecutor may argue about the credibility of witnesses, as long as her assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom" (internal

quotation marks omitted)). We further note that, unlike in *State* v. *Alexander*, supra, 254 Conn. 305, the prosecutor did not suggest that the victim was honest because she was young or that *no* child could make up an allegation of sexual abuse, thereby suggesting that she had knowledge of facts that could not be presented to the jury; she suggested only that the jury could infer from *this* child's appearance and demeanor on the stand that she was not lying in order to obtain something of value, namely, getting out of the house.

Similarly, we reject the defendant's claim that the prosecutor improperly appealed to the jurors' emotions and vouched for the victim's credibility when she stated that the victim "is an extremely passive, helpless girl folding in on herself, shy, painfully shy. She was highly uncomfortable. In the forensic [interview], there were tears, she was embarrassed." Again, the prosecutor was responding to defense counsel's argument that the victim had lied by asking the jury to consider the victim's appearance and demeanor. The record reflects that, during her examination of the victim, the prosecutor was required to ask her repeatedly to speak louder, to repeat her response and to lift her head while speaking. In addition, the victim was tearful, withdrawn and obviously uncomfortable during the forensic interview, a video recording of which was shown to the jury. Thus, the prosecutor's assertions were supported by evidence that was before the jury.

The defendant further contends that the prosecutor improperly vouched for the victim's credibility when she asked rhetorically, "[w]ere those emotions real," and stated that "[t]he state submits to you absolutely they were. It's easy to fake facts. It's much harder to fake emotion like you saw [in] the forensic [interview] and on that witness stand." We acknowledge that the propriety of these remarks is a closer question. On the one hand, it is well established that a prosecutor may

not express her opinion as to the credibility of a witness, thereby inducing the jury "to trust the [state's] judgment rather than its own view of the evidence." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 554. On the other hand, however, jurors "are not expected to lay aside matters of common knowledge or their own observations and experiences, but rather, to apply them to the facts as presented to arrive at an intelligent and correct conclusion. . . . Therefore, it is entirely proper for counsel to appeal to [the jurors'] common sense in closing remarks." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, supra, 318 Conn. 547. Moreover, not every use of a rhetorical flourish by the prosecutor is improper. See, e.g., *State* v. *Martinez*, supra, 319 Conn. 727.

The Appellate Court's decision in *State* v. *Cromety*, 102 Conn. App. 425, 925 A.2d 1133, cert. denied, 284 Conn. 912, 931 A.2d 932 (2007), is instructive on this issue. The defendant in *Cromety* claimed that the prosecutor had improperly asked the jury "[i]s that something somebody would make up" with respect to the victim's testimony that "white stuff came out" when the defendant forced her to perform fellatio, that she did not know at the time what the "white stuff" was, and that, after the assault, she brushed her teeth. (Internal quotation marks omitted.) Id., 438–39. The court concluded that the prosecutor's rhetorical question did not constitute improper vouching for the victim's credibility because he was asking the jury to apply common sense to determine whether the victim was "a vulnerable deaf child or a vengeful stepdaughter, as the defendant claimed." Id., 440.

The present case presents a closer question than *Cromety* did because the prosecutor not only asked a rhetorical question appealing to the jury to evaluate the victim's credibility, but also answered her own question when she stated that "[t]he state submits to you [that

the victim's emotions] absolutely . . . were [real]." It would have been preferable if the prosecutor had not made her remark in the form of a direct opinion but, instead, had phrased it to advocate the state's view that the evidence supports such a finding. Nevertheless, we conclude that neither this statement nor the prosecutor's statements that the victim's emotions were real and that it is "[hard] to fake emotion like you saw [in] the forensic [interview] and on that witness stand" improperly induced the jury "to trust the [state's] judgment rather than its own view of the evidence." (Internal quotation marks omitted.) *State* v. *Maguire*, supra, 310 Conn. 554. In context, the statements appealed to the jurors' common sense and life experiences, and referred to evidence that had been presented at trial. See *State* v. *Gibson*, 302 Conn. 653, 661, 31 A.3d 346 (2011) ("when the prosecutor immediately followed [his] recitation of the evidence with the rhetorical question, '[d]id the defendant wilfully [fail] to appear in court on May 5, 2006?' and then responded, 'I think he did,' he was attempting to persuade the jury to draw this inference from the circumstantial evidence of intent that he had just recited, and was not giving improper unsworn testimony or attempting to insinuate that he had secret knowledge of the defendant's guilt"). For the same reasons, we reject the defendant's claim that the prosecutor's rhetorical question, "[d]oes she look like a child who's sophisticated enough to give you that kind of facts," was improper.

The defendant finally claims that the prosecutor improperly appealed to the jurors' emotions when, during rebuttal argument, she stated in reference to the injuries to the victim's genital area that "[s]he was ripped," that she suffered "a tearing injury similar to an episiotomy" and that she did not have the luxury of having a doctor prescribe pain medication during the assault. We disagree. The prosecutor made these com-

ments in response to defense counsel's contention that the victim may have mistakenly identified the defendant as her assailant because Rowan had suggestively asked her whether the defendant had done anything to her "private area." The state's expert witness, Melillo, had testified that trauma can heighten a child's memory of an incident of sexual abuse, especially if the assailant is known to the child. Accordingly, the jury reasonably could have inferred from the severe nature of the victim's injuries that, contrary to defense counsel's argument, her memory of the assault was accurate. In addition, the comments were responsive to defense counsel's argument that the victim lied about the identity of her assailant because she wanted to get out of the house that she shared with the defendant. The jury reasonably could have inferred that, if the victim had wanted to get out of the house, it was because the defendant had brutally assaulted her. Although the prosecutor did not expressly make these arguments, she did indicate that the severe nature of the victim's injuries went to the defendant's claim that the victim was suggestible, and the jury may take any reasonable inference from the evidence before it. See, e.g., *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 544, 562 A.2d 1100 (1989).

We acknowledge, however, that it would have been preferable if the prosecutor had not used the phrase "[s]he was ripped," which arguably has more violent connotations than the language that Moles used to describe the victim's injuries. In addition, we view with some skepticism the prosecutor's mordant observation that, unlike a woman who undergoes an episiotomy during childbirth, the victim did not have the luxury of receiving pain medication during the assault. These comments came very close to the line between permissible comment on the evidence and an impermissible plea for sympathy. Because we conclude that the com-

ments did not materially mischaracterize Moles' testimony or exaggerate the severity of the victim's suffering, however, we conclude that they did not cross that line. We conclude, therefore, that the comments were not improper.

III

We finally address the defendant's claim that the trial court violated § 54-84 (b) when it denied the defendant's request to instruct the jury that it could draw no unfavorable inference from the fact that he *elected* not to testify. The defendant also contends that, if we conclude that the trial court was not statutorily required to give the instruction that he requested, § 54-84 (b) infringed on his constitutional right to remain silent to the extent that it authorized the trial court to instruct the jury that it could draw "no unfavorable inferences from the accused's failure to testify." We reject both of these claims.

A

We first address the defendant's statutory claim. The defendant contends that, contrary to the trial court's determination that it was required to instruct the jury using the specific wording of § 54-84 (b), the clause of the statute "[u]nless the accused requests otherwise" required the trial court to give the instruction that he requested. The proper interpretation of § 54-84 (b) is a question of statutory interpretation to which we apply well established rules of construction and over which we exercise plenary review. See, e.g., General Statutes § 1-2z (plain meaning rule); *Canty* v. *Otto*, 304 Conn. 546, 557–58, 41 A.3d 280 (2012) (general rules of construction aimed at ascertaining legislative intent).

We begin our analysis with a review of our past cases construing § 54-84 (b). In *State* v. *Wright*, 197 Conn. 588, 594, 500 A.2d 547 (1985), the defendant, like the

defendant in the present case, contended that the trial court had improperly instructed the jury that it could draw no unfavorable inferences from his " 'failure to testify' " because that language implied that he had a duty to testify. This court noted that the trial court had used the specific language of § 54-84 (b). Id. We also observed that this court previously had held that "a failure by the trial court to comply with § 54-84 (b) is plain error . . . and that deviations from the statutory language that alter the meaning of the charge constitute grounds for reversal." (Citations omitted.) Id., 595. In addition, we observed that, "[i]f the defendant felt that the word 'failure' had unfavorable connotations, he could have requested that the court modify the charge or not give it at all." Id. Accordingly, we concluded that "it was not error for the trial court to instruct the jury as it did." Id.

The defendant in *State* v. *Casanova*, 255 Conn. 581, 767 A.2d 1189 (2001), also challenged the trial court's use of the language "failure to testify" to describe the defendant's decision not to testify on the ground that the "use of the word 'failure' had a negative connotation." Id., 597. The defendant had requested that the trial court substitute more "neutral" language, without suggesting any specific alternative. Id., 598. This court observed that "[a] refusal to charge in the exact words of a request . . . will not constitute error if the requested charge is given in substance." (Internal quotation marks omitted.) Id., 599. We further observed that "[a] party always may take exception to the trial court's jury charge or request that the trial court modify its language. See Practice Book §§ 42-19 and 42-24. The language 'unless the accused requests otherwise,' however, permits the defendant to elect whether the court should give the jury an instruction concerning the defendant's failure to testify. . . . We have not interpreted that language to mean that the court *must* use the

defendant's requested language." (Citation omitted; emphasis in original; footnote omitted.) Id., 600–601. Accordingly, this court concluded that the trial court had properly instructed the jury. Id., 601.

We glean the following principles from these cases. First, a defendant may request, and the trial court may give, a jury instruction that deviates from the specific wording of § 54-84 (b), as long as the instruction does not materially alter the substantive meaning of the statute. See id., 600 ("[a] party always may take exception to the trial court's jury charge or request that the trial court modify its language"); *State* v. *Wright*, supra, 197 Conn. 595 (defendant "could have requested that the court modify the charge"); *State* v. *Wright*, supra, 595 (only "deviations from the statutory language that alter the meaning of the charge constitute grounds for reversal").[12] Second, the trial court is not *required* to grant a

[12] This court and the Appellate Court have repeatedly concluded that instructions that deviate from the language of § 54-84 (b) are proper when the instructions convey the substantive meaning of the statute. See *State* v. *Sinclair*, 197 Conn. 574, 584 n.11, 500 A.2d 539 (1985) ("[i]n cases [in which] a no unfavorable inferences charge was given, but in language deviating slightly from the precise wording of the statute, we have examined the entire charge to see if the words as given were sufficient to satisfy the statute"); *State* v. *Boulware*, 183 Conn. 444, 447–48, 441 A.2d 1 (1981) (trial court's deviation from precise language of § 54-84 (b) was not improper when "a reasonable juror hearing [the] instruction within the context of the entire charge would naturally assume that the defendant's silence formed no part of the case"); *State* v. *Reid*, 22 Conn. App. 321, 327, 577 A.2d 1073 ("[s]ubstituting 'adverse' for 'unfavorable' [was] not improper . . . because the terms are synonymous and such a substitution does not change the meaning of the sentence"), cert. denied, 216 Conn. 828, 582 A.2d 207 (1990); cf. *State* v. *Tatem*, 194 Conn. 594, 599–600, 483 A.2d 1087 (1984) (trial court's instruction that jury could draw " 'no unreasonable inference' " from defendant's failure to testify was improper because it "clearly permitted the jury to draw an unfavorable inference which was also a reasonable inference"); *State* v. *Vega*, 36 Conn. App. 41, 48, 646 A.2d 957 (1994) (trial court's use of word "unfair" instead of "unfavorable" when giving instruction pursuant to § 54-84 (b) was improper because "the jury could draw a fair or just, although unfavorable or adverse, inference from the defendant's failure to testify"). But see *State* v. *Townsend*, 206 Conn. 621, 626, 539 A.2d 114 (1988) ("the trial court's minor deviation from the literal wording of

defendant's request for an alternative instruction under § 54-84 (b) but may give any instruction that accurately states the law. See *State* v. *Casanova*, supra, 255 Conn. 601 (defendant may request alternative language, but that does not "mean that the court *must* use the defendant's requested language" (emphasis in original)); see also *State* v. *Whipper*, 258 Conn. 229, 286, 780 A.2d 53 (2001) ("there is no requirement in . . . § 54-84 (b) that a trial court must use the language requested by a defendant when he chooses not to testify"), overruled in part on other grounds by *State* v. *Cruz*, 269 Conn. 97, 848 A.2d 445 (2004), and *State* v. *Grant*, 286 Conn. 499, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008). Third, § 54-84 (b) requires the trial court to grant a defendant's request that the court give no instruction concerning the defendant's failure to testify. See *State* v. *Casanova*, supra, 600 ("[t]he language 'unless the accused requests otherwise' . . . permits the defendant to elect whether the court should give the jury an instruction concerning the defendant's failure to testify"). Fourth, in the absence of such a request, the failure to give a no unfavorable inference instruction pursuant to § 54-84 (b) is plain error. *State* v. *Wright*, supra, 595 ("a failure by the trial court to comply with § 54-84 (b) is plain error"); see also *State* v. *Carter*, 182 Conn. 580, 581, 438 A.2d 778 (1980) (trial

§ 54-84 (b)" was error, but error was harmless because instruction conveyed "substantive meaning" of statute); *State* v. *Cobb*, 199 Conn. 322, 324–25, 507 A.2d 457 (1986) (same). We further note that the Connecticut Judicial Branch's model criminal jury instructions contain the following instruction: "The defendant has not testified in this case. An accused person has the option to testify or not to testify at the trial. (He/she) is under no obligation to testify. (He/she) has a constitutional right not to testify. You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 19, 2021). Although the model instructions are not binding on this court; see *Snell* v. *Norwalk Yellow Cab, Inc.*, 332 Conn. 720, 762, 212 A.3d 646 (2019); the inclusion of this instruction is at least suggestive that a deviation from the specific wording of § 54-84 (b) is not automatically plain error.

court's failure to give instruction pursuant to § 54-84 (b) was plain error).

These principles are consistent with the underlying purpose of the statute. When § 54-84 (b) was enacted in 1977; see Public Acts 1977, No. 77-360; "neither the United States Supreme Court nor this court had yet recognized the [no adverse inference] instruction as a component of self-incrimination protections." (Internal quotation marks omitted.) *State* v. *Cohane*, 193 Conn. 474, 483, 479 A.2d 763, cert. denied, 469 U.S. 990, 105 S. Ct. 397, 83 L. Ed. 2d 331 (1984); see also *State* v. *Branham*, 171 Conn. 12, 16, 368 A.2d 63 (1976) ("[i]n the absence of controlling statutory provisions the accused is not entitled to an instruction that no opinion prejudicial to him shall be drawn from his failure to testify" (internal quotation marks omitted)). It was not until 1981 that the United States Supreme Court held in *Carter* v. *Kentucky*, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), that "a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" by giving a no adverse inference instruction. Id., 305; see *State* v. *Cohane*, supra, 483. It is reasonable to conclude, therefore, that the purpose of § 54-84 (b) was to fill this statutory gap and to ensure prophylactically that the defendant would pay no price for exercising his constitutional right to remain silent. Thus, it is also reasonable to conclude that the statute was intended to create a *floor* of prophylactic protection, not a ceiling. Indeed, we can perceive no reason why the legislature would have wanted to bar trial courts from deviating from the specific language of the statute when instructing the jury, as long as the courts give an instruction that is at least as protective of the defendant's constitutional right as the statutory language.[13] To the extent that this court has previously

[13] Of course, we do not suggest that the trial court has unlimited discretion to deviate from the statutory language when giving a no adverse inference

held that a minor deviation from the specific wording of § 54-84 (b) is improper, even if the instruction does not alter the substantive meaning of the statute; see, e.g., *State* v. *Townsend*, 206 Conn. 621, 626, 539 A.2d 114 (1988) ("the trial court's minor deviation from the literal wording of § 54-84 (b)" was error, but error was harmless because instruction conveyed "the substantive meaning" of statute); *State* v. *Cobb*, 199 Conn. 322, 324–25, 507 A.2d 457 (1986) (same); those cases are hereby overruled.

We conclude, therefore, that the trial court in the present case incorrectly determined that *any* deviation from the specific wording of § 54-84 (b) would be plain error. Because instructing the jury that the defendant "elected" not to testify instead of referring to his "failure" to testify would not have mischaracterized the defendant's conduct in any way and would not have altered the substantive meaning of the statute, we conclude that the trial court could have given the instruction that the defendant requested. Indeed, the state does not contend otherwise.

Contrary to the defendant's contention, however, we have already expressly rejected the proposition that, if a defendant requests that the trial court give a no unfavorable inference instruction that deviates from the specific wording of § 54-84 (b), the trial court is *required* to give that instruction. See *State* v. *Casanova*, supra, 255 Conn. 600–601. Indeed, it would make little sense for the legislature to mandate that the trial court *must* give *whatever* instruction the defendant asks for

instruction, as long as the instruction is at least as protective as § 54-84 (b). For example, it would obviously be improper for a trial court to give an instruction that the fifth amendment prevented the defendant from testifying or that the jury must draw a favorable inference from the fact that the defendant did not testify because it implied confidence in the weakness of the state's case. We hold only that a deviation from the statutory language that does not mischaracterize the facts and that conveys the substantive meaning of the statute is not improper.

in lieu of the specific wording of § 54-84 (b). Rather, it is reasonable to conclude that the legislature intended that the trial court may give any instruction that accurately states the law, which obviously would include an instruction that contains the specific wording of the statute.

We also disagree with the defendant's claim that *Casanova* is distinguishable because, unlike in the present case, the defendant in that case did not ask for a specific instruction. Nothing in *Casanova* suggests that the absence of such a request had any bearing on our holding that the trial court is not required to grant a request for an instruction that deviates from the wording of § 54-84 (b). We also conclude that the defendant's claim that our decision in *Casanova* should be overruled because it was incorrect as a matter of statutory interpretation is unreviewable because it has been inadequately briefed. See, e.g., *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016) ("Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.)). The defendant has merely made the bare assertion that the case should be overruled, without citing any authority or providing any analysis as to why he believes that this court misconstrued § 54-84 (b).[14]

[14] In his reply brief, the defendant contends for the first time that *Casanova* was wrongly decided because to conclude that the legislature wanted trial courts "to give an instruction that would suggest to the jury that the defendant had done something wrong by invoking [the right to remain silent] defies all common sense." "It is a well established principle that arguments [cannot] be raised for the first time in a reply brief." (Internal quotation marks omitted.) *State* v. *Garvin*, 242 Conn. 296, 312, 699 A.2d 921 (1997). In any event, the defendant does not dispute that § 54-84 (b) expressly authorizes the trial courts to use the word "failure," and he does not explain why the legislature would have used that language if, contrary to our decision in *Casanova*, its intent was to *require* trial courts to use more neutral

We conclude, therefore, that § 54-84 (b) did not require the trial court to grant the defendant's request to instruct the jury that the defendant had elected not to testify.

B

We next address the defendant's claim that § 54-84 (b) is unconstitutional to the extent that it authorizes the trial court to refer to the defendant's "failure to testify" when giving a no unfavorable inference instruction.[15] We are not persuaded.

"Determining the constitutionality of a statute presents a question of law over which our review is plenary. . . . It [also] is well established that a validly enacted statute carries with it a strong presumption of constitutionality, [and that] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 314, 152 A.3d 488 (2016), cert. denied, U.S. , 137 S. Ct. 2217, 198 L. Ed. 2d 659 (2017).

The fifth amendment to the United States constitution prohibits the government from forcing a defendant to be a witness against himself, and the United States

language at the defendant's request. If the legislature had wanted to require trial courts to use more neutral language, we cannot conceive why it would not have used more neutral language in the statute. Thus, the defendant's argument goes more properly to his claim that the statute is unconstitutional, a claim that was not raised in *Casanova*.

[15] Although unpreserved, this claim is reviewable pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40 (unpreserved claim is reviewable if record is adequate for review and claim is of constitutional magnitude).

Supreme Court has concluded that this protection also prohibits prosecutors from commenting at trial on the defendant's decision not to testify.[16] *Griffin* v. *California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); see also *State* v. *Parrott*, 262 Conn. 276, 292, 811 A.2d 705 (2003) ("[i]t is well settled that comment by the prosecuting attorney . . . on the defendant's failure to testify is prohibited by the fifth amendment to the United States constitution" (internal quotation marks omitted)). "In *Griffin*, the court reasoned that allowing a prosecutor to comment on the defendant's refusal to testify would be equivalent to imposing a penalty for exercising his constitutional right to remain silent." *State* v. *A. M.*, 324 Conn. 190, 200, 152 A.3d 49 (2016).

In addition, as we have already explained, "an accused who exercises his right to refuse to testify has a constitutional right to a no adverse inference instruction when requested" under *Carter* v. *Kentucky*, supra, 450 U.S. 288. *State* v. *Smith*, 201 Conn. 659, 662, 519 A.2d 26 (1986). "The raison d'etre for . . . the constitutional right [to such an instruction] . . . is to reduce to a minimum jury speculation as to why an accused would remain silent in the face of a criminal accusation. 'No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must . . . use the unique power of the jury instruction to reduce that speculation to a minimum.' *Carter* v. *Kentucky*, supra, 303." *State* v. *Smith*, supra, 662–63; see also *State* v. *Ruocco*, 322 Conn. 796, 804, 144 A.3d 354 (2016) ("[w]ithout proper instructions . . . a jury may prejudge a defendant because he failed to take the stand and [to] protest his

[16] The self-incrimination clause of the fifth amendment is made applicable to state prosecutions through the due process clause of the fourteenth amendment to the United States constitution. E.g., *Malloy* v. *Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

innocence in the face of a criminal accusation" (internal quotation marks omitted)).

The defendant in the present case contends that the "failure to testify" language of § 54-84 (b) "implies that the defendant [did] something wrong by exercising his right not to testify." He points out that one source's definition of the word "failure" includes "an act or instance of failing or proving unsuccessful; lack of success," "nonperformance of something due, required, or expected," and "a subnormal quantity or quality; an insufficiency . . . ." Dictionary.com, available at https://www.dictionary.com/browse/failure (last visited April 19, 2021). Thus, the defendant argues, the word "plants in the minds of the jurors a deficiency about the defense" and effectively penalizes the defendant for exercising his constitutional rights.

The defendant also cites to the decision of the Indiana Court of Appeals in *Moreland* v. *State*, 701 N.E.2d 288 (Ind. App. 1998). In that case, the trial court instructed the jury that "[t]he defendant's failure to testify shall not be considered by the jury in determining the [guilt] or innocence of the defendant." (Internal quotation marks omitted.) Id., 294. The Indiana Court of Appeals concluded that, in the absence of any objection by the defendant, the instruction was not improper. Id. The court also observed, however, that the defendant's claim was "not without merit. In the exercise of their discretion, trial courts when instructing juries may wish to avoid the use of the phrase 'defendant's failure,' which is subject to pejorative construction. A defendant's exercise of his constitutional right not to incriminate himself is not a 'failure.' " Id., 294 n.2.

In *State* v. *Tyson*, 23 Conn. App. 28, 579 A.2d 1083, cert. denied, 216 Conn. 829, 582 A.2d 207 (1990), the Appellate Court considered an identical constitutional claim. The defendant in *Tyson* argued that the use of

the word "failure" in § 54-84 (b) "nullifies the presumption of innocence by raising the implication that the defendant had an unmet obligation, an obligation either to respond to the accusation or to prove his innocence." Id., 43. The Appellate Court rejected this claim, reasoning that, even if "the word 'failure' has a negative connotation, [it] cannot agree that it is the word itself [that] generates the prejudice to the defendant. The court's use of this word did not alert the jury to a fact of which it had been unaware, or make it more likely that the jury would draw an adverse inference from the defendant's silence." Id. The Appellate Court further observed that "[t]he jury is patently aware of this failure. The United States Supreme Court has noted that [i]t has been almost universally thought that juries notice a defendant's failure to testify. . . . The laymen's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime." (Internal quotation marks omitted.) Id.

The Appellate Court concluded that "[t]he very nature of the no adverse inference instruction specified in § 54-84 (b) is to dispel and ameliorate the inevitable speculation and to mitigate the damage to the defendant. The defendant [in *Tyson*] merely prefers his own phrasing of this warning not to speculate. Calling such failure by a different name would not completely counter the risk inherent in the defendant's choosing to stand silent, and we cannot fault the [trial] court's adherence to statutory mandates." (Internal quotation marks omitted.) Id., 43–44.

Although we ultimately agree with the Appellate Court's holding in *Tyson*, we do not entirely agree with its analysis. The use of the word "failure" may not "alert the jury to a fact of which it had been unaware"; id., 43; but it does have the tendency to *confirm* the validity of the jury's natural assumption that an innocent person would take the stand to respond to the accusations

against him. We therefore agree with the defendant in the present case that the use of more neutral language, such as "the defendant's choice not to testify," or "the fact that the defendant did not testify," would be preferable. Indeed, as the defendant points out, the Connecticut Judicial Branch's model criminal jury instructions contain the following instruction: "The defendant has not testified in this case. An accused person has the option to testify or not to testify at the trial. (He/she) is under no obligation to testify. (He/she) has a constitutional right not to testify. You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 19, 2021). As we concluded in part III A of this opinion, it is well within the trial courts' discretion to use this alternative language, and we encourage them to do so.

We conclude, however, that the semantic difference between the phrase "failure to testify" and the phrase "choice not to testify" is too slight to have constitutional significance within the overall context of the jury instruction under consideration. There simply is no completely neutral way to characterize the fact that the defendant did not take the stand, which is why a no adverse inference instruction is constitutionally required upon the defendant's request in the first instance. For example, if the jury were instructed only that the defendant elected not to testify, as was his constitutional right under the fifth amendment, that instruction would in no way curb the natural tendency of the jury to assume that the defendant would not have made that choice if he were innocent. Although the jury would be aware that the defendant had no *obligation* to testify, it would still know that the defendant had the *ability* to testify if he so chose, and, in the absence of a no adverse inference instruction, it would still naturally

assume that, by choosing not to testify, he did what an innocent person would not have done. We conclude, therefore, that, although the phrase "failure to testify" has a slightly more negative connotation than the phrase "choice not to testify" because the word "failure" suggests the nonperformance of an obligation, that slight difference does not have a material impact on a defendant's constitutional right to remain silent. This is especially so when, as in the present case, the trial court has expressly instructed the jury that the defendant had no obligation to testify and a constitutional right not to testify. Accordingly, we reject the defendant's claim that § 54-84 (b) is unconstitutional. Having rejected the defendant's other claims on appeal, we affirm the judgment of conviction.

The judgment is affirmed.

In this opinion the other justices concurred.

D'AURIA, J., concurring. I agree with and join parts I and II of the majority opinion. I also agree with and join part III A and B, which concludes that the trial court did not violate (1) General Statutes § 54-84 (b) by denying the request by the defendant, Michael T., to instruct the jury that it could draw no unfavorable inference from his "elect[ion]" not to testify, rather than his "failure" to testify, or (2) his exercise of his constitutional right to remain silent by concluding that the same statute required the trial court to instruct the jury that it could draw "no unfavorable inferences from the accused's *failure* to testify." (Emphasis added.) General Statutes § 54-84 (b). I write briefly and separately because I believe the court's resolution of the defendant's "no unfavorable inference" claims leaves in its wake confusion for trial courts. I respectfully suggest that the legislature consider clarifying whether it intended for courts to use any particular language—

including the phrase, "failure to testify"—when giving this legislatively and constitutionally compelled instruction.

The trial court in the present case believed it was required to use the language of the statute ("failure to testify") or risk committing plain error. The court today properly disabuses trial courts of that notion. The majority opinion contains four predicates, which I agree are accurate under our law. First, "a defendant may request, and the trial court may give, a jury instruction that deviates from the specific wording of § 54-84 (b), as long as the instruction does not materially alter the substantive meaning of the statute." Second, the trial court is not *required* to grant a defendant's request for a particular alternative instruction but may give any instruction that accurately states the law. Third, § 54-84 (b) requires the trial court to grant a defendant's request that the court give no instruction concerning the defendant's failure to testify. See *State* v. *Casanova*, 255 Conn. 581, 600, 767 A.2d 1189 (2001). And, fourth, in the absence of a request not to give an instruction at all, the failure to give a "no unfavorable inference" instruction pursuant to § 54-84 (b) is plain error. *State* v. *Wright*, 197 Conn. 588, 595, 500 A.2d 547 (1985).

Even when considering these axioms together, there remains to me something incongruous. Specifically, the majority agrees with the defendant, as do I, that the statutory phrase "failure to testify," while violating no constitutional rule, nonetheless has "the tendency to *confirm* the validity of the jury's natural assumption that an innocent person would take the [witness] stand to respond to the accusations against him." (Emphasis in original.) The majority even goes so far as to "agree with the defendant in the present case that the use of more neutral language, such as 'the defendant's choice not to testify,' or 'the fact that the defendant did not testify,' would be preferable," and states that "it is well

within the trial courts' discretion to use this alternative language, and we encourage them to do so." The majority also notes and encourages use of the Judicial Branch's model criminal jury instructions, which provide in relevant part: "The defendant has not testified in this case. . . . You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions 2.2-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited April 22, 2021). The majority goes so far as to say: "[W]e can perceive no reason why the legislature would have wanted to bar trial courts from deviating from the specific language of the statute when instructing the jury, as long as the courts give an instruction that is at least as protective of the defendant's constitutional right as the statutory language."[1]

So, where does this leave our trial courts? If it is plain error to give no instruction even without a request, presumably, trial courts should have a canned instruction to give in every case in which a defendant does not testify. Should courts default to use of the statutory language? The majority's answer appears to be that they can, but they don't have to. The majority's answer is the same when a defendant proposes language that departs from the legislative language: courts may depart but don't have to.

Although we might be able to envision examples of a defendant who wishes for a trial court to use the statutory phrase, "failure to testify," in its instruction, it is not apparent to me under what circumstances the court could appropriately exercise discretion to *decline* to use alternative language that we have recognized not only as valid, but preferable. In fact, it is significant to

[1] The majority even overrules cases that have "previously held that a minor deviation from the specific wording of § 54-84 (b) is improper, even if the instruction does not alter the substantive meaning of the statute . . . ." (Citations omitted.)

me that a committee of the Judicial Branch's criminal trial judges, presumably after careful consideration of the statutory language, has proposed a model instruction that deviates from the statute's language and that we encourage trial courts to use: "The defendant has not testified in this case. . . . You must draw no unfavorable inferences from the defendant's *choice not to testify*." (Emphasis added.) Connecticut Criminal Jury Instructions, supra, 2.2-4. It is also significant to me that the state has voiced no objection to the language in the model instruction.

We could adopt this language, or any other "neutral" or "preferable" language, as a matter of our supervisory authority over the administration of justice. "We ordinarily invoke our supervisory powers to enunciate a rule that is not constitutionally required but that we think is preferable as a matter of policy." (Internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 608, 198 A.3d 562 (2019). We have exercised this authority to "[adopt] rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process"; (internal quotation marks omitted) *State* v. *Rose*, 305 Conn. 594, 607, 46 A.3d 146 (2012); including numerous times to direct trial courts to instruct or not to instruct juries in certain ways. See, e.g., *State* v. *Carrion*, 313 Conn. 823, 852–53, 100 A.3d 361 (2014); *State* v. *Aponte*, 259 Conn. 512, 522, 790 A.2d 457 (2002); *State* v. *Delvalle*, 250 Conn. 466, 475–76, 736 A.2d 125 (1999). The present case seems to fit the bill: the statutory language does not violate the constitution, but the majority considers other language preferable as a matter of policy. It would be odd if the court's reticence to exercise such authority in the present case and adopt particular language—the committee's model instruction or otherwise—stemmed from an unwillingness to deviate from the legislature's

language because we have in our opinion today encouraged trial courts to do exactly that.

I assume instead that our reluctance derives from the fact that the defendant has not specifically asked that we exercise our supervisory authority. Ultimately, it is for this reason that I do not dissent from the majority's election not to employ its supervisory authority to put its imprimatur on the committee's language or direct particular language. Instead, I humbly suggest that a signal from the legislature after its consideration of the statutory language would be useful so that courts might better understand the extent to which the legislature is wedded to any particular language.

I therefore respectfully concur.

STATE OF CONNECTICUT *v.* GREGORY JOHN POMPEI
(SC 20530)

Robinson, C. J., and D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

Convicted of two counts of the crime of interfering with an officer, the defendant appealed, claiming that the trial court had improperly denied his motion to suppress certain evidence obtained after a police officer, L, positioned his cruiser behind the defendant's car and blocked the defendant's egress from the parking lot in which he was parked. L had reported to the parking lot in response to a dispatch concerning a possibly unconscious man in a parked car. L eventually aroused the defendant by tapping on the driver's side window, and, when the defendant lowered the window, L smelled alcohol. The defendant was uncooperative and slurring his words, and subsequently was arrested. Prior to trial, the defendant moved to suppress the evidence of his statements and actions in the parking lot, claiming that he had been seized in violation of the fourth amendment as soon as L positioned his cruiser behind the defendant's car and prevented him from leaving. The trial court denied the motion to suppress, concluding that the defendant's encounter with L did not become a seizure until after the defendant awoke and lowered the window, as, up until that point, L was checking

on the defendant's well-being pursuant to his community caretaking function rather than engaging in an investigatory stop. The court further concluded that, once the defendant awoke and began to interact with L, L had a reasonable and articulable suspicion that the defendant had been operating his vehicle under the influence of alcohol. On the defendant appeal, *held* that the trial court properly denied the defendant's motion to suppress on the ground that L was acting in his community caretaking capacity when he positioned his cruiser behind the defendant's car, as the limited intrusion on the defendant's liberty was reasonable and justified under the fourth amendment: L's arrival in the parking lot was in response to information, which made no mention of erratic driving or possible drunkenness, from a concerned citizen about an unconscious man in a parked car at nearly 2 a.m., L did not activate his lights, and, consistent with his purpose of determining whether the defendant required medical attention, L's first question upon arousing the defendant was whether he was okay; moreover, L testified that he positioned his cruiser where he did to ensure that the defendant's car did not roll backward or backup while he was ascertaining the situation, and there was no evidence that L was engaging in a general exploratory or pretextual stop when he parked his cruiser behind the defendant's car.

Argued January 11—officially released April 26, 2021*

Procedural History

Two part substitute information charging the defendant, in the first part, with the crime of operating a motor vehicle while under the influence of intoxicating liquor or drugs and two counts of the crime of interfering with an officer, and, in the second part, with operating a motor vehicle while his license was under suspension, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the court, *Prats*, *J.*, denied the defendant's motion to suppress certain evidence; thereafter, the case was tried to the jury before *Prats*, *J.*; verdict and judgment of guilty of two counts of interfering with an officer, from which the defendant appealed. *Affirmed.*

Jerald M. Lentini, with whom was *Robert T. Fontaine*, for the appellant (defendant).

* April 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, *Gail P. Hardy*, former state's attorney, and *Brenda L. Hans*, senior assistant state's attorney, for the appellee (state).

Opinion

ECKER, J. A jury found the defendant, Gregory John Pompei, guilty of two counts of interfering with an officer in violation of General Statutes § 53a-167a (a). The sole issue on appeal is whether the trial court properly denied the defendant's pretrial motion to suppress alleging that the defendant was seized in violation of the fourth amendment to the United States constitution when a marked police cruiser blocked the egress of his motor vehicle, which was parked with its engine running and the defendant asleep in the driver's seat. The state claims that no violation of the fourth amendment occurred because the responding officer was not engaged in an investigatory stop involving criminal activity but, rather, was checking on the defendant's well-being pursuant to the officer's community caretaking function. We agree with the state and affirm the judgment of conviction.

The record reflects the following facts found by the trial court after an evidentiary hearing on the defendant's motion to suppress evidence, as supplemented by the undisputed testimony of the arresting officer. On October 5, 2017, at approximately 1:56 a.m., Officer John Loud of the Manchester Police Department was on a routine patrol when he received a dispatch regarding a "possibly unconscious [male] in a white Ford Focus parked at Cumberland Farms . . . ." Upon arriving at Cumberland Farms, Loud parked his patrol car behind the Focus in order "to keep it from being able to roll backwards or backup until [he] could ascertain the situation at hand." When he approached the Focus,

Loud observed a male, whom he later identified as the defendant, sleeping or unconscious in the driver's seat with the key in the ignition and the engine running.

Loud attempted to rouse the defendant "to ascertain [his] physical well-being." The officer knocked "[v]ery hard" on the driver's side window, and the defendant eventually awoke. The defendant rolled down the window, and Loud asked whether he was okay. The defendant responded, "I'm fine." Loud immediately smelled the odor of alcohol emanating from the defendant.

Loud asked the defendant for his name and identification. The defendant responded with his first name, but Loud could not ascertain with clarity if his name was Craig or Greg because the defendant was mumbling and slurring his words. When asked for his last name, the defendant kept repeating his first name. The defendant indicated that his identification was in the trunk. When the defendant exited the car and walked to the trunk to retrieve his identification, he appeared to be unbalanced and had to hold on to the vehicle to keep himself steady. After the defendant opened the trunk of the Focus, Loud observed in plain view two twelve-packs of Bud Light; one pack was empty, and the other appeared to have a few bottles missing.

The defendant never found his identification and was uncooperative about giving his full name to Loud and a second police officer who had arrived on the scene. The officers spotted a piece of mail with the defendant's name and, on that basis, were able to confirm his identity. The engine of the car was running during the entire encounter, and the defendant kept repeating, "I don't know how I got here." The officers contacted dispatch and discovered that the defendant's driver's license had been suspended.

The defendant kept trying to walk away from the officers despite their verbal commands to stop. Loud

decided to restrain the defendant in order to "continue his investigation, based [on] what he noted at this point, the odor of alcohol, the defendant's inability to perform on the undivided tasks, his slurred speech, and his gait . . . ." Loud attempted to handcuff the defendant, but the defendant resisted by clenching and pulling away. The officers then called for backup. With the assistance of additional officers, the defendant finally was restrained, placed in handcuffs, and taken to the Manchester Police Department.

The defendant was charged with one count of operating under the influence of alcohol in violation of General Statutes § 14-227a (a) (1) and two counts of interfering with an officer in violation of § 53a-167a (a).[1] Prior to trial, the defendant moved to suppress the evidence of his statements and actions in the Cumberland Farms parking lot, claiming that he was seized in violation of the fourth amendment the moment his "vehicle was blocked and [he was] unable to leave." The trial court held an evidentiary hearing on the defendant's motion. Following that hearing, the trial court concluded that "Loud's initial encounter with the defendant was in his community caretaking capacity. . . . Loud was not engaged in an investigatory stop of criminal activity but, rather, was acting in [the] capacity of the [wellness] check or community caretaking function." The trial court elaborated that "[t]he facts in this case [support the conclusion] that the officer was acting only on information from the concerned citizen that the person was either asleep or unconscious in a parked car. There was no mention that the person might be drunk or engaging in erratic driving. The officer, when he arrived, never engaged his police lights. He parked

[1] The defendant also was charged in a part B information with one count of operation of a motor vehicle with a suspended license in violation of General Statutes § 14-215 (c) (1). The disposition of this charge is unclear from the record.

the [patrol] car behind the defendant for security reasons, and he observed a person who was either sleeping or unconscious in the parked car, and the engine was running. The officer knocked on the window to ask if the defendant was okay. There was never a display of any physical force or . . . any threats made to the defendant by the officer. Therefore, up to this point, there ha[d] been no intrusion [on] any constitutionally protected rights."

The trial court determined that the defendant's encounter with Loud did not become a seizure until after "the defendant woke up and rolled down his window and the officer smelled alcohol coming off of his body . . . ." The smell of alcohol was the "first indici[um] that this may not be a [wellness] check at all, but that this [was] turning into a motor vehicle investigatory stop . . . ." The trial court further concluded that Loud "developed a reasonable and articulable suspicion that the defendant had been operating a motor vehicle while under the influence of alcohol when he smelled the odor of alcohol on the defendant emanating from the car," heard the defendant's "mumbling" and "slurring" speech, observed the defendant's "unsteady gait," and found "two twelve-packs of beer that were in clear view when the defendant opened his [trunk] . . . ." Accordingly, the trial court denied the defendant's motion to suppress.

Following a jury trial, the defendant was found not guilty of driving under the influence of alcohol but found guilty of both counts of interfering with an officer. The trial court rendered judgment consistent with the jury's verdict and sentenced the defendant to one year imprisonment, execution suspended after thirty days, followed by one year of probation, on each count of interfering with an officer. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursu-

ant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the defendant does not challenge the trial court's determination that, once Loud smelled the odor of alcohol, reasonable, articulable suspicion of criminal activity existed to justify the defendant's detention under *Terry* v. *Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Instead, the defendant challenges the trial court's conclusion that there was no fourth amendment violation prior to the *Terry* stop, arguing that the community caretaking exception "is . . . irrelevant" to the present case because the defendant was seized "the moment . . . Loud pulled behind the defendant's vehicle and blocked his egress . . . ." The state responds that the trial court properly denied the defendant's motion to suppress on the ground that Loud was acting in a community caretaking capacity when he parked his police cruiser behind the defendant's vehicle.[2] Alternatively, the state argues that, even

[2] The state also contends that the defendant's claim is unreviewable because he abandoned it in the trial court and failed to brief it adequately in this court. We disagree. In the trial court, defense counsel argued that the defendant was seized the moment the defendant's "vehicle was blocked and [he was] unable to leave." Although defense counsel later conceded that the defendant "was asleep at this time and would not have known that he was blocked in," defense counsel nonetheless maintained that "[a] reasonable person awakened [by] a forceful knocking by [the] police with a police car blocking him in late at night is not going to feel free to terminate the encounter. . . . [The defendant] was effectively constitutionally seized at the moment that [Loud] blocked him in and he became aware of the fact that he was blocked." Thus, defense counsel consistently maintained that the defendant was seized *before* Loud smelled the odor of alcohol and there was a reasonable, articulable suspicion to justify the defendant's detention. We therefore conclude that the defendant's fourth amendment claim was not abandoned in the trial court.

The state also contends that the defendant's fourth amendment claim is unreviewable due to inadequate briefing because the defendant simply alleges that "the community caretaking exception is irrelevant." We agree with the state that the defendant's analysis of the community caretaking exception to the fourth amendment's warrant requirement is somewhat conclusory, but we nonetheless exercise our discretion to review the defendant's claim. See, e.g., *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259

if the trial court improperly denied the defendant's motion to suppress, the record is inadequate to demonstrate harm.[3]

The standard of review for a motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Consistent with this general standard, in reviewing the applicability of the community caretaking exception, the trial court's "subordinate factual findings will not be disturbed unless clearly erroneous and the trial court's legal conclusion regarding the applicability of the [community caretaking] doctrine in light of these facts will be reviewed de novo." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 518–19, 88 A.3d 491 (2014).

(2004) (exercising discretion to review claim even though appellant had "failed to analyze in depth the issues presented").

[3] The defendant has not provided this court with the transcripts of the trial, and the state claims that, in the absence of such transcripts, the record is inadequate to establish that the challenged evidence was presented to the jury in support of the crimes of conviction. In light of our conclusion that the trial court properly denied the defendant's motion to suppress, we need not address the state's argument. See, e.g., *State* v. *Salgado*, 257 Conn. 394, 400 n.9, 778 A.2d 24 (2001).

The fourth amendment to the United States constitution prohibits unreasonable searches and seizures by government agents.[4] "Subject to a few well defined exceptions, a warrantless search and seizure is per se unreasonable. . . . The state bears the burden of proving that an exception to the warrant requirement applies when a warrantless search [and seizure have] been conducted." (Citations omitted; internal quotation marks omitted.) *State* v. *Rolon*, 337 Conn. 397, 409, 253 A.3d 943 (2020).

The exception to the fourth amendment's warrant requirement applicable to the present case is known as the community caretaking exception. The community caretaking exception has "evolve[d] outside the context of a criminal investigation and does not involve probable cause as a prerequisite for the making of an arrest or the search for and seizure of evidence." (Internal quotation marks omitted.) *State* v. *Fausel*, 295 Conn. 785, 794, 993 A.2d 455 (2010). This exception does not give police officers carte blanche to effectuate searches and seizures in the absence of probable cause or a warrant issued by a neutral and detached judicial officer. The police must have a valid reason "grounded in empirical facts rather than subjective feelings" to believe that a limited intrusion into liberty or property interests is justified for the exception to apply. (Internal quotation marks omitted.) Id., 795. "It is an objective and not a subjective test"; (internal quotation marks omitted) id.;

[4] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

The fourth amendment's protection against unreasonable searches and seizures is made applicable to the states through the due process clause of the fourteenth amendment. See, e.g., *Mapp* v. *Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

that "looks to the totality of the circumstances."[5] *State* v. *DeMarco*, supra, 311 Conn. 535.

The community caretaking exception was first recognized by the United States Supreme Court in *Cady* v. *Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The defendant in *Cady* was convicted of murder after incriminating evidence was found during a warrantless search of his motor vehicle following an automobile accident. Id., 434, 442. The police officers searched the defendant's motor vehicle because they knew that he was an off duty Chicago police officer who was required by regulation to carry his service revolver at all times. Id., 436–37. The court in *Cady* rejected the defendant's contention that the search was illegal, concluding that the search "was 'standard procedure in [that police] department,' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." Id., 443. The court reasoned that police officers frequently "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id., 441. The police had not violated the defendant's fourth amendment rights when they searched the trunk of his parked vehicle, the court held, because they reasonably

[5] Both *Fausel and DeMarco* involve the emergency doctrine, which "is rooted in the community caretaking function of the police . . . ." *State* v. *Blades*, 225 Conn. 609, 619, 626 A.2d 273 (1993); see also *State* v. *DeMarco*, supra, 311 Conn. 536–40; *State* v. *Fausel*, supra, 295 Conn. 799–802. Although the emergency doctrine and the community caretaking doctrine have a common origin, they are two separate and distinct exceptions to the fourth amendment's warrant requirement. As we explain in greater detail in this opinion, the community caretaking exception involves routine, nonemergency duties undertaken to protect the public, whereas the emergency doctrine requires state actors to have a reasonable belief "that life or limb is in immediate jeopardy and that the intrusion [on the defendant's liberty] is reasonably necessary to alleviate the threat." (Internal quotation marks omitted.) *State* v. *DeMarco*, supra, 536.

believed that it contained a loaded revolver that could endanger the public if left unsecured. Id., 447.[6]

This court followed *Cady* in *State* v. *Tully*, 166 Conn. 126, 348 A.2d 603 (1974), in which we recognized that a police officer acting in a community caretaking capacity may make "a reasonable intrusion not prohibited by the fourth amendment." Id., 133. In *Tully*, a police officer discovered marijuana in plain view when he made a warrantless intrusion into a car for "the purpose of removing a guitar from the motor vehicle for [safekeeping]." (Internal quotation marks omitted.) Id., 129. We held that the trial court properly denied the defendant's motion to suppress the marijuana, partly because there was "no evidence that this was a general exploratory search on the part of the policeman on the pretext of protecting the defendant's property . . . . On the contrary, the [trial] court expressly found that the purpose of the officer's entry was to remove the guitar for safekeeping." Id., 136. Furthermore, the defendant "was unable to obtain anyone to remove" the vehicle, which was parked in a vacant lot and "incapable of being secured" due to a missing vent window. (Internal quotation marks omitted.) Id., 137. Under these circumstances, "[w]here there [was] no indication that a search

[6] We recognize that the United States Supreme Court has granted certiorari to consider whether the community caretaking exception to the fourth amendment's warrant requirement extends to the home. See *Caniglia* v. *Strom*, U.S. , 141 S. Ct. 870, 208 L. Ed. 2d 436 (2020). Compare *Caniglia* v. *Strom*, 953 F.3d 112, 124 (1st Cir. 2020) (applying community caretaking exception to warrantless intrusion of defendant's home but noting that "the doctrine's reach outside the motor vehicle context is ill-defined and admits of some differences among the federal courts of appeals"), cert. granted, U.S. , 141 S. Ct. 870, 208 L. Ed. 2d 436 (2020), with *Sutterfield* v. *Milwaukee*, 751 F.3d 542, 554 (7th Cir.) ("taking the narrow view [of the community caretaking exception that] . . . has confined the doctrine to automobile searches" but noting that "state and federal courts have divided over the scope of the community caretaking doctrine recognized in *Cady*"), cert. denied, 574 U.S 993, 135 S. Ct. 478, 190 L. Ed. 2d 362 (2014). Because the present case does not involve the warrantless intrusion into a home, the outcome of *Caniglia* has no bearing on the resolution of this appeal.

for evidence of a crime was being made . . . [and] . . . [w]here a search is conducted as a service to an individual . . . evidence of a crime accidentally discovered need not be suppressed." (Citation omitted; internal quotation marks omitted.) Id.; see also *State* v. *Foote*, 85 Conn. App. 356, 362, 857 A.2d 406 (2004) (holding that officer who seized disabled vehicle on side of road initially "was not engaged in an investigatory stop of criminal activity, but rather was acting in accordance with his community caretaking function"), cert. denied, 273 Conn. 937, 875 A.2d 44 (2005), and cert. denied, 273 Conn. 937, 875 A.2d 43 (2005).

Applying these principles to the present case, we conclude that the intrusion on the defendant's liberty in the Cumberland Farms parking lot was reasonable under the fourth amendment because Loud was acting in a community caretaking capacity when he parked his patrol car behind the defendant's vehicle, knocked on the window, and inquired about his well-being. The evidence supports the trial court's determination that Loud was not acting in a criminal investigatory capacity when he parked his patrol car behind the defendant's motor vehicle but, rather, was responding to a dispatch from a concerned citizen who had reported an unconscious male in a Ford Focus in the Cumberland Farms parking lot at 1:56 a.m. Loud did not activate the lights on his patrol car and parked behind the defendant's vehicle because he wanted "to keep it from being able to roll backwards or backup until [he] could ascertain the situation at hand." Loud exited his patrol car and observed the unconscious or sleeping defendant in the driver's seat with the engine running. Loud knocked on the driver's side window to rouse the defendant and to ascertain whether he required medical attention. Indeed, consistent with this purpose, the first question Loud asked the defendant was whether he was okay. In light of the limited "purpose and scope of the intru-

sion," as well as the complete dearth of evidence indicating that "this was a general exploratory" or "pretext[ual]" stop; *State* v. *Tully*, supra, 166 Conn. 136, 138; we conclude that the defendant's encounter with Loud falls squarely within the community caretaking doctrine.[7]

The judgment is affirmed.

In this opinion the other justices concurred.

PENNY OUDHEUSDEN *v.* PETER OUDHEUSDEN (SC 20330)

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

Syllabus

The defendant, whose marriage to the plaintiff had been dissolved, appealed to the Appellate Court from the judgment of the trial court. The trial court had awarded the plaintiff $18,000 per month in alimony that was not modifiable in duration or amount. The trial court found that the defendant's gross annual income of $550,000 was derived from two closely held businesses that he owned, which were valued at $904,000. As part of its financial orders, the court awarded 50 percent of the fair market value of the two businesses to each party and ordered that the defendant retain 100 percent ownership of both businesses. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court impermissibly double counted his income by considering it both for the purpose of valuing his businesses and in making its alimony award. The Appellate Court reversed in part the trial court's judgment and remanded the case for a new hearing on all financial issues. The Appellate Court concluded that the trial court had abused its discretion

[7] The defendant argues that he was seized in violation of the fourth amendment pursuant to *State* v. *Edmonds*, 323 Conn. 34, 145 A.3d 861 (2016), in which this court determined that an unlawful seizure had taken place when, inter alia, "two marked police cruisers converged on the defendant from opposite directions, effectively blocking him from exiting the [parking] lot . . . ." Id., 57. We reject the defendant's contention that this case is analogous to *Edmonds*. In *Edmonds*, the defendant's initial encounter with law enforcement originated as a result of an investigation into potential criminal activity. See id., 40–41. No such suspicion of potential criminal activity existed when Loud approached the defendant. We consider *Edmonds* inapposite.

in failing to issue equitable orders and to consider, with respect to its alimony award, the possibility that the defendant, who was fifty-eight years old at the time of the dissolution and had a history of alcohol abuse, could become ill or might want to retire, or that his businesses could fail to thrive through no fault of his own. The Appellate Court further determined that the trial court had engaged in double counting. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the trial court had abused its discretion in awarding the plaintiff $18,000 per month in alimony that was not modifiable in duration or amount, as there was insufficient evidence that the award accounted for a substantial change in the defendant's circumstances: the trial court failed to consider or afford any significant weight to the defendant's age, health and future earning capacity, and, to the extent that it did consider these factors, the court could not reasonably have concluded that the defendant would continue to earn the same income for the rest of his life; moreover, although the evidence certainly supported the conclusion that the defendant's businesses would likely thrive for some time, the evidence did not support a finding that the growth of those businesses would necessarily be perpetual, and it was unreasonable for the trial court to conclude that the defendant would have the ability to comply with his alimony obligation for the rest of his life without some provision for modification should health or economics prevent compliance; accordingly, this court upheld the Appellate Court's reversal of the trial court's financial orders and its remand for a new hearing on all financial issues.
2. The trial court did not improperly engage in double counting, as the rule against double counting does not apply when the distributed asset is the value of a business and alimony is based on income earned from that business: this court relied on the decisions of courts in other jurisdictions in concluding that it is not double counting to award a spouse a lump sum representing a portion of the value of a business as well as alimony that is based on the paying spouse's actual income from that business; nevertheless, trial courts should consider all statutorily required factors and ensure that the awards as a whole are fair and equitable, and such consideration might include ensuring that the property distribution of a portion of a business' value to the nonowing spouse does not unfairly reduce the owning spouse's ability to earn income from that business.

Argued June 10, 2020—officially released April 27, 2021*

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial dis-

* April 27, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

trict of Stamford-Norwalk and tried to the court, *Tindill*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to the Appellate Court, *Alvord*, *Keller* and *Eveleigh*, *Js.*, which reversed the judgment in part and remanded the case for further proceedings, and the plaintiff, on the granting of certification, appealed to this court. *Reversed in part*; *further proceedings*.

Scott T. Garosshen, with whom were *Kenneth J. Bartschi* and, on the brief, *Michael T. Meehan*, for the appellant (plaintiff).

Yakov Pyetranker, for the appellee (defendant).

Opinion

D'AURIA, J. The dispositive issue in this appeal is whether the Appellate Court correctly concluded that the trial court had abused its discretion in awarding the plaintiff, Penny Oudheusden, $18,000 per month in permanent, nonmodifiable alimony. On this issue, we agree with the Appellate Court and the defendant, Peter Oudheusden, that the award constituted an abuse of discretion, and we therefore affirm the Appellate Court's order of remand to the trial court for a hearing on new financial orders.

Also presented in this appeal is the question of whether the trial court, in its financial orders, equitably divided the marital estate or, instead, inappropriately engaged in "double counting" by awarding the plaintiff half of the value of the defendant's businesses among its orders dividing the marital property, while also awarding the plaintiff alimony on the basis of income generated by those businesses, which made up the defendant's sole sources of income. Because the issue of double counting is likely to reoccur on remand, and because we have not provided sufficient guidance concerning what constitutes double counting in contexts

beyond those specifically implicated in our own case law, we reach this issue and agree with the plaintiff that this court's rule against double counting does not apply when, as in the present case, the asset at issue is the value of a business. Accordingly, we affirm in part and reverse in part the judgment of the Appellate Court.

The record reveals the following facts and procedural history. In its memorandum of decision, the trial court made several "key findings" of fact that the defendant does not challenge on appeal. The defendant was at fault for the irretrievable breakdown of the marriage in August, 2015. The defendant was the sole financial support of the plaintiff and their children beginning in 1988, and the plaintiff made significant, nonfinancial contributions to the family, including serving as the primary caretaker for the parties' children.

The defendant's gross annual income, which the court found to be $550,000, derives exclusively from his two closely held businesses. The defendant, "for the past thirty-two years, intentionally concealed the exact nature of the business[es] and marital finances from the plaintiff." The court found the defendant's testimony regarding the amount of his annual income, profit, cash flow, business expenses, and personal expenses not credible, and did not credit the testimony of his expert witness, who had testified as to the businesses' value. Instead, the court credited the testimony of the plaintiff and her expert witness, James R. Guberman, who determined that the combined fair market value of the defendant's two businesses was $904,000 ($512,000 for Connecticut Computer & Consulting Company, Inc., and $392,000 for WriteResult, LLC). Guberman used three different valuation methods and then applied a weighted average of those three methods to determine the fair market value of the businesses. Finally, the court found that the defendant's neglect of the marital home, located at 93 Cutler Road in Green-

wich, and his failure to pay the mortgage beginning October 1, 2015, caused a loss of equity in the home of $162,339.89.

On the basis of these findings, the trial court found that a lifetime, periodic alimony award to the plaintiff was "appropriate and necessary." Specifically, the court stated: "The purpose of the court's alimony award is to provide a measure of financial security to the plaintiff, who has not worked outside of the marital home in nearly three decades, has $2095 in retirement funds, and has significantly less ability to acquire income or assets in the future than does the defendant. The plaintiff has limited earning potential. She is fifty-five years old, hearing impaired, and a cancer survivor. The plaintiff earned a bachelor's degree in international marketing . . . and a master's degree in teaching . . . . She is no longer licensed to teach." The trial court made no express findings as to the defendant's age (it is undisputed that he was fifty-eight years of age at the time of dissolution), health, or future earning potential.

In its financial orders, the trial court awarded the plaintiff periodic alimony in the amount of $18,000 per month "until the plaintiff's death, remarriage, cohabitation . . . or civil union, whichever shall occur first." The court made the alimony award "nonmodifiable as to duration and amount." In its property distribution, the trial court distributed the marital assets and debts as follows. The parties had three significant assets: the defendant's two businesses and the marital home. The trial court awarded 50 percent of the fair market value of the defendant's two businesses to each party, ordering the defendant to pay the plaintiff $452,000, representing her half of the businesses' value. The court awarded the defendant 100 percent ownership of both businesses. The court also awarded the defendant ownership of the marital home but awarded the plaintiff $221,677, an amount representing 100 percent of the

estimated net equity in the house as it stood before the defendant's failure to maintain and pay the mortgage on the property caused a loss of equity of $162,339.89. The parties' remaining assets, which included personal property, pension and retirement accounts, bank accounts, and investment accounts, were awarded to whichever party listed the asset on his or her financial affidavit, with any joint accounts split equally.

The trial court ordered each party to be solely responsible for the debts and liabilities listed on their respective financial affidavits. It also ordered the defendant to maintain a ten year, term life insurance policy in the amount of $2 million, naming the plaintiff as the sole beneficiary. Finally, the trial court ordered the defendant to pay 100 percent of the plaintiff's legal, expert, and professional fees, totaling $223,298, either in a lump sum or by an agreed upon installment plan.[1]

The defendant appealed to the Appellate Court, claiming that the trial court's orders impermissibly double counted his income by considering it for business valuation purposes and also awarding alimony on the basis of his income from those businesses. The Appellate Court agreed with the defendant and reversed the judgment of the trial court as to its financial orders and remanded the case for a new hearing on all financial issues. See *Oudheusden* v. *Oudheusden*, 190 Conn. App. 169, 170, 209 A.3d 1282 (2019). The Appellate Court also agreed with the defendant that the trial court's financial orders constituted an abuse of discretion in other ways. See id., 182–85. The Appellate Court held that the trial court did not consider all of the statutory criteria and

[1] The defendant does not challenge the award of legal, expert, or professional fees to the plaintiff but does cite this award as evidence of his inability to comply with the trial court's other financial orders. The court also made the defendant responsible for any outstanding taxes for the years 1985 through 2015, as well as for any tax liability for 2016. The court did not expressly find the amount of the debts, liabilities, and taxes listed.

all of the evidence when it fashioned its financial orders. Id., 182. In particular, the Appellate Court held that the trial court, in ordering nonmodifiable lifetime alimony, failed to consider the possibility that the defendant could become ill, that his businesses could fail to thrive through no fault of his own, or that, at some point in time, he might want to retire. Id., 183. The Appellate Court also disagreed with the trial court's determination that the plaintiff had limited earning potential and held that the record failed to support this determination. See id., 183–85.

The plaintiff petitioned for certification to appeal to this court, arguing, first, that the Appellate Court misapplied this court's double counting test by treating a lump sum payment that was based on an asset's value as equivalent to the transfer of an ownership interest in that asset. The plaintiff also claimed that the Appellate Court improperly substituted its judgment for that of the trial court in determining that the trial court abused its discretion in crafting its financial orders. Specifically, the plaintiff argued that the Appellate Court mischaracterized the trial court's findings of fact regarding her earning potential and that the Appellate Court could properly have concluded that the defendant would continue to earn sufficient income indefinitely. Finally, the plaintiff argued that it was within the trial court's broad discretion to award her lifetime, nonmodifiable alimony.

We granted the plaintiff's petition for certification, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the trial court had erroneously engaged in 'double dipping' by awarding the plaintiff alimony from income generated by the defendant's businesses and also awarding the plaintiff a percentage of those businesses in its division of property?" And (2) "[d]id the Appellate Court correctly conclude that the trial court had abused its discretion by failing to

enter financial orders that equitably divided the marital estate?" *Oudheusden* v. *Oudheusden*, 332 Conn. 911, 912, 209 A.3d 1232 (2019). Additional facts will be set forth as required.

I

Because the second certified issue is dispositive of this appeal, we address it first, and, specifically, we address one aspect of that issue: whether the Appellate Court incorrectly held that the trial court's permanent, nonmodifiable alimony award constituted an abuse of discretion. On this record, we agree with the Appellate Court that the trial court abused its discretion.

In reviewing the alimony award at issue, we note that the scope of our review of a trial court's exercise of its broad discretion in marital dissolution cases is limited to whether the court correctly applied the law and reasonably could have concluded as it did. See, e.g., *Misthopoulos* v. *Misthopoulos*, 297 Conn. 358, 372, 999 A.2d 721 (2010); *Greco* v. *Greco*, 275 Conn. 348, 354, 880 A.2d 872 (2005); *Krafick* v. *Krafick*, 234 Conn. 783, 805, 663 A.2d 365 (1995). We make every reasonable presumption in favor of the correctness of the trial court's action. *Gabriel* v. *Gabriel*, 324 Conn. 324, 336, 152 A.3d 1230 (2016); *Krafick* v. *Krafick*, supra, 805. It is, however, well established that, in awarding alimony, the trial court must take into account all of the statutory factors enumerated in General Statutes § 46b-82 (a)[2]

[2] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment."

and that its failure to do so constitutes an abuse of discretion. See *Greco* v. *Greco*, supra, 360 (trial courts must "consider all of the criteria enumerated in . . . § 46b-82"). The trial court does not need to give each factor equal weight or make express findings as to each factor, but it must consider each factor. Id., 355; see also *Burns* v. *Burns*, 41 Conn. App. 716, 726, 677 A.2d 971 (" 'Although a specific finding . . . is not required, the record must indicate the basis for the trial court's award.' . . . Sufficient evidence must exist to support the award, and the award may not stand if it is logically inconsistent with the facts found or the evidence." (Citation omitted.)), cert. denied, 239 Conn. 906, 682 A.2d 997 (1996); cf. *Simmons* v. *Simmons*, 244 Conn. 158, 180–81, 708 A.2d 949 (1998) (trial court abused its discretion in failing to consider defendant's age, which was "significant" omission in court's failure to award defendant any alimony). In addition, it is a "long settled principle that the defendant's ability to pay is a material consideration in formulating financial awards." *Greco* v. *Greco*, supra, 361. Finally, the trial court's financial orders must be consistent with the purpose of alimony: to provide continuing support for the nonpaying spouse, who is entitled to maintain the standard of living enjoyed during the marriage as closely as possible. *Hornung* v. *Hornung*, 323 Conn. 144, 162, 146 A.3d 912 (2016); id., 163 (plaintiff's efforts as homemaker, primary caretaker of parties' children increased defendant's earning capacity at expense of her own earning capacity, thus entitling her, postdissolution, to maintain standard of living parties enjoyed during marriage to extent possible); see *Blake* v. *Blake*, 211 Conn. 485, 498, 560 A.2d 396 (1989) ("periodic . . . alimony is based primarily upon a continuing duty to support"). When exercising its broad, equitable, remedial powers in domestic relations cases, a court "must examine both the public policy implicated and the basic elements of fairness." *Greco* v. *Greco*, supra, 363.

In this case, the alimony award was both permanent and nonmodifiable. Permanent, or lifetime, alimony is alimony payable in regular installments and terminates upon the death of either spouse (and often upon the nonpaying spouse's remarriage or cohabitation).[3] See Black's Law Dictionary (11th Ed. 2019) p. 92 (defining "alimony"); cf. id. (defining "rehabilitative alimony," which is durational in nature). Permanent alimony is generally modifiable unless otherwise specified. See, e.g., *Eckert* v. *Eckert*, 285 Conn. 687, 693, 941 A.2d 301 (2008) ("[n]onmodification provisions that are clear and unambiguous . . . are enforceable"). General Statutes § 46b-86 (a) permits a court to make an alimony award that is not subject to modification. Id. An award may be nonmodifiable as to duration or amount, or both. See, e.g., *Way* v. *Way*, 60 Conn. App. 189, 197, 758 A.2d 884 (trial court improperly terminated award of household support pursuant to § 46b-86 (a) because award was nonmodifiable as to duration, amount), cert. denied, 255 Conn. 901, 762 A.2d 910 (2000). In this case, the trial court took the unusual step of awarding alimony that is both permanent and nonmodifiable as to duration and amount.

The trial court has the authority to order lifetime, or permanent (but modifiable), alimony awards. See General Statutes § 46b-86 (a) (authorizing permanent alimony awards and providing for modification upon substantial change in circumstances of either party); see also *Keenan* v. *Casillo*, 149 Conn. App. 642, 663–64 and n.7, 89 A.3d 912 (upholding permanent alimony award of $1200 per week to forty year old woman after three year marriage), cert. denied, 312 Conn. 910, 93

[3] The terms "permanent" and "lifetime" are somewhat imprecise given that it is common for permanent alimony awards to include limited termination provisions such as those we have described. Nonetheless, these awards are of indefinite duration unless they are terminated by a triggering event specified in the awards.

A.3d 594 (2014). The defendant argues that, to incentivize the eventual self-sufficiency of the supported spouse, courts have begun to disfavor permanent alimony and favor time limited (also called rehabilitative) alimony. Such a policy would not in any way limit the trial court's broad discretion to award permanent alimony when appropriate. See *Dan* v. *Dan*, 315 Conn. 1, 11, 105 A.3d 118 (2014) (The court explained in dictum that "courts have begun to limit the duration of alimony awards in order to encourage the receiving spouse to become self-sufficient. Underlying the concept of time limited alimony is the sound policy that such awards may provide an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency." (Internal quotation marks omitted.)). Further, such a policy does not apply when, as in the present case, the trial court found that the supported spouse has limited earning potential due to her age, health, and the number of years she had been out of the workforce. Thus, we would not likely hold that the award of permanent alimony is an abuse of discretion under the facts of this case.

Although appellate level case law addressing a trial court's authority to make alimony awards nonmodifiable is sparse, the legislature has indisputably conferred such authority. General Statutes § 46b-86 (a);[4] see also

[4] General Statutes § 46b-86 (a) provides in relevant part: "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . . By written agreement, stipulation or decision of the court, those items or circumstances that were contemplated and are not to be changed may be specified in the written agreement, stipulation or decision of the court. . . . If a court, after hearing, finds that a substantial change in circumstances of either party has occurred, the court shall determine what modification of alimony, if any, is appropriate, considering the criteria set forth in section 46b-82."

Brown v. *Brown*, 148 Conn. App. 13, 24–25, 84 A.3d 905, cert. denied, 311 Conn. 933, 88 A.3d 549 (2014); *Marshall* v. *Marshall*, 119 Conn. App. 120, 128–29, 988 A.2d 314, cert. granted, 296 Conn. 908, 993 A.2d 467 (2010) (appeal withdrawn November 18, 2010); *Sheehan* v. *Balasic*, 46 Conn. App. 327, 330–31, 699 A.2d 1036 (1997), appeal dismissed, 245 Conn. 148, 710 A.2d 770 (1998); *Burns* v. *Burns*, supra, 41 Conn. App. 724–25. As reflected in the first sentence of § 46b-86 (a), the exercise of this authority constitutes an exception to the general rule of modifiability. General Statutes § 46b-86 (a) ("[*u*]*nless and to the extent that the decree precludes modification*, any final order for the periodic payment of permanent alimony . . . may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party . . . ." (emphasis added)). We have in fact recognized that the language of § 46b-86 "suggests a legislative preference favoring the modifiability of orders for periodic alimony." *Scoville* v. *Scoville*, 179 Conn. 277, 279, 426 A.2d 271 (1979). Although a clear and unambiguous nonmodification provision is enforceable; *Eckert* v. *Eckert*, supra, 285 Conn. 693; we have explained that, "because of the volatile nature of . . . personal circumstances, it has been recognized judicially that '[p]rovisions [that] preclude modification of alimony [or support] tend to be disfavored.' " *Amodio* v. *Amodio*, 247 Conn. 724, 730, 724 A.2d 1084 (1999); see also *Cummock* v. *Cummock*, 180 Conn. 218, 222–23, 429 A.2d 474 (1980); *Lawler* v. *Lawler*, 16 Conn. App. 193, 203, 547 A.2d 89 (1988), appeal dismissed, 212 Conn. 117, 561 A.2d 128 (1989).

As an exception to the general rule, it is therefore even more important that, before entering a nonmodifiable alimony order, the trial court consider the statutory factors it is obliged to balance. And it requires no citation to state that consideration of all statutory factors—

implicating "basic elements of fairness"—is more critical still when the trial court's alimony order is not only nonmodifiable, but also permanent.

In the present case, in addition to ordering the defendant to pay the plaintiff $452,000 (half the value of his businesses) and $221,677 (representing the equity in the marital home), to purchase a ten year, $2 million life insurance policy for the plaintiff's benefit, and to assume all of the debt in the marital home, the trial court ordered that the defendant pay the plaintiff $18,000 per month ($216,000 per year) in alimony. The court specifically made this lifetime award "nonmodifiable as to duration and amount": i.e., until one party dies, however long in the future that eventuality might occur. This provision of the award was clear and unambiguous. The parties do not argue otherwise. Although we make every reasonable presumption in favor of the correctness of the trial court's decision; *Krafick* v. *Krafick*, supra, 234 Conn. 805; we agree with the Appellate Court that a review of this alimony award in light of the record compels the conclusion that the trial court failed to consider all of the required statutory factors.

Specifically, on the basis of the evidence admitted at trial, we are obliged to conclude that the trial court either failed to consider the defendant's age, health, and future earning capacity, or failed to afford any significant weight to these factors. See *Hornung* v. *Hornung*, supra, 323 Conn. 164 ("The trial court must also look to the payor spouse's financial situation, in addition to that of the recipient spouse. Specifically, the trial court must consider the payor's age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, and employability." (Emphasis omitted.)). Although the trial court is not required to make express findings regarding every factor and need not give equal weight to each factor; *Greco* v. *Greco*, supra, 275 Conn. 355; notably, the trial

court made express findings as to the plaintiff's age, health, and future earning potential without making parallel findings regarding the defendant.

The plaintiff contends that the trial court's orders reflect that the court in fact considered these factors but, in its discretion, did not find them compelling. She argues, for example, that there was no evidence of the defendant's declining health or any likely future health issues. But, although the defendant considers himself to be in good health, the record reflects that he was fifty-eight years of age at the time of trial and has a history of alcohol abuse. His age itself could suggest the likelihood of health issues at some point in the future, let alone his alcohol abuse. Because the defendant has no retirement savings and derives all of his income from his two closely held businesses, this evidence also relates to his future earning potential and, therefore, his ability to comply with the court's orders because his health is directly tied to his ability to sustain his current income.

To illustrate how the trial court's permanent, nonmodifiable award could very well violate "basic elements of fairness" underpinning the statutory factors, we need only consider the not unlikely scenario in which both parties survive into their eighties. It requires no evidence to acknowledge that people can experience failing health as they advance into their later years. Yet, the trial court's award requires the defendant to continue to pay the plaintiff $216,000 per year even after twenty plus years of such payments and as both their health and ability to work dwindle.

The plaintiff argues that the trial court had before it enough evidence that the defendant's ability to earn income would not decrease over time, thereby supporting the alimony award. She notes that the defendant testified that he has no plans to retire and that his work

requires no physical labor. The plaintiff also points to evidence that the defendant's businesses were projected to grow at a rate of 1.5 percent and that the defendant thought his businesses would grow after the divorce.[5] Although the evidence certainly supports a conclusion that the defendant's businesses are likely to thrive for some time, the evidence does not support a finding that the businesses' growth would necessarily be perpetual. To support the nonmodifiable, lifetime award in this case, and reflect a proper consideration of the defendant's future income and ability to comply with the alimony award; see *Greco* v. *Greco*, supra, 275 Conn. 361; the trial court must have concluded that the defendant's earnings will either remain static or continue to increase until his alimony obligation terminates due to the death of either party or the plaintiff's remarriage or cohabitation. Such a conclusion ignores, or certainly does not account for, "the volatile nature of . . . personal circumstances" that has led this court to disfavor " '[p]rovisions [that] preclude modification of alimony' "; *Amodio* v. *Amodio*, supra, 247 Conn. 730; and to conclude that the legislature has done the same. See *Scoville* v. *Scoville*, supra, 179 Conn. 279 (§ 46b-86 "suggests a legislative preference favoring the modifiability of orders for periodic alimony").

The trial court ordered the defendant to pay $216,000 to the plaintiff annually in alimony, come what may. It is clear from the record that the defendant's ability to comply with the court's orders is contingent on his continued ability to work. It was unreasonable for the trial court to conclude that the defendant will have the

[5] In support of this proposition, the plaintiff cites Guberman's valuation report and asserts, in a parenthetical in her brief, that the defendant's businesses have a projected growth rate of 1.5 percent. The valuation report does not explain how the growth rate was calculated, but, like many aspects of closely held businesses, future growth rates are speculative and unpredictable, and, therefore, the defendant's income from these businesses is speculative and unpredictable as well.

ability to comply with this monthly alimony obligation for the rest of his life, however long that might be, without some provision for modification should health or economics prevent compliance. Thus, it is not clear from the record whether the trial court considered the defendant's age, health, or earning potential when it ordered lifetime alimony that was nonmodifiable as to duration and amount. To the extent that the court did consider these factors, it could not reasonably have concluded on this record that the defendant would continue to earn, at a minimum, the same income for the rest of his life.

It is of course *possible* he will have more than enough resources to comply with this order for his entire lifetime. As the Appellate Court held, however, it constitutes an abuse of discretion for the trial court to have failed to contemplate the realistic possibility of the defendant's illness, disability, or the loss of income through no fault of his own.[6] See *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 183–85. Without either more detailed findings of fact or some indication in the orders themselves that the trial court considered these factors when fashioning the alimony award at issue, we conclude that the trial court either did not consider, or improperly considered, all of the statutory factors as required by § 46b-82 (a).

This is not to say that permanent, nonmodifiable alimony awards will always constitute an abuse of discre-

[6] The Appellate Court also held that the trial court's failure to consider the defendant's voluntary retirement in fashioning its financial orders constituted further evidence of an abuse of discretion. See *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 183–85. Because we hold that the trial court abused its discretion by failing to consider, or that it improperly considered, the required statutory factors and the possibility that an *involuntary* decrease in earning capacity could affect the defendant's ability to comply with the financial orders for the rest of his life, we do not reach the issue of whether denying the defendant a voluntary retirement itself would render the alimony award an abuse of discretion.

tion. Under some circumstances, such an award may be appropriate when there is evidence that the paying spouse can afford to pay the set amount, regardless of future earning capacity. For example, nonmodifiable, lifetime alimony might be appropriate when the paying spouse's income is guaranteed by a pension or when the paying spouse's income greatly exceeds the amount of the alimony award. But nonmodifiable, lifetime alimony awards are strong medicine. In fact, the parties have not cited, and we have not found in our own research, any case in which an appellate court has reviewed a lifetime periodic alimony award that was both (1) permanent and (2) nonmodifiable as to both duration and amount. This dearth of case law alone demonstrates the extraordinary nature of the trial court's approach.

We note that, in those cases in which a party has unsuccessfully challenged an alimony award that was either permanent (but modifiable) or nonmodifiable (but of limited duration), the trial court clearly accounted for the possibility that the paying spouse could have a substantial change in income in the future. See, e.g., *Brown* v. *Brown*, supra, 148 Conn. App. 23–24 (trial court placed caps on parties' annual gross incomes from employment, the attainment of which would not be considered substantial change in circumstances that would permit modification of nine year alimony award of between $2000 and $2500 per week). Two of these cases specifically anticipate the paying spouse's voluntary retirement. See *Marshall* v. *Marshall*, supra, 119 Conn. App. 124 (defendant's periodic alimony payments would be reduced to $1 per year upon his retirement); *Burns* v. *Burns*, supra, 41 Conn. App. 719 (alimony award of $5666.67 per month could not be terminated but was modifiable upon defendant's retirement on basis of change in circumstances).

Here, by contrast, there is insufficient evidence that the trial court's orders account for the possibility of a substantial change in the defendant's circumstances. For this reason, the trial court's award of $18,000 per month in periodic alimony, permanent and nonmodifiable as to duration and amount, was an abuse of discretion. Because our holding disturbs the trial court's carefully crafted mosaic of financial orders; see, e.g., *Greco* v. *Greco*, supra, 275 Conn. 354; we must uphold the Appellate Court's reversal of the trial court's financial orders and remand of this case for a new hearing on all financial issues.[7]

II

Having upheld the Appellate Court's conclusion that the trial court's alimony award constituted an abuse of discretion, we agree with the Appellate Court that the case must be remanded to the trial court for a new hearing on all financial issues. We nevertheless address the plaintiff's remaining claim as to which we also granted certification to appeal because the issue of double counting is almost certain to arise on remand. See, e.g., *State* v. *Chyung*, 325 Conn. 236, 260 n.21, 157 A.3d 628 (2017) (reviewing court may resolve claims that are not necessary for resolution of appeal but are likely to arise during proceedings on remand).

The following additional facts are required for the disposition of this issue. The trial court credited the testimony of the plaintiff's expert, Guberman, regarding the fair market value of the defendant's two businesses. The plaintiff's expert valued the businesses using a weighted average of three valuation methods—the excess earn-

[7] Because we hold that the trial court improperly failed to consider or properly apply the factors in § 46b-82 pertaining to the defendant and his ability to comply with the financial orders, we do not reach the plaintiff's argument that the Appellate Court incorrectly reweighed the evidence or mischaracterized the trial court's findings as to his earning capacity.

ings method, the capitalization of income method, and the market approach. The excess earnings and capitalization of income methods—collectively referred to as "income methods" or "income approaches"—use the businesses' incomes to determine their fair market value.

A brief description of the two income methods of valuation used by the plaintiff's expert is necessary. In his capitalization of income valuation, Guberman used a multiyear weighted average of the businesses' adjusted pretax income to determine reasonable future cash flow. The adjustments made included subtractions for the "cash flows paid to or for the benefit of" the defendant. The adjustments also accounted for the "reasonable compensation payable to [the defendant] for the part-time services he provides to the company." In his excess earnings valuation, which calculates fair market value partly by considering the businesses' goodwill, Guberman found that goodwill accounts for 81 percent of the overall value of Connecticut Computer & Consulting Company, Inc., and 49 percent of the value of WriteResult, LLC. In arriving at a value for the businesses, Guberman weighted both of these two income methods at 40 percent, and weighted the market approach at 20 percent. He concluded that the combined fair market value of the defendant's business entities was $904,000 ($512,000 for Connecticut Computer & Consulting Company, Inc.; $392,000 for WriteResult, LLC). In its property distribution order, the trial court awarded the plaintiff 50 percent of this fair market value, or a $452,000 lump sum.

As discussed in part I of this opinion, the trial court's financial orders also awarded the plaintiff permanent, nonmodifiable periodic alimony in the amount of $18,000 per month, or $216,000 annually. The trial court did not explain how it came to this number but presumably it considered the appropriate statutory factors,

including the defendant's gross annual income, which the trial court found to be $550,000. See General Statutes § 46b-82 (a) (listing factors trial court must consider in awarding alimony). The trial court also did not explain how it determined the defendant's income.[8] The defendant requested an articulation as to whether the trial's court's finding of his gross annual income constituted actual income earned from the two businesses or his earning capacity. In response, the court clarified that it based the defendant's gross annual income on the actual income from the defendant's two businesses: it did not make a finding of earning capacity. Additionally, the trial court did not explain how the defendant's gross annual income factored into its determination of alimony, but the defendant did not request a further articulation.

We are asked to decide whether the trial court double counted by awarding the plaintiff alimony from income generated by the defendant's businesses and also awarding the plaintiff 50 percent of the fair market value of those businesses. The Appellate Court held, and the defendant maintains, that double counting is generally prohibited and occurs when a court "take[s] an income producing asset into account in its property division and also award[s] alimony based on that same income." *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 178.

[8] It appears from the record that the trial court based the defendant's gross annual income on an opinion contained in Guberman's report. Guberman suggested in the report that, because the defendant has sole control of the earnings and cash flows of both businesses, the trial court should include in the defendant's actual income all of his actual compensation (between $323,369 and $394,319) as well as the net earnings retained by the businesses at year end, which Guberman calculated to total $540,000 annually (including the defendant's actual compensation). Therefore, it appears that the trial court included discretionary cash flow in the income determination, but it is unclear exactly how the trial court arrived at the slightly higher figure of $550,000. Once again, though, the defendant does not challenge any factual finding.

The defendant contends that the Appellate Court properly considered it double counting to award the plaintiff half the value of the businesses when the trial court valued the businesses, in part, on the basis of the companies' future earnings, including the defendant's income, which it also considered in calculating the alimony award. The plaintiff argues that double counting did not occur here, because, according to our case law, double counting can occur only when a party is ordered to pay alimony from an income stream he or she no longer has because it was distributed in the division of property orders, not when, as here, the trial court distributes a portion of the *value* of the businesses to the plaintiff while the defendant retains 100 percent ownership of those businesses. Because the defendant retains full ownership of the businesses, the plaintiff argues, he still has an income stream from which to make the alimony payments that is separate and distinct from the payment made to the plaintiff in the property distribution. We conclude that the trial court did not improperly double count the value of the defendant's businesses in the present case because any rule against double counting does not apply when the distributed asset is the value of a business and the alimony is based on income earned from that business.

A

"Courts and commentators have often disagreed . . . as to what constitutes [double counting], whether [double counting] ought to be prohibited as a matter of law, and if not so prohibited, whether it is inequitable in the circumstances of the particular divorce settlement." *Sampson* v. *Sampson*, 62 Mass. App. 366, 374, 816 N.E.2d 999, review denied, 443 Mass. 1102, 820 N.E.2d 259 (2004). "Double counting" or "double dipping" are not statutory terms: there is no legislative admonition against double counting in Connecticut, and we therefore have no direct legislative guidance on the issue. The

concept instead is ultimately an equitable one. "Double [counting] is a term used to describe the supposed unfairness that results when property is awarded to a spouse in equitable distribution but is also treated as a source of income for purposes of calculating maintenance or alimony." (Internal quotation marks omitted.) " 'Double Dipping,' " 14 Equitable Distribution J., no. 5, May, 1997, p. 49 (Double Dipping).

Concern about double counting arose in the context of pensions and retirement benefits, because, "in the case of pensions or other retirement assets, the asset *is* the income that will eventually be distributed." (Emphasis in original.) L. Morgan, " 'Double Dipping': A Good Theory Gone Bad," 25 J. Am. Acad. Matrim. L. 133, 140–41 (2012). Proponents of a general prohibition against double counting argue that it allows the alimony recipient to dip twice into the same asset. Double Dipping, supra, p. 49. Those who take the opposite view point to the different purposes of property distribution and spousal support argue that a strict prohibition on double counting may prevent the awards from fulfilling their distinct statutory purposes. See id.; see also *Mickey* v. *Mickey*, 292 Conn. 597, 615, 974 A.2d 641 (2009) ("[d]espite their close relationship . . . the purposes and operation of [General Statutes] §§ 46b-81 and 46b-82 are distinct and, to an extent, complementary, applying under different circumstances for different reasons"). "[T]he purpose of postdissolution property division is to unscramble the ownership of property" of each spouse; (internal quotation marks omitted) id., 614; whereas the purpose of alimony "is to recognize the obligation of support that spouses assume toward each other by virtue of the marriage." (Internal quotation marks omitted.) Id., 615–16.

This court has recognized that it is not double counting for the trial court to *consider* the same asset in both the property distribution and, as allocated, for purposes of determining spousal support. See *Krafick* v. *Krafick*,

supra, 234 Conn. 804–805 n.26.[9] Contra N.J. Stat. Ann. § 2A:34-23 (b) (14) (West Supp. 2020) ("[w]hen a share of a retirement benefit is treated as an asset for purposes of equitable distribution, the court shall not consider income generated thereafter by that share for purposes of determining alimony"). However, this court has suggested that it would be double counting for income from property that was awarded to the nonpaying spouse—and is therefore no longer available to the paying spouse—to be awarded to the nonpaying spouse in the alimony award. Although this court has never so held, our case law strongly suggests that we would prohibit this type of double counting in the pension context. See *Krafick* v. *Krafick*, supra, 804–805 n.26. Notably, this court never has been asked to determine if this double counting rule would apply when the asset at issue is the value of a business, as in the present case.

A brief discussion of double counting and our own case law on the issue illustrates the need for this court to provide additional guidance, specific to businesses.

B

In *Krafick* v. *Krafick*, supra, 234 Conn. 783, this court implicitly rejected a general prohibition on double counting when it held that the trial court improperly assigned the defendant's pension no value in the property distribution, even though the trial court acknowledged that the pension was an asset of the marriage. Id., 805–806. The court in *Krafick* rebuffed the "defendant's contention that to consider vested [pension] benefits for purposes of equitable distribution and also, *as allocated*, as a source of alimony constitutes impermissible 'double [counting].' " (Emphasis added.) Id., 804–805 n.26. The court went on to explain that "[o]ur alimony

[9] Courts in other jurisdictions that have considered the issue have declined to extend the prohibition to situations in which the asset at issue is the value of a business. See Double Dipping, supra, p. 54.

statute expressly provides that '[i]n determining whether alimony shall be awarded, and the duration and amount of the award, the court . . . shall consider . . . the award, if any, which the court may make pursuant to [§] 46b-81 [in distributing property].' . . . Relying on the pension benefits allocated to the employee spouse under § 46b-81 as a source of alimony would be improper only to the extent that any portion of the pension assigned to the nonemployee spouse [in the distribution of property] was counted in determining the employee spouse's resources for purposes of alimony." (Citation omitted.) Id., 805 n.26. Thus, this court has suggested that it would recognize a more limited prohibition on double counting in the pension context, but there was no double counting in *Krafick*.

This court also has considered the application of the double counting rule in the context of bank accounts, investment accounts, vested stock, stock options, and stock in a closely held business. For example, in *Greco*, we reviewed the trial court's order requiring the defendant to transfer the entirety of his stock in a business, or the value of that stock, to the plaintiff and also awarding the plaintiff alimony that was based in part on the salary the defendant earned as an employee of the same business. *Greco* v. *Greco*, supra, 275 Conn. 352, 361. Although we did not analyze why the rule against double counting should extend to the awarding of stock, we concluded that no double counting occurred because, notwithstanding that "the defendant's salary from [the business] appear[ed] to have been his main source of income . . . the stock itself did not constitute a significant resource or source of income and the trial court did not attribute any such income [e.g., cash dividends] to the defendant in determining his income for the purpose of calculating alimony." (Citation omitted.) Id., 357 n.8.[10]

[10] The defendant relies on *Greco*, arguing that, "[i]n this case, the trial court obviously made that *Greco* attribution by linking the defendant's income to

Similarly, in *O'Brien* v. *O'Brien*, 326 Conn. 81, 161 A.3d 1236 (2017), the assets at issue included bank and investment accounts, as well as vested stock and stock options in the company at which the plaintiff was employed but was not an owner. Id., 86–87. The court explained the general rule against double counting as follows: "A trial court's alimony award constitutes impermissible double [counting] only if the court considers, as a source of the alimony payments, assets distributed to the party *receiving* the alimony. . . . [I]f a trial court assigns a certain asset—a bank account, for example—to the party *receiving* alimony, it cannot consider that same bank account as a source of future alimony payments because the account has not been distributed to the party *paying* the alimony." (Citations omitted; emphasis in original.) Id., 120–21. Once again, though, we determined that there was no double counting because the assets the plaintiff would use to pay the alimony award were all awarded to the plaintiff himself. Id.[11]

the businesses in its clarification order." Although the facts here might appear to satisfy the test for double counting laid out in *Greco* (i.e., the businesses themselves *did* constitute a significant resource or source of income), this case is distinguishable because, as we will discuss more fully, the value of a business asset is not the same as stock.

[11] The Appellate Court has found double counting on only one occasion. In *Lynch* v. *Lynch*, 135 Conn. App. 40, 43 A.3d 667 (2012), the plaintiff had published a book. Id., 43. The Appellate Court held that the trial court double counted by awarding the defendant 30 percent of the value of the plaintiff's unsold books as well as 30 percent of all income the plaintiff would receive in the future from the sale of the same books. Id., 43–44, 53–54. Both of these awards were part of the court's property distribution under § 46b-81. Id., 52. In the present case, by contrast, the defendant does not claim that the same asset was distributed twice under § 46b-81. Rather, the question presented in this case—whether the same income was counted both for alimony and property distribution purposes—is clearly distinguishable.

The Appellate Court has considered and rejected double counting arguments on three other occasions. In *Callahan* v. *Callahan*, 157 Conn. App. 78, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015), and *McRae* v. *McRae*, 129 Conn. App. 171, 20 A.3d 1255 (2011), the Appellate Court held that double counting had not occurred when the alimony award was based on the paying spouse's

C

As noted, this court never has been asked to determine whether the rule against double counting applies when the value of a business is distributed, as in the present case. In concluding that the trial court engaged in double counting in this case, the Appellate Court cited one if its own cases for the "general principle . . . that a court may not take an income producing asset into account in its property division and also award alimony based on that same income." *Oudheusden* v. *Oudheusden*, supra, 190 Conn. App. 178, citing *Callahan* v. *Callahan*, 157 Conn. App. 78, 95, 116 A.3d 317, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015), and cert. denied, 317 Conn. 914, 116 A.3d 813 (2015). The Appellate Court's statement of this "general principle" sweeps too far, however, and, in some contexts, is at odds with this court's holding in *Krafick* and with the text of §§ 46b-81 and 46b-82.

For the proposition quoted previously, the Appellate Court relied on dictum from its own precedent in *Callahan*. The language in *Callahan* is dictum because the parties in that case agreed to the application of this general principle and because the principle ultimately did not apply—the court in *Callahan* determined that the alimony award in that case was based on the defendant's earning capacity, not his actual income from the business. *Callahan* v. *Callahan*, supra, 157 Conn. App. 95–97. In addition, the court in *Callahan* derived this "general principle" from *Eslami* v. *Eslami*, 218 Conn. 801, 815, 591 A.2d 411 (1991), a decision that predates *Krafick*. See *Callahan* v. *Callahan*, supra, 95–97. In

earning capacity. *Callahan* v. *Callahan*, supra, 97; *McRae* v. *McRae*, supra 188. And, in *Utz* v. *Utz*, 112 Conn. App. 631, 963 A.2d 1049, cert. denied, 291 Conn. 908, 969 A.2d 173 (2009), the Appellate Court rejected a double counting argument when—unlike in the present case—no portion of the paying spouse's business or its value was transferred to the payee spouse. Id., 639–40.

Eslami, this court said, in dictum, that "[a] valuation method that does not differentiate between the goodwill of the practice as a saleable entity and the practitioner's own earning power as enhanced by such goodwill may well result in counting the same basis for a financial award in dissolution cases twice, once as an asset of his estate subject to allocation and again, as a component of his *earning capacity* forming the basis for alimony." (Emphasis added.) *Eslami* v. *Eslami*, supra, 815. Because the court in *Eslami* was not required to determine whether the double counting rule applied to the value of businesses, this statement was made without considering the unique characteristics of businesses. In addition, the dictum from *Eslami* does not apply to the present case because, here, the trial court made no finding of fact as to the defendant's earning capacity and the defendant did not request articulation as to how the trial court determined his earning capacity. Therefore, we are not persuaded that the dictum in *Eslami* supports extending the rule to the valuation of businesses. It is clear from this overview of Connecticut's double counting jurisprudence that the rule is not well developed and never has been applied to the business context at issue here.

Because this court never has clearly extended our case law regarding double counting to the valuation of businesses, we look to case law from other jurisdictions for guidance on how this rule applies to businesses. The defendant argues that double counting is implicated because the businesses were valued using a method that was based on income for property distribution purposes and the alimony award was based on the income from those businesses.[12] Yet, every jurisdiction

[12] To the extent that the businesses were valued using the market approach, double counting is not implicated because it does not use income to calculate fair market value. See L. Morgan, supra, 25 J. Am. Acad. Matrim. L. 145 ("no one would argue that valuing a business using the market approach results in double [counting]").

that has considered the issue has concluded that the double counting rule does not apply when the asset at issue is the value of a business, even when the business' fair market value was determined by an income method of valuation. See *Steneken* v. *Steneken*, 183 N.J. 290, 301–302, 873 A.2d 501 (2005) ("We find no inequity in the use of the individually fair results obtained due to the use of an asset valuation methodology normalizing salary in an [ongoing] close corporation for equitable distribution purposes, and the use of actual salary received in the calculus of alimony. The interplay of those two calculations does not constitute 'double counting.' "); *Keane* v. *Keane*, 8 N.Y.3d 115, 121, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006) ("We do not see why an inquiry as to double counting should depend on the valuation method used. After all, any valuation of an [income producing] property will necessarily take into account the [income producing] capacity of that property. To prevent any income derived from any [income producing] property from being 'double counted' would, therefore, significantly limit the trial court's considerable discretion in equitably distributing marital property and awarding maintenance."); *McReath* v. *McReath*, 335 Wis. 2d 643, 674–76, 800 N.W.2d 399 (2011) ("when determining maintenance . . . counting income from income earning assets [assigned to a spouse in property division] will typically not implicate double counting" (citations omitted; footnotes omitted)). These jurisdictions treat the income approach to valuation as simply a tool to determine a business' fair market value, just like the market approach and the asset approach.

In a case with strong similarities to the present appeal, the New Jersey Supreme Court explained the rationale behind this rule particularly well. In *Steneken*, the asset was a closely held business of which the defendant was the sole shareholder. *Steneken* v. *Stene-*

ken, supra, 183 N.J. 293–94. The defendant's expert in *Steneken* used the capitalization of earnings method to value the business. Id., 298. The trial court, in its property distribution, awarded 35 percent of this value to the plaintiff. *Steneken* v. *Steneken*, 367 N.J. Super. 427, 432, 843 A.2d 344 (App. Div. 2004), aff'd as modified, 183 N.J. 290, 873 A.2d 501 (2005). As in the present case, the defendant was awarded sole ownership of the business—i.e., the court did not order that the parties would own the business jointly. Id. The plaintiff also was awarded alimony that was based on the defendant's actual income from the business. Id. The defendant argued that it was double counting to use his actual income to calculate the alimony award because his excess earnings beyond his normalized income were also considered in valuing the business, of which the plaintiff received a share. *Steneken* v. *Steneken*, supra, 183 N.J. 294–95; *Steneken* v. *Steneken*, supra, 367 N.J. Super. 433.

The New Jersey Supreme Court disagreed. "Principles of fairness that properly account for the dichotomy between alimony, on the one hand, and equitable distribution, on the other, are what inform our analysis." *Steneken* v. *Steneken*, supra, 183 N.J. 300. "Because we embrace the premise that alimony and equitable distribution calculations, albeit interrelated, are separate, distinct, and not entirely compatible financial exercises, and because asset valuation methodologies applied in the equitable distribution setting are not congruent with the factors relevant to alimony considerations, we conclude that the circumstances here present a fair and proper method of both awarding alimony and determining equitable distribution." Id., 301. "Where, as here, the major marital asset is a [closely held] corporation and the supporting spouse has determined what his or her income was during the marriage, the supported spouse is entitled, [postdivorce], both to alimony

sufficient to maintain a reasonably comparable lifestyle and to a fair division of the asset. We do not agree with [the] defendant's view that this analysis effects a 'windfall' to the supported spouse. Trial courts remain free to consider, in the exercise of their discretion and in accordance with the statutory guidelines, the fair and proper quantum of alimony and equitable distribution attendant to each case before them." (Footnote omitted.) Id., 303–304.

In addition, the New Jersey Supreme Court pointed out a logical flaw at the core of the argument that it is improper double counting to use an income method of valuation on the property distribution side and actual income on the alimony side of the equation. "[T]he [d]efendant mistakenly equates the statutory and decisional methodology applied in the calculation of alimony with a valuation methodology applied for equitable distribution purposes that requires that revenues and expenses, including salaries, be normalized so as to present a fair valuation of a going concern. . . . [T]he proper issue is whether, under the circumstances, the alimony awarded and the equitable distribution made are, both singly and together, fair and consistent with the statutory design." Id., 301.

D

We are persuaded by our sister courts that have addressed the issue and concluded that it is not double counting for a trial court to award a spouse a lump sum representing a portion of the value of a business and also award the spouse alimony that is based on the paying spouse's actual income from that business. In the present case, that is precisely what happened. Therefore, we conclude that it was not improper for the trial court to base the property distribution on Guberman's valuation of the defendant's businesses while also considering the defendant's income from those businesses in its alimony award.

Nevertheless, trial courts should—consistent with our statutory scheme—consider all required statutory factors and ensure that each award is consistent with its respective statutory purpose and that the awards as a whole are fair and equitable. This consideration might include ensuring that the property distribution of a portion of a business' value to the nonowning spouse does not unfairly reduce the paying spouse's ability to earn income from that business (resulting in the undercapitalization of the business, for example). As with any alimony or property distribution award, reviewing courts may consider how a business has been awarded (i.e., divided) in determining whether the alimony and distribution awards serve their statutory purposes and whether the award as a whole is fair. See *Greco* v. *Greco*, supra, 275 Conn. 354–56, 362–63 (discussing appellate review of trial court's financial orders); see also *Steneken* v. *Steneken*, 183 N.J. 302 (second and final step in inquiry is whether result as whole is "fair under the circumstances and congruent with the standards set forth in [the alimony statute] and [the equitable distribution statute]"); *McReath* v. *McReath*, supra, 335 Wis. 2d 677 ("the focus should be on fairness, not rigid [double counting] rules"). In the present case, because we already have determined that the trial court's alimony award was an abuse of discretion, we need not undertake consideration of whether the award as a whole is fair. The trial court will have to conduct a new hearing on financial issues and, among other things, will be guided by the principles outlined in this opinion.

The judgment of the Appellate Court is affirmed with respect to its determination regarding the trial court's financial orders, the judgment of the Appellate Court is reversed with respect to its determination that the trial court improperly double counted the value of the defendant's businesses for purposes of the property division and alimony awards, and the case is remanded

to the Appellate Court with direction to remand the case to the trial court for a new hearing on all financial issues.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* JAVIER VALENTIN PORFIL
(SC 20379)

Robinson, C. J., and McDonald, D'Auria, Kahn, Ecker and Keller, Js.

Argued October 13, 2020—officially released April 30, 2021*

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent, sale of narcotics within 1500 feet of a school, possession of drug paraphernalia, possession of narcotics and interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to the jury before *Harmon*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Prescott*, *Elgo* and *Harper*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Laurie N. Feldman, deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

* April 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PER CURIAM. The defendant, Javier Valentin Porfil, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court, which affirmed his conviction, rendered after a jury trial, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2015) § 21a-278 (b), sale of narcotics within 1500 feet of a school in violation of General Statutes § 21a-278a (b), possession of drug paraphernalia in violation of General Statutes § 21a-267, possession of narcotics in violation of General Statutes (Rev. to 2015) § 21a-279 (a), and interfering with an officer in violation of General Statutes (Rev. to 2015) § 53a-167a. *State* v. *Porfil*, 191 Conn. App. 494, 497–98, 215 A.3d 161 (2019). On appeal, the defendant challenges the Appellate Court's conclusion that the evidence adduced at trial was sufficient to support his conviction of possession of narcotics with intent to sell by a person who is not drug-dependent and possession of narcotics because the state produced sufficient evidence to prove beyond a reasonable doubt that he had constructive possession of the narcotics recovered by the police from a building located at 126-128 Walnut Street in Waterbury. The defendant contends, specifically, that, because "the [narcotics] were found [on] the second floor landing of a stairway in a common portion of a multiunit apartment building," and because there was no evidence of a "direct connection, or 'nexus,' individually linking [him] to the contraband," the Appellate Court incorrectly

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the evidence of constructive possession was sufficient to sustain the defendant's conviction of possession of narcotics and possession of narcotics with intent to sell by a person who is not drug-dependent, when the narcotics that formed the basis for the conviction were found in a common area over which the defendant did not have exclusive possession?" *State* v. *Porfil*, 333 Conn. 923, 923–24, 218 A.3d 67 (2019).

determined that there was sufficient evidence for the jury to find that the defendant was aware of the narcotics' presence and that he exercised dominion and control over the narcotics.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal should be dismissed on the ground that certification was improvidently granted.

The appeal is dismissed.

KELLY SERVICES, INC. *v.* THE SENIOR NETWORK, INC.
(SC 20548)

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

Syllabus

Pursuant to statute (§ 52-192a (c)), if "[a] plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ."

The plaintiff, an employment staffing agency, sought to recover damages for, inter alia, breach of contract from the defendant in connection with the defendant's failure to pay for certain services. Prior to trial, the plaintiff filed an offer of compromise, which the defendant did not accept, even though it previously had agreed to pay an invoice in the amount of the offer. Following a bench trial, the trial court found the defendant liable and awarded the plaintiff compensatory damages in the exact amount of the offer of compromise. The trial court determined that the defendant had wrongfully withheld payment and that it was equitable to award the plaintiff double interest in light of the defendant's prior agreement and failure to pay. Accordingly, the court awarded the plaintiff both prejudgment interest and postjudgment interest at the annual rate of 8 percent pursuant to the statute (§ 37-3a) governing interest in civil actions generally, as well as both prejudgment and postjudgment offer of compromise interest pursuant to § 52-192a (c), at an annual rate of an additional 8 percent. The defendant moved for reargument, claiming, inter alia, that the trial court's award of postjudgment interest under § 52-192a was improper under *Gionfriddo* v. *Avis*

Rent A Car System, Inc. (192 Conn. 301), in which this court concluded that offer of compromise interest under § 52-192a runs only from the date the offer was filed to the date of judgment. The trial court denied the motion for reargument without explanation, and the defendant appealed. *Held* that the trial court improperly ordered that the offer of compromise interest continue to accrue until the date the judgment is satisfied, and, accordingly, this court reversed the trial court's judgment only as to the award of postjudgment interest under § 52-192a and remanded the case with direction to vacate that award; the trial court's award of postjudgment interest under § 52-192a was improper, as this court's conclusion in *Gionfriddo* that offer of compromise interest terminates as of the date of judgment and may not be awarded postjudgment under § 52-192a controlled, that conclusion was not, contrary to the plaintiff's argument, dictum, and the plaintiff did not argue that *Gionfriddo* should be overruled or limited.

Argued February 26—officially released May 4, 2021*

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim; thereafter the case was tried to the court, *Hon. Edward R. Karazin, Jr.*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the plaintiff, from which the defendant appealed. *Reversed in part; judgment directed.*

James E. Nealon, for the appellant (defendant).

Robert C. Clark, pro hac vice, with whom was *Abraham M. Hoffman*, for the appellee (plaintiff).

Opinion

ECKER, J. The sole issue in this appeal is whether the trial court properly awarded postjudgment, offer of compromise interest to the plaintiff, Kelly Services, Inc.,

* May 4, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

under General Statutes § 52-192a[1] and Practice Book § 17-18.[2] We conclude that the trial court's award of

[1] General Statutes § 52-192a provides in relevant part: "(a) Except as provided in subsection (b) of this section, after commencement of any civil action based upon contract or seeking the recovery of money damages, whether or not other relief is sought, the plaintiff may, not earlier than one hundred eighty days after service of process is made upon the defendant in such action but not later than thirty days before trial, file with the clerk of the court a written offer of compromise signed by the plaintiff or the plaintiff's attorney, directed to the defendant or the defendant's attorney, offering to settle the claim underlying the action for a sum certain. . . . If the offer of compromise is not accepted within thirty days and prior to the rendering of a verdict by the jury or an award by the court, the offer of compromise shall be considered rejected and not subject to acceptance unless refiled. Any such offer of compromise and any acceptance of the offer of compromise shall be included by the clerk in the record of the case.

* * *

"(c) After trial the court shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . the court shall add to the amount so recovered eight per cent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. The interest shall be computed from the date the complaint in the civil action . . . was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint . . . . If such offer was filed later than eighteen months from the date of filing of the complaint . . . the interest shall be computed from the date the offer of compromise was filed. The court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly. This section shall not be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

[2] Practice Book § 17-18 provides: "After trial the judicial authority shall examine the record to determine whether the plaintiff made an offer of compromise which the defendant failed to accept. If the judicial authority ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in that plaintiff's offer of compromise, the judicial authority shall add to the amount so recovered 8 percent annual interest on said amount. In the case of a counterclaim plaintiff under General Statutes § 8-132, the judicial authority shall add to the amount so recovered 8 percent annual interest on the difference between the amount so recovered and the sum certain specified in the counterclaim plaintiff's offer of compromise. Any such interest shall be computed as provided in General Statutes § 52-192a. The judicial authority may award reasonable

postjudgment, offer of compromise interest was improper under our holding in *Gionfriddo* v. *Avis Rent A Car System, Inc.*, 192 Conn. 301, 307–308, 472 A.2d 316 (1984), and therefore reverse in part the judgment of the trial court.

The relevant facts, which the trial court found following a bench trial, are not contested on appeal. The plaintiff is an employment staffing agency that provides workers for temporary assignments. In September, 2014, the plaintiff entered into a contract with the defendant, The Senior Network, Inc., to provide temporary workers for a ten week period to distribute marketing brochures encouraging Walmart customers to enroll in a program for Medicare supplemental benefits. After the work was completed, the plaintiff submitted invoices for payment. A dispute ensued regarding the value of the services rendered, and, following a series of communications, the defendant asked the plaintiff to " 'prepare an invoice for the $114,180.56 final payment and we will consider the assignment closed.' " The plaintiff responded shortly thereafter by submitting an invoice for $113,955.56, slightly less than the defendant had agreed to pay. On May 19, 2015, the defendant advised the plaintiff that it would pay the invoice within thirty to forty-five days. Notwithstanding this agreement, the defendant did not pay any portion of the final invoice.

The plaintiff commenced this action against the defendant to recover the $113,995.56 debt by filing a two count complaint for breach of contract and unjust enrichment. The defendant filed an answer and special defenses, as well as a counterclaim for breach of con-

attorney's fees in an amount not to exceed $350 and shall render judgment accordingly. Nothing in this section shall be interpreted to abrogate the contractual rights of any party concerning the recovery of attorney's fees in accordance with the provisions of any written contract between the parties to the action."

tract. More than two years later, on March 15, 2018, the plaintiff filed an offer of compromise "to settle this action and [to] stipulate to judgment in the amount of $113,955.56 in [its] favor . . . ." The defendant did not accept the offer of compromise. A five day bench trial took place in June, 2019.

On December 2, 2019, the trial court issued a memorandum of decision, finding that the defendant had breached its contractual payment obligations to the plaintiff and awarding compensatory damages in the amount of $113,955.56, the exact amount of the plaintiff's offer of compromise.[3] The court also awarded interest and attorney's fees to the plaintiff.[4] The interest award contained two components.

First, after finding that the defendant had wrongfully withheld payment of the final invoice, the trial court awarded the plaintiff interest under General Statutes § 37-3a, which permits interest to be awarded "as damages for the detention of money after it becomes payable." General Statutes § 37-3a (a). The trial court ordered interest under § 37-3a "at the rate of 8 percent per annum" and stated that the interest will run from the date when it determined that payment of the final invoice became due, "May 19, 2015, until the date [the defendant] completely pays [the plaintiff]." In other words, the § 37-3a interest award included both prejudgment interest and any postjudgment interest that may accrue until the judgment is fully satisfied. The award

[3] The trial court concluded that the defendant had failed to prove its special defenses and its counterclaim.

[4] The trial court awarded the plaintiff reasonable attorney's fees in the amount of $350. See General Statutes § 52-192a (c) ("[t]he court may award reasonable attorney's fees in an amount not to exceed three hundred fifty dollars, and shall render judgment accordingly"); Practice Book § 17-18 ("[t]he judicial authority may award reasonable attorney's fees in an amount not to exceed $350 and shall render judgment accordingly"). The trial court's award of attorney's fees is not at issue in this appeal.

of statutory interest under § 37-3a is not challenged on appeal.

The issue on appeal relates to the second component of the trial court's interest award, which was made under § 52-192a and Practice Book § 17-18. Section 52-192a (c) provides in relevant part that, if "the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . ."[5] Similarly, Practice Book § 17-18 provides in relevant part that, "[i]f the judicial authority ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in that plaintiff's offer of compromise, the judicial authority shall add to the amount so recovered 8 percent annual interest on said amount. . . ." The disputed aspect of the trial court's interest award is the portion specifying that the interest owed to the plaintiff under § 52-192a and Practice Book § 17-18 shall be calculated "from the filing of the offer of compromise *until paid*," i.e., post-judgment. (Emphasis added.) The trial court determined that it would "not be inequitable" to award "double interest" under both § 37-3a and § 52-192a and Practice Book § 17-18 from March 15, 2018, until the

[5] The trial court determined that the plaintiff was entitled to interest under § 52-192a because it had recovered an amount "equal to" the offer of compromise. In fact, the plaintiff's recovery substantially exceeded the offer of compromise because the amount it "ha[d] recovered" under § 52-192a (c) included the trial court's award of prejudgment interest under § 37-3a. See *Blakeslee Arpaia Chapman, Inc.* v. *EI Constructors, Inc.*, 239 Conn. 708, 740 n.35, 687 A.2d 506 (1997) ("[t]he offer of judgment is to be compared to the amount that the plaintiff 'has recovered,' which includes compensatory interest"); see also *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 304–305 ("it is the total judgment that is the relevant [basis] for comparison"); *Gillis* v. *Gillis*, 21 Conn. App. 549, 556, 575 A.2d 230 (concluding that trial court improperly denied offer of judgment interest on § 37-3a interest portion of verdict), cert. denied, 215 Conn. 815, 576 A.2d 544 (1990).").

judgment is paid in full because the offer of compromise "was the second demand for the approved and agreed on amount, the first one having been in March, 2015, and [the offer of compromise] was a further alert to the defendant [that] the money should be paid in March, 2018. In addition, the nature of the offer of compromise section is to, in some respect, act as a punitive device. If you [do not] settle the case and you lose, you pay. Accordingly, the court is exercising its discretion in this case and awarding the double interest . . . ."

The defendant moved for reargument in the trial court on numerous grounds, only one of which is relevant to this appeal, namely, its claim that the trial court's award of postjudgment interest under § 52-192a and Practice Book § 17-18 was improper. In support of this claim, the defendant relied on *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 301, in which we rejected the contention that an award of interest under § 52-192a "continues to accrue until final payment of the principal debt has been tendered" and, instead, concluded that interest awarded under § 52-192a runs only until "the date of the judgment." Id., 307, 308. The plaintiff opposed reargument, claiming that the language in *Gionfriddo* was dictum. The trial court denied the motion for reargument without explanation. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

"The question of whether the trial court properly awarded interest pursuant to § 52-192a is one of law subject to de novo review."[6] *Willow Springs Condomin-*

[6] Practice Book § 17-18 provides for an "identical computation method" as § 52-192a for offer of compromise interest. *Georges* v. *OB-GYN Services, P.C.*, 335 Conn. 669, 674 n.3, 240 A.3d 249 (2020); see also footnotes 1 and 2 of this opinion. For the sake of simplicity, and consistent with the parties' arguments on appeal, we limit our analysis to § 52-192a.

ium Assn., Inc. v. *Seventh BRT Development Corp.*, 245 Conn. 1, 55, 717 A.2d 77 (1998). In *Gionfriddo*, we addressed "the availability of statutory interest [under § 52-192a] when a plaintiff's offer of judgment has been rejected." *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 302. After concluding "that § 52-192a, read as a statutory totality, encompasses recoveries in court cases as well as in jury cases"; id., 306; we proceeded to address "a number of subsidiary issues about the calculation of § 52-192a interest." Id., 307. One subsidiary issue was "the relationship between [offer of compromise] interest under § 52-192a and the postjudgment interest statute, [that is] § 37-3a . . . ." Id. We observed that § 52-192a "says nothing about when [offer of compromise] interest terminates" but held that § 37-3a definitively resolved the issue by explicitly limiting the amount of postjudgment interest that may be awarded. Id., 308. "Reading these two statutes in conjunction with each other, as we must," we held that "the rules of § 52-192a determine prejudgment interest, while the rules of § 37-3a determine postjudgment interest."[7] Id. Accordingly, we held that offer of compromise

[7] *Gionfriddo* was a personal injury action and, therefore, did not involve a claim for prejudgment interest under § 37-3a. See *Gionfriddo* v. *Avis Rent A Car System, Inc.*, supra, 192 Conn. 308 (recognizing that "a personal injury claim would not ordinarily constitute a claim for the wrongful detention of money" under § 37-3a "before the rendering of a judgment"), citing *Cecio Bros., Inc.* v. *Feldmann*, 161 Conn. 265, 274–75, 287 A.2d 374 (1971)). In a breach of contract action, however, prejudgment interest under § 37-3a may be awarded upon a finding that the defendant withheld money from the plaintiff after it became payable. See *White Oak Corp.* v. *Dept. of Transportation*, 217 Conn. 281, 302, 585 A.2d 1199 (1991) (holding that trial court improperly failed to award prejudgment interest under § 37-3a after finding that payment owed by defendant was wrongfully withheld under contract); see also *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 49–50 n.11, 74 A.3d 1212 (2013) (identifying types of claims that would, and would not, permit award of prejudgment interest under § 37-3a). As we previously noted, the trial court in the present case awarded the plaintiff prejudgment and postjudgment interest under § 37-3a, and that award is not challenged on appeal.

interest under § 52-192a terminates as of "the date of the judgment." Id.; see also *Camp*, *Dresser & McKee, Inc.* v. *Technical Design Associates*, *Inc.*, 937 F.2d 840, 844 (2d Cir. 1991) ("Connecticut case law . . . makes it clear that interest under § 52-192a (b) terminates as of the date of the final judgment"), citing *Gionfriddo* v. *Avis Rent A Car System*, *Inc.*, supra, 308.

We agree with the defendant that our analysis of the issue presented on appeal begins and ends with *Gionfriddo*, which held that postjudgment, offer of compromise interest may not be awarded under § 52-192a. This aspect of our decision in *Gionfriddo* was not dictum but, instead, was necessary to our holding and, therefore, binding precedent.[8] See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 376, 984 A.2d 705 (2009) ("a court's discussion of matters necessary to its holding is not

[8] To support its contention to the contrary, the plaintiff relies on *DiLieto* v. *County Obstetrics & Gynecology Group*, *P.C.*, 310 Conn. 38, 56–57, 74 A.3d 1212 (2013), in which we held that an award of postjudgment interest under § 37-3a was discretionary, rather than mandatory. The plaintiff points out that, in *DiLieto*, we observed that "the issue of postjudgment interest was not a contested issue in *Gionfriddo*," and, thus, "the discussion regarding the award of postjudgment interest pursuant to § 52-192a in *Gionfriddo* was dict[um]." This claim lacks merit. In *DiLieto*, we clarified that our language in *Gionfriddo* "purporting to recognize the plaintiff's 'entitlement' to postjudgment interest under § 37-3a" was not conclusive as to whether the award of such interest was mandatory in every case in which prejudgment interest was awarded under § 52-192a, reasoning that "the issue of whether postjudgment interest is automatic under § 37-3a in cases in which the plaintiff is entitled to prejudgment interest under § 52-192a was not before this court because the defendant in [*Gionfriddo*] did not challenge the plaintiff's entitlement to postjudgment interest. The defendant simply argued that such interest should be calculated at the annual rate of 8 percent pursuant to § 37-3a, rather than at the higher annual rate of 12 percent pursuant to § 52-192a. Thus, although we agreed with the defendant that § 37-3a governed an award of postjudgment interest in [*Gionfriddo*], we were not required to decide whether such an award was mandatory." *DiLieto* v. *County Obstetrics & Gynecology Group*, *P.C.*, supra, 58. Nothing in *DiLieto* suggests that we may consider as dictum the court's determination in *Gionfriddo* that controls the outcome in the present case, which is *Gionfriddo*'s conclusion that interest under § 52-192a terminates as of the date of judgment.

mere dictum"); see also *Voris* v. *Molinaro*, 302 Conn. 791, 797 n.6, 31 A.3d 363 (2011) ("[Dictum] includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not [dictum] [however] when a court . . . intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy . . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Internal quotation marks omitted.)). The plaintiff has not asked us to overrule or to limit our holding in *Gionfriddo*, and we see no reason to do so in this case.[9] We therefore conclude that the trial court improperly awarded the plaintiff postjudgment interest under § 52-192a.

The judgment is reversed only as to the award of postjudgment interest under § 52-192a and the case is remanded with direction to vacate that award of interest; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

ISAAC HERNANDEZ *v.* APPLE AUTO WHOLESALERS OF WATERBURY, LLC, ET AL.
(SC 20481)

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

Syllabus

Pursuant to statute (§ 52-572g (a)), "[a]ny holder in due course of a promissory note, contract or other instrument," executed by a buyer in connection with a credit transaction covering consumer goods, "shall be subject to all of the claims and defenses which the buyer has against the seller

[9] Indeed, counsel for both the plaintiff and the defendant informed this court during oral argument that they were unaware of any other case in which postjudgment, offer of compromise interest had been awarded under § 52-192a.

arising out of the transaction . . . limited to the amount of debt then outstanding . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction."

The plaintiff, who had purchased a motor vehicle from the defendant A Co. and entered into a retail installment contract with A Co. to finance the purchase, sought to recover damages from A Co. and the defendant W Co., the assignee of the contract, in the United States District Court for the District of Connecticut. The plaintiff alleged violations of the Truth in Lending Act (15 U.S.C. § 1601 et seq.) and the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.), and that, pursuant to § 52-572g (a), W Co. was subject to any claims or defenses that the plaintiff had against A Co. The contract contained the Federal Trade Commission (FTC) "holder rule" language mandated by federal law (16 C.F.R. § 433.2). Shortly after the sale was completed, A Co. assigned the contract to W Co. Immediately after taking delivery of the vehicle, the plaintiff noticed certain problems and had it inspected by an independent auto body expert, who concluded that it was not safe to operate. Before making any payments under the contract, the plaintiff returned the vehicle to A Co., and his attorney notified A Co. and W Co., by certified letter, that the plaintiff had revoked his acceptance of the vehicle and was demanding the return of his down payment and the trade-in allowance that he had received from A Co. After receiving the letter, W Co. reassigned the contract back to A Co. After commencing the present action, the plaintiff filed a motion for a default judgment against A Co. and a motion for summary judgment as to W Co., and W Co. filed a separate motion for summary judgment. Following a hearing, the United States District Court rendered a default judgment against A Co. and denied the motions for summary judgment. The District Court also determined that the resolution of the plaintiff's claims against W Co. turned on the applicability of § 52-572g (a) and its relationship with the FTC holder rule, and certified to this court the questions of when the limit on an assignee's liability, "the amount of indebtedness then outstanding," is determined for purposes of applying § 52-572g; can an assignee avoid liability under § 52-572g by reassigning the promissory note, contract or other instrument back to the seller, and, if so, by what point in time must it do so to avoid liability; and, if a retail installment contract includes the FTC holder rule language, is an assignee's liability under the rule cumulative to its liability under § 52-572g. *Held*:

1. The limit on assignee liability under § 52-572g (a), which is "the amount of indebtedness outstanding," is determined at the time of the buyer's written demand on the seller: a review of the legislative history of that statute made clear that the purpose of the statute was to shift the costs of seller misconduct from the consumer to the creditor, who is in the best position not only to shoulder those costs but to prevent their occurrence in the first instance by refusing to do business with unscrupulous sellers; moreover, interpreting § 52-572g (a) as limiting the extent

of assignee liability to the amount of indebtedness outstanding at the time of the written demand was consistent with and furthered the remedial purpose of the statute because it ensures the greatest possible recovery for the consumer.

2. An assignee can avoid liability under § 52-572g (a) by reassigning the promissory note, contract or other instrument back to the seller, so long as it is done before the buyer makes written demand on the seller: this court, relying on dictionary and statutory definitions for guidance, interpreted the phrase "any holder in due course of a promissory note, contract or other instrument," as used in § 52-572g (a), to mean any person in legal possession of the subject instrument, not a person formerly in possession of it; moreover, the fact that the statute required legal possession of the instrument for liability to attach did not mean that it required continued possession for liability to remain attached, as this court read the word "shall" in the phrase "shall be subject to" as creating a mandatory duty and the phrase "provided the buyer shall have made a prior written demand on the seller" as creating a condition precedent for the imposition of that duty such that, once written demand is made on the seller, the holder's liability attaches; furthermore, contrary to W Co.'s assertion that the statement of basis and purpose for 16 C.F.R. § 433.2 supported its position that the FTC contemplated that assignees could avoid liability by executing repurchase contracts with the seller prior to purchasing the financing agreement, thereby reimposing full liability for the seller's misconduct on the seller, it was clear that the FTC was not discussing ways in which a creditor could avoid liability to the buyer but, rather, ways in which the creditor could recoup from the seller money it was required to pay to the buyer.

3. If a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee's liability under the rule is cumulative to its liability under § 52-572g (a); there was nothing in the text or legislative history of either § 52-572g or 16 C.F.R. § 433.2 stating or implying that the respective remedies afforded thereunder were intended to be exclusive, and the legislative history of 16 C.F.R. § 433.2 was explicit that its remedies were not intended to be exclusive but, rather, cumulative of any remedies available to consumers under state or local law.

Argued November 16, 2020—officially released May 7, 2021*

Procedural History

Action to recover damages for, inter alia, the named defendant's alleged violation of the federal Truth in Lending Act, and for other relief, brought to the United

* May 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

States District Court for the District of Connecticut, where the court, *Bolden, J.*, rendered a default judgment against the named defendant, denied the plaintiff's motion for summary judgment and denied the motion for summary judgment filed by the defendant Westlake Services, LLC; thereafter, the court, *Bolden, J.*, certified certain questions of law to this court concerning the scope of the assignee liability of the defendant Westlake Services, LLC.

Daniel S. Blinn, with whom was *Brendan L. Mahoney*, for the appellant (plaintiff).

Kenneth A. Votre, for the appellee (defendant Westlake Services, LLC).

Opinion

KELLER, J. General Statutes § 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument . . . executed by a buyer in connection with a credit transaction covering consumer goods . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . limited to the amount of indebtedness then outstanding in connection with the credit transaction, provided the buyer shall have made a prior written demand on the seller with respect to the transaction." In the present case, which comes to us on certification from the United States District Court for the District of Connecticut; see General Statutes § 51-199b (d);[1] we must decide when "the amount of indebtedness then outstanding in connection with the credit transaction" is determined for purposes of limiting an assignee's liability under

[1] General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

§ 52-572g. We also must decide whether an assignee can avoid liability under the statute by reassigning the promissory note, contract or other instrument back to the seller and, if so, by when must the assignee reassign it to avoid liability. Finally, we must determine whether, if a retail installment contract includes the Federal Trade Commission (FTC) "holder rule" language mandated by 16 C.F.R. § 433.2,[2] an assignee's liability under that rule is cumulative to its liability under § 52-572g. We conclude that "the amount of indebtedness then outstanding" is the amount of indebtedness outstanding at the time of the buyer's written demand on the seller and that an assignee can avoid liability under § 52-572g only if the promissory note, contract or other instrument is reassigned back to the seller prior to the buyer making such demand. We further conclude that an

[2] Title 16 of the 2017 edition of the Code of Federal Regulations, § 433.2, which was promulgated by the FTC in 1975 pursuant to its rule-making authority under 15 U.S.C. § 46, provides in relevant part: "In connection with any sale or lease of goods or services to consumers, in or affecting commerce as 'commerce' is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to:

"(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

"NOTICE

"ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. . . ."

Title 16 of the Code of Federal Regulations, § 433.2, was enacted "in response to concerns that sellers of goods and services were increasingly separating the consumer's duty to pay from the seller's duty to perform either by selling loan instruments to a third party after execution or by acting as a conduit between purchasers and third-party lenders." (Internal quotation marks omitted.) *Kilgore* v. *KeyBank, N.A.*, 718 F.3d 1052, 1056 n.3 (9th Cir. 2013). Like § 52-572g, the holder rule "preserves a consumer's right to assert the same legal claims and defenses against the assignee of a credit contract as that consumer could have asserted against the assignor." *Pierre* v. *Planet Automotive, Inc.*, 193 F. Supp. 3d 157, 174 (E.D.N.Y. 2016).

assignee's liability under the FTC holder rule is cumulative to its liability under § 52-572g.

The record certified by the District Court contains the following undisputed facts and procedural history.[3] In July, 2017, the plaintiff, Isaac Hernandez, purchased a 2011 Ford Taurus from the defendant Apple Auto Wholesalers of Waterbury, LLC (Apple Auto). *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 460 F. Supp. 3d 164, 171 (D. Conn. 2020). The plaintiff paid $500 to Apple Auto as a down payment, received a trade-in allowance of $1000 for his 2003 Volkswagen Jetta, and financed $12,206.82 through a retail installment contract (contract), with interest accruing at a rate of 17.59 percent. See id. Pursuant to the contract, the plaintiff was required to pay $400.93 per month for forty-one months, beginning on September 3, 2017. Id. The total amount payable under the contract was $18,438.12. Id. The contract contained the FTC holder rule language mandated by 16 C.F.R. § 433.2. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, Docket No. 3:17-cv-1857 (VAB), 2020 WL 2542752, *3 (D. Conn. May 18, 2020); see footnote 2 of this opinion. In connection with the sale, Apple Auto provided the plaintiff with the statutorily mandated vehicle inspection form K-208,[4] which indicated that the vehicle had passed inspection as to each of the items listed on the form. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 171–72. Shortly after

[3] In its order certifying the questions, the District Court referred this court to its decision in *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, 460 F. Supp. 3d 164 (D. Conn. 2020), for a more detailed factual background. See *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, Docket No. 3:17-cv-1857 (VAB), 2020 WL 2542752, *1 (D. Conn. May 18, 2020).

[4] Form K-208 provides in relevant part: "This report shall be used by a CT licensed dealer to comply with [General Statutes §] 14-62 (g) and must be completed in its ENTIRETY. Before offering any used motor vehicle for retail sale, the selling dealer shall complete a comprehensive safety inspection of such vehicle." (Emphasis altered.)

the sale was completed, Apple Auto assigned the contract to the defendant Westlake Services, LLC, doing business as Westlake Financial Services (Westlake). Id., 172.

Immediately after taking delivery of the vehicle, "the plaintiff noticed that it shook when he drove it and made noises when the brakes were applied." (Internal quotation marks omitted.) Id. The plaintiff called Apple Auto to have the vehicle serviced and sent text messages to one of Apple Auto's managers, but his calls and text messages were never returned. Id. On or about August 15, 2017, the plaintiff had the vehicle inspected by Robert Collins, an independent auto body expert and the owner of Wreck Check Assessments of Boston, LLC. Id. From a review of the vehicle's CARFAX report, Collins determined that the vehicle had been in accidents on September 12, 2014, and May 12, 2016, and that it had been sold at auction on April 19, 2017, with a disclosure by the seller of structural damage. Id. After inspecting the vehicle, Collins concluded that it was not safe to operate on public roads.[5] Id., 173. He further concluded that "[a]ny automotive profession[al] performing a simple visual inspection [could] clearly see that [the] vehicle ha[d] been wrecked and . . . repaired to a [r]epair [l]evel 4, which entails the use of only some of the available procedures, parts, and materials to provide the minimum level of repair that would be acceptable to the average consumer's untrained eye." (Internal quotation marks omitted.) Id.

On August 28, 2017, before making any payments under the contract, the plaintiff returned the vehicle to

[5] Specifically, Collins determined that the vehicle had been involved in "an event that caused structural damage to the front and rear of the vehicle," that it was "unsafe due to [this] structural damage," and that it had "not been restored in a quality and workmanlike manner." (Internal quotation marks omitted.) *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 173.

Apple Auto by leaving it in Apple Auto's parking lot. Id. On August 29, 2017, the plaintiff's attorney notified Westlake and Apple Auto by certified letter that the plaintiff had revoked acceptance of the vehicle and was demanding the return of his $500 down payment and either the 2003 Volkswagen Jetta or the $1000 trade-in allowance for it. Id. The plaintiff also asserted various claims against Apple Auto under state and federal law, which he offered to settle for $8000.

After receiving the letter, on October 13, 2017, Westlake reassigned the contract back to Apple Auto. Id. On November 3, 2017, the plaintiff commenced the underlying action against Apple Auto and Westlake in the United States District Court for the District of Connecticut, alleging violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq., breach of the implied warranty of merchantability under the Magnuson-Moss Warranty—Federal Trade Commission Act, 15 U.S.C. § 2301 et seq., and article 2 of the Uniform Commercial Code, General Statutes § 42a-2-101 et seq., and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. Id., 174. The plaintiff further alleged that, pursuant to § 52-572g, Westlake was subject to any claims or defenses that the plaintiff had against Apple Auto. Id.

On September 6, 2019, the plaintiff filed a motion for a default judgment against Apple Auto based on its failure to appear[6] and a motion for summary judgment against Westlake. Id., 176. In response, Westlake filed a motion for summary judgment against the plaintiff. Id. On April 16, 2020, the District Court held a telephonic hearing on the parties' motions for summary judgment during which the court asked the parties to brief what,

[6] The court granted the plaintiff's motion for a default judgment against Apple Auto on May 18, 2020, awarding the plaintiff $24,300. *Hernandez* v. *Apple Automotive Wholesalers of Waterbury, LLC*, supra, 460 F. Supp. 3d 191.

if any, questions it should certify to this court regarding the applicability of § 52-572g to the plaintiff's claims against Westlake and the interplay between that statute and the FTC holder rule language contained in the contract between the plaintiff and Apple Auto. *Hernandez* v. *Apple Auto Wholesalers of Waterbury, LLC*, supra, 2020 WL 2542752, *2.

On April 27, 2020, the plaintiff submitted the requested briefing, in which he argued that Westlake was liable for the plaintiff's claims under both § 52-572g and the contractual holder rule language. Id., *2, *4. The plaintiff further argued that § 52-572g does not require that an assignee of a retail installment contract be in possession of the contract for liability to attach and that, in fact, "the statutory language contemplates that there may be multiple holders, each of which may be liable for seller misconduct." (Internal quotation marks omitted.) Id., *4. The plaintiff maintained, rather, that "Westlake's liability under [§] 52-572g was triggered when [the plaintiff] made prior written demand for his claims upon Apple Auto"; id.; and that none of the issues in the present case "[was] of sufficient public importance to justify certification to [this] [c]ourt." (Internal quotation marks omitted.) Id., *5. The plaintiff therefore argued that the District Court "should simply apply the plain meaning of the statute and impose liability upon Westlake for the amount outstanding at the time that the claim arose." (Internal quotation marks omitted.) Id.

For its part, Westlake argued that the plaintiff could not recover under § 52-572g because Westlake reassigned the contract back to Apple Auto prior to the commencement of the plaintiff's action, and, therefore, Westlake was no longer a "holder in due course" as contemplated by that statute. (Internal quotation marks omitted.) Id., *4. Westlake further argued that the District Court should seek this court's guidance as to the meaning of § 52-572g because "issues of assignee liability are

important to both lenders and consumers throughout Connecticut, and because there are no Connecticut Appellate Court or Supreme Court decisions addressing the applicability of . . . § 52-572g to innocent lenders in Westlake's position." Id., *5. Westlake proposed that the District Court certify the following questions:

"1. Whether an assignee['s] liability under . . . § 52-572g, which is limited to the amount of indebtedness then outstanding in connection with the credit transaction, is determined at the time the claim arose, at the time the consumer made a prior written demand on the seller with respect to the transaction, at the time the suit commences, at the time of the judgment, or at some other time?

"2. Whether under . . . § 52-[572g] the reassignment back to the seller assignor by an assignee of a promissory note, contract, or other instrument terminates liability of the assignee and if so at what point must [the] reassignment occur to terminate liability?

"3. How are the amounts paid under the contract determined by the court when the contract contains the language mandated by 16 C.F.R [§ 433.2] . . . ?" (Internal quotation marks omitted.) Id.

Although the plaintiff opposed certification, he agreed with Westlake's proposed questions should the District Court decide in favor of certification and recommended that the court also seek this court's guidance on whether an assignee's liability under § 52-572g and 16 C.F.R § 433.2 is cumulative or whether it is equal to the higher of the two limits specified in each of those provisions. Id.

The District Court agreed with Westlake that the issues concerning assignee liability under § 52-572g "[were] of sufficient public importance and lack[ed] sufficient guidance from Connecticut courts . . . to

warrant certification of versions of the questions proposed by parties." Id., *6. The court noted that "no [c]ourt of [a]ppeals, district court within the Second Circuit, or Connecticut state court has addressed whether a holder's reassignment of a loan before the filing of a lawsuit negates that holder's liability under the [FTC] [h]older [r]ule or under any state assignee liability laws. . . . And no court has addressed the relationship between the FTC [h]older [r]ule and . . . § 52-572g." Id., *4. The court further noted that "the questions of assignee liability raised here will not only be determinative of liability in this case but will also have implications for lender liability in consumer cases brought against sellers and lenders across [Connecticut]. . . . The issue is of equal importance to consumers, who frequently seek remedies against both the seller, based on breach of contract or unfair trade practices, and the creditor, based on assignee liability." (Citation omitted.) Id., *6. The District Court therefore certified the following questions to this court, which are "based on the parties' proposed questions and the [District] Court's own analysis:

"1. When is the limit on assignee liability, 'the amount of indebtedness then outstanding,' determined under . . . § 52-572g?

"2. Can an assignee avoid liability under . . . § 52-572g by [reassigning] the promissory note, contract or other instrument back to the seller? If so, by when must the assignee reassign the loan to avoid liability?

"3. If a retail installment contract includes the language mandated by 16 C.F.R. § [433.2], the FTC [h]older [r]ule, is the assignee liability under this incorporated contractual language cumulative to the statutory liability under . . . § 52-572g?" Id., *6–7.

I

We begin with the question of when the limit on assignee liability ("the amount of indebtedness then outstanding") is determined for purposes of applying § 52-572g. The plaintiff contends that that determination must be made when the buyer makes written demand on the seller because the phrase "then outstanding" requires that liability be fixed at a particular point in time, and the only point in time referenced in the statute is the time of the buyer's "prior written demand [on] the seller." The plaintiff further argues that, as a remedial statute, § 52-572g must be liberally construed in favor of those whom it was intended to benefit, and, "[s]ince the amount of indebtedness outstanding will decrease over time as payments are made by a debtor, it benefits consumers to set the 'amount of indebtedness' at an earlier point in time." Westlake disagrees. In its view, "the only practical time" to determine the limit on an assignee's liability is at the time of judgment or perhaps "at the time of trial" because the amount of indebtedness may increase or decrease after written demand is made on the seller depending on the actions of the debtor.[7] We agree with the plaintiff that "the amount of indebtedness then outstanding" is the amount of

[7] Rather than address the questions certified to us by the District Court, Westlake's primary contention, in response to each of those questions, is that the FTC holder rule "occupies the field" in this area such that its limit on assignee liability (the amount paid by the debtor under the contract) preempts the limit set by § 52-572g. Specifically, Westlake argues that "the [FTC] [h]older [r]ule effectively occupies the field and preempts . . . § 52-572g. Only the [h]older [r]ule is applicable, and, therefore, the only damages payable to the plaintiff are limited to those that were actually paid on the [contract]. That sum can only be finally determined at trial." The plaintiff understandably objects to this line of argument as outside the scope of the certified questions. The plaintiff further contends, and we agree, that the District Court is perfectly well situated to decide questions of federal preemption and would not have sought this court's guidance as to the meaning of § 52-572g if it believed that the statute was preempted by 16 C.F.R. § 433.2. It would have simply applied 16 C.F.R. § 433.2.

indebtedness outstanding at the time of the buyer's written demand on the seller.

When the "the amount of indebtedness then outstanding" is determined for purposes of applying § 52-572g presents a question of statutory interpretation. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *Fedus* v. *Planning & Zoning Commission*, 278 Conn. 751, 756, 900 A.2d 1 (2006). It is axiomatic that "remedial statutes should be construed liberally in favor of those whom the law is intended to protect . . . ." (Citation omitted; internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 502, 45 A.3d 627 (2012).

Section 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument . . . evidencing an indebtedness, signed or executed by a buyer in connection with a credit transaction covering consumer goods . . . shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . limited to the amount of indebtedness then outstanding in connection with the credit transaction,

provided the buyer shall have made a prior written demand on the seller with respect to the transaction." Thus, while the phrase "then outstanding" indicates that the "amount of indebtedness" is to be determined at a particular point in time, the statute does not specify when that time is. Because there are at least three reasonable possibilities—at the time of the prior written demand, at the commencement of an action, or at the time of judgment—the statute is ambiguous as to when the amount of indebtedness becomes fixed for purposes of setting a cap on an assignee's liability under the statute. It is necessary, therefore, to consult the legislative history and circumstances surrounding the statute's enactment for interpretative guidance. A review of those source materials persuades us that the amount of indebtedness then outstanding is determined at the time of the buyer's written demand on the seller.

The legislative history reveals that, prior to its passage, the Public Act that would later become § 52-572g (a); Public Acts 1972, No. 137; enjoyed near universal support in both the House of Representatives and the Senate. See, e.g., 15 S. Proc., Pt. 2, 1972 Sess., p. 638, remarks of Senator William E. Strada, Jr. (noting Senate's unanimous passage of bill at end of prior legislative session); 15 H.R. Proc., Pt. 5, 1972 Sess., p. 1963, remarks of Representative Albert R. Webber (noting bill's widespread acceptance and support). The legislative history further indicates that the statute was intended to abolish what one legislator described as "one of the most vicious of all consumer credit traps," the holder in due course doctrine.[8] 15 H.R. Proc., supra, pp. 1972–73,

[8] Under the holder in due course doctrine, as it was applied in many jurisdictions at the time of the enactment of § 52-572g, "if a seller sold goods on credit and transferred the credit contract to a lender, the lender could enforce the buyer's promise to pay even if the seller failed to perform its obligations under the sales contract. Similarly, despite a seller's breach, the buyer was obligated to pay the lender under a consumer loan contract that directly financed the purchase of goods or services from the seller." (Internal quotation marks omitted.) *Lafferty* v. *Wells Fargo Bank, N.A.*, 25 Cal. App.

remarks of Representative Howard Newman. For those members who were unfamiliar with that doctrine, Representative Newman explained that it generally arose when a consumer finances the purchase of goods or services through a retail installment contract or other instrument arranged by the seller, which is later assigned to a bank or other finance company. Id., p. 1973. "If the product turns out to be a lemon, is damaged or needs servicing under a warranty and the seller refuses to take whatever action is indicated, the finance company or bank has no responsibility to make good [on the contract]. If the buyer refuses to make payments

5th 398, 411, 235 Cal. Rptr. 3d 842 (2018), review denied, Docket No. S250794, 2018 Cal. LEXIS 8573 (Cal. October 31, 2018), cert. denied, U.S. , 139 S. Ct. 1456, 203 L. Ed. 2d 682 (2019). In other words, an assignee "could assert his right to be paid by the consumer despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale." (Internal quotation marks omitted.) Id. In Connecticut, however, an assignee of a consumer credit contract, even before the enactment of § 52-572g, "[stood] in the shoes of its assignor . . . and [had] no greater rights of recovery in [an] action [against the consumer] than [the assignor] . . . ." *Fairfield Credit Corp.* v. *Donnelly*, 158 Conn. 543, 552, 264 A.2d 547 (1969). Thus, in *Fairfield Credit Corp.*, this court rejected a claim by the holder of a retail installment contract that it was a "holder in due course" for purposes of enforcing the contract Id., 549. The contract in question contained a "waiver of defense clause," which stated that "[t]he [b]uyer . . . will not assert or use as a defense any . . . claim [it might have against the seller] against the assignee." (Internal quotation marks omitted.) Id., 548. Characterizing that clause as "an attempt to impart the attributes of negotiability to an otherwise nonnegotiable instrument"; id., 550; and "to give [an] assignee [of the contract] the status of a holder in due course of a negotiable instrument"; id., 549; this court held the clause unenforceable as against public policy. Id., 551. In so doing, the court stated: "There can be no question that there exists in Connecticut a very strong public policy in favor of protecting purchasers of consumer goods and that for a court to enforce a waiver of defense clause in a consumer-goods transaction would be contrary to that policy." Id. The court further stated that, "since Connecticut's adoption of the Uniform Commercial Code in 1959, it has become increasingly clear that the policy of our state is to protect purchasers of consumer goods from the impositions of overreaching sellers." Id., 550–51; see id. (citing various consumer protection statutes enacted following state's adoption of Uniform Commercial Code).

as they [become] due, the [finance company] may repossess the . . . goods or the buyer may be dunned for the entire balance of the loan, payable immediately." Id. In other words, "[t]he bank or finance company doesn't have to do anything about your defective appliance . . . but you have to continue to pay [for it]." Id., p. 1975, remarks of Representative Earl T. Holdsworth; see also id., p. 1965, remarks of Representative Rosario T. Vella (noting that holder in due course doctrine "deprives the consumer of his only effective bargaining tool when goods or services are defective," which is nonpayment); id., p. 1963, remarks of Representative Webber ("I know of no official . . . and no legal authority in the [n]ation who is familiar with the doctrine of holder in due course who does not favor its abolition. If there is one outrage against the common decencies of the marketplace this doctrine is it.").

Representative Webber explained that the bill would subject assignees of consumer credit contracts to all the claims and defenses that the consumer would have against the seller. Id., p. 1963. In this way, he explained, it would force "banks, finance companies and other buyers of installment [contracts] to police the companies [they do business with]. And if a retail seller has a record of poor performance [or history of selling] defective products and services, the buyer of paper will stay away from him. And this is all for the good. Such firms should be driven out of the avenues of commerce." Id.; see also 15 S. Proc., supra, p. 639, remarks of Senator Strada ("[T]his is a rather tough consumer [protection] bill" intended to put "the burden . . . on the banks because now banks will actually have to police the market. If they buy a note from a company that is not reputable, they do so at their [own] risk . . . ."); 15 H.R. Proc., supra, p. 1975, remarks of Representative Holdsworth ("This bill simply [makes] the bank or the finance company . . . liable for the same

claims and defenses as the original seller [would] be. It is very little to ask of a financing firm, especially in [a] field where the rate of return is one of the highest in [the] entire country. This is a fair bill . . . [that is] long overdue . . . .").

Although there was much commentary in both the House of Representatives and the Senate explaining the origins of the bill and extolling its virtues, the only discussion bearing directly on the question before us occurred when Representative Francis J. Collins voiced concern over language in the bill conditioning a consumer's right of recovery on the consumer's having first made a written demand on the seller. See 15 H.R. Proc., supra, p.1970, remarks of Representative Collins. Specifically, Representative Collins stated: "Perhaps the gentleman could shed some light on . . . the words . . . 'provided the buyer shall have made a prior written demand on the seller with respect to such transaction.' Would the gentleman tell us . . . what kind of a demand other than a written demand and what is the demand for?" Id. Representative Webber responded that it was "merely a written notice to the seller pointing out the complaint before [legal] action is taken [against the creditor]. This was the way we were able to get the bill out [of committee]. I think it is a very minor thing." Id. Representative Vella further responded that "*the demand would be in writing* [*and*] *would be limited to the amount of indebtedness then outstanding in connection with* [*the*] *credit transaction*." (Emphasis added.) Id., pp. 1970–71.

In the Senate, Senator Edward S. Rimer, Jr., expressed similar concern over the prior written demand requirement and asked the bill's sponsor, Senator Strada, to clarify, for purposes of "legislative intent," that the bill did not require the consumer "to institute legal action" against the seller prior to bringing an action against the creditor. 15 S. Proc., supra, pp. 641–42. Senator Strada

responded that it did not, explaining in relevant part: "What we are attempting to do here is to discourage . . . frivolous lawsuits [against the creditors] [be]cause this is a tremendous burden upon the banks, as I stated previously, and we think that it is only fair there should be some starting point, and the starting point would be a written demand [on] the [seller] and we are hopeful . . . that if it is a reputable retailer and the goods [are] defective, there can be a reconciliation worked out [between buyer and seller] and it will not reach the point of the [buyer suing] the bank, but certainly for legislative intent [it does] not mean that a lawsuit must be instituted [against the seller]." Id., p. 642.

Thus, to the extent the legislative history sheds any light on when "the amount of indebtedness then outstanding" is determined for purposes of calculating an assignee's maximum liability under § 52-572g (a), it indicates that it is the amount of indebtedness outstanding when the written demand is made on the seller. This is evident not only in Representative's Vella's response to Representative Collins—that the demand on the seller will be for the amount of the outstanding indebtedness; see 15 H.R. Proc., supra, pp. 1970–71; but also in the statement of Senator Strada that the demand letter is "the starting point" for an action against the creditor and largely a formality, albeit one that was deemed necessary to move the bill out of committee. 15 S. Proc., supra, p. 642.

Interpreting § 52-572g (a) as limiting the extent of assignee liability to the amount of indebtedness at the time of the written demand on the seller is consistent with and furthers the remedial purpose of the statute because it ensures the maximal recovery for the consumer. This is so because, if a consumer who continues to make payments under the contract during the pendency of the action ultimately prevails against the creditor, the consumer's potential recovery would be

inadequate under Westlake's proposed construction, which would limit the creditor's liability to the amount of indebtedness outstanding at the time of judgment. Because the legislative history makes clear that the purpose of the statute is to shift the costs of seller misconduct from the consumer to the creditor, who is in the best position not only to shoulder them but to prevent their occurrence in the first instance by refusing to do business with unscrupulous sellers, we conclude that "the amount of indebtedness then outstanding" under § 52-572g (a) is the amount of indebtedness outstanding when the buyer makes written demand on the seller.

II

We turn next to the question of whether an assignee can avoid liability under § 52-572g by reassigning the promissory note, contract or other instrument back to the seller and, if so, by when must the assignee do so to avoid liability. Although Westlake asserts that an assignee can avoid liability by reassigning the note "any time before judgment," it does not explain why this contention makes sense of § 52-572g as a textual matter or in light the statute's remedial purpose and legislative history. Instead, Westlake argues that interpreting § 52-572g to permit an assignee to avoid liability in this manner is consistent with the overarching purpose of 16 C.F.R. § 433.2, which, according to Westlake, is to prevent the separation of the seller's duty to perform from the consumer's duty to pay.

The plaintiff responds, inter alia, that neither § 52-572g nor its federal counterpart, 16 C.F.R. § 433.2, conditions liability on an assignee being in possession of the promissory note, contract or other instrument at the time of judgment—or at any other time for that matter—but, rather, imposes liability on "any holder" at any time, past or present. The plaintiff argues that,

if the legislature had wanted to limit liability under § 52-572g to present holders, it easily could have done so simply by using the phrase "the current holder" or even just "the holder," both of which convey a present temporal sense. To conclude otherwise, the plaintiff contends, would undermine the statute's remedial purpose of holding creditors liable for the misdeeds of sellers because it would allow a creditor, at the first sign of trouble, to avoid liability simply by reassigning the promissory note, contract or other instrument back to the seller. At a minimum, the plaintiff argues, an assignee cannot escape liability after the written demand is made on the seller because the statute's language and legislative history make clear that the written demand is what triggers the assignee's liability under the statute. We conclude that an assignee's liability under § 52-572g attaches at the time the buyer makes the required written demand on the seller, after which time the assignee cannot avoid liability by reassigning the promissory note, contract or other instrument back to the seller.

Whether an assignee can avoid liability under § 52-572g by reassigning a promissory note, contract or other instrument back to the seller and, if so, by when must the reassignment occur for liability to be avoided presents a question of statutory interpretation that is governed by the well established principles of statutory construction set forth in part I of this opinion. In applying these principles, we continue to be mindful that § 52-572g, as a remedial statute, "must be afforded a liberal construction in favor of those whom the legislature intended to benefit . . . ." (Citation omitted; internal quotation marks omitted.) *Dorry* v. *Garden*, 313 Conn. 516, 530, 98 A.3d 55 (2014).

As previously stated, § 52-572g (a) provides in relevant part that "[a]ny holder in due course of a promissory note, contract or other instrument" executed by a

buyer in connection with a consumer credit transaction "shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction." Although it is true, as the plaintiff argues, "[t]he word 'any' has a diversity of meanings and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' "; *Muller* v. *Town Plan & Zoning Commission*, 145 Conn. 325, 328, 142 A.2d 524 (1958); the word "holder" does not. It has a decidedly singular meaning in the law: "[s]omeone who has legal possession of a negotiable instrument and is entitled to receive payment on it." Blacks Law Dictionary (11th Ed. 2019), p. 879; see also General Statutes § 42a-1-201 (21) (A) (defining "[h]older" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession"). To establish "holder in due course" status, a holder must also prove that his taking of the instrument was for value, in good faith, and "without notice that it [was] overdue or has been dishonored or of any defense against or claim to it on the part of any person. General Statutes § 42a-3-302 . . . ." (Citations omitted; internal quotation marks omitted.) *Funding Consultants, Inc.* v. *Aetna Casualty & Surety Co.*, 187 Conn. 637, 640–41, 447 A.2d 1163 (1982); see also *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 458, 802 A.2d 887 (plaintiff must prove that it is in possession of promissory note to establish holder in due course status), cert. denied, 262 Conn. 918, 812 A.2d 861 (2002). Given these definitions, it is apparent that the phrase "any holder in due course of a promissory note, contract or other instrument," as used in § 52-572g (a) can only mean any person in legal possession of the instrument, not a person formerly in possession of it.

Our inquiry does not end there, however. The fact that § 52-572g (a) requires legal possession of the prom-

issory note, contract or other instrument for liability to attach does not mean that it requires continued possession of it for liability to remain attached. The statute provides that the holder "*shall be subject to all of the claims and defenses which the buyer has against the seller arising out of the transaction . . . provided the buyer shall have made a prior written demand on the seller with respect to the transaction.*" (Emphasis added.) General Statutes § 52-572g (a). We read the word "shall" in the phrase "shall be subject to" as creating a mandatory duty and the phrase "provided the buyer shall have made a prior written demand on the seller" as creating a condition precedent for the imposition of that duty such that, once written demand is made on the seller, the holder's liability attaches. General Statutes § 52-572g (a).

We can perceive no reason, and Westlake has identified none, why the legislature would have intended any other result, particularly a result that would allow an assignee to evade liability simply by reassigning the instrument back to the seller as soon as written demand is made on the seller, as in the present case. Instead, we agree with the California Court of Appeals' recent analysis of this issue as applied to 16 C.F.R. § 433.2: "[The defendant] cites to no legal authority, and we found none, excusing a holder from liability simply because it reassigned the debt instrument to someone else before judgment was entered in the consumer's case. . . .

"[The defendant] maintains there was nothing in the car financing documents of a personal nature to preclude its assignment. Perhaps this is true, but it does not answer the issue at hand. The question is not whether the finance documents could . . . be [reassigned]. The question is whether a creditor-assignee can avoid liability under the [h]older [r]ule by [reassigning]

after the misconduct has occurred, [or] the lawsuit has been filed, [or] it has been named a defendant.

"[The defendant] does not suggest what policy or purpose would be served by giving a creditor-assignee such an easy exit strategy. The notice provides any holder is subject to all claims and defenses the consumer has against the original seller. Therefore, any effort by an . . . assignee to play hot potato with a consumer credit contract will not be effective. . . .

"The [purpose of 16 C.F.R. § 433.2 is to take] away the [financer's] traditional status as a holder in due course and [to subject] it to any potential claims and defenses the purchaser has against the seller. Based on a simple public policy determination, as between an innocent consumer and a third party financer, the latter is generally in a vastly superior position to: (1) return the cost to the seller, where it properly belongs; (2) exert an influence over the behavior of the seller in the first place; and (3) to the extent the financer cannot return the cost (as in the case of fly-by-night dealers), internalize the cost by spreading it among all consumers as an increase in the price of credit. Knowing that it bears the cost of seller misconduct, the creditor will simply not accept the risks generated by the truly unscrupulous merchant. The market will be policed in this fashion and all parties will benefit accordingly." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Duran* v. *Quantum Auto Sales, Inc.*, Docket No. G052968, 2017 WL 6333871, *15–16 (Cal. App. December 12, 2017); see also *Associates Home Equity Services, Inc.* v. *Troup*, 343 N.J. Super. 254, 277, 778 A.2d 529 (App. Div. 2001) ("[The lender], as a potential holder had notice that if it procured the purchase money loan arranged by [the seller], it may be stepping into [the seller's] shoes. We cannot accept the proposition that the FTC contemplated that such result would not attach simply because of a subsequent

assignment of the loan, especially when, as here, it is claimed that [the lender] actively participated with . . . the seller . . . in placing the loan with the [the buyers]." (Internal quotation marks omitted.)).

Westlake asserts, nevertheless, that the "Statement of Basis and Purpose" for 16 C.F.R. § 433.2 supports the view that the FTC contemplated that assignees could avoid liability by executing "repurchase" contracts with the seller prior to purchasing the financing agreement, thereby reimposing the full liability for the seller's misconduct on the seller. We disagree. In the section of the statement to which Westlake is referring, the FTC explains that, "[a]s a practical matter, the creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party. This is the reallocation desired, a return of costs to the party who generates them. The creditor financing the transaction is in a better position to do this than the consumer, because (1) he engages in many transactions where consumers deal infrequently; (2) he has access to a variety of information systems which are unavailable to consumers; (3) he has recourse to contractual devices which render the routine return of seller misconduct costs to the sellers relatively cheap and automatic; and (4) the creditor possesses the means to initiate a lawsuit and prosecute it to judgment where recourse to the legal system is necessary." Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53,506, 53,523 (November 18, 1975).

One of the contractual devices available to creditors, the FTC notes, is a " 'reserve' or 'recourse' arrangement or account with the seller for reimbursement." Id. "In cases [in which] 'repurchase' or 'reserve' contracts, or other recourse devices available to creditors, facilitate the return of an account to a seller . . . the creditor will compel the seller to carry the costs so occasioned." Id. It is clear, however, that the FTC is not discussing

in this section ways in which a creditor can avoid liability to the buyer but, rather, ways in which the creditor can recoup *from the seller* money it was required to pay to the buyer. The operative word in this section is "reimbursement." The costs for which the creditor is being "reimbursed," whether through a repurchase or reserve contract with the seller, are the costs the creditor incurred when it was forced, by operation of the FTC holder rule, to stand in the seller's shoes and to compensate the buyer for the seller's misconduct.

III

Finally, we turn to the question of whether, if a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee liability under this incorporated contractual language is cumulative to the statutory liability under § 52-572g. The plaintiff argues that the assignee liability is cumulative because the FTC commentary to 16 C.F.R. § 433.2 "explicitly contemplated the existence of state remedies such as 52-572g and expressed the . . . view that the holder rule remedy was not intended as a limitation on [those] remedies . . . ." The plaintiff further argues that the legislature was aware, when it enacted § 52-572g, that the FTC was in the process of promulgating 16 C.F.R. § 433.2, which, like § 52-572g, would abolish the holder in due course doctrine in consumer credit transactions, and, rather than wait for the FTC to act, the legislature chose to act independently. The plaintiff also notes that § 52-572g has been amended three times since the enactment of 16 C.F.R. § 433.2, but not once has the legislature seen fit to conform the remedy available thereunder to the remedy available under 16 C.F.R. § 433.2. Finally, the plaintiff argues that, in *Jacobs* v. *Healey Ford-Subaru, Inc.*, 231 Conn. 707, 652 A.2d 496 (1995), this court held that remedies available under two separate statutory schemes addressing the same abusive car dealer practice were cumulative; see id.,

711, 724; and that the reasoning we applied in *Jacobs* is fully applicable to the present case. Westlake responds that 16 C.F.R. § 433.2 preempts § 52-572g, and, therefore, the only remedy available to the plaintiff is the remedy available under the holder rule notice contained in the plaintiff's contract with Apple Auto.

We agree with the plaintiff that the answer to the third certified question is informed by our decision in *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 707. In *Jacobs*, the issue before the court was "whether [a car dealer], who has violated General Statutes [(Rev. to 1989)] § 42-98 [now § 36a-785] of the Retail Instalment Sales Financing Act (RISFA) and General Statutes [(Rev. to 1989)] § 42a-9-504 [now § 42a-9-610] of the Uniform Commercial Code (UCC) [by unlawfully repossessing a vehicle], must pay damages under each statute to the injured plaintiff." (Footnotes omitted.) Id., 708–10. We concluded that, "because the remedies [were] not explicitly exclusive, there [was] no conflict between the two provisions," and, therefore, "both must be given concurrent effect . . . ." Id., 710–11.

In reaching our determination, we rejected the defendant's contention that a conflict existed "solely because the provisions of RISFA and the UCC include different and distinct remedies."[9] Id., 719. We concluded, rather, that, "[a]lthough the remedy provisions of RISFA and the UCC provide different relief, we are persuaded that both can apply simultaneously. Mindful that consumer

[9] As we explained in *Jacobs*, in the event of an unlawful repossession, "RISFA provides a statutory formula that allows the retail buyer to recover 'his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract.' General Statutes [(Rev. to 1989)] § 42-98 (i) [now § 36a-785 (i)]. The UCC allows the debtor to recover 'an amount not less than the credit service charge plus [10 percent] of the principal amount of the debt or the time price differential plus [10 percent] of the cash price.' General Statutes [(Rev. to 1989)] § 42a-9-507 (1) [now § 42a-9-625 (2)]." *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 719.

legislation must be interpreted so as to implement its remedial purpose of protecting consumer buyers; *Mack Financial Corp.* v. *Crossley*, 209 Conn. 163, 166, 550 A.2d 303 (1988); *Barco Auto Leasing Corp.* v. *House*, 202 Conn. 106, 116, 520 A.2d 162 (1987); and in accord with the reasoning other jurisdictions have applied to resolve this issue, we conclude[d] that there [was] no conflict between the remedy provisions of RISFA and the UCC, in the absence of a clear mandate that the remedies [were] exclusive." *Jacobs* v. *Healey Ford-Subaru, Inc.*, supra, 231 Conn. 722.

In reaching our determination in *Jacobs*, we also explained that our holding was consistent with the public policy behind the two statutes, which was "to protect the consumer from well documented repossession abuses and to encourage and promote compliance with the laws that govern such actions." Id. Noting that "[t]he award of damages [under RISFA] is too minimal to provide a 'stimulus to make it advantageous for the seller to follow [RISFA]' "; id., 723; we agreed with the view that "the drafters created a statutory penalty in [U.C.C. §] 9-507 [now § 9-625] to 'up the ante for those who would abuse the consumer' "; id., 724; and that it was "irrelevant that [that] penalty [bore] little or no relation to the actual loss." Id.

The same reasoning applies in the present case. There is nothing in the text or legislative history of § 52-572g or 16 C.F.R. § 433.2 stating or implying that the respective remedies afforded thereunder were intended to be exclusive. Indeed, as previously discussed, the legislative history of 16 C.F.R. § 433.2 is explicit that its remedies are *not* intended to be exclusive but, rather, cumulative of any remedies available to the consumer under state or local law. Whereas 16 C.F.R. § 433.2 limits recovery to money actually paid under the contract, including any down payment; see Guidelines on Trade Regulation Rule Concerning Preservation of Consum-

ers' Claims and Defenses, 41 Fed. Reg. 20,022, 20,023 (May 14, 1976); § 52-572g limits the consumer's recovery to the amount of indebtedness then outstanding. This means that, in cases such as the present one, in which the consumer has made no payments under the contract, the consumer's recovery may be greater than his or her actual losses. Given the legislative history of § 52-572g, there can be little doubt that this is what the legislature intended and deemed necessary to incentivize creditors to rid the marketplace of disreputable merchants. See, e.g., 15 S. Proc., supra, p. 639, remarks of Senator Strada (explaining that bill places "the burden . . . on the banks because now banks will actually have to police the market" and that, "[i]f they buy a note from a company that is not reputable, they do so at their [own] risk"); 15 H.R. Proc., supra, p. 1963, Remarks of Representative Webber ("whoever profits from a retail sales contract should also be required to stand behind the product and service"). When, however, the remaining indebtedness is less than the money paid under the contract, 16 C.F.R. § 433.2 ensures that the consumer will be able to recover an amount that is closer to the amount of his or her actual damages. In this way, the two provisions work in tandem to ensure the maximum recovery for the consumers whom they were intended to protect. For these reasons, we conclude that 16 C.F.R. § 433.2 and § 52-572g must be given concurrent effect and that the remedies awarded under them are cumulative.

The answer to the first certified question is that the limit on assignee liability under § 52-572g (a), which is "the amount of indebtedness then outstanding," is determined at the time of the written demand on the seller.

The answer to the second certified question is that an assignee can avoid liability under § 52-572g by reassigning the promissory note, contract or other instru-

ment back to the seller, so long as it is done before the buyer makes written demand on the seller.

The answer to the third certified question is that, if a retail installment contract includes the FTC holder rule language mandated by 16 C.F.R. § 433.2, the assignee's liability under that rule is cumulative to its liability under § 52-572g.

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

In this opinion the other justices concurred.