HELEN ZIEGLER BENJAMIN, TRUSTEE *v.* ISLAND MANAGEMENT, LLC (SC 20501)

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

Syllabus

Pursuant to the provision (§ 34-255i (b) (2)) of the Connecticut Uniform Limited Liability Company Act describing the conditions under which a member of a manager-managed limited liability company is permitted to inspect the company's books and records, "a member may inspect and copy full information regarding the activities, affairs, financial condition and other circumstances of the company as is just and reasonable if . . . [t]he member seeks the information for a purpose reasonably related to the member's interest as a member . . . the member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information . . . and . . . the information sought is directly connected to the member's purpose."

The defendant, a manager-managed limited liability company, appealed from the judgment of the trial court, which determined that the defendant's refusal to disclose certain information to the substitute plaintiffs, cotrustees of a trust that was a member of the defendant, violated both § 34-255i and the defendant's operating agreement. Z created trusts for the benefit of each of his six adult children, including H, B, and C. These trusts owned several family businesses from which Z's children received dividend income. The defendant was created to oversee and build the family's assets, and each of the children's trusts were members and equal one-sixth owners of the defendant, which was governed by an operating agreement executed by Z's children as trustees of their respective trusts. During the relevant time period, B and C served as both comanagers and copresidents of the defendant, and they had significant roles in family owned businesses from which the defendant received income. Sometime after Z's death, a disagreement arose regarding the amount of the annual distributions. H believed that the family businesses should be making larger distributions to benefit present trust beneficiaries, whereas others, including B and C, believed that the distribution levels were satisfactory. H, in her capacity as cotrustee of her trust, made a series of four written demands for inspection of the defendant's books and records, each of which cited § 34-255i, or its predecessor, as authority for the demand. The final demand, which requested twenty-seven categories of information, stated that the purposes of the demand were to determine the value of her trust's membership interest in the defendant and to ascertain the condition and affairs of the family owned businesses so that H's trust could exercise its rights as a member of the defendant in an informed manner. The defendant produced many records in response to each of the successive demands but declined to produce others. H, in her capacity as trustee, thereafter sought to compel the defendant to comply with her inspection demands, alleging that the member trust's right to inspection under § 34-255i had been violated and that the defendant's failure to comply with her inspection demands constituted a breach of the defendant's operating agreement. Prior to trial, the court granted a motion to substitute the successor trustees of H's trust as the plaintiffs, and the defendant provided additional information to the plaintiffs. By the time trial commenced, the plaintiffs contended that the four remaining categories of information at issue were the defendant's general ledger, information pertaining to the defendant's management services agreements, information pertaining to the compensation of the defendant's managers, officers, and employees, and records showing payments made to third parties on behalf of H's trust. The plaintiffs argued before the trial court that they were entitled to inspect the remaining categories of information because the evidence called into question whether manager and copresident compensation for B and C was excessive, which, in turn, affected the fair value of the defendant, and whether that compensation, if excessive, constituted a

disguised distribution not made available to the other children or their respective member trusts. The trial court thereafter concluded that the plaintiffs had demonstrated that they were entitled to inspect each of the four outstanding categories of information under § 34-255i. The trial court ultimately rendered judgment for the plaintiffs, and the defendant appealed. *Held*:

1. There was no merit to the defendant's claim that, in order for the investigation of mismanagement to be a proper purpose within the meaning of § 34-255i (b) (2) (A), the member of a limited liability company must come forward with facts evidencing a credible basis to infer that mismanagement may have occurred, as the text of § 34-255i neither contains a credible proof requirement nor assigns any particular burden of proof depending on the inspection purpose that is alleged, and there was no policy basis that justified reading a credible proof of mismanagement requirement into § 34-255i: although some jurisdictions, including Delaware, have adopted the requirement of credible proof of mismanagement, this court found the arguments cited by other jurisdictions against that standard to be more persuasive, including the principle that the books of a corporation are not the private property of the directors or managers but are the records of their transactions as trustees for the shareholders, and the theory that a credible proof of mismanagement requirement would often deny shareholders the right to ascertain whether their affairs have been properly conducted by the directors or managers; moreover, because the determination of whether an obligation exists to provide factual support for the stated purpose of investigating mismanagement turns on whether the court interprets the legal requirements in the applicable statute to include an express or implied condition that the shareholder is seeking the information in good faith, the fact that the Connecticut Business Corporation Act expressly incorporates a requirement that the shareholder is seeking the information in good faith, whereas the Connecticut Uniform Limited Liability Company Act does not impose such a condition for an inspection by a member of a limited liability company, cuts strongly against imposing a credible proof requirement on limited liability company members; furthermore, the defendant's claim that, in the absence of a credible proof requirement, there would be no basis to limit inspection to information directly connected to the stated purpose, as required by § 34-255i (b) (2) (C), was unavailing, as a request seeking inspection of records in order to investigate mismanagement will typically set forth facts evidencing a basis to suspect mismanagement, and, when such facts are not provided, there are mechanisms other than a credible proof requirement to vindicate a limited liability company's concerns, including the trial court's discretion to require the member of a limited liability company to provide greater specificity, or to limit the scope of inspection if the member's request is too burdensome or inadequately justified, as well as the limited liability company's right to resist the inspection by

demonstrating that the conditions of § 34-255i have not been met, or to impose reasonable restrictions on the availability and use of information sought under § 34-255i through its operating agreement.

2. The defendant could not prevail on its claim that the trial court was required to determine, pursuant to § 34-255i (b) (2) (C), that there was a direct connection between each of the four categories of information at issue and one of the two specific purposes asserted in the four demands but that it failed to engage in such an analysis: the trial court expressly acknowledged that § 34-255i required that the information sought has a direct connection to a proper purpose and cited case law interpreting that requirement, and, although the trial court did not make an express finding of a direct connection for each category of information at issue, this court presumed, in the absence of evidence to the contrary, that the trial court concluded that this requirement was met; moreover, the defendant mistakenly assumed that the trial court did not rely on the plaintiffs' valuation purpose and that the plaintiffs' sole mismanagement concerns were excessive manager compensation and management fees, as the court cited case law and testimony concerning the plaintiffs' valuation inspection purpose, and H's final demand identified a valuation purpose as one of its two purposes.

3. The defendant could not prevail on its claim that two types of information sought at trial, namely, the general ledger and employee compensation, were not requested with reasonable particularity, as required by § 34-255i (b) (2) (B), on the ground that neither was requested in H's demands: the trial court correctly concluded that several of the categories cited in H's fourth demand referenced information of the type that would be in a general ledger and that this reference was sufficiently particular to apprise the defendant about the information needed; moreover, although information about employee compensation was not requested in any written demand with reasonable particularity, the count of the plaintiffs' complaint alleging a breach of the operating agreement supported the trial court's decision to order the defendant to permit inspection of its employee compensation information, because the count of the plaintiffs' complaint alleging a breach of the operating agreement was not purely derivative of the count alleging a violation of § 34-255i, and the defendant was afforded an opportunity to assert its right to arbitrate any dispute arising under the operating agreement insofar as the plaintiffs' complaint provided fair notice that an independent violation of the operating agreement was alleged.

Argued December 9, 2020—officially released November 2, 2021*

Procedural History

Action for a writ of mandamus to compel the defendant to make certain books and records available for

* November 2, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

inspection by the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where Scott A. Weisman et al., as cotrustees of the William Ziegler III Family Irrevocable Trust Agreement dated June 3, 2002, were substituted as the plaintiffs; thereafter, the case was tried to the court, *Hon. A. William Mottolese*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the substitute plaintiffs, from which the defendant appealed to the Appellate Court; subsequently, the court, *Hon. A. William Mottolese*, judge trial referee, issued an articulation of its decision, and the defendant filed an amended appeal; thereafter, the appeal was transferred to this court. *Affirmed.*

Lynn K. Neuner, with whom were *Charles W. Pieterse*, *Wyatt R. Jansen* and *Sara A. Ricciardi*, pro hac vice, for the appellant (defendant).

Steven M. Frederick, with whom were *David G. Keyko*, pro hac vice, and, on the brief, *Christopher Fennell*, pro hac vice, and *Gessi Giarratana*, for the appellees (substitute plaintiffs).

Opinion

MULLINS, J. The principal issue in this appeal is one of first impression regarding the conditions under which a member of a manager-managed limited liability company (LLC) is permitted to inspect the LLC's books and records pursuant to General Statutes § 34-255i,[1] a

[1] Section 34-255i distinguishes between inspection rights and duties in member-managed companies and in manager-managed companies. Subsection (b) of § 34-255i, which applies in the present case, provides in relevant part: "In a manager-managed limited liability company, the following rules apply:

* * *

"(2) During regular business hours and at a reasonable location specified by the company, a member may inspect and copy full information regarding the activities, affairs, financial condition and other circumstances of the company as is just and reasonable if: (A) The member seeks the information for a purpose reasonably related to the member's interest as a member; (B) the member makes a demand in a record received by the company, describing

provision of the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq. Specifically, we consider whether such a member seeking information for the stated purpose of ascertaining whether mismanagement has occurred must produce credible proof that mismanagement may have occurred as a precondition for exercising the member's statutory inspection right. The defendant, Island Management, LLC, appeals from the judgment of the trial court holding that the defendant's refusal to disclose certain information to the substitute plaintiffs, cotrustees of the Helen Benjamin 2002 Trust,[2] a member of the defendant LLC, violated both § 34-255i and the defendant's operating agreement.[3] The defendant contends that the trial court (1) incorrectly concluded that there is no requirement under § 34-255i that the requesting member produce credible proof of mismanagement, and (2) improperly failed to apply other statutory requirements. It further contends that the alleged violation of its operating agreement is merely derivative

with reasonable particularity the information sought and the purpose for seeking the information; and (C) the information sought is directly connected to the member's purpose.

"(3) Not later than ten days after receiving a demand pursuant to subparagraph (B) of subdivision (2) of this subsection, the company shall in a record inform the member that made the demand of: (A) The information that the company will provide in response to the demand and when and where the company will provide the information; and (B) the company's reasons for declining, if the company declines to provide any demanded information. . . ."

General Statutes § 34-271, which was not cited in the operative complaint, authorizes a direct action against another member, a manager, or the LLC to enforce the member's rights and to protect the member's interests, including those arising under an LLC's operating agreement.

[2] Consistent with the parties' designation, we use the term Benjamin 2002 Trust to refer to the trust interest created for the benefit of Helen Ziegler Benjamin by the William Ziegler III Family Irrevocable Trust Agreement, dated June 3, 2002.

[3] The defendant directly appealed to the Appellate Court, and we thereafter transferred the defendant's subsequently amended appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

of the alleged statutory violation, not an independent basis for relief, and, therefore, the former fails for the same reasons that the latter fails. We affirm the trial court's judgment.

The record reveals the following undisputed facts and procedural history. In 2002, William Ziegler III created trusts for the benefit of each of his six children: Helen Ziegler Benjamin, William (Bill) T. Ziegler, Cynthia Ziegler Brighton, Karl H. Ziegler, Melissa J. Ziegler, and Peter M. Ziegler.[4] These trusts own, directly or indirectly, several family businesses from which the siblings receive dividends. In 2015, Forbes Magazine estimated the collective value of the Ziegler family entities to be in excess of $2.8 billion.

The defendant, a manager-managed LLC headquartered in Darien, was created to oversee and build the family's assets. Those assets are held by Hay Island Holding Corporation (Hay Island). Hay Island's primary assets are two wholly owned subsidiaries: Swisher International, Inc., a major supplier of cigars, and Ned's Island Investment Corporation, an investment vehicle that manages a substantial portfolio. The defendant provides management services relating to both of these subsidiaries, providing advice on investment of capital, acquisitions, and day-to-day operations, among other things. The defendant derives income from two management services agreements, one with Hay Island and one with Swisher.

Each of the six siblings' trusts are members and equal one-sixth owners of the defendant. The defendant is governed by an operating agreement executed by all six siblings as trustees of their respective trusts. The sibling trustees contemporaneously executed a document consenting to the appointment of two of the sib-

[4] For the purpose of simplicity, we refer to each of the siblings individually by first name when appropriate.

lings, Bill and Cynthia, as comanagers of the defendant. As comanagers, they were authorized under the operating agreement to hire officers and to set officer salaries. The sibling trustees subsequently consented to the appointment of Bill and Cynthia to serve as copresidents of the defendant. During the relevant period, in addition to Bill and Cynthia, the defendant had four officers, including one person acting as chief operating officer and chief finance officer, and six nonofficer employees.

Bill and Cynthia also have significant roles in family enterprises from which the defendant receives income. Bill is Hay Island's chief executive officer and chairman. Cynthia is Hay Island's president and treasurer. Bill and Cynthia sit on Swisher's compensation committee.

Sometime after the death of the siblings' father in 2008, a disagreement arose among some of the siblings regarding the amount of the annual distributions. The net return of the distributions to each sibling's trust was well under 1 percent of the Forbes estimate of the total value of the family enterprises. Helen, who has no children, believed that the family businesses should be making larger distributions to benefit present trust beneficiaries. Bill, Cynthia, and Karl, some of whom have children, took the position that the present distribution levels were satisfactory and that more earnings should be retained to preserve the family's wealth for future generations.[5] Neither the instrument creating the siblings' trusts nor the defendant's operating agreement contained a statement of purpose regarding the father's intent on this matter.

As a result of this ongoing disagreement, in early 2016, Helen was approached by the other Ziegler trustees about a potential buyout offer for her interests in

[5] Helen's siblings did, however, approve a onetime $50 million payment to Helen in 2012, as a consequence of the disagreement over distributions.

the family businesses. That offer was well below the value her one-sixth interest would have yielded if the Forbes estimate were accurate. Helen made an informal request for financial and related information about the defendant and other family enterprises, which was denied.[6]

Thereafter, the original plaintiff, Helen, in her capacity as cotrustee of her trust, made a series of four written demands for inspection of the defendant's books and records—respectively dated June 20 and July 7, 2016, April 11, 2017, and June 29, 2018—each of which cited § 34-255i (or its predecessor) as authority for the demand.[7] Section 34-255i (b) (2) permits members of a manager-managed LLC to obtain "information regarding the activities, affairs, financial condition and other circumstances of the company" if certain conditions are met. See footnote 1 of this opinion. The defendant produced many records in response to each of the successive demands but refused to produce others, claiming that the information was unnecessary (irrelevant or already provided through prior disclosures) or the request was improper.

Helen received incomplete information about the compensation Bill and Cynthia received as managers and copresidents. This information revealed that their

[6] Helen thereafter obtained a valuation of her trust's collective interests from an accounting firm, which purportedly was characterized as preliminary due to incomplete information. That estimate far exceeded what the other siblings had offered to pay for Helen's interests, and the buyout offer was withdrawn in early 2017.

[7] The first three demands cited General Statutes § 34-144, and the fourth demand cited § 34-255i, which replaced the former as of July 1, 2017. The operative complaint alleged only a violation of § 34-255i, and the plaintiffs have made no argument that § 34-144 (c), which did not impose the same express preconditions to inspection as § 34-255i; see footnote 16 of this opinion; governed their inspection rights for any of the categories of information at issue in this case. Our analysis therefore focuses exclusively on § 34-255i.

collective annual compensation significantly increased from 2011 to 2016, while annual distributions to members remained roughly flat or decreased during this same period.[8]

The final demand requested twenty-seven categories of information, including financial statements, income tax returns, descriptions of cash and assets, manager and officer compensation/procedure for setting compensation, and information relating to management arrangements and fees. The stated purposes of the demand were (1) to "determine the value of the Benjamin 2002 Trust's membership interest in the [defendant]"[9] and (2) to "ascertain the condition and affairs of such entities so that the Benjamin 2002 Trust may exercise its rights as a member of the [defendant] in an informed manner." Regarding this second purpose, Helen's demand letter, which was addressed to Bill and Cynthia, further explained: "I have concerns because of the inherent conflict [of interest] that you have as a result of your personal financial interests as copresidents and managers of the [defendant], the interests of trusts for your benefit in the [defendant] and related businesses, your roles in the businesses to which the [defendant] provides management services, and your roles as trustees of trusts having interests in such related businesses. I have requested documents con-

[8] Member distributions increased in 2012 and 2013 but thereafter dropped to approximately 2011 levels or lower. Information disclosed by the time of the trial revealed that 2017 and 2018 comanager compensation was two and one-half to three times the 2011 comanager compensation.

[9] The fourth demand linked this valuation purpose to another purpose relating to a pending transfer of Peter's trust interest, following his death in 2017, specifically to determine whether the Benjamin 2002 Trust should exercise its "right of first refusal" of that interest pursuant to the operating agreement. The right of first refusal under the operating agreement was resolved in arbitration and is not relevant to the present appeal. Another appeal is pending before this court relating to Peter's testamentary power of appointment. The legal issues in that matter have no bearing on the present appeal.

cerning the management arrangements and compensation of the [defendant's] managers and officers . . . because I wish to evaluate whether such arrangements and payments are proper. In particular, I wish to investigate the appropriateness of fees paid to the [defendant] from other family owned entities. I believe those fees may be inflated in order to increase revenue for the [defendant]. I also believe that the fees paid to the managers of the [defendant], who determine their own compensation and benefits without consulting or even advising the members of the [defendant], may be excessive. The refusal to provide information to the members of the [defendant] concerning such payments raises questions about the propriety of the management arrangements and fees. I therefore have a reasonable basis to suspect possible irregularities. The requested information and documents are necessary to investigate whether the payments were, in fact, improper."

In response to the final demand, the defendant agreed to produce reasonable updates to certain information previously provided but refused to produce any other information. The defendant's written reply to the demand asserted that the request for information was unreasonable and/or that the production of additional information was unnecessary as to the stated valuation purpose because the defendant had already disclosed sufficient records to achieve that purpose. The reply also asserted that the request was improper as to the stated mismanagement purpose because the statutory inspection right requires credible proof of mismanagement, of which there was none.

Helen, in her capacity as trustee of her trust, thereafter commenced the present action by way of a two count complaint seeking to compel the defendant to comply with her inspection demands. The first count alleged that the member trust's right to inspection under § 34-255i had been violated. The second count alleged

that the defendant's failure to comply with the inspection demands was a breach of § 5.7 of the defendant's operating agreement.[10] The defendant filed an answer and asserted special defenses to both counts, claiming that the demands were made for improper purposes—to maximize Helen's financial gain, to engage in a fishing expedition to find any possible basis for a claim against the defendant, and to harass the defendant—and that the action was moot because Helen had received all of the documents to which she legally was entitled. Shortly after the complaint was filed, Scott A. Weisman and Stephen D. Benjamin, Helen's husband, were appointed successor trustees of the Benjamin 2002 Trust, and the court thereafter granted a motion to substitute them, in their capacity as trustees, as the plaintiffs in the present action.[11]

At some point prior to trial, the defendant provided additional information to the plaintiffs, although it disclaimed any legal obligation to do so. By the time trial commenced, the plaintiffs contended that there were four categories of information remaining at issue: (1)

[10] Section 5.7 of the defendant's operating agreement provides: "The [m]anagers shall maintain and preserve, during the term of the [c]ompany, and for seven (7) years thereafter, all accounts, books, and other relevant [c]ompany documents as provided in [§] 9.2 of this [o]perating [a]greement. Upon request, each [m]ember and [e]conomic [i]nterest [o]wner shall have the right, during ordinary business hours, to inspect and copy any and all of the books and records of the [c]ompany at the expense of the [m]ember or [e]conomic [i]nterest [o]wner making such request."

Section 9.2 of the operating agreement requires the defendant to keep (1) a current list of its past and present members, (2) copies of its articles of organization, all amendments thereto, and any powers of attorney pursuant to which an amendment had been exercised, (3) copies of its federal, state, and local income tax returns and financial statements for the six most recent fiscal years, and (4) copies of any of its past and present written operating agreements and amendments thereto. Helen sought all of these records in her demands, and the defendant initially withheld some but eventually produced all of them.

[11] For convenience, we hereafter refer to the substitute plaintiffs as the plaintiffs in this opinion.

the defendant's general ledger; (2) information pertaining to the defendant's management services agreements with Hay Island and Swisher; (3) information pertaining to the compensation of the defendant's managers, officers, and employees; and (4) records showing payments made to third parties on behalf of the Benjamin 2002 Trust.

At trial, the parties stipulated to the admission of numerous documents pertaining to the business of the Ziegler family enterprises and the defendant's operations in particular, some of which had been previously disclosed in response to Helen's written demands, and documents memorializing communications between the parties.[12] The plaintiffs presented testimony from two witnesses: Weisman, one of the substitute plaintiff trustees, whose background was in corporate law, investment banking, and capital markets; and Vladimir Starkov, a certified valuation analyst specializing in intercompany pricing and asset valuation. The defendant presented testimony from one witness, Howard Romanow, the defendant's chief operating officer and chief finance officer since 2011. The plaintiffs argued, in essence, that they were entitled to inspect the remaining categories of information because the evidence called into question (1) whether manager and copresident compensation for Bill and Cynthia was excessive (in part because actual management of the defendant appeared to have been delegated to Romanow and other highly compensated professional staff), which, in turn, affected the fair value of the defendant,[13] and (2) whether that compensation, if excessive,

[12] Pursuant to the parties' request, the trial court ordered the exhibits, the parties' trial briefs, and the trial transcripts to be sealed to protect confidential information.

[13] Weisman explained that overpayment of compensation would affect fair value because the amount of overpayment should come out of the company's profit and loss and be recharacterized as a distribution. The intrinsic worth of the businesses is their "fair value," as opposed to fair *market* value, because the siblings' interests cannot be sold in the open market.

constituted a disguised distribution not made available to the other siblings or their respective member trusts.

The trial court thereafter issued a written decision, concluding that the plaintiffs had demonstrated that they were entitled to inspect each of the four outstanding categories of information under § 34-255i. It cited case law from our Appellate Court recognizing that a corporate shareholder's desire to value shares or to determine whether improper transactions have occurred are proper inspection purposes. It rejected an argument raised in the defendant's trial brief that Connecticut courts should interpret § 34-255i, as Delaware courts had interpreted that state's corporate records inspection statute, to require credible proof of mismanagement when inspection is sought for the alleged purpose of investigating mismanagement. The trial court also determined that there was no merit to the defendant's special defenses. The court found that there was no evidence that the plaintiffs were pressing their inspection demands for the purpose of pressuring Helen's siblings to increase dividends or the buyout offer, or to harass them.[14] The court noted, however, that it would not be improper, in any event, for a trustee to seek to maximize income or asset value.

The court also addressed two arguments raised by the defendant at trial but not pleaded as special defenses contesting the plaintiffs' entitlement to pursue relief under the operating agreement: (1) the plaintiffs had waived that right by pursuing a mutually exclusive statutory claim, and (2) the plaintiffs were barred from seeking such relief in a judicial action because there is a mandatory arbitration provision in the operating agree-

[14] The basis for the harassment allegation appears to be not only the expansiveness of the inspection request, but also the fact that Helen had initiated several other legal proceedings against various Ziegler entities or officers of those entities.

ment. In rejecting these arguments, the court noted that § 5.7 of the operating agreement "has particular significance to the present case because it evinces a clear and unmistakable intent that all books and records of the [defendant] should be open to inspection and copying for any legitimate purpose . . . . The court sees this provision as not only confirmatory of the statutory remedy but as expansive of it so much so that the request need not even be in writing." (Internal quotation marks omitted.)

Despite its conclusions as to the operating agreement, the trial court initially rendered judgment for the plaintiffs only on count one, the statutory violation. Following the defendant's motion for articulation, the court modified the judgment to include judgment in favor of the plaintiffs on the second count as well.[15] The defendant then filed an amended appeal with the Appellate Court, which we transferred to this court. See footnote 3 of this opinion.

On appeal, the defendant claims that the trial court improperly rendered judgment for the plaintiffs and that the case must be remanded for a new trial under the proper legal standard. Specifically, it contends that the trial court erred as a matter of law by failing to apply various statutory requirements. It further contends that the claimed violation of the operating agreement was

[15] The defendant originally appealed to the Appellate Court, which issued an order to show cause why the appeal should not be dismissed for lack of a final judgment, pursuant to *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 183 A.3d 1164 (2018). That case held that a final judgment has not been rendered if the trial court has failed to dispose of a count alleging an alternative theory of recovery that is not legally inconsistent with a count on which judgment was rendered. See id., 717–24. The defendant then sought an articulation from the trial court as to whether it had disposed of count two, which the court granted. The trial court's articulation stated that the judgment would be modified to render judgment for the plaintiffs on both counts, citing two pages of its written decision in which it had discussed the operating agreement.

purely derivative of the statutory violation and, thus, cannot provide an alternative basis on which to affirm the judgment. We disagree with both contentions.

I

We turn first to the question of whether the trial court correctly determined that the defendant's conduct violated the plaintiffs' statutory inspection right. Section 34-255i (b) (2) provides in relevant part: "[A] member may inspect and copy full information regarding the activities, affairs, financial condition and other circumstances of the company *as is just and reasonable if*: (A) The member seeks the information for a *purpose reasonably related to the member's interest as a member*; (B) the member makes a demand in a record received by the company, *describing with reasonable particularity the information sought and the purpose for seeking the information*; and (C) the information sought is *directly connected to the member's purpose*." (Emphasis added.)

The defendant claims that the trial court improperly failed to apply three statutory requirements. First, the defendant contends that the court failed to recognize that investigating mismanagement is a proper purpose for inspection only if there is credible proof that mismanagement may have occurred. The defendant deems this omission fatal because, according to the defendant, the trial court's decision did not rely on the alternative, valuation purpose cited in Helen's demands. Second, the defendant contends that the court failed to apply the requirement that the information sought must be "directly connected" to a proper purpose stated in the demand. Third, the defendant contends that the court failed to apply the requirement of stating the information requested with "reasonable particularity" as to the general ledger and employee compensation because

neither was expressly or implicitly referenced in the written demands.

A

We begin by setting out the legal landscape that informs our analysis. The Uniform Limited Liability Company Act of 2006, as harmonized (ULLCA), or one of its predecessors has been adopted by nineteen states, including Connecticut, and by the District of Columbia. See Uniform Law Commission, Limited Liability Company Act, Revised, at https://www.uniformlaws.org/committees/community-home?CommunityKey=bbea059c-6853-4f45-b69b-7ca2e49cf740 (last visited November 2, 2021). The inspection provision of the ULLCA that is the counterpart to § 34-255i, § 410, has not been subjected to judicial scrutiny by any of these jurisdictions. There is also no illuminating Connecticut legislative history.[16]

Yet, we are not altogether without guidance on this subject. Because LLCs are creatures of statute that are viewed as a hybrid of a partnership and a corporation, having some attributes of each,[17] courts often rely on

[16] Connecticut adopted the ULLCA in 2016; see Public Acts 2016, No. 16-97; which went into effect on July 1, 2017. That public act repealed the then existing LLC inspection provision, which provided in relevant part: "During ordinary business hours a member may, at the member's own expense, inspect and copy *upon reasonable request* any limited liability company record, wherever such record is located." (Emphasis added.) General Statutes (Rev. to 2015) § 34-144 (c). This predecessor statute similarly was not subjected to judicial scrutiny by our courts. But see *In re Newman*, 500 B.R. 328, 330–32 (Bankr. D. Conn. 2013) (addressing whether attorney-client privilege shielded documents from inspection under predecessor statute). In the absence of any case law or legislative history, there is no clear indication whether the multipronged successor statute was intended to give greater clarity to considerations subsumed under the existing reasonableness standard or was intended to impose a more stringent standard.

[17] "Our common law does not recognize LLCs, which were first created by statute in Connecticut in 1993. Public Acts 1993, No. 93-267. An LLC is a distinct type of business entity that allows its owners to take advantage of the pass-through tax treatment afforded to partnerships while also providing them with limited liability protections common to corporations." *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 317, 138 A.3d 257 (2016); see, e.g., *Marx* v. *Morris*, 386 Wis. 2d 122, 138, 925 N.W.2d 112 (2019) ("Similar to a

jurisprudence pertaining to those entities when addressing comparable considerations for LLCs. See E. Miller, "Are the Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing from Other Forms?," 42 Suffolk U. L. Rev. 617 (2009); see, e.g., *Morris* v. *Cee Dee, LLC*, 90 Conn. App. 403, 414, 877 A.2d 899 (applying theories of piercing corporate veil to LLCs), cert. granted, 275 Conn. 929, 883 A.2d 1245 (2005) (appeal withdrawn March 13, 2006). As we explain subsequently in this opinion, the contested statutory terms in this appeal are the same as those applied to corporate records inspection, which, unlike partnership and LLC records inspection, has been the subject of a well-developed body of law. We therefore consider the treatment of this subject for corporations, as well as any reasons to distinguish treatment of this subject as applied to LLCs.[18]

partnership, an LLC allows for informality and flexibility of organization and operation, internal governance by contract, direct participation by members in the business, and no taxation at the entity level. . . . Similar to a corporation, however, an LLC grants its investors limited liability such that a member is not personally liable for any debt, obligation or liability of the [LLC], except that a member or manager may become personally liable by his or her acts or conduct other than as a member. . . . Therefore, as with a shareholder in a corporation, each LLC member's potential liability to third parties is limited to the amount the member chose to invest in the LLC." (Citations omitted; internal quotation marks omitted.)).

[18] The trial court in the present case suggested that corporate records inspection statutes should not be consulted because a material difference between corporations and LLCs is the "magnitude of the number of shareholders who own a publicly traded [corporation]." Although this statement may be factually accurate in the majority of cases, there is no legal limit to the number of members of an LLC, and some have hundreds of members. See E. Welle, "Limited Liability Company Interests as Securities: An Analysis of Federal and State Actions Against Limited Liability Companies Under the Securities Laws," 73 Denv. U. L. Rev. 425, 431 (1996); see also L. Brenman, "Limited Liability Companies Offer New Opportunities to Business Owners," 10 J. Partnership Taxation 301, 308 (1994). Moreover, "corporations, partnerships, pension plans, and foreign investors may become members of an LLC." L. Brenman, supra, 308. We do not intend to suggest, however, that an inspection request always must yield the same result regardless of whether it is made to a closely held LLC or to a large, publicly traded corporation. As we explain subsequently in this opinion, the trial court has discretion

The common law has long recognized the right of shareholders to inspect a corporation's books and records for a "proper purpose," which, consistent with the requirement in § 34-255i (b) (2) (A), has been interpreted to mean a purpose reasonably related to such person's interest as a shareholder. See, e.g., *State ex rel. Costelo* v. *Middlesex Banking Co.*, 87 Conn. 483, 484–85, 88 A. 861 (1913); *Pagett* v. *Westport Precision, Inc.*, 82 Conn. App. 526, 532, 845 A.2d 455 (2004); see also Annot., "Purposes for Which Stockholder or Officer May Exercise Right To Examine Corporate Books and Records," 15 A.L.R.2d 15, § 2 (1951). See generally 5A T. Bjur & D. Jensen, Fletcher Cyclopedia of the Law of Private Corporations (Rev. 1995) § 2214, p. 342.

Most jurisdictions have adopted statutes prescribing conditions for the inspection of books and records of both corporations and partnerships. Many of these statutes incorporate common-law principles. See generally 5A T. Bjur & D. Jensen, supra, § 2246, p. 490; A. Sparkman, "Information Rights—A Survey," 2 Bus. Entrepreneurship & Tax L. Rev. 41, 43–44, 117 (2018). Some statutes are based on model or uniform acts that were the source of the terms and conditions in § 410 of the ULLCA, the inspection provision: inspection if just and reasonable, purpose reasonably related to the person's interest as a member of that entity, demand made with reasonable particularity, and information directly connected to the asserted purpose. See Unif. Limited Liability Company Act § 410, comment (amended 2013), 6C U.L.A. 114 (2016) (acknowledging that language is derived from §§ 304 and 407 of Uniform Limited Partnership Act of 2001); Unif. Limited Partnership Act § 304, comment (amended 2013), 6B U.L.A. 86 (2016)

to consider many factors when assessing whether to allow inspection and the reasonable scope of inspection, and the entities' governing agreement may impact inspection rights as well. See footnote 21 of this opinion (acknowledging other differences in statutes).

(acknowledging that language is derived from § 16.02 of American Bar Association's Model Business Corporation Act); see also Model Business Corporation Act (A.B.A. 2002) § 16.02, comment (3), p. 16-9 ("A 'proper purpose' means a purpose that is reasonably relevant to the demanding shareholder's interest as a shareholder. Some statutes do not use the phrase 'proper purpose'; the Model [Business Corporation] Act continues to use it because it is traditional and well understood language defining the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable under the revised [a]ct."). Connecticut has not adopted any version of the Uniform Limited Partnership Act[19] but has adopted the Model Business Corporation Act.[20] See Connecticut Business Corporation Act, General Statutes § 33-600 et seq.

We look to the jurisprudence interpreting these other sources—statutory and common law—to inform our analysis, and rely on them to the extent they are persuasive.[21] Consistent with these sources, for convenience,

[19] Connecticut's statutes governing partnership inspection rights have not been amended for several decades, and the one applicable to limited partners, General Statutes § 34-18, is similar to the predecessor to § 34-255i for LLC inspection, General Statutes (Rev. to 2015) § 34-144 (c). See footnote 16 of this opinion.

[20] General Statutes § 33-946, which mirrors § 16.02 of the Model Business Corporation Act; see *Pagett* v. *Westport Precision, Inc.*, supra, 82 Conn. App. 533; provides in relevant part: "(d) A shareholder may inspect and copy the records described in subsection (c) of this section only if: (1) His demand is made in good faith and *for a proper purpose*; (2) he describes with *reasonable particularity* his purpose and the records he desires to inspect; and (3) the records are *directly connected* with his purpose. . . ." (Emphasis added.)

[21] We do not intend to suggest that, simply because these sources impose similar conditions to the ones at issue in the present case, they afford the same scope of inspection under the same conditions in every case. There are some material differences in these statutes regarding the treatment of certain categories of information. Shareholders and limited partners have the right to inspect certain records that the corporations and partnerships are statutorily required to maintain without any showing of good cause. See

we use the term "proper purpose" as shorthand for a purpose reasonably related to the requesting party's interest as a member, shareholder, or partner.

B

The defendant's principal claim is that, in order for the investigation of mismanagement to be a proper purpose, the LLC member must come forward with facts evidencing a credible basis to infer that mismanagement may have occurred. The defendant points to the adoption of this standard for shareholder inspection by Delaware, a leading business law jurisdiction. It contends that a requirement of credible proof of mismanagement is necessary to ascertain whether the information sought is "directly connected" to a proper purpose and to ensure that the member is not seeking unfettered access to information for improper purposes. In advancing this argument, the defendant does not contend that credible proof is required to support any inspection purpose, but only when the proffered purpose involves a claim of mismanagement or comparable wrongdoing. It contends that there is a difference between a purpose such as valuation of a member's interest, which is "common to all members, suggests no wrongdoing, and implicates a discrete universe of information," and the purpose of investigating mismanagement, which has the opposite characteristics.

Unif. Limited Liability Company Act § 410 (a) (1), supra, 6C U.L.A. 113; Unif. Limited Partnership Act § 304 (a), supra, 6B U.L.A. 84. LLCs are no longer statutorily required to maintain any specific records under Connecticut law; see Public Acts 2016, No. 16-97, § 110 (repealing General Statutes § 34-144); and the CULLCA draws no distinction for inspection rights based on the type of records sought. Shareholders may inspect specific types of records; see General Statutes § 33-946 (c); whereas LLC members may inspect information "regarding the company's activities, affairs, financial condition, and other circumstances . . . ." Unif. Limited Liability Company Act § 410 (a) (1), supra, 6C U.L.A. 113; see Unif. Limited Partnership Act § 304 (b), supra, 6B U.L.A. 84 (recognizing same inspection rights with respect to limited partners).

The plaintiffs assert that our Appellate Court's case law involving shareholder inspection rights is incompatible with the credible proof requirement. They point to *Pagett* v. *Westport Precision, Inc.*, supra, 82 Conn. App. 526, in which the Appellate Court quoted the following official comment to the inspection provision in the Model Business Corporation Act: "As a practical matter, a shareholder who alleges a purpose in general terms, such as a desire to determine the value of his shares, to communicate with fellow shareholders, *or to determine whether improper transactions have occurred*, has been held to allege a proper purpose." (Emphasis added; internal quotation marks omitted.) Id., 533–34, quoting Model Business Corporation Act, supra, § 16.02, comment (3), p. 16-9.

We are not persuaded that the cursory reference by the court in *Pagett* to improper transactions constitutes due consideration of the particular issue before us. The inspection purpose at issue in *Pagett* was to value the plaintiff's shares. *Pagett* v. *Westport Precision, Inc.*, supra, 82 Conn. App. 534. The court in *Pagett* had no occasion to examine case law from other jurisdictions addressing the investigation of mismanagement. Moreover, an argument could be made that the Model Business Corporation Act's reference to allegations of "improper transactions" could be read consistently with the Delaware standard that the defendant advocates (i.e., the nature of the impropriety alleged—excessive management salaries, failure to adhere to legal or contractual requirements, depletion of assets, etc.—could indicate a factual basis for a suspicion of mismanagement).

We therefore consider the defendant's claim, which raises a question of statutory construction to which we apply plenary review. See id., 528. We observe, at the outset, that the text of § 34-255i neither contains a credible proof requirement nor assigns any particular burden

of proof depending on the inspection purpose that is alleged. That said, the terms in the statute are sufficiently elastic that we cannot say that the defendant's proposed standard is untenable as a matter of law.[22] We turn therefore to the case law that has considered this matter in the corporate context.

It is broadly recognized, as a general principle, that investigating mismanagement is a proper purpose for seeking inspection of corporate records. See Annot., 15 A.L.R.2d, supra, § 7, p. 30; see, e.g., *Compaq Computer Corp.* v. *Horton*, 631 A.2d 1, 5 (Del. 1993) ("[m]any cases recognize a [shareholder's] right to investigate past acts of mismanagement"); *State ex rel. Fussell* v. *McLendon*, 109 So. 2d 783, 786 (Fla. App. 1959) ("[a shareholder] in a corporation has, in the very nature of things and upon principles of equity, good faith, and fair dealing, the right to know how the affairs of the company are conducted and whether the capital of which he has contributed a share is being prudently and profitably employed" (internal quotation marks omitted)); *Kalanges* v. *Champlain Valley Exposition, Inc.*, 160 Vt. 644, 645, 632 A.2d 357 (1993) ("[p]roper purpose has been found [when] shareholders wanted . . . to ascertain possible mismanagement of the corporation"). In the vast majority of cases deeming inspection proper for this purpose, however, specific acts of actual mismanagement or facts providing a reasonable basis to suspect mismanagement were alleged. See Annot., 15 A.L.R.2d, supra, § 7, p. 33 ("it appears that in most of the cases [in which] the [shareholder] has been successful in enforcing an inspection on this ground there have been at least allegations suggesting grounds for suspicion of ineptitude or misconduct on the part of the officers or directors").

[22] Neither party is contending that all of the pertinent statutory terms are plain and unambiguous, susceptible to only one definition.

No jurisdiction holds that allegations or proof of *actual* mismanagement is required. See id.; see also, e.g., *Security First Corp.* v. *U.S. Die Casting & Development Co.*, 687 A.2d 563, 568 (Del. 1997) (expressly rejecting this requirement); *Arctic Financial Corp.* v. *OTR Express, Inc.*, 272 Kan. 1326, 1329–30, 38 P.3d 701 (2002) (same). But some jurisdictions, including Delaware, have held that a shareholder seeking to inspect corporate records to investigate whether the corporation is being properly managed must come forward with facts that demonstrate a reasonable basis to suspect mismanagement. See, e.g., *Brehm* v. *Eisner*, 746 A.2d 244, 267 n.75 (Del. 2000) ("a party needs to show, by a preponderance of the evidence, that there is a legitimate chance that [the party's] reason for suspecting mismanagement is credible"); *Security First Corp.* v. *U.S. Die Casting & Development Co.*, supra, 568 ("A mere statement of a purpose to investigate possible general mismanagement, without more, will not entitle a shareholder to broad [statutory] inspection relief. There must be some evidence of possible mismanagement as would warrant further investigation of the matter." (Emphasis omitted; internal quotation marks omitted.)). Delaware has the most developed body of case law articulating and applying this requirement,[23] but other jurisdictions have required similar fac-

[23] Delaware's corporate inspection statute requires a plaintiff to establish that inspection is for a "proper purpose," a term it defines as "reasonably related to such person's interest as a stockholder." Del. Code Ann. tit. 8, § 220 (b) (2011). This statute does not expressly limit inspection to records directly connected to the purpose advanced or require reasonable particularity in the demand, but Delaware courts have effectively adopted these requirements as part of the proper purpose requirement (i.e., if the record is not essential to accomplishing the purpose, it is not being sought for a proper purpose). See, e.g., *Security First Corp.* v. *U.S. Die Casting & Development Co.*, supra, 687 A.2d 569 ("The plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the [shareholder's] articulated purpose for the inspection. . . . [I]t is the responsibility of the trial court to tailor the inspection to the [shareholder's] stated purpose." (Footnote omitted.)). Although the trial court discounted Delaware case law in part because that state did not

tual support, whether as allegations in the demand or evidentiary proof. See, e.g., *Weigel* v. *O'Connor*, 57 Ill. App. 3d 1017, 1025, 373 N.E.2d 421 (1978) (stating that "[g]ood faith fears of mismanagement are sufficient" after setting forth evidentiary basis for plaintiff's fears); *Bernstein* v. *Pritsker*, Docket No. MICV2012-3183-C, 2013 WL 678043, *4 (Mass. Super. February 14, 2013) (noting that, for closely held corporation, "[a] reasonable articulation of suspected facts, not mere speculation, supporting an inference of possible mismanagement or wrongdoing should be enough," but suggesting that, in other circumstances, Delaware's credible *proof* standard would apply); *Cain* v. *Merck & Co.*, 415 N.J. Super. 319, 334, 1 A.3d 834 (App. Div. 2010) ("unsupported allegations of mismanagement do not present a 'proper purpose' entitling a shareholder to examine corporate documents"); *Towle* v. *Robinson Springs Corp.*, 168 Vt. 226, 228, 719 A.2d 880 (1998) ("[c]laims of mismanagement . . . must be supported by evidence"); see also, e.g., *Meyer* v. *Board of Managers of Harbor House Condominium Assn.*, 221 Ill. App. 3d 742, 748, 583 N.E.2d 14 (1991) (pointing to plaintiff's affidavits that stated that defendant "[a]ssociation was not collecting assessments from delinquent unit owners" and "was incurring excessive [attorney's] fees" as establishing "a [good faith] fear that the [a]ssociation was mismanaging its financial matters, which was a proper purpose to inspect the [a]ssociation's records"); *North Oakland County Board of Realtors* v. *Realcomp, Inc.*, 226 Mich. App. 54, 58–60, 572 N.W.2d 240 (1997) ("[u]nder [Michigan] common law, a shareholder stated a proper purpose for an inspection by raising doubts whether corporate affairs had been properly conducted by the directors or management," and, although plaintiff's alleged inspection purposes to monitor company's

adopt the Model Business Corporation Act, we find the corporate inspection statutes, as interpreted, similar in material respects.

financial health and compliance with amended bylaws "were arguably overbroad and nonspecific," its subsequently submitted affidavit of accountant set forth "concerns regarding allocation of computer equipment, allegedly improper employee benefits, discrepancies between actual expenditures for tax line charges and the operating budget, expenditures in hiring certain employees, and reaffirmation of plaintiff's ownership interest" that were sufficiently "specific, limited in scope, and reasonably related" to plaintiff's interest as shareholder).

Several reasons have been offered as justification for the requirement of facts supporting a suspicion of mismanagement. Some courts cite the common-law principle that seeking inspection "for speculative purposes," "to gratify idle curiosity"; *Guthrie* v. *Harkness*, 199 U.S. 148, 156, 26 S. Ct. 4, 50 L. Ed. 130 (1905); or to undertake a "fishing expedition"; *News-Journal Corp.* v. *State ex rel. Gore*, 136 Fla. 620, 623, 187 So. 271 (1939); is not a proper purpose. See, e.g., *Nodana Petroleum Corp.* v. *State ex rel. Brennan*, 50 Del. 76, 81–82, 123 A.2d 243 (1956); *Weigel* v. *O'Connor*, supra, 57 Ill. App. 3d 1025; *Cain* v. *Merck & Co.*, supra, 415 N.J. Super. 332.

A related justification cited is that this standard balances the plaintiff's need for information for legitimate purposes against the burden imposed on the entity and other stakeholders. See, e.g., *Cain* v. *Merck & Co.*, supra, 415 N.J. Super. 333–34; see also, e.g., *Dynamics Corp. of America* v. *CTS Corp.*, 479 N.E.2d 1352, 1355 (Ind. App. 1985). These concerns are another way of saying that "the primary purpose of the inspection must not be one that is adverse to the best interests of the corporation." *Abdalla* v. *Qadorh-Zidan*, 913 N.E.2d 280, 287 (Ind. App. 2009), transfer denied, 929 N.E.2d 782 (Ind. 2010); see also *Cain* v. *Merck & Co.*, supra, 332 ("[a]n inspection to investigate possible wrongdoing

where there is no credible basis . . . is a license for fishing expeditions and thus adverse to the interests of the corporation" (internal quotation marks omitted)).

Finally, this standard is sometimes justified as necessary to meet a statutorily imposed burden of proof. See, e.g., *Thomas & Betts Corp.* v. *Leviton Mfg. Co.*, 681 A.2d 1026, 1031 (Del. 1996) ("When a [shareholder] seeks inspection of books and records, the burden of proof is on the [shareholder] to demonstrate that his purpose is proper. . . . In order to meet that burden of proof, a [shareholder] must present some credible basis from which the court can infer that waste or mismanagement may have occurred." (Citation omitted; footnote omitted.)); *Weigel* v. *O'Connor*, supra, 57 Ill. App. 3d 1025 (describing burden of proof).[24]

Other jurisdictions, however, have rejected the proposition that inspection for the purpose of investigating mismanagement is not permitted unless the shareholder comes forward with facts substantiating the possibility that mismanagement may have occurred. See, e.g., *Schein* v. *Northern Rio Arriba Electric Cooperative, Inc.*, 122 N.M. 800, 804, 932 P.2d 490 (1997); *Lake* v. *Buckeye Steel Castings Co.*, 2 Ohio St. 2d 101, 105, 206 N.E.2d 566 (1965); *Rosentool* v. *Bonanza Oil & Mine Corp.*, 221 Or. 520, 532–33, 352 P.2d 138 (1960). This position appears to rely on the following principles.

First, "[t]he books [of the corporation] are not the private property of the directors or managers, but are

[24] The Illinois and Delaware shareholder inspection statutes expressly impose the burden of proof either on the shareholder, requiring him or her to prove a proper purpose, or on the corporation, requiring it to prove that the shareholder does not have a proper purpose, depending on the type of records sought. See Del. Code Ann. tit. 8, § 220 (c) (2011); 805 Ill. Comp. Stat. Ann. 5/7.75 (b) and (c) (West 2010); see also N.J. Stat. Ann. § 14A:5-28 (3) and (4) (West Cum. Supp. 2020) (imposing burden of proof on shareholder, requiring him or her to prove proper purpose for inspection of certain records).

the records of their transactions as trustees for the [shareholders]." (Internal quotation marks omitted.) *Guthrie* v. *Harkness*, supra, 199 U.S. 155. "The right of inspection rests [on] the proposition that those in charge of the corporation are merely the agents of the [shareholders] who are the real owners of the property." Id.; see, e.g., *Schein* v. *Northern Rio Arriba Electric Cooperative, Inc.*, supra, 122 N.M. 803 (citing shareholder's "right to know how his agents, the corporation's [decision makers], are conducting the affairs of the organization"); *Rosentool* v. *Bonanza Oil & Mine Corp.*, supra, 221 Or. 533 (citing same principle).

Second, "[t]o say that [shareholders] have the right [to ascertain whether their affairs have been properly conducted by the directors or managers], but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant." (Internal quotation marks omitted.) *Guthrie* v. *Harkness*, supra, 199 U.S. 155; see, e.g., *Schein* v. *Northern Rio Arriba Electric Cooperative, Inc.*, supra, 122 N.M. 804 ("We reject [the] contention that [the shareholder] needed to possess some basis for suspecting illegal or improper behavior on the part of [the corporation] to warrant the request for information. Such a proposition would thwart efforts of oversight by shareholders, making abuses of corporate power more likely. Moreover, it would deny owners their proprietary right of monitoring and safeguarding their interests."). "Until an examination of the corporate records is obtained, the shareholder often can do nothing more than entertain a belief of mismanagement . . . ." *Rosentool* v. *Bonanza Oil & Mine Corp.*, supra, 221 Or. 533.

Third, in the absence of a clear statutory directive placing the burden on the shareholder to prove his or

her purpose, it is sufficient for the shareholder to allege a proper purpose in general terms to make a prima facie case in support of inspection, and, if the corporation disputes that allegation, it may come forward with evidence that the primary purpose of inspection is, in fact, an improper purpose. See, e.g., *Schein* v. *Northern Rio Arriba Electric Cooperative, Inc.*, supra, 122 N.M. 803; *In re Marcato*, 102 App. Div. 2d 826, 826, 476 N.Y.S.2d 582 (1984); *Cooke* v. *Outland*, 265 N.C. 601, 615, 144 S.E.2d 835 (1965); *Lake* v. *Buckeye Steel Castings Co.*, supra, 2 Ohio St. 2d 105–106; *Rosentool* v. *Bonanza Oil & Mine Corp.*, supra, 221 Or. 533–34; see also, e.g., *Franklin* v. *Middle Tennessee Electric Membership Corp.*, Docket No. M2007-1060-COA-R3-CV, 2009 WL 2365572, *6 (Tenn. App. July 31, 2009) ("[t]here has been extensive litigation dealing with general questions involving access to corporate records, and while there is a split of authority as to where the burden of proof lies, the majority view is that the burden is on the corporation to prove an improper purpose").

We find the arguments against the Delaware standard more persuasive, especially as applied to LLC member inspection. The foregoing cases demonstrate that the decision as to whether an obligation exists to provide factual support for the stated purpose of investigating mismanagement seems to turn on whether the court interprets the legal requirements (1) to include an implied or express condition that the shareholder is seeking the information in good faith and (2) to impose the burden on the shareholder to prove good faith or on the entity resisting inspection to prove bad faith. These considerations bring into focus an important distinction between the statutory schemes for inspection of corporate records and for inspection of LLC records that was overlooked by the parties and the trial court in the present case.

The Connecticut Business Corporation Act expressly incorporates the first condition, permitting inspection

if the shareholder's demand "*is made in good faith* and for a proper purpose," i.e., a purpose germane to the shareholder's interest. (Emphasis added.) General Statutes § 33-946 (d). By contrast, the CULLCA does not impose such a condition for LLC member inspection except when inspection is sought by a *dissociated* member, who must not only satisfy all of the conditions that a current member must satisfy under § 34-255i (b) (2), but also the condition that "[t]he person seeks the information in good faith . . . ." General Statutes § 34-255i (c) (2). The absence of this good faith requirement for current LLC members cuts strongly against imposing a credible proof requirement on such members.[25]

We also are not persuaded by the defendant's argument that, in the absence of a credible proof requirement, there would be no basis to limit inspection to information "directly connected" to the stated purpose, as is required by § 34-255i (b) (2) (C), and thus a mere allegation of mismanagement could lead to unfettered and burdensome inspection.

If history is any guide, it demonstrates that, in most cases, a person seeking inspection of records in order to investigate mismanagement will provide facts evidencing a basis to suspect mismanagement in order to justify the scope of inspection sought. That was so in the present case.[26] When such facts are not provided,

[25] We express no opinion as to whether this statutory obligation would support a credible proof of mismanagement requirement for corporations, only that the absence of this requirement for current LLC members is a factor that weighs against a credible proof requirement for such members.

[26] The plaintiffs pointed to, among other things, the comanager siblings' conflicts of interest, which could have provided an opportunity for self-dealing, highly trained officers who managed the day-to-day operations of the businesses, a buyout offer that fell well short of a valuation estimate Helen obtained; see footnote 6 of this opinion; and manager/president compensation increasing almost threefold over an eight year period while member distributions decreased or stayed at approximately the same level for most of those years despite increased company earnings. See, e.g., *Weigel* v. *O'Connor*, supra, 57 Ill. App. 3d 1025 ("[a] desire to learn the reasons for lack of dividends or insubstantial dividends, and suspicion of mismanage-

there are mechanisms other than the credible proof requirement to vindicate the defendant's concerns.

Statutory conditions for inspection are cast in terms that plainly confer discretion on the court—purpose "*reasonably* related to the member's interest as a member"; (emphasis added) General Statutes § 34-255i (b) (2) (A); demand stated with "*reasonable* particularity"; (emphasis added) General Statutes § 34-255i (b) (2) (B); and information "*directly connected* to the member's purpose." (Emphasis added.) General Statutes § 34-255i (b) (2) (C). This discretion permits the trial court to require the LLC member to provide greater specificity when justified by the facts and circumstances of the case, including the nature of the entity and the extent of the member's knowledge of the company's business. See, e.g., Model Business Corporation Act, supra, § 16.02, comment (3), p. 16-9 (explaining that inspection provision "attempts to require more meaningful statements of purpose, *if feasible*, by requiring that a shareholder designate 'with reasonable particularity' his purpose and the records he desired to inspect" (emphasis added)); see also, e.g., *Security First Corp.* v. *U.S. Die Casting & Development Co.*, supra, 687 A.2d 569 ("While the trial court has wide latitude in determining the proper scope of inspection, it is the responsibility of the trial court to tailor the inspection to the [shareholder's] stated purpose. Undergirding this discretion is a recognition that the interests of the corporation must be harmonized with those of the inspecting [shareholder]." (Internal quotation marks omitted.)); *Kelley Mfg. Co.* v. *Mar-*

ment arising from such a dividend policy alone, will constitute a proper purpose"); *Taylor* v. *Eden Cemetery Co.*, 337 Pa. 203, 208–209, 10 A.2d 573 (1940) (concluding that concern about whether salaries paid to officers and trustees of defendant company were excessive was proper purpose for seeking inspection). In their trial briefs, the plaintiffs assumed that they were required to establish credible proof but argued that it was the lowest possible burden of proof. During argument by counsel, the trial court questioned the basis for applying this standard to § 34-255i.

tin, 296 Ga. App. 236, 241, 674 S.E.2d 92 (2009) ("the trial court has much discretion . . . to determine whether the purpose named is a proper one" (internal quotation marks omitted)), cert. denied, Georgia Supreme Court, Docket No. S09C1052 (May 18, 2009); *Parsons* v. *Jefferson-Pilot Corp.*, 333 N.C. 420, 429–30, 426 S.E.2d 685 (1993) ("[T]he record does not show that the plaintiff had any specific knowledge of corporate mismanagement or of any improper use of corporate assets at the time that she made the demand. The record shows only that the plaintiff was dissatisfied with the return on her investment in the defendant corporation. In light of the plaintiff's actual knowledge at the time of the demand, it would not have been feasible to state her purpose with any greater particularity. . . . Although the plaintiff's demand was broad . . . there is nothing in this record to show that the plaintiff could have described the desired records with any greater particularity than she did . . . ."). In addition, because inspection of LLC records is permitted only to the extent it is "just and reasonable"; General Statutes § 34-255i (b) (2); the trial court may limit the scope of inspection if the request is too burdensome or inadequately justified. Cf. *Thomas & Betts Corp.* v. *Leviton Mfg. Co.*, supra, 681 A.2d 1035 (noting that provision vesting trial court with discretion to prescribe inspection limitations that are just and proper gives it "wide latitude in determining the proper scope of inspection"); *Kasten* v. *Doral Dental USA, LLC*, 301 Wis. 2d 598, 637–38, 733 N.W.2d 300 (2007) ("[O]ne purpose of the language 'upon reasonable request' is to protect the company from member inspection requests that impose undue financial burdens on the company. Whether an inspection request is so burdensome as to be unreasonable requires balancing the statute's bias in favor of member access to records against the costs of the inspection to the company. When applying this balancing test, a

number of factors may be relevant . . . . Decisions of [a trial] court regarding the reasonableness of an inspection request are addressed to its discretion." (Footnotes omitted.)).

An LLC resisting inspection also can produce evidence to demonstrate that the statutory conditions have not been met. The company may, as the defendant unsuccessfully attempted to do in the present case, persuade the court that an improper purpose is the true, primary purpose.[27] Cf. *Alexandria Venture Investments, LLC* v. *Verseau Therapeutics, Inc.*, Docket No. 2020-0593-PAF, 2020 WL 7422068, *5 (Del. Ch. December 18, 2020) ("Once the court has found that the [shareholder's] primary purpose is proper, any secondary or ulterior [purpose] is irrelevant. The court may, however, take into account an ulterior purpose when considering the permitted scope of inspection." (Footnote omitted.)); *Advance Concrete Form, Inc.* v. *Accuform, Inc.*, 158 Wis. 2d 334, 344, 462 N.W.2d 271 (App. 1990) ("[When] a [shareholder] who seeks inspection of corporate books and records has two purposes, one [shareholder related] and the other not, the critical inquiry is whether the [shareholder related] purpose predominates over the ulterior purpose. . . . If the ulterior purpose is the shareholder's primary purpose, the shareholder may not obtain inspection relief under a [proper purpose] statute." (Citation omitted; internal quotation marks omitted.)). If the company believes that requested records are not directly connected to

[27] A Connecticut Superior Court case cited by the defendant proves this very point. See *Strauss* v. *Educational Innovations, Inc.*, Docket No. CV-08-4014480-S, 2008 WL 5220278, *5–6 (Conn. Super. November 14, 2008) (finding that shareholder was not entitled to inspection when "there was no credible proof" supporting his allegations of mismanagement and there was evidence that inspection was sought for improper purposes—shareholder "was engaging in a similar, possibly competing business" and sought inspection to "harass the company and its officers and directors and/or [to] go on a 'fishing expedition' ").

the member's purpose, it can submit those records to the court for an in camera examination. See Model Business Corporation Act, supra, § 16.02, comment (3), pp. 16-9 through 16-10; see also, e.g., *Parsons* v. *Jefferson-Pilot Corp.*, 106 N.C. App. 307, 322–23, 416 S.E.2d 914 (1992), rev'd in part on other grounds, 333 N.C. 420, 426 S.E.2d 685 (1993).

Finally, the CULLCA recognizes that an LLC may, through its operating agreement, impose reasonable restrictions on the availability and use of information provided for under § 34-255i. See General Statutes § 34-243d (c) (8); see also Unif. Limited Liability Company Act § 105 (c) (8), supra, 6C U.L.A. 27–28. As we explain in part II of this opinion, the defendant's operating agreement in the present case expands, rather than restricts, the statutory access to LLC records.

In sum, we conclude that there is neither a textual nor a policy basis that justifies reading a credible proof of mismanagement requirement into § 34-255i. A trial court may, however, consider the absence of facts demonstrating a basis to suspect mismanagement, in combination with other factors, in determining whether an improper purpose is the true reason for the demand and the extent to which disclosure is just and reasonable under the circumstances. Although our reasons differ somewhat from those on which the trial court's decision rested, that court correctly determined that there is no credible proof of mismanagement requirement in § 34-255i.

C

The defendant also claims that the trial court improperly failed to apply the requirement under § 34-255i (b) (2) (C) that "the information sought is directly connected to the member's purpose" for all four categories of information at issue, as well as the requirement that the information sought be stated with "reasonable par-

ticularity" for two categories of information. General Statutes § 34-255i (b) (2) (B). It contends that, because it is challenging the application of an improper legal standard, this claim presents an issue of law subject to plenary review. The plaintiffs contend that the issue is not whether the trial court failed to apply these requirements but, rather, a challenge to the evidentiary support for the trial court's conclusion, which is subject to review for clear error.

We do not agree entirely with either characterization. The defendant raises some legal arguments that implicate the proper construction of these requirements and the trial court's decision. Other arguments effectively challenge whether there is support in the record for these requirements having been met. As to this latter category, although a handful of cases have treated these requirements as giving rise to factual findings subject to review for clear error; see, e.g., *Pagett* v. *Westport Precision, Inc.*, supra, 82 Conn. App. 539; *Towle* v. *Robinson Springs Corp.*, supra, 168 Vt. 228; we conclude that the abuse of discretion standard is more apt. As we explained in part I B of this opinion, the statutory conditions for inspection require the balancing of many factors. Subordinate factual findings would be subject to the clearly erroneous standard, but the ultimate determination involves the exercise of discretion. See, e.g., *Kelley Mfg. Co.* v. *Martin*, supra, 296 Ga. App. 241 (distinguishing review of findings from discretionary determination).

1

The defendant argues that the trial court was required to determine that there was a direct connection between each of the categories of information at issue and one of the specific purposes asserted in the demands—(1) to value the Benjamin 2002 Trust's interest in the defendant, and (2) to investigate the appropriateness of fees

paid to the defendant from other family entities and the fees paid to the defendant's managers—but failed to engage in such an analysis. It contends that the court, at best, could be said to have found that some of the information sought could expose mismanagement of some nature. It also contends that, for each of the contested categories of information, the court either failed to make a determination regarding the direct connection requirement, relied on a connection to a purpose that was not alleged in the demands, or relied on findings or principles that were irrelevant or erroneous. A recurring theme in the defendant's brief is that production of the remaining information is unnecessary in light of the adequacy of the records it has already provided, and, therefore, the remaining information lacks a direct connection to the inspection purposes alleged.

We disagree with several propositions on which the defendant's claim rests. Most of these propositions depend on an artificially strict and unduly literal interpretation of the trial court's decision and the underlying testimony. The defendant overlooks settled law that "[a] judgment is entitled to reasonable presumptions in support of its validity." (Internal quotation marks omitted.) *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 7, 513 A.2d 1218 (1986). "[A] claim of error cannot be predicated on an assumption that the trial court acted [improperly]. . . . Rather, we are entitled to assume, *unless it appears to the contrary*, that the trial court . . . acted properly, including considering the applicable legal principles." (Citations omitted; emphasis added; internal quotation marks omitted.) *Rosenblit* v. *Danaher*, 206 Conn. 125, 134, 537 A.2d 145 (1988). In the present case, the trial court expressly acknowledged that § 34-255i required that the information sought has a direct connection to a proper purpose and cited case law interpreting that requirement. Although it did not make an express finding of

a direct connection for each category of information at issue, we presume, in the absence of evidence to the contrary, that it concluded that this requirement was met.

The defendant also mistakenly assumes that the trial court did not rely on the plaintiffs' valuation purpose and therefore discounts any testimony relating to that purpose to establish the requisite connection. The trial court quoted case law regarding proper inspection purposes and underscored two of the examples given, corresponding to the two purposes explicitly specified in Helen's demands. One of those examples was "to determine the value of [the shareholder's] shares . . . ." (Emphasis omitted; internal quotation marks omitted.) In discussing the general ledger, the trial court recited reasons Weisman gave in his testimony for needing various information, one of which unambiguously related to valuation. Furthermore, because the plaintiffs' theory was that excessive compensation was not just a mismanagement issue but also affected valuation, any evidence relating to the former necessarily supported the latter.

The defendant additionally assumes, incorrectly, that the plaintiffs' sole mismanagement concerns were excessive manager compensation and management fees. Those two matters were identified as being of particular concern in Helen's final demand, but the demand did not limit itself in this respect. Instead, the demand broadly identified one of its two purposes as to "ascertain the condition and affairs of such entities so that the Benjamin 2002 Trust may exercise its rights as a member of the [defendant] in an informed manner." We are therefore inclined to view the purpose cited by the trial court in connection with the records of payments made on behalf of the Benjamin 2002 Trust—"achieving and assuring lawful trust administration"—as consistent with the demand.

We also disagree with the defendant's interpretation of the direct connection requirement insofar as it seems to equate that requirement to a test of strict necessity. The defendant's view is that, if it has provided sufficient records from which the plaintiffs can accomplish their purposes, any remaining records lack a direct connection to those purposes. We recognize that Delaware applies a strict necessity test; see, e.g., *Security First Corp.* v. *U.S. Die Casting & Development Co.*, supra, 687 A.2d 569 ("[t]he plaintiff bears the burden of proving that each category of books and records is essential to the accomplishment of the [shareholder's] articulated purpose for the inspection"); see also, e.g., *Cain* v. *Merck & Co.*, supra, 415 N.J. Super. 334 (following *Security First Corp.*); and that cases from some other jurisdictions have cited the necessity of the record when considering whether the right to inspection was established. See, e.g., *Computer Solutions, Inc.* v. *Gnaizda*, 633 So. 2d 1100, 1102 (Fla. App. 1994); *Cardiovascular Specialists, P.S.C.* v. *Xenopoulos*, 328 S.W.3d 215, 219 (Ky. App. 2010).

We find no support for a strict necessity test, however, in the plain meaning of "direct connection,"[28] which is more suggestive of relevance than indispensable need. See, e.g., *Bacompt Systems, Inc.* v. *Peck*, 879 N.E.2d 1, 6 (Ind. App. 2008) (The court rejected argument that the report sought was "not directly related to a proper purpose because, given the 'plethora' of documents provided, the . . . report is not necessary and essential. . . . [T]he provisions of Indiana Code [§] 23-1-52-2 do not articulate such a 'necessary and essential' standard for determining whether a requested document is directly connected with a share-

[28] See Random House Unabridged Dictionary (2d Ed. 1993) pp. 432, 559 (defining "connection" as "association" or "relationship" and "direct" as "proceeding in a straight line" or "without intervening persons, influences, factors"); see also Webster's Third New International Dictionary (2002) p. 481 (defining "connection" as "relationship or association in thought (as of cause and effect, logical sequence, mutual dependence or involvement)").

holder's purpose. In any event, the relationship of the . . . report to the [shareholder's] purpose is a factual matter for the trial court upon remand to determine. But the mere fact that a 'plethora' of documents has already been provided does not preclude a factual finding that the . . . report is nevertheless directly connected to a proper purpose."); see also, e.g., *Dewey* v. *Bechthold*, 387 F. Supp. 3d 919, 928 (E.D. Wis. 2019) ("A record is 'directly connected' to the purpose of determining the book value of a share if the record *assists* in valuing the company. That is, a record is 'directly connected' to the determination of book value if an analyst would need the record in order to conduct a valuation." (Emphasis added.)); *Pagett* v. *Westport Precision, Inc.*, supra, 82 Conn. App. 539 (upholding trial court's direct connection conclusion because of "a correlation" between stated purpose and documents requested).

Cumulative sources may be important to confirm the correctness of information in hand or may expose inconsistencies. If information is duplicative and the effort needed to produce it imposes an undue burden on the company, that concern is better left to the court's discretion under the consideration of whether allowing inspection is "just and reasonable . . . ." General Statutes § 34-255i (b) (2).

Finally, the defendant suggests that it is insufficient for the plaintiffs' witnesses to make assumptions about what they expect the records to reveal and that the trial court is required to credit testimony to the contrary by defense witnesses.[29] We disagree with both proposi-

[29] In its brief to this court, the defendant cites testimony from Weisman as to information about a specific Ziegler business enterprise that he claimed would be relevant and testimony from Romanow indicating that the defendant had no involvement with that enterprise. Because the defendant makes a broad legal argument that the proper legal standard was not applied to any of the categories of information sought and makes no claim that specific information sought should not have been ordered to be disclosed, we express no opinion on the propriety of ordering inspection as to any particular piece of information.

tions. The trial court is not required to credit a witness' testimony. See, e.g., *Osborn* v. *Waterbury*, 333 Conn. 816, 824 n.5, 220 A.3d 1 (2019). Moreover, a comment to the Model Business Corporation Act suggests that, "[i]f disputed by the corporation, the 'connection' of the records to the shareholder's purpose may be determined by a court's in camera examination of the records." Model Business Corporation Act, supra, § 16.02, comment (3), pp. 16-9 through 16-10; see, e.g., *Parsons* v. *Jefferson-Pilot Corp.*, supra, 106 N.C. App. 322–23 (remanding case to trial court to reconsider direct connection issue because trial court improperly had relied on purpose stated in shareholder's pleadings/motions rather than in demand and ordering trial court "to conduct an in camera examination of the desired records to determine which records, if any, are directly connected with the plaintiff's purpose"). The contested documents were not submitted for such examination in the present case.

Having reviewed the record, we are not persuaded that the trial court abused its discretion in concluding that there was a direct connection between the four categories of information sought and the proper purposes of inspection.

2

The defendant also contends that two types of information sought at trial—the general ledger and employee compensation—were not requested with "reasonable particularity"; General Statutes § 34-255i (b) (2) (B); because neither was requested in any of Helen's demands.

We agree with the trial court that several of the twenty-seven categories cited in the fourth demand referenced information of the type that would be in a general ledger and that this reference was sufficiently particular to apprise the defendant about the informa-

tion needed. See, e.g., *Sunlitz Holding Co., W.L.L.* v. *Trading Block Holdings, Inc.*, 17 N.E.3d 715, 722 (Ill. App.) ("[T]he particularity requirement . . . is a relative one, turning on the degree of knowledge that a movant in a particular case has about the documents he requests. . . . [T]he shareholder's request must be sufficient to apprise a [person] of ordinary intelligence what documents are required, depending on the facts and circumstances of each case." (Citations omitted; internal quotation marks omitted.)), appeal denied, 21 N.E.3d 719 (Ill. 2014).

The plaintiffs effectively conceded at oral argument before this court, however, that employee compensation was not requested in any written demand with reasonable particularity. They acknowledged that their interest in this information arose after the complaint was filed, when Romanow's deposition revealed that one of Cynthia's children was employed by the defendant, and, therefore, their entitlement to this information is contractual only. We turn, therefore, to the judgment rendered on count two, the violation of the operating agreement, to determine whether the plaintiffs were entitled to employee compensation information.[30]

II

Section 5.7 of the defendant's operating agreement provides in relevant part: "Upon request, each [m]ember . . . shall have the right, during ordinary business hours, to inspect and copy any and all of the books

[30] Because count two must be reached under any circumstances, a legitimate question arises as to why our analysis does not begin and end there. We note that the trial court's decision in the present case expressly retained jurisdiction over the case "to resolve any dispute which may arise concerning the accessibility to particular documents not included within the [four] broad categories noted [in its decision]." The interests of judicial economy impel us to rule on the contours of the statutory right to inspection under these circumstances.

and records of the [c]ompany at the expense of the [m]ember . . . making such request." The trial court observed that this provision unambiguously provides a more expansive right of inspection than is afforded by statute and permits such inspection upon an informal request rather than a written demand. The defendant does not contend otherwise; nor does it contend that any particular information sought for inspection falls outside of this provision.

The defendant instead claims that, as litigated in the present case, the count alleging a violation of the operating agreement is purely derivative of the count alleging a statutory violation and, therefore, cannot provide an independent basis to support the judgment in favor of the plaintiffs. It points to the fact that each of the written demands expressly and exclusively invoked § 34-255i (or its predecessor) as authority for the demand and emphasizes allegations in the complaint citing those written demands as the basis for the action. It also points to the fact that the operating agreement has a mandatory arbitration provision. The defendant contends that, under these circumstances, it had no notice or reason to suspect that Helen or the plaintiffs were making a demand under the operating agreement and would have invoked the arbitration provision if an independent claim under the operating agreement had been asserted. We disagree.

The defendant conflates the issues of whether there was a demand under the agreement and whether it had fair notice that the plaintiffs were advancing a claim under the agreement. The operating agreement requires nothing more than an inspection "request"; it does not require that the request expressly invoke the operating agreement. The defendant points to no text in the agreement that suggests otherwise.

We agree that, because all of the demands expressly and exclusively invoked § 34-255i or its predecessor,

the defendant may have lacked fair notice that Helen or the plaintiffs were invoking a contractual right to inspect its records prior to the filing of the complaint.[31] The complaint, however, provided the requisite notice. See, e.g., *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012) ("The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.)). To read the complaint otherwise would ignore the fact that it is stated in two counts and specifically alleges that Helen, in her capacity as trustee, was seeking an order to compel the defendant to comply with § 34-255i "and [the defendant's] obligations under the operating agreement . . . ." Moreover, if the inspection right and the remedy sought in count two are wholly derivative of the right and remedy sought in count one, as the defendant contends, count two would serve no purpose.

Because the complaint provided fair notice that an independent violation of the operating agreement was alleged, the defendant was afforded an opportunity to press its right to arbitrate any dispute arising under the

[31] The plaintiffs' concession to this court that their interest in employee compensation information arose after the demands were made; see part I C 2 of this opinion; does not similarly compel the conclusion that Helen failed to make a "request" for that information that would satisfy the less formal requirements of the operating agreement. The plaintiffs' written demands included an ambiguous request for information regarding management arrangements, management fees, and "other such arrangements or fees . . . ." The plaintiffs specifically alleged in their complaint that the defendant had failed to produce records "showing compensation and benefits paid to or provided for each . . . officer *and employee* annually . . . ." (Emphasis added.) Because the operating agreement does not require the formalities of a demand that the statute does, we presume that there was a "request" made in accordance with the operating agreement. The defendant makes no argument that there was no request that met the requirements of the operating agreement, only that the count alleging a violation of the operating agreement is wholly derivative of the count alleging the statutory violation, which imposes more formal requirements.

agreement. The trial court's decision thoroughly and appropriately explained why the defendant was required to plead arbitration as a special defense; see Practice Book § 10-50; and why its failure to do so constituted a waiver of that right. As the trial court further observed, the defendant also failed to make a formal demand for arbitration in any other form. See General Statutes § 52-409 (motion to compel arbitration and to stay judicial proceedings).

The defendant alternatively suggests that the trial court improperly construed § 5.7 of the operating agreement to allow "carte blanche access" to all of the defendant's records for any purpose because a requirement is implied in such provisions that the members seeking information must have a proper purpose that is not adverse to the company. The case cited by the defendant does not stand for this proposition. Rather, under the so-called "implied improper purpose" rule, when a proper purpose is not expressly required, the entity can avoid inspection if it proves that disclosure would, in fact, be adverse to the entity. See, e.g., *Arbor Place, L.P.* v. *Encore Opportunity Fund, LLC*, Docket No. CIV. A. 18928, 2002 WL 205681, *4 n.9 (Del. Ch. January 29, 2002); *Bond Purchase, LLC* v. *Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 859 (Del. Ch. 1999). The trial court rejected the defendant's various improper purposes defenses, and, although the defendant criticizes these conclusions and the supporting factual findings in footnotes in its appellate brief, it has not directly challenged those rulings on appeal.

Count two of the complaint, alleging a violation of § 5.7 of the operating agreement, therefore, supports the trial court's decision ordering the defendant to permit inspection of its employee compensation information.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* NOEL BERMUDEZ (SC 20461)

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

Syllabus

Convicted, after a jury trial, of the crime of felony murder, the defendant appealed. The defendant and his brothers, S and B, had robbed the victim as he returned home at night after closing the bar he owned, during or after which the victim was shot and killed. Twelve years after the incident, A, the estranged wife of S, provided a written statement to the police that implicated the defendant and his brothers in the victim's death. A, who knew that the defendant and his brothers were affiliated with gangs, delayed providing information to the police, purportedly out of fear that the defendant and his brothers would retaliate against her or her family. S had regularly abused A throughout their marriage and, following the victim's murder, had threatened to kill her, their children, and A's mother. While the defendant was incarcerated on unrelated charges during the twelve years after the shooting, he instructed A to write salacious letters to him so that he could discredit her if she were to testify against him. At trial, A's testimony was crucial to the state's case, and, therefore, the reason for her twelve year delay in coming forward and the credibility of her statement inculpating the defendant and his brothers were central issues. In affirming the defendant's conviction, the Appellate Court rejected the defendant's claim that the trial court had improperly admitted evidence that he and his brothers were affiliated with gangs and that A and her children had been relocated by the state following her statement to the police. The Appellate Court also rejected the defendant's claim that his constitutional rights to present a defense and to confront the witnesses against him was violated insofar as the trial court declined to admit into evidence the letters that A had sent to the defendant and precluded defense counsel from questioning A about the circumstances surrounding the termination of her employment from a hospital and her birth control practices. On the granting of certification, the defendant appealed to this court, renewing the evidentiary claims that he raised in the Appellate Court. *Held*:

1. The Appellate Court correctly concluded that the trial court had not abused its discretion in admitting, through A's testimony, evidence of the gang affiliations of the defendant and his brothers: that evidence was probative of the reason why A feared the defendant and his brothers and why she waited twelve years before providing her statement to the police, and that evidence was not merely cumulative of other evidence, as it was the only evidence that explained why A feared not only S, but

the defendant and B as well, why she feared retaliation from individuals acting on their behalf, and why she believed that there was no place she could go where she would be safely out of their reach, even while they were incarcerated for unrelated charges or convictions; moreover, the trial court minimized the prejudicial impact of the evidence by twice instructing the jury that it could consider it solely in evaluating A's credibility as to why she waited twelve years before coming forward and by barring any other witness from testifying that the defendant and his brothers were affiliated with gangs; furthermore, A's testimony on this issue was relatively brief, and the prosecutor made only a brief reference to it in his closing argument.

2. The Appellate Court correctly concluded that the trial court had not abused its discretion in admitting, through A's testimony on direct examination, evidence of the state's relocation of A and her children following her statement to the police; that evidence was highly relevant to A's claimed fear of the defendant and his brothers and to demonstrate that her fear remained even after they were incarcerated, which was a central focus of defense counsel's efforts to impeach A's credibility, as the jury reasonably could have concluded that A's willingness to subject herself to the upheaval and disruption of moving herself and her children multiple times was credible evidence of her belief that she and her family were not safe and that A's relocation explained her willingness to testify against the defendant and his brothers, despite her long-standing fear of retaliation; moreover, the state did not exploit the relocation evidence, as A's testimony on the issue was relatively brief, the questions posed to her and her responses thereto did not directly implicate the state in a way that might suggest that the prosecutor was vouching for her credibility, and the prosecutor made only a brief reference to it during closing argument; furthermore, the evidence was not presented in such a way as to suggest that A was in the state's witness protection program because of direct threats by the defendant.

3. The trial court did not abuse its discretion in determining that the prejudicial effect of the salacious letters that A had written to the defendant outweighed their probative value, and, therefore, the defendant could not establish that his constitutional rights to present a defense and to confront the witnesses against him were violated by that court's decision to preclude the letters from being admitted: the sexually graphic language used in the letters and, more generally, the letters themselves, lacked probative value, and, although the trial court treated the letters as independently probative of whether A was fearful of the defendant, the admission of the letters was not necessary to prove that A was not fearful of the defendant, as she essentially admitted that she had a good relationship with him and had no reason to fear him, as long as she did not inculpate him in the crime; moreover, to the extent that the defendant claimed that the trial court's exclusion of the letters deprived him of

the opportunity to effectively impeach A's credibility, he failed to demonstrate how the specific contents of the letters bore on that issue.

4. The Appellate Court correctly concluded that the defendant's claim that his constitutional rights were violated insofar as the trial court precluded defense counsel from questioning A about the circumstances surrounding the termination of her employment from a hospital and her birth control practices was not constitutional in nature and that the trial court did not abuse its discretion in precluding these two lines of inquiry: the trial court correctly concluded that the circumstances surrounding the termination of A's employment were simply too remote and would have injected a collateral issue into the trial and that further inquiry into A's birth control practices, after defense counsel questioned her about why she continued to have children with S after the victim's murder, would have inappropriately focused on a matter far too attenuated from the material issues in the case; moreover, even if this court concluded that the trial court should have permitted some inquiry into these two matters, such error was harmless because the defendant had ample opportunity at trial to impeach A with respect to her purported fear of S and those lines of inquiry were merely cumulative of other evidence calling into question the genuineness of that fear.

Argued February 18—officially released November 3, 2021*

Procedural History

Substitute information charging the defendant with the crimes of murder and felony murder, brought to the Superior Court in the judicial district of Waterbury, where the court, *K. Murphy*, *J.*, granted the state's motion to preclude certain evidence and granted in part the defendant's motion to preclude certain evidence; thereafter, the case was tried to the jury before *K. Murphy*, *J.*; verdict of guilty of felony murder; subsequently, the court, *K. Murphy*, *J.*, declared a mistrial as to the charge of murder, dismissed the charge of murder, and rendered judgment of guilty of felony murder, from which the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Elgo*, *Moll* and *Devlin*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

* November 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Don E. Therkildsen, Jr.*, and *Cynthia S. Serafini*, senior assistant state's attorneys, for the appellee (state).

Opinion

KELLER, J. The defendant, Noel Bermudez, appeals, following our grant of certification, from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c. On appeal, the defendant claims that the Appellate Court should have reversed the judgment of conviction and ordered a new trial in light of the trial court's rulings (1) admitting testimony regarding the gang affiliations of the defendant and his two brothers and the state's relocation of its chief witness, Damaris Algarin-Santiago (Algarin),[1] after she provided a statement to the police incriminating the defendant and the brothers in the murder, (2) excluding from evidence salacious letters written by Algarin to the defendant while he was imprisoned, and (3) preventing the defendant from questioning Algarin about the circumstances surrounding the termination of her employment from Waterbury Hospital and her birth control practices. The defendant contends that the trial court's rulings excluding Algarin's letters and precluding his inquiry into her termination and birth control practices violated his rights to confrontation and to present a defense under the sixth and fourteenth amendments to the United States constitution, and that all of the rulings constituted harmful error requiring

[1] For purposes of clarity, we refer in this opinion to Algarin-Santiago as Algarin to distinguish her from her estranged husband, Victor Santiago.

a new trial. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts, which the jury reasonably could have found, and procedural history. "In the early hours of April 11, 1998, Wilfred Morales, the owner of Morales Café, was closing his bar for the night. As part of his routine, Morales counted the cash and checks he received from the patrons and placed the proceeds in a blue bank bag. At approximately 2:30 a.m. that morning, Morales was shot and killed on a street near his home in Waterbury.

"Twelve years later, [Algarin], the estranged wife of the defendant's brother, Victor Santiago, provided a written statement to the police. In that statement, Algarin implicated the defendant, Santiago, and another brother of the defendant, Thomas Bonilla, in Morales' death. The defendant ultimately was charged with the murder of Morales.

"Algarin was the state's chief witness in its prosecution of the defendant. Algarin testified that she had been in a relationship with Santiago since [graduating from the eighth grade in] 1993 and that they eventually married in 2004.[2] Throughout their time together, Santiago abused Algarin on a regular basis, both physically and emotionally. The couple had two children at the time of Morales' murder [and had two more children together thereafter].

"In her testimony at trial, Algarin [offered the following account of] the events of April 11, 1998. At approximately 3 a.m., Algarin was awakened by Santiago, who was screaming at her to come downstairs. Upon doing

[2] "Algarin testified that the two married so that she would not be able to testify against Santiago." *State* v. *Bermudez*, 195 Conn. App. 780, 784 n.3, 228 A.3d 96 (2020).

so, Algarin saw a coffee table full of money, checks,[3] and a blue leather bag with a zipper. She also saw Bonilla counting the checks and cash as the defendant dismantled a pistol in the kitchen and Santiago cleaned the pistol parts with baby oil to remove fingerprints. When Algarin asked what had happened, Santiago immediately started to beat her. The three brothers continued to argue about what had transpired and were upset about the number of checks relative to the amount of cash. Algarin again asked what had happened, and the defendant responded that they had shot Morales." (Footnote omitted; footnotes in original.) *State* v. *Bermudez*, 195 Conn. App. 780, 784–85, 228 A.3d 96 (2020).

Algarin learned the following details about the crime from the defendant and his brothers. "[T]he defendant and his . . . brothers were in need of money and thus sought to rob Morales that night, believing that the Good Friday holiday would result in a large amount of cash. To become familiar with Morales' routine . . . Santiago stalked Morales for some time. . . . Santiago planned to act as the driver [and to have] Bonilla and the defendant . . . commit the robbery. When Bonilla and the defendant confronted Morales on the night in question, the defendant shot him to death. The defendant gave Algarin two explanations for doing so: (1) he believed [that] Morales was reaching for a gun, and (2) he wanted revenge due to his belief that Morales had shot Santiago some years earlier."[4] Id., 785.

[3] "Algarin testified that she recognized some of these checks as Social Security checks." *State* v. *Bermudez*, 195 Conn. App. 780, 784 n.4, 228 A.3d 96 (2020).

[4] There was evidence that, as a consequence of this incident, the state brought criminal charges against Morales, and Santiago later initiated a civil action against him. "Santiago was frustrated that Morales had been acquitted of shooting him and was further enraged that his civil action against [him] was unlikely to result in a large monetary [award]." *State* v. *Bermudez*, supra, 195 Conn. App. 785 n.5.

Algarin then observed the defendant and his brothers undertake the following activities to dispose of evidence of the crime. "Upon arriving at Algarin's home after the shooting, the defendant and his brothers burned the checks in the kitchen sink,[5] cleaned the weapons of fingerprints, and placed the dismantled pistol parts into three separate bags. . . . [They also] burned their clothing in a barrel behind the house and cleaned the car to remove gun residue. . . . When [Algarin] refused [Santiago's demand] to go with him to dispose of the bags filled with the gun parts, Santiago . . . beat Algarin until the defendant intervened. Reluctantly, [Algarin] agreed [to] accompan[y] Santiago to dispose of the bags. When the [last] bag was thrown into the Naugatuck River, Santiago . . . threatened to kill Algarin, her mother, and their children, stating . . . '[n]ow you know what we're capable of.' " (Footnote in original.) Id., 785–86.

"Later that day, Santiago and Bonilla accompanied Algarin to deposit the [stolen] cash into her bank account via an automated teller machine (ATM). Algarin . . . deposited three separate envelopes of cash, which she believed to have totaled $3000. . . . [T]he following Monday, Santiago and Bonilla went with Algarin to make a withdrawal, at which time Algarin gave the cash to Santiago. [At some point during the aftermath of the murder, the defendant and his brothers concocted an alibi that they and Algarin had been celebrating Bonilla's return from prison by eating fish for Good Friday at their mother's home.]

"[Between] 1998 [and] 2010, Algarin was questioned by the police on approximately seven occasions. Each time, she stuck to the manufactured alibi out of fear

[5] "The [defendant and his] brothers decided to burn the checks after Algarin refused to deposit them in her account." *State* v. *Bermudez*, supra, 195 Conn. App. 785 n.6.

for her safety and the safety of her family. Knowing that the defendant, Santiago, and Bonilla were affiliated with nationwide gangs,[6] Algarin was particularly afraid of reprisals should she provide the police with any information. During this period, however, she did divulge some information to three people. Approximately one year after Morales' murder, Algarin revealed to Ralph C. Crozier, an attorney whom she knew, that the defendant and his two brothers had been involved in the homicide.[7] She also provided details of the homicide to Sally Roden-Timko, a coworker at Waterbury Hospital, who . . . confirm[ed] the [conversation] in a statement given to the police in 2010.[8] Algarin later discussed details about the homicide with Luis Maldonado, a person she began dating in 2009 while Santiago was incarcerated for an unrelated matter.

"Despite being incarcerated throughout much of the twelve year interval [between the murder and Algarin's statement to the police], Santiago continued to threaten Algarin. After a newspaper article was published on the [reopening of the] investigation into Morales' murder, the defendant, who was also incarcerated on an unre-

[6] "Algarin testified that the defendant and Santiago were members of the Latin Kings, while Bonilla was a member of 'Netas.' " *State* v. *Bermudez*, supra, 195 Conn. App. 786 n.7.

[7] "Crozier had represented Algarin, the defendant, Santiago, and various family members [in] numerous matters prior to the 1998 murder of Morales. In fact, Crozier represented Santiago in his civil action against Morales. Crozier also testified that Algarin attempted to get away from Santiago on multiple occasions and that she stayed with Santiago because she feared him. He also stated that, had Algarin gone to the police with information about the murder, 'she would have definitely been murdered, based on who the people were.' " *State* v. *Bermudez*, supra, 195 Conn. App. 786 n.8.

[8] At trial, Roden-Timko repudiated the statement she had given to the police. The jury was permitted to credit her prior statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), in which we adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination.

lated criminal matter . . . instructed Algarin to write [him] three letters that were intimate and particularly salacious in nature. The defendant had requested the letters for the [stated] purpose of discrediting Algarin in the event that she were ever to testify against him.[9]

"In 2010, Maldonado was arrested in connection with an unrelated crime. Following his arrest, Maldonado provided the police with details about Morales' murder and further indicated that Algarin could provide more information. Algarin subsequently was visited by a detective from the Waterbury Police Department and taken to the police department [for questioning]. Fearing that Maldonado had disclosed information and concerned that he would be murdered by Santiago if he were incarcerated, Algarin abandoned the [brothers'] alibi [that she had maintained for twelve years] and provided a seven page statement to the police detailing the events of Morales' murder.

"On February 16, 2017, the defendant was charged by substitute information with one count of murder in violation of General Statutes § 53a-54a and one count of felony murder in violation of § 53a-54c." (Footnote added; footnotes in original.) Id., 786–87.

At trial, Algarin's testimony was the linchpin of the state's case, although the state also produced other corroborative evidence. The reason for Algarin's recantation of her prior statements supporting the brothers' alibi after many years and, in turn, the credibility of her detailed account inculpating them were thus the central issues in the case. The state presented evidence to support the theory that Algarin had been fearful of retribution against her, her family, and, later, Maldo-

[9] "Algarin also wrote a series of letters to Santiago during his incarceration for an unrelated matter. These letters did not contain the sexually graphic content found in the letters she wrote to the defendant." *State* v. *Bermudez*, supra, 195 Conn. App. 787 n.9.

nado because of Santiago's past physical abuse and threats, and the three brothers' gang affiliations. Algarin also testified that she had been relocated after she gave her statement to the police.

The defendant attempted to cast doubt on the state's theory through evidence demonstrating that Algarin's belated inculpation of the defendant and his brothers was not a product of fear but a desire for revenge. The defendant proffered evidence demonstrating that Algarin and Santiago had, and were perceived by others to have, a loving relationship.[10] He also elicited admissions from Algarin that she had written three salacious letters to the defendant while he was in prison, although she claimed that the defendant had directed her to write them, after the police reopened their investigation into the victim's murder, to use as an insurance policy against her disclosing her knowledge about the crime. The defendant argued that Algarin changed stories for revenge against Santiago after he ended their relationship as a consequence of the defendant's disclosing the letters to him.[11]

[10] The defendant adduced evidence that, in the years following the victim's murder, Algarin had written Santiago love letters and sent him money whenever he was imprisoned. Attorney Norman A. Pattis and a bail bondsman, Ismael Santiago, testified that, in their professional experiences working with Santiago and Algarin on unrelated matters, the couple appeared to have a normal, loving, and nonabusive relationship. Defense counsel also argued that, when Algarin had dated another man during one of Santiago's stints in prison in the early 2000s, Santiago did not threaten to kill Algarin or her boyfriend.

[11] Defense counsel argued: "[Algarin] spent [sixteen] years of her life with [Santiago]. She was committed to him despite his problems. Why would she leave him? . . . We submit that [Santiago] found out . . . about the sexually explicit letters . . . and he broke up with her after he found out that she was writing these sexually explicit letters to [the defendant], and . . . what happened then? He broke up with her, and she was alone in her life after [sixteen] years with [Santiago], and she weaved this tale with the help of [the police] . . . for revenge on [Santiago] for ending the relationship, and she got a $50,000 bonus to start a new life, and she also was able to [exact] her revenge on [the defendant] for sending the letters [to Santiago] . . . ."

During its rebuttal closing argument, the state countered the defendant's claim that Algarin, in 2010, had implicated the defendant in the victim's murder out of spite, pointing to evidence that Algarin had told Crozier about the murder shortly after it occurred in 1998 and that she had told a friend about it a few years after that.

The jury found the defendant guilty of felony murder but deadlocked on the charge of murder. *State* v. *Bermudez*, supra, 195 Conn. App. 787–88. The trial court declared a mistrial on that charge[12] and, thereafter, sentenced the defendant to a total effective term of sixty years of incarceration. Id. 788.

The defendant appealed from his conviction to the Appellate Court, claiming, among other things, that certain of the trial court's evidentiary rulings constituted harmful error that deprived him of a fair trial. See id., 783, 788. Specifically, the defendant contended that the trial court improperly admitted unduly prejudicial evidence of his and his brothers' gang affiliations and of Algarin's relocation by the state following her statement to the police. See id., 788. The defendant further claimed that the trial court violated his constitutional rights to present a defense and to confront witnesses against him by refusing to admit into evidence the three sexually explicit letters Algarin had sent to him in prison and by precluding him from questioning Algarin about two matters that he claimed undermined her purported fear of Santiago—the circumstances surrounding the termination of her employment from Waterbury Hospital and her birth control practices during the period of her marriage following the victim's murder. See id., 783, 805–806. In a thorough and comprehensive decision, the Appellate Court rejected in turn each of these claims, concluding that none of the claimed errors was constitu-

[12] The trial court ultimately dismissed the murder charge. See *State* v. *Bermudez*, supra, 195 Conn. App. 788 n.10.

tional in nature and that most of the rulings were not an abuse of the trial court's discretion. See id., 788–820. Two of the trial court's rulings, however, presented a closer question. The Appellate Court concluded that the probative value of evidence of Algarin's relocation by the state outweighed any undue prejudice but that, even if the evidence was improperly admitted, its admission was harmless error. Id., 802–804 and n.19. The Appellate Court also concluded that exclusion of the sexually explicit letters was improper but that it was harmless evidentiary error given the extensive testimony about them. Id., 813–17.

The Appellate Court therefore affirmed the judgment of conviction; Id., 827; and this certified appeal followed. On appeal, the defendant renews his evidentiary claims raised in the Appellate Court.[13] For the reasons set forth hereinafter, we conclude that the Appellate Court properly affirmed the judgment of conviction.

I

We begin with the defendant's claims that he concedes are not constitutional in nature. The defendant contends that the Appellate Court incorrectly determined that the trial court had properly admitted evidence of (1) his and his brothers' gang affiliations, and (2) Algarin's relocation by the state following her state-

[13] This court granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's admission of evidence that the defendant was a gang member and that the state's chief witness was relocated out of state after providing her statement to the police inculpating the defendant?" (2) "Did the Appellate Court correctly conclude that the trial court's erroneous preclusion of sexually explicit letters the state's chief witness wrote to the defendant was harmless and that the trial court's limitation on the defendant's cross-examination of her was proper?" And (3) "[d]id the Appellate Court properly uphold the trial court's rulings limiting the defendant's cross-examination of the state's chief witness on topics regarding her credibility?" *State* v. *Bermudez*, 335 Conn. 908, 227 A.3d 521 (2020).

ment to the police inculpating the defendant and his brothers in the victim's murder.

"Our standard of review for evidentiary claims is well settled. To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 10–11, 1 A.3d 76 (2010). Because the defendant challenges the application and not the interpretation of our rules of evidence, the trial court's rulings as to this evidence are reviewed for an abuse of discretion. "The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . ." (Citation omitted; internal quotation marks omitted.) Id., 11.

A

We turn first to the defendant's claim that the trial court abused its discretion in admitting evidence of his and his brothers' gang affiliations because its prejudicial effect outweighed any probative value. Although the defendant does not dispute that this evidence was relevant to Algarin's claimed fear of him and his brothers, he argues that it was of limited probative value because it was merely cumulative of other evidence of her state of mind. He further argues that, contrary to the Appellate Court's conclusion, the trial court's limiting instruction did not dissipate the highly prejudicial impact of this evidence. We agree with the Appellate Court's resolution of this issue.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "Prior

to his trial, the defendant filed a motion in limine in response to the state's notice of its intent to introduce evidence of the [defendant's and his brothers'] gang affiliations. Specifically, the state sought to introduce testimony from Algarin that the defendant and Santiago were members of the Latin Kings gang. The purpose of this testimony, the state argued, was to illustrate the extent to which Algarin feared retaliation from Santiago, the defendant, or other gang members. According to the state, Algarin's fear of the defendant and his brothers bore directly on her reason for waiting twelve years to provide the police with inculpating evidence.

"After balancing the probative value of the evidence against the danger of unfair prejudice, the [trial] court allowed the testimony for the limited purpose proposed by the state. As the court explained, 'to the extent that the state is going to introduce evidence that . . . [Algarin] was afraid to disclose [what she knew about the crime] because . . . the defendant and/or . . . Santiago was a member of the Latin Kings street gang; that they are a group of people that have access to people in many places; and that they have access to weapons, I would allow it just for that purpose. I would not allow the introduction of that evidence to go to whether [the defendant] did this crime, and so I would [provide] a limiting instruction regarding the introduction of [the] evidence if [it] comes in as an explanation for her delay in disclosing this [crime].' " *State* v. *Bermudez*, supra, 195 Conn. App. 789.

The following exchange then ensued during the state's direct examination of Algarin:

"[The Prosecutor]: I think where we left off, you indicated that you were afraid, and that's why you decided to tell the police in 2010. What exactly were you afraid of?

"[Algarin]: I was afraid of their gang affiliations.

"[The Prosecutor]: And when you say gang affiliations, who are you talking about?

"[Algarin]: I'm talking about all three of them.

"[The Prosecutor]: Okay. And when . . . you say gang affiliation, what exactly do you mean?

"[Algarin]: They're all in gangs. They're Latin Kings and Netas.

"[The Prosecutor]: Okay. Who was [a] Latin King?

"[Algarin]: [The defendant] and [Santiago].

"[The Prosecutor]: And . . . [Bonilla] was in Netas?

"[Algarin]: Yes.

"[The Prosecutor]: And why was that concerning to you?

"[Algarin]: Because of their past actions.

"[The Prosecutor]: Things that you had actually witnessed?

"[Algarin]: And heard, yes.

"[The Prosecutor]: And when you say heard, heard them talking about things that they had done?

"[Algarin]: Yes.

"[The Prosecutor]: And so, at that point in time, were you afraid just for yourself or for anyone else?

"[Algarin]: I was afraid for myself, my family, [Maldonado], my children, my mom, my brother. Everyone."

Later in the direct examination, the topic was referenced again in the following brief exchange:

"[The Prosecutor]: And, as you sit here today, are you still in fear of retaliation?

"[Algarin]: Absolutely.

"[The Prosecutor]: By whom?

"[Algarin]: By all three of them and their gang affiliations.

"[The Prosecutor]: And you talked before about the Latin Kings, that [the] defendant and [Santiago] were members of the Latin Kings. Is that a group that's just found in Waterbury or is that found in other places as well? . . .

"[Algarin]: They're nationwide."

Immediately after this testimony, the court provided a limiting instruction and cautioned the jury that any evidence of gang affiliations was admitted only to show why Algarin delayed in coming forward or why she disclosed at a certain time. The court also provided a similar instruction in its final charge to the jury.[14]

Near the end of his closing argument, the prosecutor connected Algarin's twelve year delay in coming forward to the defendant's and his brothers' gang affiliations: "The delay in disclosure. Why did it take [twelve] years? We've talked about that. She was with . . . Santiago since her eighth grade graduation. She had a . . . child with him a year later, four children all together. She testified the abuse started early and . . . progressively got worse. He beat [her], financially abused [her], psychologically abused [her], pistol whipped [her], and broke [her] nose [when she burned French fries]. . . .

[14] During its final charge to the jury, the trial court reiterated this limitation in a lengthy instruction, emphasizing that this evidence could not be considered "as establishing a predisposition on the part of the defendant [and his brothers] to commit any of the crimes charged or to demonstrate a criminal propensity," and that it could be considered only to the extent that "it may bear on the issue of fear of [them] on the part of [Algarin], and some of her reasons for not immediately reporting her observations of April 11, 1998, and to explain the timing of her disclosure in 2010." The court further explained to the jury that it was not obligated to credit the evidence for this purpose.

Do you think it's reasonable to believe that, if someone broke your nose over burnt French fries and . . . told you they were going to kill you if you [talked to the police] . . . that you'd believe [them]? Tried to leave multiple times. She had him . . . arrested. When he got out of jail . . . [he] beat her with a phone. . . .

"The night of the [murder] . . . [Santiago] beats her. Told her he was going to kill her mother and her kids. She knew he was a Latin King, a gang member . . . from things . . . he and . . . the defendant . . . had told her and she had seen. . . . Would you be afraid of that man? Would you be afraid of those other individuals? . . . She testified she believes the Latin Kings are a nationwide gang, and she is still afraid of them."

The following legal principles guide our analysis of the defendant's claim that admission of this evidence was harmful error. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities [or be conclusive] . . . ." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429, 64 A.3d 91 (2013). "All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) Id. Nonetheless, "relevant . . . evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defen-

dant but whether it will improperly arouse the emotions of the [jurors]. . . . Reversal is required only whe[n] an abuse of discretion is manifest or whe[n] injustice appears to have been done." (Internal quotation marks omitted.) Id., 429–30.

We agree with the Appellate Court's thorough and persuasive analysis and conclusion that the trial court's admission of the gang affiliation evidence was not an abuse of discretion. See *State* v. *Bermudez*, supra, 195 Conn. App. 792–95. To be sure, courts must exercise caution whenever the state seeks to admit evidence of a defendant's affiliation with a gang. See, e.g., *United States* v. *Irvin*, 87 F.3d 860, 865 (7th Cir.) ("Gangs . . . often invoke images of criminal activity and deviant behavior. There is therefore always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury's negative feelings toward gangs will influence its verdict."), cert. denied, 519 U.S. 903, 117 S. Ct. 259, 136 L. Ed. 2d 184 (1996); *Commonwealth* v. *Akara*, 465 Mass. 245, 267, 988 N.E.2d 430 (2013) ("urg[ing] caution in admitting [gang related] evidence . . . because evidence of a defendant's gang membership risks prejudice to the defendant in that it may suggest a propensity to criminality or violence" (internal quotation marks omitted)). This includes carefully evaluating the proffered purpose of the evidence to ensure its probative value is significant enough to overcome the potential for unfair prejudice. See, e.g., *State* v. *Pham*, 27 Kan. App. 2d 996, 1002, 10 P.3d 780 (2000) ("[a]lthough proof of a criminal defendant's membership in a street gang can always be described as prejudicial, it becomes grossly and unfairly so when it is not balanced by probative value of some significant magnitude"). Under no circumstance should the evidence be admitted to demonstrate the defendant's criminal propensity or bad character. See, e.g., *United States* v. *Street*, 548 F.3d

618, 632 (8th Cir. 2008) (citing cases in which gang membership evidence was admitted and noting that in none of them "was [it] used to show criminal propensity or otherwise paint a defendant guilty through mere association"); *United States* v. *McKay*, 431 F.3d 1085, 1093 (8th Cir. 2005) ("gang affiliation evidence is not admissible [when] it is meant merely to prejudice the defendant or [to] prove his guilt by association with unsavory characters"), cert. denied, 547 U.S. 1174, 126 S. Ct. 2345, 164 L. Ed. 2d 859 (2006), and cert. denied, 549 U.S. 828, 127 S. Ct. 46, 166 L. Ed. 2d 48 (2006).

Our appellate courts previously have held, however, that evidence of a defendant's gang affiliation is admissible when it is relevant to a material issue in the case, such as why a witness delayed in coming forward to the police; see *State* v. *Wilson*, supra, 308 Conn. 430; *State* v. *Cruz*, 56 Conn. App. 763, 771–72, 746 A.2d 196 (2000), aff'd, 260 Conn. 1, 792 A.2d 823 (2002); and, to the best of our knowledge, every other court has similarly held. See, e.g., *Blackmon* v. *Booker*, 696 F.3d 536, 555 (6th Cir. 2012) ("gang affiliation evidence tended to make the fact of witness bias in favor of [the] [p]etitioner based on fear more probable"), cert. denied, 568 U.S. 1217, 133 S. Ct. 1501, 185 L. Ed. 2d 557 (2013); *United States* v. *Jimenez*, Docket No. 94-2625, 1995 WL 135923, *3–4 (7th Cir. March 28, 1995) (defendant's membership in Latin Kings was admissible to question defense witness on whether fear of retaliation caused him to recant his prior statements to Federal Bureau of Investgation) (decision without published opinion, 51 F.3d 276), cert. denied, 516 U.S. 847, 116 S. Ct. 139, 133 L. Ed. 2d 86 (1995); *United States* v. *Keys*, 899 F.2d 983, 987–88 (10th Cir.) (because "[c]redibility was crucial to resolution of this case . . . evidence that the defense witnesses might have slanted their testimony because of their fear of [the defendant] and his fellow gang members had a high probative value"), cert.

denied, 498 U.S. 858, 111 S. Ct. 160, 112 L. Ed. 2d 125 (1990); *United States ex rel. Garcia* v. *Lane*, 698 F.2d 900, 902 (7th Cir. 1983) (witness' testimony that he knew defendant was member of Latin Kings was properly admitted to explain his prior inconsistent statement due to fear of retaliation); *People* v. *Sanchez*, 58 Cal. App. 4th 1435, 1449, 69 Cal. Rptr. 2d 16 (1997) ("[Gang affiliation] evidence was properly admissible on the issue of witness credibility. Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible." (Internal quotation marks omitted.)); *State* v. *Dean*, 310 Kan. 848, 862, 450 P.3d 819 (2019) ("[w]e have held that gang affiliation evidence may be relevant to show bias, prove identity, or explain an otherwise inexplicable act, but these reasons are not exclusive"); *Commonwealth* v. *Holliday*, 450 Mass. 794, 814–15, 882 N.E.2d 309 (trial court properly admitted evidence demonstrating witnesses' fear of retaliation in gang related double homicide case to explain why they had failed to share information sooner), cert. denied sub nom. *Mooltrey* v. *Massachusetts*, 555 U.S. 947, 129 S. Ct. 399, 172 L. Ed. 2d 292 (2008); *State* v. *Trujillo*, 131 N.M. 709, 729–30, 42 P.3d 814 (2002) (undisputed evidence of defendant's gang affiliation was properly admitted because witness' "fear of retaliation went to his credibility, by showing that he had valid reasons—including the safety and well-being of himself and his family—for being less than candid about . . . [the] [d]efendant's involvement in the shooting"); *State* v. *Gonzalez*, 345 P.3d 1168, 1178 (Utah 2015) (gang related evidence was properly admitted to show "a key [witness'] fear of gang retaliation").

There can be no doubt that whether Algarin delayed providing the inculpatory information to the police because she was afraid of violence against her or her loved ones and whether there was a factual basis for any such fear for the period preceding her disclosure

were probative of a material issue in the present case. We also agree with the Appellate Court that the challenged evidence was not merely cumulative of other evidence. See *State* v. *Bermudez*, supra, 195 Conn. App. 794. As that court explained, that other evidence consisted mainly of Algarin's testimony detailing Santiago's abuse of her, which did not explain why she would fear harm from the defendant and Bonilla, especially when there was evidence that neither had ever physically abused Algarin and that, in fact, the defendant had intervened "on multiple occasions" when Santiago abused her. Id., 794 and n.14. Nor did evidence of Santiago's abuse demonstrate why Algarin would fear retribution from the defendant and his brothers and continue to corroborate their false alibi, even during their long periods of incarceration, when they were not physically present to harm her. See id., 794. Evidence of their gang affiliations was the only evidence to explain why Algarin feared all three of them, why she feared retaliation from individuals acting on their behalf, and why she believed that there was no place she could go where she would be safely out of their reach, even when they were incarcerated.

As the Appellate Court also explained, the record reflects that the trial court was keenly aware of the potential for the evidence to inflame the jurors' emotions. See id., 794–95. To minimize its prejudicial impact, the trial court twice instructed the jury that it could consider the evidence solely in evaluating Algarin's credibility as to why she waited twelve years to come forward. The court also barred any other witness from mentioning the defendant's and his brothers' gang affiliations. We note, moreover, that Algarin's testimony regarding this matter was relatively brief in the context of her two days of testimony, and the prosecutor made only brief reference to it in closing argument. See, e.g., *State* v. *Wilson*, supra, 308 Conn. 430–31 (risk of unfair

prejudice from gang related evidence was minimized when witness referred to gang only once during testimony and prosecutor did not refer to it during closing argument). In light of the foregoing, we agree with the Appellate Court that the trial court did not abuse its discretion in admitting the gang affiliation evidence.

B

We next address the defendant's claim that the trial court abused its discretion in admitting evidence that Algarin "was relocated," which necessarily implied that such action was undertaken by the state, after she inculpated the defendant and his brothers in the victim's murder. The defendant contends not only that the evidence was irrelevant to the issue of Algarin's credibility, but also that the trial court failed to recognize its highly inflammatory nature and, as a result, "did not properly balance the prejudicial effect of the evidence [with] its probative value . . . ." The defendant argues that courts in other jurisdictions recognize that "great care must be taken to protect against the very real possibility that the jury will infer [that] the witness was relocated as a result of threats by the defendant" and that the trial court in the present case, by failing to provide the jury with a limiting instruction, failed to exercise that level of care.

The state responds that the defendant's argument "fails to differentiate between evidence that is duly prejudicial and that which is unfair." (Emphasis omitted.) Specifically, the state contends that, "to the extent that Algarin's testimony implied that she feared the [defendant and his] brothers, it was duly prejudicial because it was highly probative of why she had corroborated their false alibi for twelve years." The state further contends that the relocation evidence was also probative of Algarin's credibility "in that it established [the] significant hardship that [she] endured as a result of

providing information [to the police]," which courts have held is relevant to a fact finder's assessment of a witness' credibility. We agree with the state.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "At trial, the prosecutor asked Algarin whether she continued to live in Waterbury after giving her statement to the police. [Defense counsel] immediately objected, believing that the prosecutor was about to elicit evidence about [Algarin's participation in the state's] witness protection program. . . . Outside the presence of the jury, [counsel] argued that any testimony regarding Algarin's placement in the witness protection program would be unduly prejudicial. [Counsel] further asserted that this testimony 'emphasizes the fact that the government agency, whether it's a state or federal, believes [that Algarin] is in danger and [has] paid for her care since the time of this so-called disclosure.' In response, the [prosecutor] argued that evidence of Algarin's relocation was probative of her fear of retaliation. The court agreed that Algarin should not refer to the 'witness protection program' but ruled that the [prosecutor] could elicit details on how [Algarin's] life has been impacted since the disclosure, including how she was relocated at the state's expense. The court thereafter instructed Algarin not to use the phrase, 'witness protection program.' Algarin subsequently testified that she, her children, and Maldonado were relocated out of the state [after she provided the statement to the police] and [were] relocated numerous times [thereafter].[15] The [prosecutor] referenced this fact in . . .

[15] Algarin's testimony concerning her relocation proceeded as follows:

"[The Prosecutor]: After you gave the statement to the Waterbury police in April of 2010, you never continued to live in Waterbury, did you?

"[Algarin]: No.

"[The Prosecutor]: And, in fact, you were relocated out of this state with your four children, correct?

"[Algarin]: Yes.

"[The Prosecutor]: And Mr. Maldonado was relocated as well, correct?

closing argument, noting that Algarin was 'immediately relocated with her four children' after giving her statement to the police and that she was 'still in relocation, still in fear of the [defendant and his brothers].' " (Citation omitted; footnote added; footnote omitted.) *State* v. *Bermudez*, supra, 195 Conn. App. 796.

The Appellate Court concluded that evidence of Algarin's relocation was "highly probative and relevant" to her fear of retaliation from the defendant and his brothers, which she claimed had prevented her from coming forward sooner. Id., 797. The court further observed that whether the trial court should have excluded the evidence as unduly prejudicial was a matter of first impression in this state. Id., 798. The Appellate Court thus looked to federal precedent for guidance; see id., 798–802; and, on the basis of that precedent, concluded that "the probative value of the relocation testimony was not outweighed by the prejudicial impact to the defendant." Id., 802. The Appellate Court expressed a concern that the prosecutor's use of the passive voice when questioning Algarin about her relocation; see footnote 15 of this opinion; "alluded to a third party, presumably the state, as having facilitated [the] relocation," but noted that this expression was not as prejudicial as "witness protection program" or "at state expense." (Internal quotation marks omitted.) *State* v. *Bermudez*, supra, 195 Conn. App. 801. The Appellate Court also opined that, rather than allow the state to present the relocation evidence during its direct examination of Algarin, "the better practice would have been for the [trial] court to instruct the [prosecutor] not to implicate [the state's] involvement in relocation efforts in any way on direct examination . . . [u]nless

"[Algarin]: Yes.

"[The Prosecutor]: And you were relocated on more than one occasion, correct?

"[Algarin]: Yes."

and until further explication in rebuttal [was] triggered by the defense in cross-examination . . . ." (Internal quotation marks omitted.) Id., 804. Despite these concerns, the Appellate Court concluded that, "given both the passive and infrequent references to the witness protection program, as well as the absence of the prosecutor's exploitation of that evidence . . . the [trial] court did not abuse its discretion in allowing testimony that Algarin had been relocated." Id. We agree with the Appellate Court.

As that court explained, although an issue of first impression for this court, "[a] number of federal . . . courts of appeals that have addressed the issue have cautioned that admitting evidence of a testifying witness' placement in a witness protection program 'must be handled delicately.' *United States* v. *Partin*, 552 F.2d 621, 645 (5th Cir.), cert. denied, 434 U.S. 903, 98 S. Ct. 298, 54 L. Ed. 2d 189 (1977); see also *United States* v. *Melia*, 691 F.2d 672, 675 (4th Cir. 1982) (evidence of witness' participation in witness protection program should be admitted 'with great caution')." *State* v. *Bermudez*, supra, 195 Conn. App. 798. The concern with admitting evidence of this nature is that it implies to the jury that the witness needed protection from the defendant and tends to bolster the witness' credibility by raising the inference that the witness' testimony must be truthful because she would neither need nor be afforded protection if she were the source of false information. See *United States* v. *Adamo*, 742 F.2d 927, 944 (6th Cir. 1984), cert. denied sub nom. *Freeman* v. *United States*, 469 U.S. 1193, 105 S. Ct. 971, 83 L. Ed. 2d 975 (1985); see also *United States* v. *DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979) ("disclosure of . . . participation [in a witness protection program] must be handled delicately . . . so as to minimize the possibility that the jury will infer that the defendant was the source of danger to the witness" (citation omitted; internal

quotation marks omitted)), rev'd on other grounds, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).

Accordingly, we agree with the Appellate Court that, as a general matter, in order to minimize the potential for undue prejudice, the state should not elicit testimony from a witness regarding the witness' participation in a witness protection program on direct examination but, rather, should wait until redirect examination to do so, and then only if the defense's cross-examination of the witness opened the door to such testimony. See *State* v. *Bermudez*, supra, 195 Conn. App. 804. As that court explained, however, courts are in general agreement that prosecutors may appropriately introduce evidence of their witnesses' participation in the witness protection program " 'to counter any inference of improper motivation or bias and, under some circumstance[s], may [present this evidence] on direct examination in anticipation of a defense attack [of] the witnesses' credibility.' " Id., 799, quoting *United States* v. *Melia*, supra, 691 F.2d 675; see also *State* v. *Harris*, 521 N.W.2d 348, 352 (Minn. 1994) ("In anticipation of the challenge to [a] witness' credibility, the prosecution may wish to bring out the witness' involvement in the [witness protection] program so as not to appear to be hiding anything from the jury. . . . To bolster the witness' credibility, the prosecution may also want to introduce evidence that the decision to testify has resulted in negative consequences to the witness." (Citation omitted.)). These courts have recognized that testimony about a witness' participation in a witness protection program, although prejudicial, "is permissible so long as the prosecutor does not attempt to exploit it." *United States* v. *DiFrancesco*, supra, 604 F.2d 775; see id. ("[s]ince a defendant often will seek to impeach a participating witness by showing that he has received significant benefits while in the program, the government may desire to bring out the witness'

participation during direct examination in order to avoid an inference that the government was attempting to hide the witness' possible bias"); see also *United States* v. *Ciampaglia*, 628 F.2d 632, 640 (1st Cir.) ("[a]t least when not exploited by the prosecution, the possibility that . . . disclosure [that a witness is in the witness protection program] might cause undue prejudice to defendants is . . . generally minimal"), cert. denied, 449 U.S. 956, 101 S. Ct. 365, 66 L. Ed. 2d 221 (1980), and cert. denied sub nom. *Bancroft* v. *United States*, 449 U.S. 1038, 101 S. Ct. 618, 66 L. Ed. 2d 501 (1980). Some courts also require trial courts to provide limiting instructions regarding the proper use of this evidence. See *State* v. *Harris*, supra, 352 ("[i]f admitted, the trial court must give the jury explicit instructions as to the use of the evidence" and "strictly control the use of the evidence by the prosecution to prevent its exploitation"). We are persuaded that the present case represents a rare instance in which it was appropriate for the state to present evidence of a witness' participation in a witness protection program during its direct examination of the witness.

There can be no question that both the prosecutor and the trial court knew in advance of trial that Algarin's reason for waiting twelve years to come forward would be the central focus of the defense's attack on the state's case. The defendant's trial was the fourth trial arising out of the victim's murder and the second one to be presided over by the judge in this case. See *State* v. *Santiago*, 187 Conn. App. 350, 202 A.3d 405, cert. denied, 331 Conn. 902, 201 A.3d 403 (2019). As in the present case, in *Santiago*, Algarin's testimony was the linchpin of the state's case, and her reasons for coming forward when she did were as strongly contested in that case as they were in the present case.[16] See id., 365–66 ("[E]vi-

[16] It appears that Algarin's testimony was not as crucial in the trial of Bonilla, who gave a detailed confession to the police at the time of his arrest. See *State* v. *Bonilla*, 317 Conn. 758, 761–62, 120 A.3d 481 (2015).

dence of the uncharged misconduct was probative to explain why Algarin feared [Santiago] and waited twelve years before telling the police about her knowledge of Morales' murder. The state argued that admitting evidence of severe domestic abuse was material to corroborating crucial prosecution testimony. In its ruling admitting such evidence, the court relied on *State* v. *Yusuf*, 70 Conn. App. 594, 800 A.2d 590, cert. denied, 261 Conn. 921, 806 A.2d 1064 (2002), noting 'that a delay in disclosing is a significant event that the state must have some type of explanation for. So it's an important—it's extremely important if the state has any explanation for a delay in reporting.' "); *State* v. *Santiago*, supra, 358 ("[Santiago] stated in his [appellate] brief . . . that the 'main focus in [the] cross-examination [of Algarin] was to suggest that [she] made up the story about [Santiago's] and his brothers' involvement in the murder because she was concerned about Maldonado's safety in jail and wanted to get favorable treatment for him in his criminal case.' Defense counsel also questioned Algarin regarding the reward for which she applied and suggested that she may have fabricated her testimony in order to qualify for the reward.").

Because the trial court knew in advance that Algarin's purported fear of and need for protection from the defendant and his brothers would be a central focus of the trial and that the defense would argue that Algarin was lying when she claimed that fear had prevented her from coming forward sooner, we cannot conclude that it was an abuse of that court's wide discretion to allow Algarin to testify, on direct examination, that she was relocated by the state immediately after giving her statement to the police due to fear of reprisals from the defendant and his brothers. See, e.g., *United States*

The principle issue on appeal in *Bonilla* was whether there was sufficient evidence to establish the intent element of Bonilla's murder as an accessory conviction. Id., 765–66.

v. *Deitz*, 577 F.3d 672, 689 (6th Cir. 2009) (prosecutor should not refer to witness protection program unless need for protection is obvious, relevant, or made an issue by defense counsel), cert. denied, 559 U.S. 984, 130 S. Ct. 1720, 176 L. Ed. 2d 201 (2010).

In *Melia*, the United States Court of Appeals for the Fourth Circuit explained that, when reviewing the admission of this evidence on appeal, courts "must consider whether such evidence was in its totality excessive and likely to excite the [jurors], encouraging them to make improper inferences linking the defendant to threats against the witness." *United States* v. *Melia*, supra, 691 F.2d 676. In *Deitz*, the United States Court of Appeals for the Sixth Circuit concluded that evidence that various witnesses participated in the witness protection program "was relevant to the . . . history of violence and reputed practice of retaliating against witnesses and informants [of the defendant's motorcycle gang]." *United States* v. *Deitz*, supra, 577 F.3d 689. Although the court warned that the evidence could "[r]aise negative inferences against the defendant if great care is not employed"; (internal quotation marks omitted) id.; it concluded that its admission in that case was not prejudicial because the government did not attempt to use it to enhance the credibility of the witnesses or to imply that the defendant himself was threatening the witnesses. See id.; see also *United States* v. *Vastola*, 899 F.2d 211, 236 (3d Cir.) ("the potential for prejudice is slight [when the witness protection program] testimony only vaguely suggests that the witness was placed in the program because of threats emanating from the defendant"), vacated on other grounds, 497 U.S. 1001, 110 S. Ct. 3233, 111 L. Ed. 2d 744 (1990).

As in *Deitz*, evidence of Algarin's relocation was highly relevant to her claimed fear of the defendant and his brothers and that this fear remained even after they were incarcerated, a central focus of defense counsel's

efforts to impeach her at trial. As the Appellate Court noted, the jury reasonably could have concluded, contrary to the defendant's assertion, "that Algarin's willingness to subject herself to the upheaval and disruption of moving herself and her four children multiple times was credible evidence of her belief that, due to the . . . gang affiliation[s] [of the defendant and his brothers], she and her family were not safe." *State* v. *Bermudez*, supra, 195 Conn. App. 797–98; see also *State* v. *Burney*, 288 Conn. 548, 566–67, 954 A.2d 793 (2008) (trial court did not abuse its discretion in admitting evidence of victim's emotional state to explain her delay in reporting sexual assault when "the defendant had made such testimony 'virtually essential' by effectively attacking the victim's credibility on the basis of the time lapse between the sexual assault and her first report of it"). The jury also reasonably could have concluded that Algarin's relocation explained her willingness to testify against the defendant and his brothers, despite her longstanding fear of retaliation.

Importantly, the state did not exploit this evidence. Algarin's testimony regarding her relocation was relatively brief in the context of her two days of testimony, the questions posed to her and her responses thereto did not directly implicate the state in a way that might suggest that the prosecutor was vouching for her credibility, and the prosecutor made only brief reference to it in closing argument.[17] Cf. *United States* v. *Melia*,

[17] Although the trial court did not provide the jury with a limiting instruction concerning this evidence, we note that the defendant did not request one. Nonetheless, we agree with the Minnesota Supreme Court that, when admitting evidence of this sort, the best course is for the trial court to provide the jury with a limiting instruction as to its proper use in order to reduce the potential prejudice to the defendant. See *State* v. *Harris*, supra, 521 N.W.2d 352. Such an instruction in the present case would have informed the jury that Algarin's testimony regarding her relocation was to be used solely in assessing her credibility as to her reasons for waiting twelve years to come forward.

supra, 691 F.2d 676 ("dramatic testimony of [five witnesses concerning the witness protection program] was excessive—an abuse by the government of its privilege to utilize this potentially volatile evidence"); *State* v. *Harris*, supra, 521 N.W.2d 352 ("prosecutor's questioning of witnesses about their participation in the [witness] protection program did not just occur once or with only one witness, but rather was an important focus of her [direct examination]," and, thus, "created an inference that [the defendant] was responsible for the threats to [them], an inference unsupported by any evidence"). We note, moreover, that the evidence was not presented in such a way as to suggest that Algarin was in the witness protection program because of direct threats by the defendant. See, e.g., *United States* v. *Deitz*, supra, 577 F.3d 689 ("courts have . . . determined that . . . references [to the witness protection program] are admissible as long as they do not directly implicate the defendant as a source of threats to the witness"); *United States* v. *Vastola*, supra, 899 F.2d 236 ("the potential for prejudice is slight [when the witness protection program] testimony only vaguely suggests that the witness was placed in the program because of threats emanating from the defendant"). Indeed, Algarin testified that the defendant never abused her and that, in fact, he had even intervened on her behalf when Santiago assaulted her. The purpose of the testimony, rather, was to rebut the defendant's argument that Algarin was not genuinely afraid of him and his brothers, and the record reflects that the prosecutor utilized it solely for that purpose when he argued in closing argument that Algarin was "still in relocation, still in fear of the [defendant and his brothers]." In light of the foregoing, we conclude that, under the circumstances of this case, the trial court did not abuse its discretion in admitting evidence that Algarin was relocated following her statement to the police inculpating the defendant and his brothers in the victim's murder.

II

We next address the defendant's claim that certain evidentiary rulings by the trial court were constitutional in nature and that the state cannot prove that these constitutional errors were harmless. Specifically, the defendant contends that the court violated (1) his constitutional right under the sixth and fourteenth amendments to the United States constitution to present a defense and to confront witnesses against him by refusing to admit into evidence three sexually explicit letters Algarin had written to him while he was in prison, and (2) his right to confrontation by preventing him from questioning her about the termination of her employment at Waterbury Hospital and her birth control practices. The defendant sought to admit the letters to prove that Algarin had a motive for falsely inculpating him and Santiago in the victim's murder. He sought to question Algarin about conduct relating to Santiago, namely, the reason for the termination of her employment and her birth control practices, to discredit her testimony that she was afraid of Santiago. We disagree with the defendant.

A

We begin with the trial court's exclusion of Algarin's letters, in which she professed her love for, and sexual attraction to, the defendant in passionate and graphic terms, including descriptions of certain sex acts. The Appellate Court concluded that, although exclusion of the letters did not state a claim that was constitutional in nature in light of the adequate opportunity provided to the defense to cross-examine Algarin on them, it was evidentiary error to exclude them but that this error was harmless. See *State* v. *Bermudez*, supra, 195 Conn. App. 809–10. The defendant argues that being permitted to cross-examine Algarin about the letters was insufficient and that precluding the jury from seeing the letters

themselves was not harmless because the letters "went to the heart of [his] defense and explained Algarin's motive to fabricate her allegations." Although we disagree with the defendant, we reach that conclusion by a different route than that taken by the Appellate Court.

At the outset, it is important to clarify the purpose for which the defendant intended to use the letters and the trial court's ground for precluding their admission. Prior to trial, the state filed a motion in limine to preclude admission of three letters Algarin had written to the defendant while he was in prison, citing several grounds, including that they were more prejudicial than probative. In its memorandum in support of its motion in limine, the state argued that the letters were unduly prejudicial for the following reason: "[B]ecause some portions of the letters are sexually graphic, it may unduly arouse the [jurors'] emotions of prejudice, hostility or sympathy or may have an adverse effect [on] the witness beyond tending to prove the fact or issue that may justify its admission. . . . Allowing admission . . . would subject [Algarin] to ridicule and scorn, and would not, in any way, be relevant to the issues at trial, or the credibility of the witness."

The trial court did not rule on the motion until the state concluded its direct examination of Algarin. On direct examination, Algarin testified that, although Santiago had threatened to harm her or her loved ones on more than one occasion, she had never had a problem with the defendant and he had in fact intervened to protect her from Santiago's physical abuse on more than one occasion. She admitted, however, that she feared "retaliation" by the defendant and his brothers, and the gangs with which they were affiliated. Before the defense commenced its cross-examination, the court heard argument on the state's motion in limine to preclude admission of Algarin's letters to the defendant. Defense counsel contended that the letters were highly

relevant because, although Algarin claimed that she was afraid of the defendant and his brothers, the letters constituted evidence of her motive to falsely implicate the defendant in the victim's murder. Specifically, defense counsel asserted that the defendant had given the letters to Santiago, through their mother, that the letters had prompted Santiago to end his sixteen year relationship with Algarin, and that Algarin had concocted her story implicating the defendant as revenge for the breakup of that relationship.[18]

The trial court ruled that there was no reason to introduce the letters themselves but that defense counsel could question Algarin about the letters and specifically refer to them as "graphic letters about having sex with the defendant . . . ." The trial court furthered stated that it would allow defense counsel to "go line by line talking about [the] various sex acts that [Algarin wanted] to do with the defendant" but that it "[did not] think [that there was] a need to read the exact language in the letter . . . ."

The next day, during his cross-examination of Algarin, defense counsel sought to admit one of the letters in redacted form. At that time, outside the jury's presence, the following colloquy occurred:

"The Court: It's not being admitted at all. I've already ruled. . . . I believe [that] the prejudicial impact . . . outweighs its probative value [and that] the probative

[18] Defense counsel replied to the court's relevance inquiry as follows: "Because she is contending that she was in fear of not only . . . Santiago and [Bonilla], but also [the defendant]; she was in fear. The information is—*and this is what I want to inquire into*—is that, once those letters were written to [the defendant], [he] gave them to his mother, and his mother was able to get those—send those letters to [Santiago]. After . . . Santiago read those letters to [the defendant] . . . he called [Algarin] up and said, 'It's over, baby; it's over.' So, after she [became] aware that their relationship was over—this is after, what, sixteen years . . . she finds out that he's breaking up with her, she's history. *She then has a motive to concoct this scenario.*" (Emphasis added.)

value can be explored . . . by cross-examining the witness . . . but I will not allow . . . the defense to use any of the [salacious] language in the letter. . . .

"[Defense Counsel]: *I agree with the court regarding the language.* The [salacious] language is taken out of this [letter] . . . . It's just one letter . . . [that] I again say . . . is vital to the defense.

"The Court: What is? What's vital? Let me see what it is that you want in . . . that I haven't allowed in. It says 'Pooch Baby, I love you.'

"[Defense Counsel]: Yeah.

"The Court: Okay, you can ask her about that. . . . You don't need to have the letter in. . . . What else in this letter is vital to the defense that I'm missing? 'I miss you, baby.' [You can ask her] [d]idn't you say 'I miss you, baby?'

"[Defense Counsel]: Okay. 'Baby, your picture is the first thing I look at.'

"The Court: Go ahead, you can ask that.

"[Defense Counsel]: 'You look blazing.'

"The Court: You what?

"[Defense Counsel]: 'You look blazing.'

"The Court: Whatever. I said you can ask [that]. Those aren't what I would view as salacious comments. You can ask any question that goes to her affection toward [the defendant]. . . . I mean, it cuts both ways [counsel]. One of the things I instruct the jury is that [it] consider any motive to lie, any animosity toward [the defendant]. In some ways you're creating a case for the state that . . . she has no animosity toward [the defendant] and that she wouldn't have made this up. But that's your choice."

Thereafter, defense counsel resumed his questioning of Algarin, during which he asked her about the content of the letters within the parameters set by the trial court. Specifically, he asked her whether she had sent the defendant three "sexually explicit" letters in which she had expressed her love for him, which Algarin admitted having done.[19] He did not go through the letters

[19] The following constitutes the entirety of defense counsel's cross-examination of Algarin about the letters:

"[Defense Counsel]: Do you remember sending [the defendant] a series, three letters that were sexually explicit?

"[Algarin]: Yes.

"[Defense Counsel]: This is your husband's brother, correct?

"[Algarin]: Yes.

* * *

"[Defense Counsel]: Do you remember saying I love you?

"[Algarin]: It says it there.

"[Defense Counsel]: Is that your handwriting?

"[Algarin]: Yeah.

"[Defense Counsel]: Do you remember when you sent that to him?

"[Algarin]: No.

* * *

"[Defense Counsel]: You did say that you did send sexually explicit letters to [the defendant], correct?

"[Algarin]: Yes, sir.

"[Defense Counsel]: And you sent at least three correct?

"[Algarin]: I believe so.

"[Defense Counsel]: Now, after you sent those letters to [the defendant], isn't it true that [Santiago], after being with you for sixteen years, broke up with you in 2009?

"[Algarin]: That is not true.

"[Defense Counsel]: When did he break up with you?

"[Algarin]: I broke up with him because he faked a stroke in federal prison and had someone call me at work to tell me that he was dying, and that's when I called the federal penitentiary and told them I do not want any more contact with him, no phone call, no e-mail, no letter, no nothing."

On recross-examination, the following exchange ensued:

"[Defense Counsel]: Now, you said something about the letter that you wrote to [the defendant], that you went to a website?

"[Algarin]: AOL.

"[Defense Counsel]: To look up what?

"[Algarin]: I went to an adult website, and I wrote down what I saw.

"[Defense Counsel]: What you saw on the adult website?

"[Algarin]: Yes, sir.

* * *

"[Defense Counsel]: And you referred to [the defendant] as B-Real in that letter, correct? . . .

line by line with her, as the court had permitted him to do, however. Nor did he recite aloud any of the nonsalacious portions of the letters, as the court also had permitted him to do. In accordance with his stated purpose for introducing the letters, he asked her whether it was true that Santiago broke up with her "after [she] sent [the] letters . . . in 2009," to which Algarin responded, "[t]hat is not true." She then claimed that it was she who had ended the relationship with Santiago because of an unrelated incident in 2008. On redirect examination, Algarin explained that she had written the letters because, after the police reopened their investigation into the victim's murder, the defendant asked her to write them as insurance against her reporting him to the police because they would discredit her. She stated that the defendant had not forced her to write the letters; he simply asked, and she complied. Although Algarin denied that the letters were the cause of the end of her relationship with Santiago, the defendant never proffered any other evidence to prove that

"[Algarin]: [The defendant] asked me to write B-Real.

"[Defense Counsel]: Did he ask you in a letter? Did he send you a letter saying correspond with me with sexually explicit language and use the—

"[Algarin]: He asked me—he needed something for reassurance that I was not gonna snitch.

"[Defense Counsel]: That's a letter that he wrote to you?

"[Algarin]: No. That's a conversation we had.

"[Defense Counsel]: When did you have that conversation?

"[Algarin]: After [Bonilla] moved in and that article came out in the newspaper.

* * *

"[Defense Counsel]: And had you used AOL to get the verbiage out of—for [another] letter as well?

"[Algarin]: Some of it, yeah.

"[Defense Counsel]: Some of it?

"[Algarin]: Yeah, 'cause it's not all sexual and not—not all saying, you know. Some of it's saying, hey, how are you, and some of it's very sexual.

"[Defense Counsel]: Very sexual, correct?

"[Algarin]: Yeah.

"[Defense Counsel]: Okay. And you say that that was requested at the behest of [the defendant]?

"[Algarin]: Yes, 'cause this showed up in [Santiago's] trial as insurance."

he had provided the letters to his mother, that Santiago had seen the letters or learned of their existence, or that Santiago had initiated the breakup of the relationship with Algarin.

The defendant's challenge to the trial court's ruling precluding admission of the letters is governed by the following settled principles. "Generally, an accused must comply with established rules of procedure and evidence in exercising his right to present a defense." *State* v. *Cerreta*, 260 Conn. 251, 261, 796 A.2d 1176 (2002). "While the [c]onstitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, [well established] rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes* v. *South Carolina*, 547 U.S. 319, 326, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); see, e.g., *State* v. *Sandoval*, 263 Conn. 524, 545, 821 A.2d 247 (2003) ("evidence of [a witness'] abortion, in certain circumstances, may give rise to a real risk of unfair prejudice because such evidence necessarily implicates a woman's sexual history and her highly personal decision to terminate a pregnancy"); *State* v. *Swain*, 101 Conn. App. 253, 269, 921 A.2d 712 ("[T]he fact that [the complaining witness] was incarcerated might be expected to cause a negative reaction in the eyes of the [jurors]. It is not difficult to presume that such negative feeling could unduly prejudice a witness." (Emphasis omitted; footnote omitted.)), cert. denied, 283 Conn. 909, 928 A.2d 539 (2007). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. . . . It does not follow, of course, that the [c]onfrontation [c]lause of the [s]ixth [a]mendment prevents a trial judge from imposing any

limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [T]he [c]onfrontation [c]lause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678–79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); see also *State* v. *Gaynor*, 182 Conn. 501, 508, 438 A.2d 749 (1980) (right of accused to cross-examine adverse witness "may be limited [when] the sixth amendment interest is outweighed by the danger of harassing witnesses or unduly prejudicing the jury" (internal quotation marks omitted)).

Thus, "[t]he defendant's right to cross-examination . . . is not absolute [but rather] is subject to reasonable limitation by the court. . . . The general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial judge. This discretion comes into play . . . after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which the jurors, as the sole triers of the facts and credibility, can appropriately draw inferences relating to the reliability of the witness." (Citations omitted; internal quotation marks omitted.) *State* v. *Dobson*, 221 Conn. 128, 137, 602 A.2d 977 (1992).

Unlike the Appellate Court, we begin with the question of whether the trial court correctly concluded that the letters were more prejudicial than probative. See

State v. *Sandoval*, supra, 263 Conn. 544–46 (considering whether trial court abused its discretion in ruling that prejudicial effect of proffered evidence outweighed its probative value before assessing whether ruling was of constitutional magnitude or merely evidentiary in nature); see also *State* v. *Christian*, 267 Conn. 710, 750, 841 A.2d 1158 (2004) (considering whether trial court improperly excluded witness' testimony before assessing whether that ruling was of constitutional magnitude or merely evidentiary in nature). We cannot help but observe that the trial court's ruling appears to be directed more at protecting the assumed delicate sensibilities of the jurors from exposure to offensive words than at protecting Algarin from undue embarrassment. We question whether Algarin would have been appreciably less humiliated by having the jurors read the letters than having them hear about the sex acts described therein, line by line, in more clinical terms in cross-examination, as permitted by the trial court's ruling. If the specific terminology was probative of facts relevant to the defendant's revenge theory, the trial court would have abused its discretion in precluding the defendant from introducing the letters into evidence simply because they contained vulgar language. Cf. *United States* v. *Schweihs*, 971 F.2d 1302, 1314 (7th Cir. 1992) (concluding that District Court did not abuse its discretion in denying in part defense motion in limine to redact from videotape evidence offensive language, either racially or ethnically derogatory or coarse and vulgar, because offensive language had probative value to issues in case); see also *United States* v. *Soltero-Olivas*, 285 Fed. Appx. 476, 478 (9th Cir. 2008) (concluding that District Court did not abuse its discretion in admitting transcript of defendant's telephone conversation containing vulgar language when risk of unfair prejudice did not substantially outweigh transcript's probative value).

Several factors, however, persuade us that the sexually graphic language and the letters more generally

were of little to no probative value. The lack of probative value of the sexually graphic aspects of the letters is evidenced by defense counsel's express concession that he "agree[d]" with the court that the jury did not need to see the salacious language when he requested the admission of a redacted form of one letter. Consistent with that concession, he declined to ask Algarin a single question about the sexual aspect of the letters, other than whether she had sent the defendant "sexually explicit" letters. See footnote 19 of this opinion. More important, the defendant's failure to introduce any evidence to support the factual predicates to his theory of relevance negated the probative value of the letters. In order for the letters to be relevant to the defendant's revenge theory, Santiago would have had to see them or, at the very least, learned of their existence and contents. No evidence was proffered from which the jury could have inferred either fact, let alone that Santiago was the one who had ended the relationship. "When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts *or subject to later proof of the connecting facts*." (Emphasis added.) Conn. Code Evid. § 1-3 (b). "If the proponent fails to introduce evidence sufficient to prove the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. *State* v. *Ferraro*, 160 Conn. 42, 45, 273 A.2d 694 (1970); *State* v. *Johnson*, 160 Conn. 28, 32–33, 273 A.2d 702 (1970)." Conn. Code Evid. § 1-3 (b), commentary. The trial court did not issue such an order, but its discretion to do so evidences the lack of probative value of the letters in the absence of proof of the connecting facts.[20]

[20] The prosecutor never moved to strike the testimony related to the letters due to the absence of evidence to support the breakup theory, but the prosecutor did object to a defense question on this basis and did point out this omission in its rebuttal argument to the jury.

Although the trial court treated the letters as independently probative of whether Algarin was fearful of the defendant; see *State* v. *Bermudez*, supra, 195 Conn. App. 810–11; the defendant did not seek admission of the letters on that basis. Indeed, the trial court overruled the state's hearsay objection on the ground that the content of the letters was not being admitted for its truth. It is true that, if the jury had accepted the defendant's revenge theory, that theory would have discredited Algarin's claim that she had delayed disclosing what she knew about the defendant's and his brothers' involvement in the victim's murder because she feared retribution. The defendant evidenced no intention, however, to use the letters themselves as *direct* proof of Algarin's state of mind. The defendant never asked Algarin any questions about the letters with regard to her state of mind, and the only reference to the letters in defense counsel's closing argument was in connection with the revenge theory. Moreover, there was no reason for the defendant to offer the letters to prove that Algarin was not fearful of the defendant. Algarin essentially admitted that she had a good relationship with the defendant; she had no reason to fear him, as long as she did not inculpate him in the crime. The prosecutor in fact used Algarin's testimony about her good relationship with the defendant to argue in closing argument that Algarin had no motive to lie about the defendant.[21]

Insofar as the defendant contends that the trial court's exclusion of the letters deprived him of the opportunity to effectively impeach Algarin's credibility, he has failed to demonstrate how the specific contents of the letters

[21] The prosecutor argued: "When you judge [Algarin's] credibility, consider this: No motive to lie about the defendant. He was nice to her. . . . She never had a problem with him. She testified to that. That night she was getting beat, the night of the incident . . . the defendant stops her from getting beat. . . . He had stopped . . . Santiago from beating her on other occasions. Why would she lie about this defendant? . . . Why implicate the defendant unless it was true?"

bore on that issue.[22] Therefore, we conclude that the trial court did not abuse its discretion in concluding that the prejudicial effect of the letters outweighed their probative value. In the absence of evidentiary error or a colorable claim that application of the rules of evidence resulted in a manifest injustice, the defendant cannot establish a violation of his constitutional rights to confront witnesses or to present a defense.

B

Last, we turn to the defendant's claim that the trial court committed harmful, constitutional error when it prevented him from questioning Algarin about the circumstances surrounding the termination of her employment from Waterbury Hospital and her birth control practices during her marriage to Santiago. The defendant contends that "[b]oth of these matters were directly relevant to the central issue at trial—[Algarin's] fear of Santiago as the reason why she delayed going to the police for [twelve] years." Although we might have decided these evidentiary questions differently from the trial court, we agree with the Appellate Court that the exclusion of these matters was not constitutional in nature and that the trial court did not abuse its discretion in precluding the two lines of inquiry.

The following facts and procedural history are relevant to our resolution of the defendant's claim. In an effort to further impeach Algarin, defense counsel asked her whether she felt sorry for Santiago in January, 2004, when he was admitted to the psychiatric unit at her place of employment, Waterbury Hospital. The trial court sustained the prosecutor's objection on relevancy

[22] We note that, after Algarin testified that she had written the salacious letters at the behest of the defendant and that she had drawn on an online adult website for some of the sexually explicit language in at least one of the letters, defense counsel never renewed his objection to the exclusion of the letters on the ground that they were relevant impeachment evidence with regard to those facts.

grounds. Outside the presence of the jury, defense counsel explained that Algarin's purported fear of Santiago was contradicted by her objection to the treatment Santiago received at the hospital in 2004, which was so "disruptive" that it ultimately resulted in her employment being terminated. Defense counsel argued: "She's claiming that . . . she's terrified of this guy, she doesn't want to be with him, but, in 2004, she gets so worked up, yelling at people, being rude to people at the . . . hospital, and she's dismissed for that reason . . . ." The court reaffirmed its ruling sustaining the prosecutor's objection, finding that the evidence was "totally irrelevant," that the defense had various other avenues of impeachment, and that, to the extent the evidence possessed any relevance, its "probative value [was] far outweighed by [its] prejudicial impact." The following day, the defense again sought to introduce evidence of Algarin's behavior at the hospital, this time through examination of Crozier. The court sustained the prosecutor's objection, concluding that the evidence was irrelevant, did not go to truth and veracity, was cumulative of other evidence contradicting Algarin's fear of Santiago, and was too remote in time, and that, even if it were relevant, its prejudicial effect outweighed its probative value.

During cross-examination, defense counsel also asked Algarin why she had conceived two more children with Santiago after the victim's murder, despite her purported fear of him, to which Algarin responded that Santiago had hid her birth control and had prevented her from seeing her gynecologist to get more. When defense counsel pressed Algarin whether there were other means by which she could have prevented becoming pregnant, the court sustained the prosecutor's objection to continued inquiry on the topic. The following day, the court again disallowed further inquiry into Algarin's birth control practices, finding that the subject matter was irrelevant.

The Appellate Court's reasoning in concluding that the trial court did not abuse its discretion in precluding the two lines of inquiry equally demonstrates why these rulings were not constitutional in nature. See *State* v. *Dobson*, supra, 221 Conn. 137 ("[t]he constitutional standard is met when defense counsel is permitted to expose to the jury the facts from which the jurors, as the sole triers of the facts and credibility, can appropriately draw inferences relating to the reliability of the witness" (internal quotation marks omitted)). As the Appellate Court explained, quoting *State* v. *Annulli*, 309 Conn. 482, 493–95, 71 A.3d 530 (2013), "[a] court . . . [may] exclude . . . evidence [that] has only slight relevance due to . . . its tendency to inject a collateral issue into the trial. . . . An issue is collateral if it is not relevant to a material issue in the case *apart from its tendency to contradict the witness*. . . . This is so even when the evidence involves untruthfulness and could be used to impeach a witness' credibility. . . . Whether a matter is collateral also is a determination that lies within the trial court's sound discretion. . . . Undoubtedly, our case law permits a party to ask a witness about a collateral matter, with the limitation that the party must accept the witness' response without having the opportunity to impeach that witness with extrinsic evidence. . . . This does not mean, however, that the trial court is obligated to permit such questioning. In considering whether the court abused its discretion in this regard, the question is not whether any one of us, had we been sitting as the trial judge, would have exercised our discretion differently. . . . Rather, our inquiry is limited to whether the trial court's ruling was arbitrary or unreasonable." (Emphasis in original; internal quotation marks omitted.) *State* v. *Bermudez*, supra, 195 Conn. App. 819.

Like the Appellate Court, we conclude that it was a proper exercise of the trial court's discretion to con-

clude that the circumstances surrounding the termination of Algarin's employment from Waterbury Hospital were simply too remote and "would have injected a collateral issue into the trial." Id. We also agree with the Appellate Court that the trial court properly found that further inquiry into Algarin's birth control practices, after defense counsel questioned her about why she continued to have children with Santiago after the victim's murder, "would have inappropriately focused on a matter far too attenuated from the material issues in the case." Id., 820.

Even if we were to conclude that the trial court should have permitted some inquiry into these two areas, we nevertheless would conclude that the error was harmless in light of the ample opportunity defense counsel had at trial to impeach Algarin's purported fear of Santiago. To the extent that the excluded lines of inquiry were relevant to this issue, they were merely cumulative of other defense evidence calling into question the genuineness of her fear. We note, moreover, that the defense's theory that Algarin could not have been genuinely afraid of the defendant and his brothers in light of the loyalty she demonstrated to them over the years was not a particularly strong defense. It is common knowledge that many victims of spousal abuse stay with their abusers for years, often appearing to the outside world to be in happy, loving relationships. Many undoubtedly love their spouses and try to make them happy. Many, like Algarin, have children with their abusers, even after the abuse starts. To argue, therefore, that Algarin's support of Santiago during their marriage was proof that she was not genuinely afraid of him and could not have seriously believed that he would hurt her if she turned him into the police simply flies in the face of reality.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

BRYAN JORDAN *v.* COMMISSIONER OF CORRECTION (SC 20485)

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

Syllabus

The petitioner, who had been convicted of manslaughter in the first degree with a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his criminal trial counsel, P, had provided ineffective assistance insofar as she failed to conduct a proper investigation, to present available evidence supporting his self-defense claim, and to raise a third-party culpability defense. On the day of the shooting, the petitioner was arguing with the victim. Certain individuals who witnessed the incident agreed that an initial gunshot was fired by someone other than the petitioner or the victim. Several witnesses then saw the petitioner pull out a gun and fire in the direction of the victim. The petitioner fled the scene, and the witnesses heard more gunshots. At the habeas trial, the habeas court heard testimony from the petitioner, as well as eight witnesses, including six individuals, A, X, Y, J, W and R, who witnessed the events surrounding the shooting but who were not called by P to testify during the petitioner's criminal trial. A was the petitioner's sister, X was A's daughter and the petitioner's niece, Y was the sister to A and the petitioner, J was a friend of the petitioner and the victim, W was a close friend of the victim, and R was an acquaintance of both the petitioner and the victim. The court did not hear testimony from P because she had died prior to the habeas trial. The habeas court rendered judgment granting the habeas petition, reasoning that P's failure to call A, X, Y, J, W and R to testify at the petitioner's criminal trial prejudiced him by unduly diminishing his constitutional right to present a defense. On the granting of certification, the respondent appealed to the Appellate Court, which reversed the habeas court's judgment, concluding that the petitioner had not provided sufficient evidence to rebut the strong presumption that P had exercised her reasonable, professional judgment. On the granting of certification, the petitioner appealed to this court. *Held*:

1. This court clarified that, in cases such as the present one, in which the attorney who allegedly provided ineffective assistance is unavailable to testify at the petitioner's habeas trial, the framework of the inquiry into counsel's performance is not altered merely because of that unavailability, and the Appellate Court in the present case placed undue emphasis on the petitioner's failure to present P's testimony, as the petitioner's claim regarding P's performance turned on the objective reasonableness of the possible strategic reasons that P might have had rather than on

P's subjective state of mind; moreover, this court's plenary review of the petitioner's ineffective assistance claims required it to examine the record of his criminal trial in the absence of P's testimony, as that record served as an informative window through which this court could identify P's possible strategic reasons and consider the objective reasonableness of those reasons, and such an approach was consistent with that taken in Connecticut and federal case law; furthermore, a habeas court's inquiry into the reasonableness of counsel's actions is not limited to a review of the criminal trial record, although the habeas court's evaluation of counsel's performance should begin with a thorough review of that record, as a court's conclusion is strong when it is based in evidence divined from the record, and when the criminal trial record does not reveal the reasons for counsel's decisions, the habeas court is required to affirmatively entertain other possible reasons and to rely on the presumption of reasonable, professional assistance.

2. The petitioner could not prevail on his claim that P's performance was constitutionally deficient on the ground that she had failed to adequately investigate and to call six eyewitnesses whose testimony would have supported his self-defense claim: P's failure to investigate X and Y was objectively reasonable, as P reasonably might have declined to investigate them given that their potential bias as close family to the petitioner might have undermined their credibility, that they were young at the time of the shooting, and that their testimony did not directly support a claim of self-defense; moreover, P's decision not to call A and J was objectively reasonable, as A's testimony did not directly support a claim of self-defense, P reasonably could have concluded that A's bias as the petitioner's sister might have undermined her credibility such that the damaging effect of her testimony would have outweighed its benefit, and the criminal trial record strongly supported the possibility that P made a strategic decision not to call J so that P would have a stronger basis on which to attack the sufficiency of the state's evidence regarding the requisite intent to commit murder, even though such a decision might have weakened the petitioner's self-defense claim; furthermore, irrespective of P's performance with respect to W and R, her failure to investigate or to call them as witnesses did not prejudice the petitioner, as this court could not conclude that there was a reasonable probability that the result of the petitioner's criminal trial would have been different if P had called W or R to testify in light of the facts that their testimony that the victim had a gun at the scene was duplicative of the testimony of the state's key witnesses at the petitioner's criminal trial, that W's testimony would have contradicted the petitioner's criminal trial testimony regarding a critical fact, and that R observed the shooting from a distance and could not identify the individuals who were present at the scene.

3. There was no merit to the petitioner's claim that P's performance was constitutionally deficient on the ground that P had unreasonably failed

to raise a third-party culpability defense as a result of her inadequate investigation and decision not to call J and W as witnesses at the criminal trial; although J's and W's testimony that the victim's brother, K, fired his gun and the medical examiner's testimony regarding the path through which the bullet travelled after entering the victim's body may have supported an inference that the fatal gunshot was fired by K, not the petitioner, P reasonably may have believed that the third-party culpability defense was weaker than the petitioner's self-defense claim because the state had strong evidence to counter a third-party culpability narrative, as all of the witnesses testified that the victim did not fall to the ground until after the petitioner fired his gun, suggesting it was the petitioner's shot, and not the first shot fired, that struck and killed the victim.

Argued May 3—officially released November 5, 2021*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Kwak*, *J.*; judgment granting the petition, from which the respondent, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Prescott* and *Sheldon*, *Js.*, which reversed the habeas court's judgment and remanded the case with direction to deny the petition, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Daniel J. Krisch, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

McDONALD, J. This certified appeal requires us to consider how a habeas petitioner may satisfy his burden to establish a claim of ineffective assistance of counsel

* November 5, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), when the allegedly ineffective counsel has died prior to the habeas trial. The petitioner, Bryan Jordan, was engaged in an argument with the victim, Curtis Hannons, when an initial gunshot fired from elsewhere prompted the petitioner to pull out his gun and fire it once at the victim's head. The petitioner was convicted of manslaughter in the first degree, in addition to another crime, and sentenced to forty-five years of imprisonment, and he thereafter filed a petition for a writ of habeas corpus on the basis of ineffective assistance of his trial counsel. The habeas court granted the petition for a writ of habeas corpus, reasoning that trial counsel's failure to call six additional eyewitnesses to testify at the underlying criminal trial prejudiced the petitioner's defense. The Appellate Court subsequently reversed the habeas court's judgment on the ground that the petitioner, as a consequence of his trial counsel's death, had not provided sufficient evidence to rebut the strong presumption that his trial counsel had exercised her reasonable professional judgment. *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 871–72, 234 A.3d 78 (2020). On appeal to this court, the petitioner claims that the Appellate Court's standard places an insurmountable obstacle in the path of a habeas petitioner whose trial counsel is unavailable to testify. For the following reasons, we clarify the applicable standard and conclude that the petitioner has failed to satisfy the *Strickland* test with respect to either claim of ineffective assistance of counsel.

The Appellate Court's decision affirming the petitioner's conviction on direct appeal sets forth the facts and procedural history; *State* v. *Jordan*, 117 Conn. App. 160, 161–62, 978 A.2d 150, cert. denied, 294 Conn. 904, 982 A.2d 648 (2009); which we summarize in relevant part. On the day of the shooting, the petitioner was in an

argument with the victim and the victim's brother, Jason Kelly. The argument ended when the petitioner got into his car and drove away. A few minutes later, the petitioner returned, and another heated discussion took place between the petitioner and the victim. Several people congregated around the petitioner and the victim, attempting to calm them down.

The eyewitnesses gave varying accounts of precisely what happened next. All agreed, however, that an initial gunshot was fired by someone other than the petitioner or the victim. Several witnesses then saw the petitioner pull out a gun and fire it once in the direction of the victim's head. The petitioner fled on foot, and the witnesses heard several more gunshots. The victim was transported to a hospital, where he died.

The petitioner was arrested and charged with murder in violation of General Statutes § 53a-54a (a), as well as several lesser included offenses.[1] The petitioner asserted a claim of self-defense. Id., 170. The jury ultimately found the petitioner not guilty of murder but guilty of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). Id., 162. The trial court sentenced the petitioner to the maximum permitted sentence of forty years of imprisonment with respect to this charge. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 824 n.1. The Appellate Court affirmed the petitioner's conviction on direct appeal. *State* v. *Jordan*, supra, 117 Conn. App. 172.

The Appellate Court's decision reversing the habeas court's judgment in the present case sets forth addi-

[1] In addition, the petitioner was charged with carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. *State* v. *Jordan*, supra, 117 Conn. App. 162. The jury found the petitioner guilty of this crime, and the trial court sentenced the petitioner to the maximum permitted sentence of five years of imprisonment, to run consecutively to the sentence imposed for the first degree manslaughter conviction. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 824 n.1.

tional facts and procedural history pertaining to the habeas proceeding; *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 824–28; which we summarize in relevant part. The petitioner filed the present amended petition for a writ of habeas corpus against the respondent, the Commissioner of Correction, in 2015. The petition raised, in relevant part, two claims of ineffective assistance of trial counsel in violation of the United States and Connecticut constitutions. Specifically, the petitioner first alleged that his criminal trial counsel, Diane Polan, failed to conduct a proper investigation and failed to present available evidence supporting his self-defense claim. The petitioner also alleged that Polan failed to raise a third-party culpability defense as a result of the same improper investigation and failure to present available evidence.

The habeas court, *Kwak*, *J.*, conducted a trial and heard testimony from the petitioner, as well as eight witnesses called on his behalf, including Polan's private investigator, an attorney testifying as an expert on professional standards, and six individuals who witnessed the events surrounding the shooting but were not called by Polan to testify during the criminal trial. The court did not hear testimony from Polan because she had died prior to the habeas trial. The court subsequently granted the petition for a writ of habeas corpus on the basis of both claims of ineffective assistance of counsel. Specifically, the court determined that "the petitioner had met his burden of demonstrating that Polan had rendered constitutionally deficient performance by failing to investigate properly or to present available evidence in support of the petitioner's claim of self-defense and by failing properly to investigate, raise, or present evidence in support of a third-party culpability defense." Id., 828. The court further determined that the petitioner had met his burden of demonstrating that Polan's defi-

cient performance "had prejudiced him by unduly diminishing his due process right to establish a defense." Id.

The Appellate Court reversed the judgment of the habeas court with respect to both claims of ineffective assistance of counsel. Id., 872. The court emphasized that, because Polan was unavailable to testify at the habeas trial, the petitioner had not met his burden of establishing how her investigative efforts were inadequate. Id., 848. Likewise, the court reasoned that the petitioner had not met his burden of disproving the objective reasonableness of any strategic reasons Polan might have had for her decisions regarding the investigation, which witnesses to call, and the potential third-party culpability defense. Id. The court then considered the testimony of the habeas witnesses at length and concluded that the petitioner failed to demonstrate that Polan's performance had been deficient with respect to either claim of constitutionally ineffective assistance. Id., 860, 871.

Thereafter, the petitioner filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly reverse the habeas court's determination that the performance of the petitioner's criminal trial counsel fell outside the range of competent counsel under *Strickland* v. *Washington*, [supra, 466 U.S. 668]?" *Jordan* v. *Commissioner of Correction*, 335 Conn. 931, 236 A.3d 218 (2020).

On appeal, the petitioner contends that the Appellate Court applied an incorrect standard to his claims of ineffective assistance of counsel. Specifically, the petitioner contends that the habeas court required him to negate every " 'plausible' " reason Polan might have had for her failure to investigate and call six witnesses with respect to his self-defense claim, as well as her failure to raise a third-party culpability defense that would have been supported by those same witnesses. With

respect to his first claim of ineffective assistance, the petitioner asserts that Polan's failure to investigate the six witnesses who observed the events surrounding the shooting and to call them to support his self-defense claim constituted objectively unreasonable representation. With respect to his second claim of ineffective assistance, the petitioner asserts that Polan's failure to investigate and to call the same witnesses, as well as her failure to raise a claim of third-party culpability supported by those witnesses, was objectively unreasonable. The respondent disagrees, contending that the Appellate Court properly applied the strong presumption of reasonable competence and concluded that the petitioner had failed to meet his heavy burden of overcoming that presumption with respect to either claim of constitutionally ineffective assistance.

I

We begin with the standard of review and principles of law that govern the petitioner's claims. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . [In addition], [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

The sixth and fourteenth amendments to the United States constitution, as well as article first, § 8, of the Connecticut constitution, guarantee a criminal defendant the assistance of counsel for his or her defense. See U.S. Const., amend. VI; Conn. Const., art. I, § 8. "It

is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Citation omitted; internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). "When a [habeas petitioner] complains of the ineffectiveness of [trial] counsel's assistance, the [petitioner] must show that counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, supra, 466 U.S. 687–88. "In other words, the petitioner must demonstrate that [trial counsel's] [performance] was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, supra, 460. Moreover, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Strickland* v. *Washington*, supra, 688.

"To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 458. "[T]he question is whether there is a reasonable probability that, [without] the errors, the [fact finder] would have had a reasonable doubt respecting [the petitioner's] guilt." *Strickland* v. *Washington*, supra, 466 U.S. 695. "A reasonable probability is a probability sufficient to undermine confidence

in the outcome." Id., 694. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." Id., 695–96. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id., 696. "Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 538, 198 A.3d 52 (2019).

Our analysis of the petitioner's claims focuses largely on Polan's performance. The United States Supreme Court has elaborated further principles that inform this prong of the *Strickland* test. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess [trial] counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action *might be considered sound trial strategy*." (Citation omitted; emphasis added; internal

quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689.

In a typical habeas trial for a claim of ineffective assistance, the petitioner's criminal trial counsel would testify about whether the challenged action was part of a strategic decision or litigation tactic, rather than a result of inadvertence or "sheer neglect." (Internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011); see, e.g., id. ("[t]here is a 'strong presumption' that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than 'sheer neglect' "); *Henry* v. *Scully*, 918 F. Supp. 693, 715 (S.D.N.Y. 1995) ("[n]ormally, before finding counsel inadequate, an evidentiary hearing would be held" to determine whether counsel's action was "strategic, that is, that it represented a conscious decision on counsel's part"), aff'd, 78 F.3d 51 (2d Cir. 1996); *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 553, 138 A.3d 378 (noting that petitioner conceded that trial counsel's decision was "a matter of strategy made at trial" and then considering "whether this strategic decision was reasonable"), cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). Assuming the habeas court finds testimony regarding trial counsel's strategy credible, the petitioner would then attempt to overcome the strong presumption that the asserted strategy was objectively reasonable. See, e.g., *Harrington* v. *Richter*, supra, 104; *Strickland* v. *Washington*, supra, 466 U.S. 689.

Neither this court nor the United States Supreme Court has considered how a habeas petitioner may satisfy his or her burden under *Strickland* when the allegedly ineffective trial counsel has died or is otherwise unavailable to testify at the habeas trial. However, based on the nature of the performance prong of *Strickland*, we begin by noting that the framework of that inquiry is not significantly altered by the unavailability of the

allegedly ineffective counsel. As the United States Supreme Court has observed, *Strickland* "calls for an inquiry into the *objective reasonableness* of counsel's performance, not counsel's subjective state of mind." (Emphasis added.) *Harrington* v. *Richter*, supra, 562 U.S. 110. As a result, the habeas court cannot "insist counsel confirm every aspect of the strategic basis for his or her actions." Id., 109. Likewise, trial counsel's testimony may identify specific strategic or tactical reasons counsel had for the challenged action, but the habeas court is not confined to consider only those reasons identified. Rather, in all circumstances, the strong presumption of *Strickland* that counsel exercised reasonable professional judgment requires the habeas court "to affirmatively entertain the range of possible reasons" trial counsel might have had for the challenged action. (Internal quotation marks omitted.) *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). Given the court's obligation affirmatively to contemplate possible strategic reasons for the challenged action, the strategic reasons identified by counsel's habeas testimony do not necessarily restrict or resolve the *Strickland* inquiry. Accordingly, when trial counsel is not available to testify, the absence of such testimony does not alter the relevant inquiry. In that circumstance, as always, the court must contemplate the possible strategic reasons that might have supported the challenged action and then consider whether those reasons were objectively reasonable. See, e.g., id.; *Strickland* v. *Washington*, supra, 466 U.S. 689.

In applying *Strickland* and its progeny to the context of unavailable counsel, the Appellate Court in this case placed undue emphasis on the petitioner's failure to present testimony by his deceased attorney, reasoning that this failure was effectively fatal to his claim: "[S]pecific evidence of Polan's reasons for pursuing or not pursuing any particular defense strategy—something

generally obtained at the habeas trial through the testimony of trial counsel or someone directly familiar with her strategy—was utterly lacking. Ordinarily, such evidence is crucial to meet the high hurdle imposed on a petitioner to show that his counsel's exercise of professional judgment fell outside the wide range considered competent for constitutional purposes." *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 870–71; see also id., 871 ("the petitioner was unable, *due to a lack of evidence*, to negate all possibility that Polan engaged in a reasonable . . . defense strategy" (emphasis added)). As we noted, however, the performance prong of *Strickland* "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington* v. *Richter*, supra, 562 U.S. 110. In other words, the petitioner's claim turned on the objective reasonableness of the possible strategic reasons Polan might have had and that the habeas court was required affirmatively to consider. Evidence regarding whether Polan actually, subjectively made the challenged decisions based on those reasons—evidence that was lacking by virtue of Polan's death, and that the Appellate Court indicated was "crucial" to the petitioner's claim; *Jordan* v. *Commissioner of Correction*, supra, 871—would not have addressed the relevant inquiry, which was *objective* reasonableness. As the petitioner in this case persuasively contends, requiring every habeas petitioner, whose allegedly ineffective trial counsel is unavailable to testify at the habeas trial, to provide evidence of counsel's *subjective* state of mind would undoubtedly and impermissibly heighten the petitioner's burden under *Strickland*.

In sum, our plenary review requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported Polan's decisions regarding investigating witnesses, calling witnesses, and present-

ing third-party culpability, and, second, to consider whether those reasons were objectively reasonable.[2] See, e.g., *Cullen* v. *Pinholster*, supra, 563 U.S. 196; *Strickland* v. *Washington*, supra, 466 U.S. 689. In order affirmatively to contemplate possible strategic reasons for Polan's actions, we begin by examining the record of the petitioner's criminal trial. See, e.g., *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 519–20, 139 A.3d 798 (2016). In the absence of testimony by trial counsel, the record of the underlying proceeding serves as an informative window into the representation alleged to have been ineffective, allowing the reviewing court to identify possible strategic reasons, consider the objective reasonableness of those reasons, and firmly ground its ultimate conclusion.

This approach is consistent with the Connecticut cases and federal court cases that have considered this circumstance. For example, in *Franko*, a habeas petitioner claimed ineffective assistance regarding a jury instruction issue, and trial counsel was unavailable to testify at the habeas proceeding. Id., 509, 515. The Appellate Court reasoned that, "[l]acking the ability to

[2] The petitioner contends that the Appellate Court applied an incorrect standard by requiring him to negate all "*plausible*" reasons for Polan's actions, rather than the "possible" reasons for her actions. (Emphasis altered; internal quotation marks omitted.) Specifically, the petitioner asserts that possibility designates a quantitative assessment falling between probability and impossibility, whereas plausibility is a qualitative assessment of superficiality. We note, however, that the Appellate Court used those terms interchangeably throughout its opinion. See *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 856 ("[t]here are a number of plausible reasons" for Polan's actions); id., 869 ("there are a number of possible reasons" for Polan's actions). In addition, the United States Supreme Court also has used those terms interchangeably throughout its ineffective assistance jurisprudence. See, e.g., *Cullen* v. *Pinholster*, supra, 563 U.S. 196 (court must "affirmatively entertain the range of possible reasons" for counsel's actions (internal quotation marks omitted)); *Strickland* v. *Washington*, supra, 466 U.S. 690 (actions taken "after thorough investigation of law and facts relevant to plausible options" are objectively reasonable). For purposes of our disposition of this case, we eschew use of the term "plausibility" in favor of the term "possibility."

determine directly the reasons for trial counsel's actions, courts must examine all other available evidence from the trial record in order to determine whether the conduct complained of might be considered sound trial strategy." Id., 519. In doing so, the court found objectively reasonable, strategic reasons for trial counsel's actions contained in the transcript of his closing argument. Id., 522–24. In addition, in *Bullock* v. *Whitley*, 53 F.3d 697 (5th Cir. 1995), a habeas petitioner claimed ineffective assistance regarding trial counsel's preparation for an alternative defense. Id., 700. The Fifth Circuit emphasized that, although trial counsel was deceased at the time of the habeas trial, his testimony was "not necessary to [the court's] determination that [counsel's] decision might be considered sound trial strategy." Id., 701. After reviewing the criminal trial record, the court concluded that trial counsel was prepared and made objectively reasonable decisions regarding a difficult case. See id., 701 n.11 ("[a]lthough there was no opportunity to obtain [trial counsel's] testimony regarding his motivations, our review of the record has left us with the distinct impression that [counsel] did the best he could with what he had"). Finally, in *Henry* v. *Scully*, supra, 918 F. Supp. 693, a habeas petitioner claimed ineffective assistance because his criminal trial counsel failed to request a jury instruction that a codefendant's confession could be used only against the codefendant and not against the petitioner. Id., 714. In granting the habeas petition, the United States District Court for the Southern District of New York reasoned that, even accepting that the criminal trial record supported the argument that trial counsel's decisions were based on a strategy of presenting a joint defense for the two codefendants, such strategy was not objectively reasonable under *Strickland*. Id., 715. These cases demonstrate that, irrespective of the merits of a habeas petition, in the absence of trial counsel's testimony, a

reviewing court finds the strongest foundation for the outcome of the petition in the record of the underlying proceeding.

Regardless of the availability of trial counsel to testify at the habeas proceeding, the habeas court's inquiry into the reasonableness of counsel's actions is not *limited* to a review of the criminal trial record. See *Cullen* v. *Pinholster*, supra, 563 U.S. 196 (court must "affirmatively entertain the range of possible reasons" counsel might have had for challenged action (internal quotation marks omitted)); *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 222, 145 A.3d 362 (2016) (trial counsel's action was objectively reasonable despite record containing "little or no circumstantial evidence from which the habeas court could have divined" counsel's reasons), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017). We emphasize, however, that a habeas court's evaluation of an ineffective assistance claim in a circumstance of unavailable trial counsel ought to begin with a thorough review of the record of the underlying proceeding because, as the cases that have considered this circumstance demonstrate, the court's conclusion is surely *strongest* when it is based in evidence divined from that record. See, e.g., *Bullock* v. *Whitley*, supra, 53 F.3d 701; *Henry* v. *Scully*, supra, 918 F. Supp. 715; *Franko* v. *Commissioner of Correction*, supra, 165 Conn. App. 520. Grounding the court's reasoning in the record maintains the ideal balance between the court's responsibility affirmatively to entertain possible strategic reasons and its obligation to avoid "[indulging] post hoc rationalization for counsel's [decision-making] *that contradicts the available evidence of counsel's actions* . . . ." (Emphasis added; internal quotation marks omitted.) *Harrington* v. *Richter*, supra, 562 U.S. 109; see also *Franko* v. *Commissioner of Correction*, supra, 520 (reviewing court "should not speculate as to trial counsel's reasons for making [litigation] decisions").

Likewise, beginning the court's analysis with a thorough review of the record best maintains the original *Strickland* burdens in the absence of counsel's testimony, without unfairly prejudicing either the petitioner or the respondent. Compare *Slevin* v. *United States*, 71 F. Supp. 2d 348, 358 n.9 (S.D.N.Y. 1999) (recognizing that "the death of a petitioner's trial counsel is just as, if not more, likely to prejudice the respondent"), aff'd, 234 F.3d 1263 (2d Cir. 2000), with *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 871 (recognizing that "the death of counsel . . . made the petitioner's case more difficult to prove than it might otherwise have been"). That said, we recognize that the record of the underlying proceeding may not always reveal the reasons for counsel's decisions, in which case the court will be required affirmatively to entertain other possible reasons and to rely on the presumption of reasonable professional assistance. See *Moye* v. *Commissioner of Correction*, supra, 222.

II

We now turn to the petitioner's claim of ineffective assistance of counsel with respect to his self-defense claim. Specifically, the petitioner contends that Polan's performance was constitutionally deficient because she failed to adequately investigate and to call six witnesses whose testimony would have supported his self-defense claim. The respondent disagrees, contending that the petitioner cannot overcome *Strickland*'s strong presumption of reasonable competence because decisions about which witnesses to call are quintessential trial strategy decisions entitled to great deference.

The substantive principles governing a self-defense claim are well settled. "Pursuant to [General Statutes] § 53a-19 (a) . . . a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to

use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack." (Footnote omitted; internal quotation marks omitted.) *State* v. *Saunders*, 267 Conn. 363, 372–73, 838 A.2d 186, cert. denied, 541 U.S. 1036, 124 S. Ct. 2113, 158 L. Ed. 2d 722 (2004). We repeatedly have stated that the second requirement is "subjective-objective," meaning that it requires the jury to "make two separate affirmative determinations . . . . First, the jury must determine whether, on the basis of all of the evidence presented, the defendant in fact had believed that he had needed to use deadly physical force, as opposed to some lesser degree of force, in order to repel the victim's alleged attack. . . . If . . . the jury determines that the defendant in fact had believed that the use of deadly force was necessary, the jury must make a further determination as to whether that belief was reasonable, from the perspective of a reasonable person in the defendant's circumstances. . . . Thus, if a jury determines that the defendant's honest belief that he had needed to use deadly force, instead of some lesser degree of force, was not a reasonable belief, the defendant is not entitled to the protection of § 53a-19."[3] (Internal quotation marks omitted.) Id., 373–74.

[3] In concluding that the petitioner failed to satisfy the prejudice prong of the *Strickland* test with regard to the habeas witnesses' testimony that the victim had a gun, the Appellate Court emphasized that this evidence "would only be marginally relevant to the petitioner's self-defense claim because it was the reasonableness of the petitioner's subjective perception of the situation, as he saw it, not the perception of the other witnesses, that was relevant to the issue of self-defense. In other words, Polan did not need to demonstrate that the victim in fact had a gun, only that the petitioner reasonably believed [that he was] armed." (Emphasis omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. 865. However, as the petitioner persuasively contends, the witnesses' testimony that the victim *actually* had a gun would have corroborated his *belief* that the victim had a gun, which would have been relevant to the reasonableness element of his self-defense claim. See, e.g., *State* v. *Saunders*, supra, 267 Conn. 373–74.

A

The following additional facts and procedural history are relevant to our resolution of this claim, reflecting our examination of the petitioner's underlying criminal trial record to divine possible strategic reasons that might have supported Polan's investigative and trial decisions. In the petitioner's criminal trial, the state relied on several eyewitnesses. Relevant to this appeal, one eyewitness, Roger B. Williams, Sr., lived in the neighborhood where the shooting took place, knew both the petitioner and the victim, and testified that he was present for the entire incident. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 840. Williams testified that the victim drew his gun during the argument, before the petitioner drew his. Id., 841. Williams also indicated that one of the petitioner's habeas witnesses had fired the initial gunshot, at which point the petitioner drew a gun and fired it at the victim's head. Id. In addition, the state called Kimberly Stevenson, the victim's girlfriend and the mother of their children, who witnessed the shooting from her bedroom window. Id. She testified that, although she heard the initial gunshot, she did not see who fired it, and that the petitioner subsequently drew a gun and fired it at the victim's head. Id. Stevenson also testified that she had not seen the victim with a gun during the afternoon leading up to the shooting. Id. Williams and Stevenson both testified that Kelly, the victim's brother, was not present at the shooting. Id., 841–42. At the state's request, the trial court admitted a recorded statement, given by a third eyewitness to the police while he was in custody on unrelated charges, that generally corroborated Williams' and Stevenson's accounts. Id., 842. Finally, the state called two police officers who responded to the scene shortly after the shooting; id., 843; and a detective who testified about his efforts to investigate the shooting and to locate the petitioner. Id., 826.

The petitioner testified on his own behalf at his criminal trial. Specifically, he testified that he did not know whether the victim had a gun, but he had "observed [the victim] fumbling with his pocket in a way that suggested he might be armed." Id., 843. The petitioner testified that he likewise believed that Kelly had a gun. Id. He further testified that he drew his gun only in response to the first gunshot and that he fired in the direction of the victim because he believed the first gunshot had been fired from that direction. Id. On cross-examination, the petitioner testified that he was not in constant possession of his gun throughout the day and that he sometimes left his gun in the glove compartment of his car. Id., 844. Finally, the medical examiner who performed the autopsy of the victim testified regarding the nature, location, and trajectory of the victim's bullet wound. Id.

Polan's cross-examination of the state's witnesses as well as her closing argument demonstrate that her overall trial strategy was based on three related theories of the case. First, Polan highlighted the reasonable doubt that the bullet from the petitioner's gun was the one that actually killed the victim, relying on the eyewitness' testimony that the petitioner had been standing directly in front of the victim and the medical examiner's testimony regarding the leftward and upward path of the bullet wound. Id., 844–45. Second, Polan highlighted the reasonable doubt that the petitioner ever developed the specific intent required for the various charges, relying on the eyewitness' conflicting accounts about what had happened, as well as the consistent testimony about the rapid pace of events. Id., 845–46. Third, Polan presented evidence in support of the petitioner's self-defense claim, relying on the eyewitness' testimony regarding the initial gunshot, the possibility that the victim and others in the vicinity were armed, and the fact that the petitioner did not fire until fired

at. Id. Polan ended her closing argument by focusing on the second and third theories: "This is a tragic killing, it's a tragedy that [the victim] is . . . not with us today, but it's not a murder. It's not a murder because the state cannot prove the specific intent to kill beyond a reasonable doubt, and, again, there is ample evidence here that [the petitioner] acted in self-defense. He was shot at [and] didn't know where the shots were coming from. It all happened so quickly that he did not form a specific intent to kill [the victim]. Yes, he shot in [the victim's] direction; he told you that when he testified here yesterday, but his intent was not to kill [the victim]. [The petitioner's] intent was to protect himself." (Internal quotation marks omitted.) Id., 846.

We next consider the record of the habeas trial, beginning with the six witnesses whom, the petitioner contends, Polan should have called to testify about the events surrounding the shooting. Three witnesses were closely related to the petitioner and to each other: Audrey Jordan, the petitioner's sister; Alexis Jordan, Audrey's daughter and the petitioner's niece; and Jymisha Freeman, sister to Audrey and the petitioner. Audrey testified that she was inside her mother's house when she heard gunshots. She went outside, saw a body on the ground, and walked forward to hug Stevenson where she knelt beside the victim's body. Audrey testified that she observed Stevenson jump up, run inside her nearby house, and come back to the scene with a towel. Stevenson used the towel to pick up a gun lying inches from the victim's body, carried it back inside her house, and then returned to the scene without the gun or the towel. Audrey also testified that she spoke with the state's detective and Polan about what she had observed.

Alexis was about eight years old and Jymisha was about eleven years old at the time of the incident. Both witnesses testified that they were inside the same house

as Audrey when they heard gunshots and went outside. Alexis saw the victim's body and a gun lying a few inches from it; Jymisha could not identify the victim, and she did not see a gun from her farther distance. Alexis corroborated Audrey's testimony that Stevenson wrapped a gun in a cloth and carried it from near the victim's body into her house. Likewise, Jymisha testified that she saw Stevenson at the scene with a white towel or cloth in her hand. Neither witness spoke with Polan, her private investigator, or the police about the incident.

Flonda Jones also testified at the habeas trial; she had provided a written statement to Polan's private investigator dated approximately nine months after the incident, which was admitted into evidence at the habeas trial. She was a friend of both the petitioner and the victim, and she witnessed the two confrontations between them, including the shooting. Jones stated that, as the petitioner was leaving the first confrontation and walking to his car, he said to the victim: "You going to confront me with a gun." She stated that the petitioner subsequently returned, and the victim resumed his argument with the petitioner. Throughout this confrontation, Jones observed the victim reaching for a gun in his waistband multiple times. In both her written statement and her testimony at the habeas trial, Jones stated that Kelly fired the initial gunshot from where he stood next to and slightly behind the victim.

Then, according to Jones' written statement, the victim and the petitioner both pulled guns from their waistbands. The petitioner fired his gun, the victim fell to the ground, and the petitioner began running away. Jones' testimony at the habeas trial diverges from her written statement with respect to who fired the gunshot that killed the victim. When confronted with her written statement on cross-examination, however, Jones testified that the written statement "sounds about right." She further testified that she saw a gun fall out of the

victim's waistband when he fell. Jones also corroborated Audrey's and Alexis' testimony that Stevenson wrapped the gun in a cloth and carried it into her house. Jones testified that she spoke with the police and Polan's private investigator about the incident and that she was subpoenaed for the petitioner's criminal trial but not called to testify.

James Walker, a close friend of the victim, also testified at the habeas trial. Walker was Kelly's cousin, and he indicated that he, Kelly, and the victim grew up together. Walker testified that he saw the "heated discussion" between the petitioner and the victim and observed the victim "flashing" the gun at his waistband but that the victim never actually drew his weapon. He testified that he saw Kelly standing behind the victim on the steps of a nearby building throughout the confrontation. Walker testified that he turned away from the petitioner and the victim and then heard a gunshot. When he turned back around, he saw that the victim was on the ground and that Kelly was firing his gun from his place on the steps. Walker testified that he fled but returned a few minutes later to see Stevenson and Williams next to the victim's body. He saw Williams remove something wrapped in a towel from the scene, but he did not know what. Walker testified that he spoke with the state's detective about what he had observed, but he did not speak with Polan or her private investigator. Finally, in response to questions seeking to impeach his credibility, Walker testified that he did not intend to testify in support of the petitioner because he was "loyal" to the victim.

The sixth witness to testify at the habeas trial was Billy Wright. He indicated that he knew both the petitioner and the victim. He was seventeen at the time of the incident, and he testified that he was at a playground when he saw the victim on a nearby porch talking to someone he could not identify. Wright testified that he

saw the victim pull a gun from his waistband, at which point he decided to leave the playground to get away from the incident. He heard gunshots as he was leaving, but he did not see who fired them because his back was turned, and he did not see anything else from the incident or anyone else whom he recognized. Wright denied Williams' testimony from the petitioner's criminal trial that Wright had a gun during the incident and that he fired the initial gunshot. He also testified that he spoke with the state's detective about the incident. The habeas court found all six of these witnesses credible.

The petitioner testified at the habeas trial regarding Polan's trial preparation. He testified that he told Polan the names of certain witnesses to the incident, including Jymisha, Jones, Walker, and Wright, and that Polan had subpoenaed Audrey. Polan informed the petitioner about Jones' written statement and explained that, given Jones' anticipated testimony, she intended to raise a self-defense claim. Specifically, the petitioner testified that, "[w]hen I elected to go to trial, I went to the trial under the premise that we were—it was a self-defense case based on the testimony of [Jones]." The petitioner also testified that he asked Polan why she did not call Jones, but he could not recall the reason Polan provided. He further testified that, when Polan indicated to the petitioner that he would testify, he asked her, "why won't you call the witnesses, and she just said concentrate on what we're doing," which, at that time, had been preparing for the petitioner's own testimony. In addition, Mike O'Donnell, the private investigator who worked with Polan on the petitioner's criminal trial, testified at the habeas trial. O'Donnell testified that he "never discussed the witness list with [Polan]" and otherwise remembered almost nothing from his work on the petitioner's case, including any conversations with Jones.

B

In this appeal, the petitioner contends that, given the totality of the record from the underlying criminal trial and the habeas trial, it is clear that Polan had failed to conduct a proper investigation into the six witnesses to the incident. The petitioner further contends that Polan should have called those witnesses to support his self-defense claim. The petitioner asserts that those eyewitnesses were crucial to his self-defense claim because they would have established that the victim had a gun and was exhibiting threatening behavior toward him.

Because the petitioner's claims specifically challenge Polan's failure to investigate and to call certain witnesses, we note that we have articulated further principles, as has the United States Supreme Court, that inform our review of these specific challenged actions under *Strickland*. In the investigation context, "[i]nasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case." (Citation omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 680; see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 34, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland* v. *Washington*, supra, 466 U.S. 690–91; see also *Skakel* v. *Commissioner of Correction*, supra, 32.

Regarding ineffectiveness claims relating to the failure to call witnesses, "[w]hen faced with the question of whether counsel performed deficiently by failing to call a certain witness, the question is whether this omission was objectively reasonable because there was a strategic reason not to offer such . . . testimony . . . [and] whether reasonable counsel could have concluded that the benefit of presenting [the witness' testimony] . . . was outweighed by any damaging effect it might have." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 539. Moreover, "our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." (Footnotes omitted.) *Gaines* v. *Commissioner of Correction*, supra, 681–82.

On the basis of our review of the criminal and habeas trial records, we conclude that there were objectively reasonable, strategic reasons Polan might have had for her limited investigation and her decisions not to call certain habeas witnesses. Regarding Audrey, given that the habeas court credited her testimony that Polan subpoenaed her for the petitioner's criminal trial, it may reasonably be inferred that Polan knew the substance of Audrey's anticipated testimony. It may also reasonably be inferred that Polan knew that Audrey was the petitioner's sister. It is not unduly speculative and does not constitute impermissible post hoc rationalization to entertain the possibility that Polan concluded that Audrey's bias might have undermined her credibility enough that the damaging effect of her testimony would have outweighed its benefit. Under *Cullen*, it is our obligation to entertain reasonably possible reasons that

may explain trial counsel's decisions, and it is not unduly speculative and does not constitute impermissible post hoc rationalization to entertain the possibility that Polan concluded that Audrey's bias might have undermined her credibility enough that the damaging effect of her testimony would have outweighed its benefit. Experienced trial lawyers know that simpler is often better and sometimes will decide not to call a witness because, in counsel's estimation, the marginal value to be gained from the expected testimony is not worth the risk that the jury will become distracted, confused or even doubtful about the theory of defense following an effective cross-examination of the witness. We cannot conclude that such a decision would have been objectively unreasonable. Indeed, we have previously recognized that counsel's decision not to call a witness based on counsel's concern about the witness' potential bias as a family member of the habeas petitioner was objectively reasonable. See *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 552. We noted that this concern "was justified even if [the witness] was considered . . . credible . . . by the habeas court . . . ." Id. Moreover, given that Polan knew of Audrey, her decision not to call her at trial is "virtually unchallengeable . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 690.

Regarding Alexis and Jymisha, nothing in the record supports an inference that Polan knew the substance of their anticipated testimony; rather, given that the habeas court credited their testimony that they never spoke with Polan or her investigator, it may reasonably be inferred that Polan did not contact either of them to learn the substance of their anticipated testimony.[4]

[4] The Appellate Court speculated that Polan knew the substance of Alexis' and Jymisha's anticipated testimony because Audrey "may have told Polan and O'Donnell . . . what they may have observed." *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 852. However, Audrey's habeas testimony did not indicate that she communicated such information to Polan or to her private investigator. We need not so speculate because the record

Accordingly, Polan's decision not to investigate them will be considered objectively reasonable "to the extent that reasonable professional judgments support the limitations on [Polan's] investigation." Id., 691. However, as with Audrey, it may reasonably be inferred that Polan knew that Alexis and Jymisha were close family to the petitioner. It would have been reasonable for Polan to conclude that, as with the petitioner's sister, Audrey, their bias might have undermined their credibility. We cannot conclude that such a decision would have been objectively unreasonable. See, e.g., *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 552. Polan also reasonably might have declined to investigate Alexis and Jymisha given their young ages—eight and eleven years old, respectively, at the time of the shooting—which Polan likely would have learned from the petitioner or Audrey when they were first brought to Polan's attention.

We also emphasize, as the Appellate Court noted, that Alexis, Jymisha, and Audrey's testimony did not directly support a claim of self-defense. See *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 853. Their testimony tended to demonstrate only that a gun had been lying on the ground near the victim's body after he was shot, suggesting that it was the victim's gun and that he may have had it when he was shot. Id. Williams, the state's key eyewitness from the criminal trial, testified before the jury that the victim had drawn a gun prior to being shot. Thus, Polan reasonably could have concluded that Alexis, Jymisha, and Audrey's testimony was cumulative of, and not as compelling as, Williams' testimony. Consequently, we cannot conclude that any limitation on Polan's investigation

supports our conclusion that Polan might have declined to learn the substance of Alexis' and Jymisha's testimony because of their young ages and family relation to the petitioner.

of these witnesses would have been objectively unreasonable.

Turning to Polan's failure to call Jones at the criminal trial, we note that Jones' written statement to Polan's private investigator, as well as her credible testimony that Polan subpoenaed her for the petitioner's criminal trial, strongly supports the inference that Polan knew the substance of Jones' anticipated testimony. See id., 855. The criminal trial record reveals an objectively reasonable reason Polan might have had to decline to call Jones: Although Jones' testimony would have supported the petitioner's self-defense claim, it also would have undermined Polan's efforts to inject reasonable doubt into the state's case regarding the petitioner's intent. Specifically, Jones' statement recited the petitioner's words to the victim, as the petitioner was leaving the first confrontation, "[y]ou going to confront me with a gun." Jones and the state's key eyewitness from the criminal trial, Williams, consistently described how the petitioner returned a few minutes after the end of the first confrontation, at which point the second confrontation and eventual shooting occurred. In addition, the criminal trial record contains testimony from the petitioner that he did not have possession of his gun at all times and that he sometimes left it in his car.

Together, this evidence would have strongly supported the state's argument that the petitioner possessed the requisite intent for murder because he left the first confrontation in order to acquire his gun and to resume his argument with the victim while armed. Without Jones' statement that the petitioner said, "[y]ou going to confront me with a gun" as he was leaving the first confrontation, the state's argument lacked direct evidence that the petitioner possessed the requisite intent for murder. In other words, the criminal trial record strongly supports the possibility that Polan decided not to call Jones so that she would have a

stronger basis from which to attack the sufficiency of the state's evidence regarding the requisite intent to commit murder, even though such a decision might have weakened the petitioner's self-defense claim.[5] The jury ultimately found the petitioner not guilty of murder but guilty of the lesser included offense of manslaughter in the first degree with a firearm. Thus, it is reasonable to conclude that Polan's decisions, including her decision not to call Jones, contributed to the jury's decision to find the petitioner not guilty of the more serious charge. See, e.g., *Harrington* v. *Richter*, supra, 562 U.S. 111 ("while in some instances even an isolated error can support an [ineffective assistance] claim if it is sufficiently egregious and prejudicial . . . it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy" (citation omitted; internal quotation marks omitted)). As the Appellate Court noted, "[i]t is hard to label Polan's efforts on behalf of the petitioner as ineffective advocacy when those efforts resulted in a significant reduction in the petitioner's potential sentencing exposure through his acquittal on the murder charge. If the petitioner had been convicted of murder, he faced a sentence ranging from the mandatory minimum of twenty-five years to a maximum of life in prison. See General Statutes § 53a-35a (2). Instead, his manslaughter with a firearm conviction carried a lesser penalty, a five year mandatory minimum with a maximum sentence of forty years of incarceration. General Statutes

[5] The Appellate Court listed other "plausible" reasons why Polan might have decided not to call Jones that find no support in the criminal trial record. Specifically, the court reasoned that Jones "had a criminal record," although the habeas record contains no further details, and that Jones was a friend of the petitioner, which ignores her testimony that she was also a friend of the victim and that she was therefore a neutral witness. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 856. As the petitioner notes, the court provided no basis in the criminal trial record for its inference that these were among the possible reasons Polan might have had. Given that there is an objectively reasonable, strategic basis for Polan's decision not to call Jones that finds substantial support in the criminal trial record, we need not speculate further.

§ 53a-35a (5)." *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 865.

We cannot conclude that the decision not to call Jones was objectively unreasonable. Given the strong support in the criminal trial record, this was a strategic decision made by Polan that, "although not entirely immune from review," is "entitled to substantial deference by the court." *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 31. This is precisely a circumstance in which the court should not "second-guess defense counsel's decision not to . . . call certain witnesses" because counsel "[learned] the substance of the witness' testimony and determin[ed] that calling that witness [was] unnecessary or potentially harmful to the case . . . ." (Footnotes omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82. As with Polan's decision not to call Audrey, this was a "strategic [choice] made after thorough investigation . . . [that is] virtually unchallengeable . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 690. Moreover, counsel's decision regarding which defense theory to emphasize—attacking the sufficiency of the evidence supporting the state's case or buttressing a statutory defense—is a quintessential decision of trial strategy and professional judgment that *Strickland* considers to be objectively reasonable. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id., 689. Accordingly, we conclude that Polan's decision not to call Jones did not constitute constitutionally deficient performance.

Regarding Walker and Wright, nothing in the record supports an inference that Polan knew the substance of their anticipated testimony. Given that the habeas court credited their testimony, it may reasonably be inferred that Polan did not contact either of them to

learn the substance of their anticipated testimony. Accordingly, Polan's decision not to investigate them will be considered objectively reasonable "to the extent that reasonable professional judgments support the limitations on [Polan's] investigation." *Strickland* v. *Washington*, supra, 466 U.S. 691. Moreover, and unlike with the previous four witnesses, nothing in the record points to any particular reasons that appear to have supported Polan's decisions not to investigate them.[6] However, we need not speculate why Polan might not have investigated Walker and Wright or determine whether such decision could be objectively reasonable despite the lack of support in the criminal trial record. Irrespective of the performance prong, we conclude that the petitioner cannot satisfy the prejudice prong of the *Strickland* test with respect to these witnesses.

"Although a petitioner can succeed only if he satisfies both prongs [of the *Strickland* test], a reviewing court can find against a petitioner on either ground." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 538. Considering the totality of the evidence before the jury, we cannot con-

[6] The Appellate Court speculated that Polan both knew the substance of Walker's testimony and determined that "she would have a better chance of persuading the jury by relying on the state's witnesses" because of factual inconsistencies between Walker's testimony and Williams' testimony. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. 858. This reasoning, however, appears to contradict Polan's emphasis of the factual inconsistencies in the testimony of the various eyewitness as part of her strategy to highlight the reasonable doubt in the state's case. See id., 845 ("Polan, attempting to capitalize on the inconsistent factual testimony of the state's own witnesses, began her closing argument by attempting to persuade the jury that there was reasonable doubt about what had occurred"); see also *Harrington* v. *Richter*, supra, 562 U.S. 109 (court should not "indulge post hoc rationalization for counsel's [decision-making] *that contradicts the available evidence of counsel's actions*" (emphasis added; internal quotation marks omitted)). Given that the petitioner's claim with respect to Walker's testimony fails on the prejudice prong of the *Strickland* test, we decline to speculate outside the record regarding why Polan did not investigate or call Walker.

clude that there is a reasonable probability that the result of the petitioner's criminal trial would have been different if Polan had called Walker or Wright to testify. See, e.g., *Ledbetter* v. *Commissioner of Correction*, supra, 275 Conn. 458. Regarding Walker, who was a close friend of the victim, we begin by noting that his testimony that the victim had a gun was duplicative of the testimony of the state's key eyewitness, Williams. In fact, Polan reasonably could have determined that Walker's testimony that the victim never actually drew his gun would have been less compelling for purposes of the petitioner's self-defense claim than Williams' testimony, given that Williams claimed that the victim actually drew his gun. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 857–58; see also *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 628, 212 A.3d 678 (2019). Additionally, although Walker's testimony would have supplied credible evidence by a hostile witness that the victim had a gun and was exhibiting threatening behavior toward the petitioner, his testimony also contained a crucial fact that would have undercut its persuasive effect. Specifically, Walker's testimony that he saw the victim " '*flashing*' " his gun; (emphasis added) *Jordan* v. *Commissioner of Correction*, supra, 857; would have contradicted the petitioner's criminal trial testimony that *he did not see* the victim's gun and did not know whether the victim actually had a gun. See id., 843. This testimony concerned the critical factual dispute of whether the petitioner reasonably believed that the victim was about to fire his gun at him, which was central to his self-defense claim. Because the petitioner's testimony and Walker's testimony on this critical fact were inconsistent, however, we cannot conclude that there is a reasonable probability that Walker's testimony would have altered the outcome of the criminal trial. Rather, there was a real possibility that the jury would have found the

petitioner, Walker, or both less credible because of the discrepancy concerning this central issue.

Regarding Wright, his testimony would have supported the petitioner's self-defense claim only to the extent that the jury credited his testimony that the victim had a gun at the scene. However, this was consistent with testimony by the state's key eyewitness, Williams, that the victim drew his gun before the petitioner drew his. Id., 841. Given that Wright testified that he observed the shooting from such a distance, his testimony contained little additional evidence that would have supported the petitioner's self-defense claim. He did not see any of the other witnesses around the victim, and he could not even identify the petitioner as the person with whom the victim was conversing. Moreover, at the criminal trial, Williams had identified Wright as the person who fired the initial gunshot. Id. Because of Williams' testimony at the criminal trial, coupled with Wright's habeas testimony regarding his distant observation of the shooting and his weak recall of the other individuals present, we cannot conclude that there is a reasonable probability that Wright's testimony would have altered the outcome of the criminal trial. In sum, to the extent that Polan performed deficiently by failing to call Walker or Wright, the effect of such failure is best characterized as "isolated"; *Strickland* v. *Washington*, supra, 466 U.S. 696; it did not have "a pervasive effect on the inferences to be drawn from the evidence"; id., 695–96; or "[alter] the entire evidentiary picture . . . ." Id., 696. Our confidence in the outcome is not undermined by Walker's or Wright's habeas testimony.

In sum, we conclude that Polan's failure to investigate Alexis and Jymisha was objectively reasonable. We likewise conclude that Polan's decisions not to call Audrey and Jones were objectively reasonable. We also conclude that, irrespective of Polan's performance, her failure to investigate or call Walker or Wright did not

prejudice the petitioner. Consequently, the petitioner has not satisfied the *Strickland* test with respect to Polan's representation in connection with his self-defense claim.

III

We next consider the petitioner's claim of ineffective assistance with respect to Polan's failure to raise a third-party culpability defense. Specifically, the petitioner contends that Polan's performance was constitutionally deficient because, as a result of her inadequate investigation and decisions not to call Jones and Walker, Polan unreasonably failed to raise a third-party culpability defense. The petitioner asserts that Jones' and Walker's testimony that Kelly fired his gun, combined with the testimony by the medical examiner regarding the leftward and upward path of the victim's bullet wound, supports a strong inference that the fatal gunshot was fired by Kelly, not the petitioner. The respondent disagrees, contending that Polan reasonably decided that it was "better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." *Harrington* v. *Richter*, supra, 562 U.S. 109. We agree with the respondent.

We first review the standards governing the third-party culpability defense. "It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 514, 964 A.2d 1186,

cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). "It is not ineffective assistance of counsel . . . to decline to pursue a [third-party] culpability defense when there is insufficient evidence to support that defense." Id., 515.

Polan did not request, and the criminal trial court did not provide, a third-party culpability jury instruction. *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 869. The criminal trial record, however, demonstrates that one of Polan's defense strategies was to highlight the reasonable doubt in the state's case by explaining to the jury, particularly on the basis of the forensic evidence presented by the medical examiner, that the bullet that killed the victim could not have been fired by the petitioner. Id. It is not unduly speculative to conclude that Polan might have determined that this was the better approach to a theory of third-party culpability because it would not have involved the more rigorous requirements a jury instruction on the defense would have imposed. See *Harrington* v. *Richter*, supra, 562 U.S. 109; see also *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 514 (defendant must directly connect third party to crime). Polan reasonably may have believed that the third-party culpability defense was weaker than the petitioner's self-defense claim because the state had strong evidence to counter a third-party culpability narrative. For example, all the witnesses testified that the victim did not fall to the ground until after the petitioner fired his gun, suggesting it was his shot, and not the first shot fired, that struck and killed the victim.[7] Thus, although not abandoning

[7] Additionally, as the Appellate Court explained, Stevenson, Williams and the petitioner himself testified at the criminal trial that the victim had begun to turn away from the petitioner at the time the petitioner fired his gun, which could have explained away the forensic evidence that was central to the success of any third-party culpability claim. See *Jordan* v. *Commissioner of Correction*, supra, 197 Conn. App. 870. This further supports the conclusion that Polan reasonably may have determined that it would not have been the strongest defense strategy to request a third-party culpability instruction.

it completely, Polan chose not to make it more of a focus of her closing argument and risk confusing or alienating the jury. Moreover, third-party culpability was only one of several defense strategies Polan pursued. As we emphasized with respect to the petitioner's self-defense claim, Polan's decisions regarding which defense strategies to emphasize throughout the trial involved the exercise of her professional judgment and were not objectively unreasonable. See *Strickland* v. *Washington*, supra, 466 U.S. 689.

The petitioner nevertheless contends that this case is factually analogous to *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 502, in which we held that counsel's "decision not to present the [third-party] culpability defense fell below an objective standard of reasonableness, and, therefore, constituted deficient performance under the principles enunciated in *Strickland.*" Id., 520. The petitioner asserts that, as in *Bryant*, the credible and highly persuasive testimony of two of the habeas witnesses—one of whom was neutral, the other of whom was hostile—supported a third-party culpability defense. See id., 517. The petitioner further asserts that, as in *Bryant*, this testimony was "exceedingly important" because both cases involved "a credibility contest . . . ." (Internal quotation marks omitted.) Id., 518.

Bryant is distinguishable, however, because we noted in that case that the explanations offered by counsel for his decision not to call the third-party culpability witnesses were objectively unreasonable based on the governing law and the criminal trial record. Id., 521–22 and n.15. As divined from the criminal trial record in the present case, the strategic reason for Polan's decision not to pursue an express third-party culpability defense is much stronger than the reasons proffered by counsel in *Bryant*. In addition, the arguments raised by the petitioner regarding *Bryant* and third-party cul-

pability emphasize the crucial nature of Jones' and Walker's testimony and the prejudicial effect of Polan's decision not to call them or to raise an express third-party culpability defense. Although these arguments inform the prejudice prong of the *Strickland* test, they do not address the performance prong or our conclusion that the criminal trial record supports Polan's reasonable decisions regarding which defense strategies to pursue throughout the trial. Accordingly, the petitioner has not satisfied the *Strickland* test with respect to Polan's representation in connection with his third-party culpability claim.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

TORO CREDIT COMPANY *v.* BETTY ANNE ZEYTOONJIAN, TRUSTEE, ET AL. (SC 20534)

McDonald, D'Auria, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on commercial property owned by the defendants that was comprised of parcel A and parcel B, and secured by a promissory note. A remedies provision in the mortgage agreement between the parties permitted the plaintiff to seek foreclosure by sale of both parcels. After the defendants defaulted on the promissory note, the plaintiff commenced the present action and requested that the trial court render judgment of foreclosure by sale of both parcels. After a trial, the court concluded that foreclosure by sale, rather than strict foreclosure, was the most appropriate remedy. The court determined that it was not bound by the remedies provision in the mortgage agreement but considered it as one factor in its balancing of the equities. In addition, the court, in balancing the equities, considered, inter alia, that the plaintiff successfully bargained for the right to select the remedy of foreclosure by sale and that it is generally an abuse of discretion not to order a foreclosure by sale when, as in the present case, the fair market value of the property substantially exceeds the amount of the debt. The trial court ordered the sale of both parcels, either together or separately depending on the defendants' preference, to protect the

plaintiff's interest in its security and to ensure that any value realized in excess of the amount owed would redound to the defendants' benefit. The defendants appealed from the trial court's order of foreclosure by sale, claiming that the court should not have considered the remedies provision in the mortgage agreement and that foreclosure by sale of both parcels was inequitable when strict foreclosure as to parcel A would have fully satisfied the defendants' debt. *Held*:

1. The trial court having determined the method of foreclosure and the amount of debt, the defendants appealed from a final judgment, and the fact that the trial court's decision contemplated further orders regarding the details of the foreclosure sale did not affect the finality of the judgment for purposes of appellate jurisdiction.
2. The trial court did not abuse its discretion in ordering a foreclosure by sale of both parcels: although strict foreclosure might have technically satisfied the debt owed by the defendants if the plaintiff had taken title to parcel A, it would have left the plaintiff in a position that it specifically had not bargained for, namely, holding title to real estate; moreover, it was not clear that strict foreclosure would have made the plaintiff whole in the way it envisioned when it acquired the mortgage, because strict foreclosure might have been ordered only as to parcel A, as the appraised value of that parcel was slightly greater than the amount of the defendants' debt, the plaintiff thereby would have been required to release its interest in parcel B, and, if the plaintiff had been unsuccessful in selling parcel A at its appraised value, it would have lost the ability to satisfy any deficit by selling parcel B; furthermore, the trial court did not abuse its discretion in considering the remedies provision in the mortgage agreement as one factor in its consideration, as there was no principled reason why the court should have been barred from considering the contract language in the parties' agreement when there was no argument that the parties were not on equal footing in negotiating the mortgage, the defendants' concern about an unfair windfall to the plaintiff as a result of a forced sale of both parcels was unwarranted, as any proceeds from such a sale that exceeded the amount of the foreclosure judgment and costs of the sale would be returned to the defendants, and strict foreclosure as to only one parcel would have defeated the plaintiff's purpose in encumbering the two parcels with one mortgage to secure the defendants' debt.

Argued February 25—officially released November 9, 2021*

Procedural History

Action to foreclose a mortgage on certain commercial properties owned by the defendants, and for other

* November 9, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Sicilian*, *J.*; order of foreclosure by sale, from which the defendants appealed; thereafter, Mark A. Zeytoonjian was substituted for the named defendant. *Affirmed.*

William S. Fish, *Jr.*, with whom was *Sara J. Stankus*, for the appellants (defendants).

Jeffrey R. Babbin, with whom were *Matthew C. Brown* and, on the brief, *Sean M. McAuliffe*, for the appellee (plaintiff).

Opinion

D'AURIA, J. In this appeal, we are asked to determine whether the trial court abused its discretion when it ordered a foreclosure by sale as to two parcels of land owned by the defendants, Betty Anne Zeytoonjian, as trustee of the Nubar Realty Trust, and Three Z Limited Partnership,[1] and secured by a blanket mortgage given to the plaintiff, Toro Credit Company. The parties' mortgage agreement contains a remedies provision that provides that, in the event the defendants default on the mortgage, the plaintiff could seek a foreclosure by sale as to both parcels. The trial court determined that the remedies provision was not binding on it but, nonetheless, considered this contractual provision as one factor in its balancing of the equities under General Statutes § 49-24.[2] The defendants claim that the trial court abused its discretion by ordering a foreclosure by sale

[1] Mark A. Zeytoonjian was substituted for the named defendant in this appeal on February 24, 2021.

[2] General Statutes § 49-24 provides in relevant part: "All liens and mortgages affecting real property may, on the written motion of any party to any suit relating thereto, be foreclosed (1) by a decree of sale instead of a strict foreclosure at the discretion of the court before which the foreclosure proceedings are pending, or (2) with respect to mortgages, as defined in section 49-24a, that are a first mortgage against the property, by a judgment of foreclosure by market sale upon the written motion of the mortgagee, as defined in section 49-24a, and with consent of the mortgagor . . . ."

as to their two properties because (1) the court should not have considered the remedies provision at all, and (2) it was inequitable for the court to order a foreclosure by sale as to both parcels when a strict foreclosure as to one parcel would have fully satisfied the debt. We conclude that the trial court did not abuse its discretion when it granted the plaintiff's request for a foreclosure by sale under these circumstances. Accordingly, we affirm the trial court's order of foreclosure by sale.

The record reveals the following undisputed facts and procedural history. The defendants operated Turf Products, LLC, and acted as the plaintiff's New England distributor. In 2003, the parties restructured $14 million of debt the defendants owed the plaintiff. As part of the restructuring, the defendants granted the plaintiff various mortgages on several properties to secure a portion of the overall debt. The only mortgage at issue in this case encumbered undeveloped land, comprised of two adjacent parcels, each approximately 33 acres in area, in Enfield. The parcels were identified in the mortgage as parcel A and parcel B. This mortgage secured a promissory note in the principal amount of $1,662,500.

The mortgage contains a remedies provision, which states that, upon default, the defendants "[authorize] and fully [empower]" the plaintiff to foreclose the mortgage "by judicial proceedings or by advertisement, or render any power of sale . . . or by such other statutory procedures available in the state in which the [p]remises are located, at the option of [the plaintiff], with the full authority to sell the [p]remises at public auction. . . ." The provision states that, out of the proceeds of the sale, the plaintiff was entitled to "retain the principal, repayment fee, if any, and interest due on the [n]ote . . . ."

The defendants subsequently defaulted on the promissory note, and the plaintiff initiated this foreclosure

action. The defendants never have disputed that the plaintiff is entitled to a judgment of foreclosure because of their default. The parties disagree about the appropriate form of foreclosure. The trial court conducted a trial to determine whether to order a strict foreclosure or a foreclosure by sale and concluded that foreclosure by sale was the most appropriate equitable remedy. The court made the following factual findings in support of this determination.

First, the trial court found that, as of April 5, 2019, the total unpaid debt claimed by the plaintiff was $902,447.12, which continued to accrue with per diem interest. Each party had an appraiser value the two parcels. Both appraisers valued parcel A at $950,000; the plaintiff's appraiser valued parcel B at $850,000, whereas the defendants' appraiser valued parcel B at $840,000.

In balancing the equities, the trial court considered that the plaintiff "successfully bargained for the right to select its remedy" of foreclosure by sale, that the plaintiff might not be made whole if there was only a strict foreclosure of parcel A, that it is "generally . . . an abuse of discretion to fail to order a sale" when the fair market value of the property substantially exceeds the debt, and that the other available foreclosure options were inequitable as to one party over another. The trial court ordered the parcels sold, either bundled together or sequentially, at the defendants' choice, to protect "the plaintiff's interest in its security while ensuring that any value realized in excess of the amount owed to the plaintiff would redound to the defendants' benefit."

The trial court rejected an order of a strict foreclosure as to both parcels, as the "fair market value of the two parcels very substantially exceeds the outstanding debt" and would yield an inequitable windfall to the

plaintiff. The trial court also rejected the defendants' request that it order a strict foreclosure as to only parcel A because that would "[rob] the plaintiff of a measure of the security which it was granted," namely, a mortgage on both properties. Additionally, the trial court was concerned that strict foreclosure of parcel A would "leave the risk of a shortfall entirely" on the plaintiff after taking title to the property and then selling it. Last, the trial court rejected a "forced sale of the combined parcels . . . ." The trial court reasoned that, while the sale of both parcels would generate the most value, it would eliminate the possibility that the defendants could retain parcel B if the sale of parcel A satisfied the debt.[3]

From the trial court's order of foreclosure by sale, the defendants appealed to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

I

After oral argument before this court, we sua sponte ordered the parties to file supplemental briefs addressing whether the defendants had appealed from a final judgment. See General Statutes § 52-263. Clearly, because the trial court's ruling did not end the case, it was not

[3] It does not appear from the record that either party argued that the two parcels of land securing one promissory note were a unified security interest that could not be separated in a foreclosure action. See *Voluntown* v. *Rytman*, 21 Conn. App. 275, 280–81, 573 A.2d 336 (trial court did not abuse its discretion in denying request to sell only one of two parcels), cert. denied, 215 Conn. 818, 576 A.2d 548 (1990). Rather, both parties proceeded under the premise that the parcels could be considered as two separate security interests. Likewise, the plaintiff has not cross appealed, claiming to be aggrieved by the trial court's order rejecting a forced sale of both parcels and, instead, permitting the defendants to choose whether to have the sale conducted sequentially and which parcel to sell first, potentially permitting the defendants to retain the second parcel. Therefore, we have no occasion to consider whether the trial court had discretion to make such an order or to treat the parcels as two separate security interests.

a "final judgment" in that sense, and we have on many occasions indicated that orders that are "a step along the road to final judgment" are not appealable. (Internal quotation marks omitted.) *Abreu* v. *Leone*, 291 Conn. 332, 339, 968 A.2d 385 (2009). Nevertheless, there are areas of our law in which we have held that certain steps along that road, although not literally final, inasmuch as the case goes on, are considered final judgments for purposes of appellate jurisdiction under § 51-199. Foreclosure is one such area. Recently, we stated that there are three appealable determinations in a case involving a foreclosure by sale: "the judgment ordering a foreclosure by sale, the approval of the sale by the court and the supplemental judgment [in which proceeds from the sale are distributed]." (Internal quotation marks omitted.) *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 592, 239 A.3d 1162 (2020). "The first determination is deemed final if the trial court has determined the method of foreclosure and the amount of the debt." Id., 593. Because the trial court in the present case determined the method of foreclosure (foreclosure by sale) and the amount of the debt ($902,447.12),[4] we conclude that the defendants appealed from a final judgment. The fact that the trial court's decision contemplated further orders regarding the details of the sale does not affect the finality of the judgment under these circumstances. See, e.g., *Benvenuto* v. *Mahajan*, 245 Conn. 495, 501, 715 A.2d 743 (1998) (judgment of strict foreclosure is final for purposes of appeal, even though

[4] Subsequent to this court's order for supplemental briefing on the issue of whether the trial court made a finding as to the defendants' debt as of the date of its decision, the parties agreed that, notwithstanding that the trial court's memorandum of decision recites only that the "total amount *claimed* to be owed as of April 5, 2019, is $902,447.12"; (emphasis added); the court in fact determined that the amount of the debt had been established because (1) the parties do not dispute the amount of the debt, and (2) such a determination is implicit in the court's decision to order a foreclosure by sale because, otherwise, the trial court may have ordered a different method of foreclosure. We agree with the parties.

recoverability or amount of attorney's fees for litigation, and, thus, total amount of debt, remained to be determined); *Bank of New York Mellon* v. *Mazzeo*, 195 Conn. App. 357, 362 n.6, 225 A.3d 290 (2020) ("[a] judgment ordering a foreclosure by sale is a final judgment for purposes of appeal even if the court has not set a date for the sale"); *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 836–38, 779 A.2d 174 (2001) (same); see also *Moran* v. *Morneau*, 129 Conn. App. 349, 357, 19 A.3d 268 (2011) (postjudgment orders contemplated by trial court's decision were interlocutory decisions), overruled in part on other grounds by *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 239 A.3d 1162 (2020).

II

In support of their claim that the trial court abused its discretion by ordering a foreclosure by sale as to the two parcels,[5] the defendants argue that (1) strict foreclosure is the general rule in Connecticut, and strict foreclosure of only parcel A would have satisfied the debt, (2) foreclosure by sale exposes them to a loss in value as to parcel B and a deficiency judgment if parcel A sells for less than its appraised value, and (3) in exercising its equitable discretion, the trial court should

[5] The record is not clear as to whether the plaintiff requested that the trial court determine the proper remedy under § 49-24 or sought to exercise its contractual right to require foreclosure by sale. Regardless, neither before this court nor the trial court did the plaintiff argue that the contract was binding and, thus, that § 49-24 did not apply and that the trial court lacked discretion in crafting the remedy. Both parties—at trial and on appeal—along with the trial court, proceeded under the assumption that § 49-24 governed this dispute. The trial court also held that, in exercising its discretion under § 49-24, it did not consider the contract language to be determinative. To the extent the contract might bind the parties to the remedy of foreclosure by sale, we deem this argument abandoned. Additionally, because we do not address this issue, we also will not address whether, if binding, the remedies provision would violate public policy by taking discretion away from the trial court, an issue not adequately addressed by the briefing in this appeal.

not have considered the remedies provision of the mortgage. We are not persuaded and conclude that the trial court did not abuse its discretion by ordering a foreclosure by sale.

In foreclosure matters, this court reviews the trial court's exercise of its equitable powers for an abuse of discretion. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 336 Conn. 633, 639, 249 A.3d 327 (2020). "In determining whether the trial court has abused its discretion, we must make every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143 (2007). "Although we ordinarily are reluctant to interfere with a trial court's equitable discretion . . . we will reverse [the court's judgment] where we find that a trial court acting as a court of equity could not reasonably have concluded as it did . . . or to prevent abuse or injustice." (Internal quotation marks omitted.) *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 640.

Specifically, "whether to order a strict foreclosure or a foreclosure by sale is a matter committed to the sound discretion of the trial court, to be exercised with regard to all the facts and circumstances of the case." *New England Savings Bank* v. *Lopez*, 227 Conn. 270, 284, 630 A.2d 1010 (1993). "A judgment of strict foreclosure, when it becomes absolute and all rights of redemption are cut off, constitutes an appropriation of the mortgaged property to satisfy the mortgage debt." *Bugg* v. *Guilford-Chester Water Co.*, 141 Conn. 179, 182, 104 A.2d 543 (1954). "[I]n a strict foreclosure, the vesting of title operates to reduce the debt by the value of the property." *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 794, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006). "The purpose of the judicial sale in a foreclosure action is to convert the property

into money and, following the sale, a determination of the rights of the parties in the funds is made, and the money received from the sale takes the place of the property." (Internal quotation marks omitted.) *Saunders* v. *KDFBS, LLC*, supra, 335 Conn. 594.

This dispute arises out of the defendants' default of a debt restructuring that derived to them by virtue of their long-term business relationship with the plaintiff. Both the plaintiff and the defendants are commercially sophisticated and were represented by counsel at all pertinent times. The plaintiff specifically bargained for, and the defendants agreed to, a blanket mortgage on both parcels and for the remedy of foreclosure by sale. "A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." (Internal quotation marks omitted.) *Issler* v. *Issler*, 250 Conn. 226, 235, 737 A.2d 383 (1999). We previously have explained that "[j]udicial deference to freedom of contract is particularly appropriate" in cases in which a private lender and borrower are "presumed to have had equal access to the financial marketplace when the mortgage was first negotiated." *Olean* v. *Treglia*, 190 Conn. 756, 768, 463 A.2d 242 (1983).

In considering the remedies provision of the contract when balancing the equities, the trial court doubtlessly was aware of the fact that not only had the plaintiff bargained for the right to a foreclosure by sale but that such a provision implicates other integral mortgage provisions, including the interest rate, length of term, and sources of collateral. The plaintiff might have made concessions it would not have acquiesced to had it not succeeded in obtaining this remedies provision. As a result, although strict foreclosure might technically satisfy the debt if the plaintiff took title to parcel A, it would leave the plaintiff in the position it specifically

had bargained *not* to be in: holding title to real estate. There might have been very good business reasons why the plaintiff, a Minnesota based company, did not want to become a Connecticut property owner, with all the attendant responsibilities and consequences. The record also casts doubt that strict foreclosure would make the plaintiff whole in the way it envisioned when accepting the mortgage. The trial court noted that, after considering the time and costs associated with selling parcel A, the plaintiff might not realize the full appraisal value to satisfy the debt. Strict foreclosure of parcel A would force the plaintiff to take the precise risk that it tried to protect against by securing the property with a blanket mortgage. As we will explain, if the trial court orders strict foreclosure only as to parcel A because the appraised value of that parcel satisfies the debt, the plaintiff must release its interest in parcel B, and if the plaintiff is later unsuccessful at selling parcel A at its appraised value, the plaintiff will lose the ability to foreclose as to parcel B. See *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 261 and n.14, 708 A.2d 1378 (1998) (suggesting that mortgagee might waive right to foreclose on particular parcel when "mortgagee intentionally elected not to foreclose on one of several parcels securing the mortgage"). The trial court reasonably considered that it would be inequitable to place the parties in a position they did not contemplate when entering into this agreement.

The defendants, however, argue that the trial court abused its discretion by considering the remedies provision in the mortgage contract at all. This argument is premised on the proposition that parties cannot contract around § 49-24 because to do so would violate public policy by depriving the trial court of its discretion to determine an equitable remedy. Although this argument might have some teeth if the parties were disputing whether the contract was binding, this public policy

concern does not arise in this particular case because the parties made no such argument, and the trial court explicitly held that the remedies provision was "not determinative" but, instead, was only "a factor in the court's consideration."[6] See footnote 6 of this opinion. Like the trial court, we agree that "due consideration of the parties' bargained-for remedies provision is appropriate in the balancing of [the] parties' competing interests," as long as the overall agreement was not the result of duress, misrepresentation, or mutual mistake—none of which the defendants argue in the present case. See *Mack Financial Corp.* v. *Crossley*, 209 Conn. 163, 168, 550 A.2d 303 (1988) ("Commercial contracting parties have considerable freedom to determine the remedial rights that will ensue upon breach. . . . Absent some cogent reason such as mistake or unconscionability, there is no reason why a court should not enforce the bargain that the parties have made." (Footnote omitted.)). Even if we were to assume that public policy reasons prohibit parties from contracting around § 49-24, an issue we have not decided; see footnote 5 of this opinion; we see no principled reason why the trial court should be barred from considering the contract language in the present case when there is no argument that the parties were on unequal footing in negotiating the mortgage. As a result, the trial court's consideration of the remedies provision was not inequitable but, rather, constituted an appropriate exercise of discretion.

In the present case, the plaintiff requested a foreclosure by sale as to the two parcels covered by the blanket

[6] Additionally, the defendants argue that the remedies provision is boilerplate, not specific to Connecticut, and provides remedies not available in Connecticut, and, thus, the trial court erred in considering the remedies provision. These arguments are unavailing, however, because the plaintiff did not seek to strictly enforce the remedies provision and the trial court did not consider it binding. Instead, the court considered it as only one factor in the balancing of the equities.

mortgage, rather than a strict foreclosure.[7] The trial court granted the plaintiff this relief. If the plaintiff had not requested and been granted a foreclosure by sale, pursuant to § 49-24, the plaintiff would have been entitled to strict foreclosure as to both parcels. Given that the debt is roughly $900,000, and the appraised value of parcel A is $950,000 and parcel B between $840,000 and $850,000, if the trial court had ordered strict foreclosure as to both parcels, based on the parties' appraisals, the plaintiff would be given "a substantial and undeserved windfall" of nearly $900,000. *Amresco New England II, L.P.* v. *Colossale*, 63 Conn. App. 49, 55, 774 A.2d 1083 (2001). "Since a mortgage foreclosure is an equitable proceeding, either a forfeiture or a windfall should be avoided if possible." *Farmers & Mechanics Savings Bank* v. *Sullivan*, 216 Conn. 341, 354, 579 A.2d 1054 (1990).

Fidelity Trust Co. v. *Irick*, 206 Conn. 484, 538 A.2d 1027 (1988), is instructive. In *Fidelity Trust Co.*, this court held that the trial court abused its discretion in ordering a strict foreclosure when the mortgagee would have received a property that had a value in excess of the debt by more than $17,000. Id., 487–88.

By contrast, the defendants' concern about an unfair windfall to the plaintiff as a result of a forced sale of both parcels is simply not warranted. Instead, any additional proceeds of the sale of both parcels above the total amount of the judgment and costs of sale would be returned to the defendants; see General Statutes

[7] We also reject the defendants' argument that the plaintiff did not move for a foreclosure by sale, therefore divesting the trial court of the ability to grant such a remedy. The clear language of § 49-24 does not require a party to request a particular foreclosure remedy. We cannot say that the trial court abused its discretion in determining that this argument "exalts form over substance."

§ 49-27;[8] and further eliminates the defendants' concern about a potential deficiency judgment.

Moreover, an order of strict foreclosure as to only parcel A would have extinguished the plaintiff's interest in parcel B, security the plaintiff had bargained for to ensure recovery of the defendants' debt. See General Statutes § 49-1 ("[t]he foreclosure of a mortgage is a bar to any further action upon the mortgage debt, note or obligation"). This court has previously explained that, "once a mortgagee strictly forecloses on a mortgage and obtains title to the property following the running of the law days, § 49-1 extinguishes all rights of the mortgagee with respect to the 'mortgage debt, note or obligation' . . . except as provided in [General Statutes] § 49-14." *JP Morgan Chase Bank, N.A.* v. *Winthrop Properties, LLC*, 312 Conn. 662, 671, 94 A.3d 622 (2014). Strict foreclosure of only one parcel defeats the plaintiff's purpose in encumbering the two parcels with a blanket mortgage to secure the debt. See 2 D. Caron & G. Milne, Connecticut Foreclosures (11th Ed. 2021) § 19-1:2, p. 17 ("[s]ince the main purpose behind a lender's insistence on a blanket mortgage is to maximize its security, it is not at all surprising to find that most blanket mortgages are amply secured and that a foreclosure by sale is ordered"). We therefore conclude that the

[8] General Statutes § 49-27 provides in relevant part: "The proceeds of each such sale shall be brought into court, there to be applied if the sale is ratified, in accordance with the provisions of a supplemental judgment then to be rendered in the cause, specifying the parties who are entitled to the same and the amount to which each is entitled. If any part of the debt or obligation secured by the mortgage or lien foreclosed or by any subsequent mortgage or lien was not payable at the date of the judgment of foreclosure, it shall nevertheless be paid as far as may be out of the proceeds of the sale as if due and payable . . . [and] if the plaintiff is the purchaser at any such sale, he shall be required to bring into court only so much of the proceeds as exceed the amount due upon his judgment debt, interest and costs. . . ."

There are no additional subsequent encumbrancers in this action, so excess proceeds would go to the defendants.

trial court did not abuse its wide discretion in arriving at an equitable result.

We agree with the trial court that there is no merit in the defendants' claim that they were entitled to a strict foreclosure as to a single parcel of land as a matter of law because strict foreclosure is the rule in Connecticut and foreclosure by sale the exception. The proposition is contained in a single conclusory sentence in *National City Mortgage Co.* v. *Stoecker*, supra, 92 Conn. App. 793, unaccompanied by any citation to legal authority or analysis to support such a sweeping statement. Indeed, § 49-24 contains no language indicating that foreclosure by sale should be used only in extreme cases, or rarely, or never; rather, it plainly provides for the option of a "decree of sale instead of a strict foreclosure at the discretion of the court . . . ." General Statutes § 49-24 (1). In fact, foreclosure by sale is the preferred "decree" in situations in which the property's fair market value exceeds the debt, as in the present case. See, e.g., *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 394, 180 A.3d 611 ("when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale" (internal quotation marks omitted)), cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018); *Voluntown* v. *Rytman*, 27 Conn. App. 549, 555, 607 A.2d 896 (same), cert. denied, 223 Conn. 913, 614 A.2d 831 (1992). It may be that the majority of foreclosure judgments are by strict foreclosure, but, if anything, that would indicate only that the majority of foreclosures arise in situations in which the value of the property is less than the debt owed. That hardly makes strict foreclosure the general rule.

The defendants also rely on *Amresco New England II, L.P.* v. *Colossale*, supra, 63 Conn. App. 49, in support of their argument that, when a limited strict foreclosure

on a blanket mortgage can satisfy a debt, the trial court abuses its discretion by not opting for that remedy. We find this comparison inapposite. *Amresco New England II, L.P.*, concerned a mortgagee's request that a trial court order strict foreclosure on a blanket mortgage that covered several properties when the value of all the properties greatly exceeded the debt. Id., 50. The trial court rejected the plaintiff's request and ordered strict foreclosure as to only two properties the mortgage covered, the value of which sufficed to cover the debt. Id., 50–51. The court in *Amresco New England II, L.P.*, explained that the order of a limited strict foreclosure was "an entirely appropriate exercise of [the trial court's] equitable discretion"; id., 56; to avoid granting the plaintiff "a substantial and undeserved windfall . . . ." Id., 55. The present case does not involve the option of a partial strict foreclosure as to two of several parcels that secured the loan versus a full strict foreclosure as to more than two parcels, which occurred in *Amresco New England II, L.P.* The question here, instead, is whether the trial court abused its discretion when it ordered a foreclosure by sale, as requested by the plaintiff, instead of a partial strict foreclosure, as requested by the defendants. The exercise of equitable discretion in one way in *Amresco New England II, L.P.*, does not mean it is inequitable to exercise discretion in another way in this case, especially given the different interests at stake when deciding to order a foreclosure by sale versus a strict foreclosure.

Finally, if the defendants are unsatisfied with the outcome of the sale—either because of the ultimate sale price or because of the way the sale was conducted—they can contest the confirmation of the sale before the trial court. See *New England Savings Bank* v. *Lopez*, supra, 227 Conn. 277–82; see id., 280 (stating that "usual notion of fair market value is inconsistent with the notion of a foreclosure sale" in part because

seller is "required to take the highest bid, subject only to the approval of the court"); see also *Central Bank for Savings* v. *Heggelund*, 23 Conn. App. 266, 270, 579 A.2d 598 ("[i]f the court wanted to protect [the defendant] from a future deficiency liability, it had the equitable power at the hearing on the bank's motion for approval of the sale to disapprove the sale and instead to order a strict foreclosure"), cert. granted, 217 Conn. 804, 584 A.2d 471 (1990) (appeal dismissed February 21, 1991).

Thus, we conclude that the trial court did not abuse its discretion by ordering a foreclosure by sale.

The trial court's order of foreclosure by sale is affirmed.

In this opinion the other justices concurred.

PHYLLIS LARMEL *v.* METRO NORTH COMMUTER RAILROAD COMPANY (SC 20535)

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

Syllabus

Pursuant to the accidental failure of suit statute (§ 52-592 (a)), "[i]f any action, commenced within the time limited by law, has failed one or more times to be tried on its merits because . . . the action has been otherwise avoided or defeated . . . for any matter of form . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action . . . ."

Pursuant further to statute ((Rev. to 2017) § 52-549z), unless a demand for a trial de novo is filed with the court within twenty days after an arbirator's decision in a civil arbitration has been mailed to counsel, that decision shall become a judgment of the court.

The plaintiff sought to recover damages for personal injuries that resulted after she slipped and fell while boarding a passenger railcar operated by the defendant. The plaintiff had previously commenced a similar action against the defendant, claiming that her injuries were caused by a wet floor inside of the railcar and that the defendant negligently failed to prevent her fall. Before the commencement of trial in the prior action,

the court ordered the parties to submit to civil arbitration pursuant to statute (§ 52-549u). The arbitrator found in favor of the defendant, and notice of the decision was issued. As a result of issues with the mail and staffing issues at the law firm of the plaintiff's counsel, the plaintiff's counsel did not become aware of the arbitration decision until twenty-two days after the decision was mailed. Because neither party demanded a trial de novo within twenty days of the mailing of the arbitrator's decision pursuant to § 52-549z, the trial court rendered judgment for the defendant. The plaintiff then commenced the present action pursuant to § 52-592 (a), claiming that her failure to demand a trial de novo in the prior action was due to excusable neglect. The trial court granted the defendant's motion to dismiss on the basis of res judicata, and the plaintiff appealed to the Appellate Court, which concluded that the action was not viable under § 52-592 (a) because the first action was tried on its merits by the arbitrator and had resulted in a judgment in favor of the defendant. Accordingly, the Appellate Court reversed the trial court's judgment dismissing the action and remanded the case with direction to render judgment for the defendant. On the granting of certification, the plaintiff appealed to this court. *Held* that the plaintiff's action could not be saved by § 52-592 (a) because her prior action was tried on the merits, and, accordingly, the judgment of the Appellate Court was affirmed: an arbitration pursuant to § 52-549u is a quasi-judicial examination of the parties' claims, the parties submitted evidence to the arbitrator, who was empowered to receive evidence and to find facts, and the arbitrator examined that evidence and rendered a decision on the merits; moreover, allowing a new action to be commenced under § 52-592 (a) in a case such as the present one would undermine the finality mandated by § 52-549z, and a more expansive reading of the phrase "tried on its merits" in § 52-592 (a) that incorporates forms of summary adjudication, other than a formal trial, that turn on the merits of the particular claims presented produced a result more harmonious with existing case law; furthermore, the plaintiff's reliance on the remedial nature of § 52-592 was unavailing, as the nature of the arbitration proceeding itself and the statutory requirement in § 52-549z that an arbitrator's decision shall become a judgment of the court if no demand for a trial de novo is filed within twenty days of the mailing of that decision to counsel indicated that the present case was considered on its merits, and requiring adherence to the judgment that followed worked neither a surprise nor an injustice on the plaintiff.

(*Two justices dissenting in one opinion*)

Argued May 6—officially released November 15, 2021*

* November 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, *Lavine* and *Prescott*, *Js.*, with *Eveleigh*, *J.*, dissenting, which reversed the trial court's judgment and remanded the case with direction to render judgment for the defendant, and the plaintiff, on the granting of certification, appealed. *Affirmed.*

James P. Brennan, for the appellant (plaintiff).

Beck S. Fineman, with whom, on the brief, was *Jenna T. Cutler*, for the appellee (defendant).

Opinion

KAHN, J. This certified appeal requires us to consider whether a case that results in a judgment of the trial court in favor of the defendant following a plaintiff's failure to demand a trial de novo after an arbitration proceeding pursuant to General Statutes (Rev. to 2017) § 52-549z[1] has been "tried on its merits," thus barring

[1] General Statutes (Rev. to 2017) § 52-549z provides in relevant part: "(a) A decision of the arbitrator shall become a judgment of the court if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

"(b) A decision of the arbitrator shall become null and void if an appeal from the arbitrator's decision by way of a demand for a trial de novo is filed in accordance with subsection (d) of this section.

* * *

"(d) *An appeal by way of a demand for a trial de novo must be filed with the court clerk within twenty days* after the deposit of the arbitrator's decision in the United States mail, as evidenced by the postmark, and it shall include a certification that a copy thereof has been served on each counsel of record, to be accomplished in accordance with the rules of court. The decision of the arbitrator shall not be admissible in any proceeding resulting after a claim for a trial de novo or from a setting aside of an award in accordance with section 52-549aa. . . ." (Emphasis added.)

a subsequent action under the accidental failure of suit statute, General Statutes § 52-592 (a). The Appellate Court's decision in the present case answered this question in the affirmative, and, as a result, that court remanded the case to the trial court with direction to render judgment in favor of the defendant, Metro North Commuter Railroad Company, on a claim of negligence brought by the plaintiff, Phyllis Larmel, that had previously been the subject of mandatory arbitration in a prior civil action. *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 661–62, 240 A.3d 1056 (2020). In the present appeal, the plaintiff claims that her first action was never "tried on its merits" because there was no formal trial in the first action and that, as a result, the Appellate Court's conclusion was in error. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The following undisputed facts and procedural history are relevant to the present appeal. On October 1, 2014, the plaintiff was injured when she slipped and fell while boarding a passenger railcar at Union Station in New Haven. In 2015, the plaintiff commenced a personal injury action alleging that her injuries were caused by a wet floor inside of the railcar and that the defendant negligently failed to prevent her fall. After the close of pleadings in that case, but before the commencement of trial, the court ordered the parties to arbitration pursuant to General Statutes § 52-549u.[2]

We note that, after the events underlying the present appeal, the legislature amended § 52-549z (d) to allow a demand for a trial de novo following the receipt of an electronic notice. See Public Acts 2019, No. 19-64, § 23. All references to § 52-549z in this opinion are to the 2017 revision of the General Statutes.

[2] General Statutes § 52-549u provides in relevant part: "[T]he judges of the Superior Court may make such rules as they deem necessary to provide a procedure in accordance with which the court, in its discretion, may refer to an arbitrator, for proceedings authorized pursuant to this chapter, any civil action in which in the discretion of the court, the reasonable expectation of a judgment is less than fifty thousand dollars exclusive of legal interest and costs and in which a claim for a trial by jury and a certificate of closed

The arbitration took place on December 1, 2017, and the arbitrator, Attorney David J. Crotta, Jr., issued his decision on February 26, 2018. In that decision, the arbitrator made various factual findings "[o]n the basis of the credible evidence" submitted by the parties, including the plaintiff's deposition transcript, medical records, medical bills, and a report filed by a medical expert for the defendant. The arbitrator noted that the plaintiff's credibility was circumspect because of various factual inconsistencies in her accounts of the event, and that a defective condition may have never even existed in the first instance because the plaintiff's fall could have been caused by "water on the bottom of [her] own shoes . . . ." Ultimately, the arbitrator found in favor of the defendant, concluding that "the plaintiff has failed to meet her burden of proof by a preponderance of the evidence . . . ."

Notice of the arbitrator's decision was mailed to the parties' counsel on February 27, 2018, as evidenced by a postmark, but did not arrive at the office of the plaintiff's counsel until March 13, 2018. The plaintiff's counsel was on vacation at that time, and did not return to his office until March 19, 2018. As a result of certain staffing issues at the firm, another two days passed before the plaintiff's counsel became aware of the arbitrator's decision. By that point, twenty-two days had passed since the arbitrator's decision was mailed.[3]

Because neither party demanded a trial de novo pursuant to § 52-549z within twenty days of the February 27, 2018 mailing of the arbitrator's decision, the trial court rendered judgment in favor of the defendant in

pleadings have been filed. An award under this section shall not exceed fifty thousand dollars, exclusive of legal interest and costs. . . ."

[3] The facts relating to the events following the arbitrator's decision in the prior action are taken from the allegations contained in the complaint in the present case. The defendant does not appear to contest the accuracy of these allegations.

accordance with the arbitrator's decision on March 21, 2018. The plaintiff then filed a motion to open the judgment on March 23, 2018, which was denied by the court on August 27, 2018, following oral argument. The plaintiff neither appealed from the trial court's denial of her motion to open nor sought an articulation of the court's decision.

The plaintiff then commenced the present action in October, 2018, pursuant to the accidental failure of suit statute, § 52-592 (a).[4] The complaint in this action repeated the allegations of negligence in the first action and further alleged that her failure to demand a trial de novo in the first action was due to excusable neglect. The trial court in the present case granted the defendant's motion to dismiss on the basis of res judicata, and the plaintiff subsequently appealed to the Appellate Court.

The Appellate Court disagreed with the trial court's conclusion that the doctrine of res judicata required dismissal[5] but nonetheless concluded that the action was not viable under § 52-592 (a) because the first action had been "tried on its merits" by the arbitrator and had resulted in a judgment of the court in favor of the defendant. *Larmel* v. *Metro North Commuter Railroad Co.*, supra, 200 Conn. App. 666–67, 673. In

[4] General Statutes § 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be *tried on its merits* because of insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction, or the action has been otherwise avoided or defeated by the death of a party or for any matter of form; or if, in any such action after a verdict for the plaintiff, the judgment has been set aside, or if a judgment of nonsuit has been rendered or a judgment for the plaintiff reversed, the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action or after the reversal of the judgment." (Emphasis added.)

[5] We note that the Appellate Court's analysis of res judicata is not at issue in this certified appeal. See footnote 6 of this opinion.

its decision, the Appellate Court concluded that "[t]he judgment in the first action was rendered on the arbitrator's decision as a matter of law and, therefore, the plaintiff may not take advantage of § 52-592 because she has not met the factual predicate that the first action was not tried on its merits." Id., 671. On the basis of this reasoning, the Appellate Court reversed the trial court's judgment dismissing the action and remanded the case with direction to render judgment in favor of the defendant. Id., 661, 679.

Writing in dissent, Justice Eveleigh disagreed with the majority's conclusion that the plaintiff's first action was tried on its merits for purposes of § 52-592 (a). Id., 679. According to Justice Eveleigh, the majority incorrectly concluded that the phrase "tried on its merits" could be satisfied by an adjudication of a claim by an arbitrator, rather than by a more formal judicial proceeding. Id., 683–84 (*Eveleigh*, *J.*, dissenting). Citing *Nunno* v. *Wixner*, 257 Conn. 671, 680–81, 778 A.2d 145 (2001), Justice Eveleigh argued that arbitration proceedings have "procedural deficiencies" that make them inadequate to be considered "trials," such as a lack of live testimony, cross-examination, and objection to evidence. Id., 682 (*Eveleigh*, *J.*, dissenting). As a result of those deficiencies, Justice Eveleigh concluded that cases sent to arbitration under § 52-549u are not "tried on [their] merits" for purposes of § 52-592 (a) and, therefore, that the present action should be remanded to the trial court for a determination of whether the plaintiff's failure to demand a trial de novo within twenty days of the arbitration decision caused the first action to fail as a "matter of form." Id., 679–84, 87 (*Eveleigh*, *J.*, dissenting). This certified appeal followed.[6]

[6] This court granted the plaintiff's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that a judgment rendered after mandatory arbitration pursuant to . . . § 52-549u is a 'trial on the merits' that bars a plaintiff from subsequently utilizing . . . § 52-592?" And (2) "[w]as the plaintiff's failure to request a

In the present appeal, the plaintiff renews her contention that her second action may be saved by § 52-592 (a) because her first action was not "tried on its merits . . . ." The plaintiff argues that the Appellate Court's conclusion to the contrary was incorrect and that the case must be remanded to the trial court to decide whether her failure to demand a trial de novo in the first action was the result of mistake, inadvertence, or excusable neglect, and was, thus, a matter of form, allowing the plaintiff to utilize the accidental failure of suit statute to bring the same claim in a second lawsuit. Specifically, the plaintiff argues that the phrase "tried on its merits" means a formal trial and cannot be fulfilled by a judgment of the court following mandatory arbitration under § 52-549u. In response, the defendant argues that the Appellate Court properly interpreted the phrase "tried on its merits" to include a proceeding resolved in such a manner.

Because our resolution of this action involves a question of statutory construction, our review is plenary. See, e.g., *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 782, 105 A.3d 103 (2014). "When presented with a question of statutory construction, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . The meaning of a statute shall, in the first instance, be ascertained from 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." (Citation omitted;

trial de novo pursuant to . . . § 52-549z, following entry of the arbitrator's decision under § 52-549u, a 'matter of form,' as contemplated by § 52-592?" *Larmel* v. *Metro North Commuter Railroad Co.*, 335 Conn. 972, 240 A.3d 676 (2020). Because we answer the first question in the affirmative, we need not address the second.

internal quotation marks omitted.) Id.; see also General Statutes § 1-2z.

We begin our analysis with the language of the accidental failure of suit statute. Section 52-592 (a) provides in relevant part: "If any action, commenced within the time limited by law, has failed one or more times to be *tried on its merits* because . . . the action has been otherwise avoided or defeated . . . for any matter of form . . . the plaintiff . . . may commence a new action . . . for the same cause at any time within one year after the determination of the original action . . . ." (Emphasis added.) A plaintiff may obtain relief under this provision only if the original action has "failed one or more times to be tried on its merits . . . ." General Statutes § 52-592 (a). For the reasons that follow, we conclude that a judgment of the trial court rendered following arbitration pursuant to § 52-549u has been "tried on its merits" within the meaning of the accidental failure of suit statute.

To understand the phrase "tried on its merits" as used in § 52-592 (a), we must first review the definition of the term "tried." See, e.g., *State* v. *Webster*, 308 Conn. 43, 53, 60 A.3d 259 (2013). Because the term "tried" is not defined within the statutory scheme, we may "look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) Id. Modern dictionaries indicate that the word "[t]ried" is the past tense of the verb "try," which means, inter alia, "to examine or investigate judicially . . . ." Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1344. Dictionaries dating back to the first use of the phrase "tried on its merits" in the 1918 revision of the General Statutes have consistently defined the word "try" in a broad manner. See Black's Law Dictionary (2d Ed. 1910) p. 1178 (defining "try" as verb meaning "[t]o examine judicially"); Webster's Revised Unabridged Dictionary of the English Language (1913) p. 2210 (defining "try"

as "[t]o examine or investigate judicially; to examine by witnesses or other judicial evidence and the principles of law"); see also *Nixon* v. *United States*, 506 U.S. 224, 229–30, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (noting that word "try" has been defined broadly).

An arbitration proceeding pursuant to § 52-549u is, undoubtedly, a quasi-judicial examination of the parties' claims, as arbitrators are statutorily authorized to carry out functions that are judicial in nature. Indeed, the trial court may refer any civil action in which the reasonable expectation of the judgment is expected to be less than $50,000, to an arbitrator. General Statutes § 52-549u. "Such arbitrators shall have the power to: (1) Issue subpoenas for the attendance of witnesses and for the production of books, papers and other evidence, such subpoenas to be served in the manner provided by law for service of subpoenas in a civil action and to be returnable to the arbitrators; (2) administer oaths or affirmations; and (3) determine the admissibility of evidence and the form in which it is to be offered." General Statutes § 52-549w (c). The parties in this case submitted various pieces of evidence to the arbitrator for consideration. Although the parties chose not to offer witnesses or to object to evidence, the plaintiff does not dispute that she had the opportunity to do both.

Upon completion of the arbitration hearing, the arbitrator must submit a decision in writing within 120 days. General Statutes § 52-549x; cf. General Statutes § 51-183b. Thereafter, § 52-549z provides either party with an unqualified right to demand a trial de novo before the trial court. "If neither party requests a trial de novo within twenty days, the decision of the arbitrator *becomes the judgment of the court*." (Emphasis added.) *Nunno* v. *Wixner*, supra, 257 Conn. 679. Because neither party made such a demand in the present case, the arbitrator's decision, in fact, became a judgment of the trial court on the merits in favor of the defendant.

Even in the absence of a demand for a trial de novo, the trial court possesses independent authority to review and, if necessary, set aside the arbitrator's decision. See General Statutes § 52-549aa ("[i]n addition to the absolute right to a trial de novo . . . the court . . . may set aside an award of arbitrators and order a trial de novo in the Superior Court upon proof that the arbitrators acted arbitrarily or capriciously"). This degree of judicial oversight suggests that the trial court's involvement is more than "ministerial," as the plaintiff suggests.

In sum, the foregoing demonstrates that the plaintiff's claim against the defendant was presented to a neutral fact finder who was empowered by statute both to receive evidence and to find facts. That arbitrator examined what had been submitted to him and ultimately rendered a decision against the plaintiff on the merits. Notwithstanding its authority under § 52-549aa, the trial court subsequently adopted that decision as its own after the parties failed to object to it. Because this statutory process turned on the merits of the claims raised in the present case, § 52-592 (a) does not permit the plaintiff to circumvent the judgment of the trial court that was rendered as a result of it.[7]

Reaching a contrary conclusion would undermine the purpose of the twenty day deadline set forth in § 52-549z (d). If we were to accept the plaintiff's argument, a defendant that has obtained a judgment of the court

[7] In reaching this conclusion, we emphasize that the existence of a judgment itself is not determinative of whether the accidental failure of suit statute applies. The question of whether a particular case has been "tried on its merits" within the meaning of § 52-592 (a), rather, turns on the *basis* of the judgment ultimately rendered. When, as in this case, the judgment rendered was based on an assessment of the underlying merits of the claims, the accidental failure of suit statute will not operate to revive those claims. See, e.g., *Hughes* v. *Bemer*, 206 Conn. 491, 492–93, 538 A.2d 703 (1988) (accidental failure of suit statute did not apply to claims that were disposed on merits pursuant to grant of motion to strike).

in its favor following arbitration on the merits under § 52-549u would have no way of knowing whether the plaintiff's failure to demand a trial de novo within that period of time was the result of excusable neglect and, thus, no way of knowing whether it could rely on the court's judgment. Allowing new actions to be commenced under the accidental failure of suit statute in such a case would undermine the finality so clearly mandated by § 52-549z. See *Coldwell Banker Manning Realty, Inc.* v. *Cushman & Wakefield of Connecticut, Inc.*, 293 Conn. 582, 594, 980 A.2d 819 (2009) ("[t]he principal characteristic of an arbitration award is its finality as to the matters submitted so that the rights and obligations of the parties may be definitely fixed" (internal quotation marks omitted)); cf. *Carbone* v. *Zoning Board of Appeals*, 126 Conn. 602, 607, 13 A.2d 462 (1940) ("Statutes and special laws such as the one before us fixing a rather brief time in which appeals may be taken to the courts from the orders and decisions of administrative boards are evidently designed to secure in the public interest a speedy determination of the issues involved; and to make it possible to proceed in the matter as soon as the time to take an appeal has passed if one has not been filed. To hold that an appeal in such a proceeding as the one before us is an 'action' within the meaning of [the accidental failure of suit statute], would have the practical effect of eliminating the time factor in taking such appeals."); *Bank Building & Equipment Corp. of America* v. *Architectural Examining Board*, 153 Conn. 121, 124–25, 214 A.2d 377 (1965) (citing *Carbone* and concluding that "[t]he obvious legislative purpose of securing a prompt determination of the issues in an appeal from the orders of the defendant board . . . could be nullified . . . by a resort to . . . § 52-592"); *Metcalfe* v. *Sandford*, 271 Conn. 531, 537, 858 A.2d 757 (2004) ("The reasoning adopted by this court in *Carbone* and endorsed in *Bank*

Building & Equipment Corp., applies with equal force to appeals from probate. As with appeals from administrative agencies, the legislature has provided for prompt resolution of issues and finality in decisions by establishing a relatively short time limit within which an appeal from probate may be taken. . . . This time limit provides for the prompt settlement and administration of estates by giving interested parties confidence in the status of the estate within a reasonable time period." (Citation omitted; footnote omitted.)).

Furthermore, if the meaning of the phrase "tried on its merits" is limited to cases in which there has been a formal "trial," an action resolved on the merits prior to a court or jury trial, for example, by way of summary judgment, could well be open to relitigation through § 52-592 (a). A more expansive reading of the phrase that incorporates other forms of summary adjudication that turn on the merits of the particular claims presented produces a result more harmonious with existing case law. See *Boone* v. *William W. Backus Hospital*, 102 Conn. App. 305, 315, 925 A.2d 432 (accidental failure of suit statute was inapplicable because merits of plaintiff's claims had already been decided "through the [trial] court's rendering of summary judgment"), cert. denied, 284 Conn. 906, 931 A.2d 261 (2007); see also *Hughes* v. *Bemer*, 206 Conn. 491, 492–93, 538 A.2d 703 (1988) (trial court's judgment in favor of defendant resulting from plaintiff's failure to plead over following grant of motion to strike was considered on merits for purposes of § 52-592); *Carr* v. *Century 21 Real Estate*, Superior Court, judicial district of Fairfield, Docket No. CV-31-84-16 (March 31, 1995) ("[T]he [accidental failure of suit] statute cannot be used when there has been a valid judgment on the merits after [a] full and fair hearing. . . . [The trial court rendered] summary judgment in favor of [the defendant] in the original action. Such a judgment constitutes a judgment on the merits." (Cita-

tions omitted.)); cf. *Holt* v. *KMI-Continental, Inc.*, 95 F.3d 123, 131 (2d Cir. 1996) (Connecticut's accidental failure of suit statute "only applies if the original claim was dismissed for procedural reasons and not on the merits"), cert. denied, 520 U.S. 1228, 117 S. Ct. 1819, 137 L. Ed. 2d 1027 (1997).

The plaintiff's reliance on the remedial nature of § 52-592 is also unavailing. It is well established that the purpose of § 52-592 (a) is "to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his [or her] day in court. . . . The design of the rules of practice is both to facilitate business and to advance justice; they will be interpreted liberally in any case [in which] it shall be manifest that a strict adherence to them will work surprise or injustice. . . . Our practice does not favor the termination of proceedings without a determination of the merits of the controversy where that can be brought about with due regard to necessary rules of procedure." (Internal quotation marks omitted.) *Rocco* v. *Garrison*, 268 Conn. 541, 558, 848 A.2d 352 (2004). As we discussed previously in this opinion, the nature of the arbitration proceeding itself and the statutory requirement that "[a] decision of the arbitrator *shall become a judgment of the court* if no appeal from the arbitrator's decision by way of a demand for a trial de novo is filed" all indicate that the present case has, in fact, been considered on its merits. General Statutes § 52-549z (a). The arbitrator made a finding based on the evidence presented by the parties and clearly articulated the reasons for his findings. The trial court then adopted that decision as its own. Requiring adherence to the judgment that followed works neither a surprise nor an injustice on the plaintiff. As such, the policy considerations behind § 52-592 (a) do not bolster the plaintiff's position.[8]

[8] We note that reaching the opposite conclusion would mean that a plaintiff who inadvertently misses the deadline for requesting a trial de novo could have recourse under the accidental failure of suit statute, whereas a similarly

Finally, because we find its facts distinguishable from the present case, we respectfully disagree with Justice Eveleigh's conclusion that the issue presented in this appeal is controlled by *Nunno* v. *Wixner*, supra, 257 Conn. 671. In *Nunno*, this court considered whether the offer of compromise statute, General Statutes § 52-192a, applies to a judgment rendered after a mandatory arbitration proceeding pursuant to § 52-549u. Id., 673–74. Section 52-192a indicates that offer of compromise interest is only available "[a]fter trial," and, accordingly, this court was called on to consider whether a mandatory arbitration pursuant to § 52-549u constituted a "trial" for that limited purpose. *Nunno* v. *Wixner*, supra, 676–77. Although we concluded that arbitration pursuant to § 52-549u is not a "trial" for purposes of the offer of compromise statute; id., 677; for the reasons that follow, we do not believe that our holding in that case requires us to apply the same narrow reading of the term "trial" in § 52-192a to the phrase "tried on its merits" in § 52-592 (a).

First, the statute at issue in *Nunno*, the offer of compromise statute, is textually distinguishable from the accidental failure of suit statute. The phrase "[a]fter trial" in § 52-192a is different from the phrase "tried on its merits" in § 52-592 (a). Although the word "trial" is most often understood as a formal trial before a judicial body, the word "tried" has frequently been used in reference to alternative dispute resolutions outside of a formal trial, including arbitration proceedings. See, e.g., *Demsey & Associates, Inc.* v. *S. S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972) ("[third-party defendant claimed it] was entitled to have certain issues *tried by arbitration*" (emphasis added)); *Bean* v. *Farnam*, 23

situated defendant would not. This would mean that the deadline created by § 52-549z, which nominally applies to both parties, would be fatal only to defendants. It is difficult to believe that such an inequitable result would have been intended by our legislature.

Mass. (6 Pick.) 268, 275 (1828) ("[t]he plea . . . in the present case does not require us to try over again a matter already *tried by the arbitrators*" (emphasis added)); cf. *Paulus* v. *LaSala*, 56 Conn. App. 139, 140, 742 A.2d 379 (1999) ("[a]n attorney trial referee *tried* the case" (emphasis added)), cert. denied, 252 Conn. 928, 746 A.2d 789 (2000); *Spearhead Construction Corp.* v. *Bianco*, 39 Conn. App. 122, 127, 665 A.2d 86 ("[t]his case was *tried* before an attorney trial referee" (emphasis added)), cert. denied, 253 Conn. 928, 667 A.2d 554 (1995).

In addition, the phrase "[a]fter trial" in § 52-192a and the phrase "tried on its merits" in § 52-592 (a) can also be distinguished by the other language used in those statutes. Section 52-192a contains several references to "a verdict by the jury or an award by the court" that will be considered "[a]fter trial . . . ." These references make it plain that the legislature intended for the term "trial" in § 52-192a to refer to a formal trial held before a judge. The relevant portions of § 52-592 (a), on the other hand, neither mention jury verdicts or court awards nor contain any other language that would indicate the legislature's intention to restrict the phrase "tried on its merits" to proceedings conducted exclusively before a judge. Rather, the statute contemplates a remedy for actions that have failed to be heard *on their merits*. There can be no dispute that the arbitrator's decision, which was later adopted by the trial court itself, resolved the present case on its merits. Indeed, the plaintiff does not contend otherwise.

Unlike in *Nunno*,[9] a reading of the phrase "tried on [the] merits" as requiring less than a formal trial is not

[9] One of the arguments that informed our construction of the phrase "[a]fter trial" in *Nunno* was that the imposition of interest on a defendant would discourage the voluntary acceptance of arbitration awards. (Internal quotation marks omitted.) *Nunno* v. *Wixner*, supra, 257 Conn. 677, 684–85. That same tension is not at issue in the present case.

inconsistent with the underlying purpose of § 52-592 (a). The purpose of § 52-592 (a) is "to avoid hardships arising from an unbending enforcement of limitation statutes"; *Issac* v. *Mount Sinai Hospital*, 210 Conn. 721, 728, 557 A.2d 116 (1989); and "to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court." (Internal quotation marks omitted.) *Rocco* v. *Garrison*, supra, 268 Conn. 558. In other words, rather than trying to conserve judicial resources, the accidental failure of suit statute ensures that, under certain circumstances, litigants retain their right to have their disputes resolved on the merits. The right to have disputes resolved on the merits is not exclusive to a formal court or jury trial. For the reasons discussed previously, it is clear that the parties in the present case have had an opportunity to have their dispute resolved on the merits.

For the foregoing reasons, we conclude that the plaintiff's first case was "tried on its merits" within the meaning of § 52-592 (a) and that, as a result, the Appellate Court properly remanded the present case to the trial court with direction to render judgment in favor of the defendant.

The judgment of the Appellate Court is affirmed.

In this opinion D'AURIA, MULLINS and KELLER, Js. concurred.

ECKER, J., with whom ROBINSON, C. J., joins, dissenting. The majority holds that an action that has been submitted to court-ordered arbitration under General Statutes § 52-549u has been "tried on its merits" within the meaning of General Statutes § 52-592 (a), a savings statute that we have repeatedly stated, since its enactment 160 years ago, must be construed liberally to effec-

tuate its remedial purpose.[1] It is clear to me that the informal arbitration proceeding at issue lacks the formality or procedural protections of a trial, and, therefore, the present case has not been "tried on its merits" under § 52-592 (a). Accordingly, I would reverse the judgment of the Appellate Court and remand the case to the trial court to determine whether the plaintiff, Phyllis Larmel, has satisfied the other condition necessary to qualify for relief under the savings statute.[2]

The majority holds that the plain language of the phrase "tried on its merits" in § 52-592 (a) includes a case resolved by arbitration pursuant to § 52-549u. I have difficulty understanding the basis for this conclusion. It is not supported by any of the dictionary definitions cited in the majority opinion, all of which require that the inquiry or examination proceed "judicially." E.g., Merriam-Webster's Collegiate Dictionary (11th Ed. 2014) p. 1344. On its face, that qualification would appear to *exclude* an arbitration, certainly a nonbinding, informal arbitration conducted by an attorney under

[1] "The first case construing [the accidental failure of suit] statute was *Johnston* v. *Sikes*, 56 Conn. 589 [Super. 1888]. It definitely established that the statute was remedial and should be liberally interpreted." *Baker* v. *Baningoso*, 134 Conn. 382, 386–87, 58 A.2d 5 (1948); see *Johnston* v. *Sikes*, supra, 596 ("a very liberal construction is to be given to the" savings statute). We have liberally interpreted the statute for more than one century. See, e.g., *Dorry* v. *Garden*, 313 Conn. 516, 530, 98 A.3d 55 (2014) (observing that "[§ 52-592] is remedial in nature" and, therefore, "must be afforded a liberal construction in favor of those whom the legislature intended to benefit" (internal quotation marks omitted)); *Ruddock* v. *Burrowes*, 243 Conn. 569, 575, 706 A.2d 967 (1998) (citing "a long line of cases [holding] that § 52-592 (a) is remedial in nature and, therefore, warrants a broad construction"); *Lacasse* v. *Burns*, 214 Conn. 464, 470, 572 A.2d 357 (1990) ("we have consistently held that § 52-592 is remedial in nature and thus, should be broadly and liberally construed").

[2] In addition to establishing that the first action was not "tried on its merits," the plaintiff in the present case would be entitled to the benefit of the savings statute only if she demonstrates that the first action was "avoided or defeated . . . for any matter of form . . . ." General Statutes § 52-592 (a). I discuss this additional requirement later in this dissenting opinion.

§ 52-549u.[3] This conclusion finds strong support in the fact that the savings statute applies only to an "action" that has failed to be tried on its merits.[4] See General Statutes § 52-592 (a) ("If any *action*, commenced within the time limited by law, has failed one or more times to be tried on its merits . . . ." (Emphasis added.)).

[3] Contrary to the majority's assertion, an arbitration held pursuant to § 52-549u is not a "quasi-judicial" proceeding; nor is an arbitrator appointed pursuant to General Statutes § 52-549w "statutorily authorized to carry out functions that are judicial in nature." All attorneys admitted to practice in Connecticut, while in good standing, are commissioners of the Superior Court with the power to "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgments of deeds," as well as to "issue subpoenas to compel the attendance of witnesses . . . ." General Statutes § 51-85. Although an arbitrator has the power to "determine the admissibility of evidence and the form in which it is to be offered"; General Statutes § 52-549w (c) (3); he or she is not constrained by the rules of evidence in doing so; see Practice Book § 23-63; and, most important, any judgment rendered is of no force or effect if either party rejects it simply by filing a one sentence demand for a trial de novo. The arbitrator thus exercises no true judicial function.

[4] I agree entirely with the majority's statement that the word "try" may be defined "in a broad manner" depending on the context of its usage. See, e.g., *Nixon* v. *United States*, 506 U.S. 224, 228–29, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (construing meaning of "try" in article first, § 3, clause 6, of United States constitution, which provides that " '[t]he Senate shall have the sole Power to *try* all Impeachments' " (emphasis added)). But the context here is provided by § 52-592, the statute under construction, and the legislature did not use the phrase "tried on its merits" in a broad or informal manner therein; instead, the plain language of the statute refers to the formalities attendant to a trial before a judge. Section 52-592 provides in relevant part that a plaintiff "may commence a new *action*" only if the original "*action*" was "commenced within the time limited by law" and "failed . . . to be tried on its merits" due to "any matter of form," such as "insufficient service or return of the writ due to unavoidable accident or the default or neglect of the officer to whom it was committed, or because the action has been dismissed for want of jurisdiction . . . ." (Emphasis added.) General Statutes § 52-592 (a). In light of the "basic tenet of statutory construction that the intent of the legislature is to be found not in an isolated phrase or sentence but, rather, from the statutory scheme as a whole"; (internal quotation marks omitted) *Wiseman* v. *Armstrong*, 269 Conn. 802, 820, 850 A.2d 114 (2004); we must consider the meaning of the phrase "tried on its merits" in conjunction with the statutory references to actions, statutes of limitations, service of process, and jurisdiction. Construing the statute as a whole, as this court is required to do, it is an inescapable conclusion that the legislature intended the phrase "tried on its merits" to refer to a trial in court, which is where actions are tried in Connecticut.

An "action" in this context means a civil lawsuit, not an arbitration.[5] As far as I am aware, moreover, an action is "tried on its merits" at a *trial*, that is, a formal, binding adjudication presided over by a judge or other official authorized to carry out the judicial function. This is what "tried on its merits" meant around the time that the accidental failure of suit statute was first enacted,[6] and I have no reason to believe that the meaning of the phrase is appreciably different today. I have not seen any lexical or legal authority that would support the majority's contrary view, as a matter of plain language or otherwise.

I agree with the majority that "[t]he question of whether a particular case has been 'tried on its merits' within the meaning of [the accidental failure of suit statute] . . . turns on the *basis* of the judgment ultimately rendered"; (emphasis in original) footnote 7 of the majority opinion; but I disagree that the *judgment rendered by the trial court* in this case "turned on the merits of the claims raised" by the plaintiff. The trial court, in fact, never assessed the merits of the plaintiff's claims, and judgment was rendered with absolutely no consideration of the merits. Exactly the opposite occurred—the trial court automatically rendered judgment after the plaintiff failed to file a timely demand for a trial de novo in accordance with General Statutes

[5] See, e.g., *Capers* v. *Lee*, 239 Conn. 265, 266–67, 684 A.2d 696 (1996) (notice of claim filed with office of claims commissioner pursuant to General Statutes § 4-147 is not "an 'action' " under § 52-592 (a)); *Bank Building & Equipment Corp.* v. *Architectural Examining Board*, 153 Conn. 121, 124–25, 214 A.2d 377 (1965) (appeal from order of architectural examining board was not "an 'action' " under § 52-592 (a) or "a 'civil action' " under General Statutes § 52-593); *Arute Bros., Inc.* v. *Dept. of Transportation*, 87 Conn. App. 367, 369, 865 A.2d 464 ("[an] arbitration proceeding [under General Statutes § 4-61] is not an action under § 52-592 [a]"), cert. denied, 273 Conn. 918, 871 A.2d 370 (2005).

[6] See, e.g., *Rutkoski* v. *Zalaski*, 90 Conn. 108, 115, 96 A. 365 (1916) (referring to action filed and adjudicated in Superior Court as "tried on its merits"); *Downie* v. *Nettleton*, 61 Conn. 593, 594, 24 A. 977 (1892) (same).

(Rev. to 2017) § 52-549z. Because the basis of the trial court's judgment was a "procedural [reason] and not on the merits," there is no doubt that Connecticut's accidental failure of suit statute applies. *Holt* v. *KMI-Continental, Inc.*, 95 F.3d 123, 131 (2d Cir. 1996), cert. denied, 520 U.S. 1228, 117 S. Ct. 1819, 137 L. Ed. 2d 1027 (1997).

Indeed, in *Nunno* v. *Wixner*, 257 Conn. 671, 778 A.2d 145 (2001), we expressly held that "[c]ourt-mandated arbitration proceedings pursuant to § 52-549u do not include many of the distinctive hallmarks of a trial"; id., 679; and, therefore, "do not constitute a trial . . . ." Id., 681. *Nunno* enumerates the myriad ways in which an arbitration proceeding is not equivalent to a trial in a civil action, both as a general matter and under the particular procedures applicable to an arbitration under § 52-549u. See id., 678–80.[7] The court in *Nunno* also observed that the actual arbitration procedures followed by the parties in that case, which were essentially the same procedures utilized in the present case, supported the conclusion that the arbitration proceeding was not a trial: "[N]o witnesses testified for either party and no formal exhibits were offered. The parties merely submitted copies of a police report, photographs, transcripts of depositions, medical reports and medical bills. The parties also summarized their respective cases through their counsel. After reviewing all of the information provided, the arbitrator issued his nonbinding award. The arbitration proceedings . . . differed greatly from a trial. The procedures were informal and parties were allowed to present unsworn evidence. None of the rules of evidence applied in this proceeding. In addition, the proceeding was presided over by a nonjudicial officer, whose decision was not binding on

[7] For example, the decision maker is a lawyer, there is no record of the proceedings, and the parties are not bound by the rules of evidence. See Practice Book § 23-63.

the parties. The court-mandated arbitration proceeding . . . case did not constitute a trial." Id., 680–81.

Finally, and importantly, the court in *Nunno* relied on the legislative history of § 52-549u to demonstrate that the legislature did not intend a court-mandated arbitration proceeding to be a trial (or, in the statutory language applicable here, a proceeding in which an "action" has been "tried on its merits"). As the court in *Nunno* observed, the "legislative history demonstrates that the legislature intended these arbitration proceedings to be a form of alternative dispute resolution designed to assist parties to settle cases voluntarily. In 1997, during the course of the legislative debates concerning the enactment of the bill that later amended § 52-549u, the members of the House of Representatives discussed the purpose of the court-mandated arbitration proceedings. In the course of the debate, Representative Michael P. Lawlor, a proponent of the bill, was asked why the rules of evidence would not apply in these arbitration proceedings. 40 H.R. Proc., Pt. 4, 1997 Sess., p. 1391. Representative Lawlor replied that '[t]his whole process of arbitration is an [alternative] dispute resolution mechanism [that is] intended to avoid unnecessary court delays. *In effect these are the two parties sitting down with an impartial hearing officer to figure out if there is a resolution to the case* [*that*] *would avoid a lengthy and expensive trial. . . .* [*T*]*his is what you might consider an elaborate* [*pretrial*] *discussion.*' . . . Id., pp. 1391–92. Representative Lawlor went on to indicate that the purpose of the legislation was 'essentially trying to encourage as many people as possible to go this route for a relatively small case where there are relatively simple issues at hand.' Id., p. 1393. Representative Lawlor's comments clearly indicate that the legislature did not understand these arbitration proceedings to be a trial, or its equivalent. To the contrary, we conclude[d] [in *Nunno*] that the legislature

intended these arbitration proceedings to be a desirable, informal means of resolving disputes *before* trial." (Emphasis in original.) *Nunno* v. *Wixner*, supra, 257 Conn. 682–83. I therefore agree with Justice Eveleigh's dissenting opinion that our holding in *Nunno* effectively dictates the outcome of the present appeal because, under the ineluctable logic and reasoning of that case, "whe[n] an arbitration lacks the formalities and hallmarks of a judicial proceeding, as it does here, pursuant to the statutory scheme of § 52-549 et seq., it cannot constitute a trial." *Larmel* v. *Metro North Commuter Railroad Co.*, 200 Conn. App. 660, 682, 240 A.3d 1056 (2020) (*Eveleigh*, *J.*, dissenting).

The majority seeks to distinguish *Nunno* on the ground that there is a distinction between the meaning of the word "trial" in our offer of compromise statute, General Statutes § 52-192a, and the phrase "tried on its merits" in our accidental failure of suit statute, § 52-592 (a). I fail to see any meaningful difference between an action being "tried" and the "trial" of an action. Although the word "tried" is a verb and the word "trial" is a noun, they refer to the same thing: an action is "tried on its merits" in a "trial." It is, of course, true that the present case involves § 52-592 rather than § 52-192a, but the fundamental inquiry in both *Nunno* and the present case is the same, namely, whether the legislature intended a court-mandated arbitration proceeding under § 52-549u to constitute a "trial" of the action such that it has been "tried on its merits." The consonance is both logical and meaningful. I cannot imagine an action that results in a recovery for a plaintiff "[a]fter trial"; General Statutes § 52-192a (c); that has not also been tried on its merits. Nor can I envision an action that has been tried on its merits without first having been decided in a trial.[8]

[8] The majority states that "the word 'tried' has frequently been used in reference to alternative dispute resolutions outside of a formal trial, including arbitration proceedings." Whatever nomenclature may be used in connec-

Contrary to the majority's assertion, the "finality" of the trial court's judgment is not an unacceptable or unwarranted casualty under the circumstances of this case.[9] Indeed, the very purpose and effect of § 52-592 is to remove the finality of any judgment within its scope. Judgment has *always* been rendered against a plaintiff in *every* case in which a second action is reinitiated under § 52-592. The policy embedded in the statute dictates that finality is a concern only if the underlying judgment was rendered after being "tried on its merits." See *Peabody N.E., Inc.* v. *Dept. of Transportation*, 250 Conn. 105, 127, 735 A.2d 782 (1999) ("[i]t is the policy of the law to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his *day in court*" (emphasis added; internal quotation marks omitted)); *Contadini* v. *DeVito*, 71 Conn. App. 697, 702, 803 A.2d 423 ("[t]he saving[s] statute has a broad and liberal purpose and ensures the plaintiff *the right to a trial of his claim*" (emphasis added)), cert. denied, 262 Conn. 918, 812 A.2d 862 (2002). Rendering judgment does not transform an action that was not tried on the merits into an action

tion with a formal arbitration, I would be very surprised if any lawyer or judge would describe a case as having been "tried" at an informal, court-mandated arbitration proceeding under § 52-549u.

[9] The majority's reliance on *Carbone* v. *Zoning Board of Appeals*, 126 Conn. 602, 13 A.2d 462 (1940), and its progeny is misplaced because those cases hold that an appeal from an administrative decision is not an "action," as defined by § 52-592 (a), and say nothing about whether the matter has been "tried on its merits." Moreover, the policy interests underlying those cases are inapplicable because the purpose of a court-ordered arbitration under § 52-549u is not to obtain a final determination of disputed issues but to reach a settlement that both parties find acceptable. Unlike the decision of an administrative agency, which must be affirmed on appeal unless "the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion"; (internal quotation marks omitted) *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 669, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001); the decision of the arbitrator "shall become null and void" and "shall not be admissible in any proceeding" after a demand for a trial de novo is filed. General Statutes § 52-549z (b) and (d).

that was tried on the merits. Judgment was not rendered in the present case because the action was tried on the merits; judgment was rendered because the plaintiff's lawyer neglected to timely file a piece of paper demanding a trial on the merits.

Similarly, effectuating the remedial purpose of § 52-592 by permitting a plaintiff to reinitiate an action after judgment does not "undermine the purpose of the twenty day deadline set forth in § 52-549z (d)," as the majority states, any more than it undermines the purposes served by statutes of limitations, sovereign immunity, disciplinary dismissals, or a variety of other filing requirements.[10] See, e.g., *Plante* v. *Charlotte Hungerford Hospital*, 300 Conn. 33, 46–47, 12 A.3d 885 (2011) (accidental failure of suit statute was applicable to dismissal of medical malpractice action under General Statutes § 52-190a (c) for failure to supply opinion letter authored by similar health care provider, provided failure was "[a] matter of form"); *Ruddock* v. *Burrowes*, 243 Conn. 569, 576, 706 A.2d 967 (1998) ("disciplinary

[10] The majority expresses the related concern that effectuating the remedial purpose of § 52-592 in the present case would create "an inequitable result" because a defendant who misses the twenty day deadline cannot obtain relief under the statute. Footnote 8 of the majority opinion. But this result is inherent in a statute that provides a remedy to the plaintiff whose action is defeated without a trial because of a "matter of form" within the meaning of the statute. There are many deadlines that apply to both parties, the violation of which may be fatal to either party's case. For example, failure to comply with the deadlines governing discovery may result in the entry of a nonsuit or default judgment. See Practice Book § 13-14 (b) (1). Under such circumstances, a defendant's only recourse is to file postjudgment motions (for reconsideration or to open the judgment) or an appeal challenging the judgment, whereas a plaintiff may file a second action under § 52-592 (a) provided that the requirements of the accidental failure of suit statute have been met. See, e.g., *Ruddock* v. *Burrowes*, supra, 243 Conn. 576 ("disciplinary dismissals are not excluded categorically from the relief afforded by § 52-592 (a)"). To the extent that such a result is inequitable, the inequity is consistent with the express language of § 52-592 (a) and the intent of the legislature, and the rectification of any such inequity should come from the legislature, not this court.

dismissals are not excluded categorically from the relief afforded by § 52-592 (a)"); *Capers* v. *Lee*, 239 Conn. 265, 271, 684 A.2d 696 (1996) (accidental failure of suit statute, which "applies only when there has been an original action that had been commenced in a timely fashion," was enacted "to avoid hardships arising from an unbending enforcement of limitation statutes" (internal quotation marks omitted)); *Lacasse* v. *Burns*, 214 Conn. 464, 470–71, 572 A.2d 357 (1990) (concluding, "on the basis of the language and evident purpose of § 52-592," that statute applies "to the state in the same manner as it would . . . to any other litigant"). As we previously have observed, the language of § 52-592 "is general and comprehensive. It neither embodies exceptions or reservations, nor suggests any." *Korb* v. *Bridgeport Gas Light Co.*, 91 Conn. 395, 401, 99 A. 1048 (1917).

By all appearances, the legislature's use of the phrase "tried on its merits" in § 52-592 (a) was deliberate and fully informed. Indeed, the relevant language has remained unchanged for more than one century. Far from enacting restrictions, the legislature has expanded the scope of the statute over time.[11] It presumably has done so in recognition of the fact that justice is best served when courts decide cases on their merits. Justice Shea made this point in his concurring opinion in *Andrew Ansaldi Co.* v. *Planning & Zoning Commission*, 207 Conn. 67, 540 A.2d 59 (1988), in which he

[11] See *Baker* v. *Baningoso*, 134 Conn. 382, 386, 58 A.2d 5 (1948) ("[the statute] has been amended repeatedly to cover additional situations but its basic provisions have not been changed"); see also *Broderick* v. *Jackman*, 167 Conn. 96, 98–99, 355 A.2d 234 (1974) (reviewing history of statutory amendments and expansion of "ground[s] [that] could be used as the basis for commencing a new action" under § 52-592 and predecessor statutes). Chief Justice Peters, writing for the court in 1998, interpreted the pattern of legislative expansion to indicate agreement with this court's rule of liberal construction: "Apparently acceding in our assessment of its [remedial] intent, the legislature, over the years, repeatedly has broadened eligibility for the relief afforded by the statute." *Ruddock* v. *Burrowes*, supra, 243 Conn. 575.

observed that the "accidental failure of suit statute, permitting a new action to be commenced after the original action has been defeated 'for any matter of form' "; id., 76 (*Shea*, *J.*, concurring); was designed to ameliorate the harshness of the common law in order for parties to have their cases resolved, not on the basis of the neglect of the lawyer but, rather, on the merits. See id. 75–76 (*Shea*, *J.*, concurring) ("[b]eginning in the middle of the nineteenth century . . . our legislature enacted numerous procedural reforms applicable to ordinary civil actions that are designed to ameliorate the consequences of many deviations from the prescribed norm, which result largely from the fallibility of the legal profession, in order generally to provide errant parties with an opportunity for cases to be resolved on their merits rather than dismissed for some technical flaw").

Of course, the remedial purpose of § 52-592 "is not without limits. . . . Even the saving[s] statute does not guarantee that all plaintiffs have the opportunity to have their cases decided on the merits. It merely allows them a limited opportunity to correct certain defects in their actions within a certain period of time." (Internal quotation marks omitted.) *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 355, 63 A.3d 940 (2013). In order to " 'save' [a] deficient [action]" under our accidental failure of suit statute; *Peabody N.E., Inc.* v. *Dept. of Transportation*, supra, 250 Conn. 128; a plaintiff must establish not only that the first action was not "tried on its merits" but also that it was "otherwise avoided or defeated . . . for any matter of form . . . ."[12] General Statutes

[12] For example, an action resolved on the merits by way of summary judgment cannot be reinitiated under § 52-592 (a) because the rendering of summary judgment is not as a "matter of form . . . ." See *Boone* v. *William W. Backus Hospital*, 102 Conn. App. 305, 314, 925 A.2d 432 (plaintiff could not reinitiate second action after rendering of summary judgment because plaintiff's failure to disclose expert witness did not "[amount] to a mistake as a matter of form under § 52-592 (a)"), cert. denied, 284 Conn. 906, 931 A.2d 261 (2007); see also *Hughes* v. *Bemer*, 206 Conn. 491, 495, 538 A.2d

§ 52-592 (a). We have declined to construe the phrase "matter of form" as creating a sharp distinction between matters of procedure and those "of substance . . . embracing the real merits of the controversy between the parties." (Internal quotation marks omitted.) *Plante* v. *Charlotte Hungerford Hospital*, supra, 300 Conn. 50; see *Lacasse* v. *Burns*, supra, 214 Conn. 472–74. Instead, we have held that whether an action has failed due to a "matter of form" is a "fact-sensitive . . . inquiry," and a plaintiff must be afforded an opportunity to make a factual showing that the failure of the case to be tried on its merits was due to a "good faith mistake, inadvertence or excusable neglect," as opposed to the "egregious conduct by an attorney or party . . . ." *Plante* v. *Charlotte Hungerford Hospital*, supra, 50–51; see *Ruddock* v. *Burrowes*, supra, 243 Conn. 576 ("[w]hether the [accidental failure of suit] statute applies cannot be decided in a factual vacuum"); see also *Skinner* v. *Doelger*, 99 Conn. App. 540, 554, 915 A.2d 314 (whether prior action failed as "matter of form" "may be conceptualized as a continuum whereupon a case must be properly placed between one extreme of dismissal for mistake and inadvertence, and the other extreme of dismissal for serious misconduct or cumulative transgressions"), cert. denied, 282 Conn. 902, 919 A.2d 1037 (2007).

In the absence of factual findings by the trial court, we cannot determine on appeal whether the plaintiff's failure to file a demand for a trial de novo within twenty days was due to mistake, inadvertence or excusable neglect on the one hand, or egregious conduct on the

703 (1988) (dismissal of action for failure to file memorandum of law in opposition to motion to strike "is not a matter of form" under § 52-592). I therefore disagree with the majority that, "if the meaning of the phrase 'tried on its merits' is limited to cases in which there has been a formal 'trial,' an action resolved on the merits prior to a court or jury trial, for example, by way of summary judgment, could well be open to relitigation through § 52-592 (a)."

other. Accordingly, I would remand the case to the trial court for a factual determination as to whether the first action was defeated for a "matter of form" under § 52-592 (a).

I therefore respectfully dissent.

LAURA GRABE *v.* JUSTIN HOKIN (SC 20432)

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

Syllabus

The plaintiff sought to dissolve her marriage to the defendant and to enforce a nuptial agreement that the parties had executed shorty before their marriage. The prenuptial agreement provided that, in the event of dissolution, the parties agreed to waive any claim to each other's separate property or to support from the other. The agreement also provided that a party who unsuccessfully challenged its enforceability would pay the attorney's fees of the other party and contained a severability clause providing that, if any provision or provisions in the agreement were found to be unenforceable, the remainder of the agreement would continue in full force and effect. The defendant filed a cross complaint, claiming that enforcement of the agreement would be unconscionable in light of certain, uncontemplated events during the marriage, including the birth of the parties' three children, the destruction of the defendant's house by fire, the destruction of a yacht club, in which the defendant had an indirect ownership interest, due to a natural disaster, and the failure of a business from which the defendant derived his primary source of income. The trial court found that, although these events were not contemplated, they did not render enforcement of the agreement unconscionable. The court found, however, that enforcement of the attorney's fees provision would be unconscionable insofar as it would financially cripple the defendant. The trial court rendered judgment dissolving the parties' marriage, striking the attorney's fees provision from the prenuptial agreement and concluding that the remainder of the agreement was enforceable. The defendant appealed, claiming that the trial court incorrectly determined that the occurrence of the uncontemplated events during the parties' marriage did not render enforcement of the agreement unconscionable at the time of dissolution. *Held* that the trial court correctly determined that enforcement of the parties' prenuptial agreement was not unconscionable in light of all of the relevant facts and circumstances: the fact that events arose during the

marriage that were beyond the parties' initial contemplation did not establish that enforcement of the prenuptial agreement would be unconscionable, and, although the defendant claimed that the children were entitled to continue the lifestyle to which they were accustomed before the dissolution, the children were being supported by the plaintiff at the same standard of living they enjoyed before the dissolution, the defendant conceded that, as a noncustodial parent, he was not entitled to child support, and there was nothing in this state's statutes or case law to suggest that public policy required that a noncustodial parent receive postdissolution support for the sole purpose of ensuring that he or she has the ability to provide for the children of the marriage in the same manner as the custodial parent, as a regulation (§ 46b-215a-5c (b) (6) (B)) setting forth the criteria for deviating from this state's child support guidelines expressly contemplates that, after dissolution, parents may have an extraordinary disparity in income; moreover, the defendant had significant assets at the time of the dissolution, nothing in the record supported the conclusion that he was incapable of earning an income, it was not unreasonable to expect the defendant to obtain employment to replace the income that he lost from the failed business, and there was no evidence that the defendant gave up any income earning opportunities as a result of his marriage or the births of the children, or that he made significant contributions to family life, for which it would be unfair not to compensate him; furthermore, it was not inconsistent for the trial court to conclude that it would be unconscionable to enforce the attorney's fees provision in the agreement on the ground that enforcement of that provision would financially cripple the defendant while also finding the remainder of the agreement enforceable, as the agreement's severability clause contemplated the possibility of enforcement of certain provisions in the agreement but not others.

Argued May 3—officially released November 17, 2021*

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a cross complaint; thereafter, the case was referred to the Regional Family Trial Docket at Middletown and tried to the court, *Diana*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed. *Affirmed.*

* November 17, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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

Charles D. Ray, with whom were *Angela M. Healey*, *David W. Griffin* and, on the brief, *Dyan M. Kozaczka*, for the appellee (plaintiff).

Opinion

KAHN, J. The issue before us in this appeal is whether the trial court correctly determined that the enforcement of a prenuptial agreement executed by the plaintiff, Laura Grabe, and the defendant, Justin Hokin, was not unconscionable at the time of the dissolution of their marriage. Shortly before the parties' marriage in 2010, they executed a prenuptial agreement in which each party agreed, in the event of a dissolution action, to waive any claim to the other's separate property, as defined in the agreement, or to any form of support from the other, including alimony. The agreement also provided that a party who unsuccessfully challenged the enforceability of the agreement would pay the attorney's fees of the other party. In 2016, the plaintiff brought this action seeking dissolution of the marriage and enforcement of the prenuptial agreement. The defendant filed a cross complaint in which he claimed, inter alia, that the agreement was unenforceable because it was unconscionable at the time of the dissolution under General Statutes § 46b-36g (a) (2).[1] After a trial to the court, the court concluded that, with the excep-

[1] General Statutes § 46b-36g provides in relevant part: "(a) A premarital agreement or amendment shall not be enforceable if the party against whom enforcement is sought proves that:

* * *

"(2) The agreement was unconscionable when it was executed or when enforcement is sought;

* * *

"(c) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law."

tion of the attorney's fees provision, enforcement of the terms of the prenuptial agreement that the parties entered into was not unconscionable, even in light of certain events that had occurred during the marriage. Accordingly, the trial court rendered judgment dissolving the marriage and enforcing the terms of the prenuptial agreement, with the exception of the provision requiring the party who unsuccessfully challenged the enforceability of the agreement to pay the attorney's fees of the other party. On appeal,[2] the defendant contends that the trial court incorrectly determined that the occurrence of the unforeseen events found by the trial court did not render the enforcement of the entire agreement unconscionable at the time of the dissolution. We affirm the judgment of the trial court.

The record reveals the following facts that were found by the trial court or that are undisputed. Shortly before the parties' marriage on October 2, 2010, they entered into a prenuptial agreement. The agreement provided that it would be "governed and construed in accordance with the Connecticut Premarital Agreement Act, [General Statutes] § 46b-36a et seq. . . ." Under the agreement, each party waived any claim to the property of the other during the marriage. In the event of a marital dissolution, each party agreed to waive "all claims and rights to any equitable distribution of [s]eparate [p]roperty [of the other party, as defined in the agreement]," and to "any claim for temporary or permanent maintenance, support, alimony, [attorney's] fees (including [pendente] lite [attorney's] fees) or any similar claim . . . ." In addition, each party agreed that, if either party "unsuccessfully seeks to invalidate all or any portion of [the] [a]greement or seeks to recover alimony (other than pendente lite [attorney's] fees) or

[2] The defendant appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

property in a manner which deviates from the terms of [the] [a]greement, then the prevailing party shall be entitled to recover all reasonable and necessary [attorney's] fees and other costs incurred in successfully defending his or her rights under [the] [a]greement." The agreement also contained a severability provision stating that, "[i]n case any provision of [the] [a]greement should be held to be invalid, such invalidity shall not affect, in any way, any of the other provisions herein, all of which shall continue in full force and effect, in any country, state or jurisdiction in which such provisions are legal and valid." In addition, the agreement provided that "[n]o change in circumstances of the parties shall render [the] [a]greement unconscionable if enforcement hereof is sought at any time in the future."

At the time that the parties executed the prenuptial agreement, the plaintiff's annual income was $1,312,225, and her net worth was $12,319,380. The defendant's estate had a fair market value of $5,150,295,[3] and he disclosed income of $97,719.06 over the previous six months. The primary sources of the defendant's income were a director's fee of approximately $60,000 per year from an entity known as Intermountain Industries and guaranteed payments ranging from $80,000 to $100,00 per year from an entity known as 4H, LLC Family Partnership (4H, LLC).[4] The defendant received no other income from employment.

[3] Financial disclosures attached to the prenuptial agreement indicated that the value of the defendant's assets at the time of the marriage was $13,267,952.81. It was discovered during the dissolution proceedings that this figure had been established by using generally accepted accounting practices, rather than fair market value, and that the fair market value of the assets was $5,150,295.

[4] Intermountain Industries was an oil and gas exploration business in which the defendant's father had a controlling interest. Intermountain Industries made dividend payments to an entity known as Century American, which, in turn, made guaranteed payments to 4H, LLC, the members of which were the defendant's father and his lineal descendants, including the defendant.

Before their marriage, both the plaintiff and the defendant would frequently stay out all night socializing and drinking with friends. The plaintiff changed her behavior when she became pregnant shortly after the marriage, but the defendant did not. After the parties' oldest daughter was born in late 2011, the defendant continued to neglect his responsibilities to his family. For example, ten months after his daughter's birth, the defendant left the plaintiff at home alone with her while Hurricane Sandy struck their neighborhood, and the plaintiff was forced to seek shelter at her parents' home.

After the parties' second daughter was born in 2013, the defendant's family planned an intervention for him, as his drinking was out of control and he was being completely unproductive. The intervention never occurred, and the defendant continued to stay out all night, sleep most of the day and ignore the needs of his wife and children.

In August, 2014, the plaintiff contacted a divorce lawyer. Two weeks later, the house in Norwalk where the parties resided, which the defendant owned, was completely destroyed by a fire. The parties then leased another residence in Norwalk. In November, 2014, the plaintiff filed an action for the dissolution of the marriage, but she later withdrew it. In 2015, the parties' third daughter was born.

During this period, the plaintiff started building a house in the Rowayton neighborhood of Norwalk. In March, 2016, the plaintiff separated from the defendant and moved into the Rowayton house with their three young daughters. Several weeks later, she filed this action seeking the dissolution of the marriage and enforcement of the prenuptial agreement. In February, 2017, the defendant filed an amended answer and cross complaint, alleging, inter alia, that the prenuptial agree-

ment was unenforceable under § 46b-36g (a) (2) because it was unconscionable when enforcement wassought.[5]

Thereafter, in September, 2017, a yacht club in the Caribbean known as the Bitter End Yacht Club (Yacht Club), which was owned by the defendant's family and in which the defendant had an indirect, fractional ownership interest, was destroyed by Hurricane Irma. Also in 2017, Intermountain Industries failed due to a downturn in the price of crude oil. As a result, it no longer paid the defendant a director's fee, and its guaranteed payments to 4H, LLC were discontinued.

Evidence presented at trial showed that, since the execution of the prenuptial agreement, the defendant's assets had decreased in value from $5,150,295 to $2.1 million. A note on the defendant's financial affidavit dated February 11, 2019, which was introduced as an exhibit at trial, indicated that $1,845,000 of these assets were held in the Justin Hokin Grantor Trust, representing the trust's ownership interests in other assets, "primarily [4H, LLC]," and that "[t]he most significant asset in [4H, LLC], is [the Yacht Club], which was destroyed by Hurricane Irma in the summer of 2017." The note also indicated that the trust was "wholly illiquid" and that its value was not "accessible" to the defendant. The defendant had liabilities of $1,351,262, more than $1 million of which was debt owed to his father and to 4H, LLC, for "legal fees . . . ." The affidavit showed that the defendant had no significant income.[6]

The defendant contended in his posttrial brief to the trial court that the births of the parties' three children, the destruction of his house by fire, the destruction of the Yacht Club by Hurricane Irma and the failure of

[5] The trial court made no findings in connection with the defendant's claim at trial that the prenuptial agreement was unconscionable when the parties executed it, and the defendant does not pursue that claim on appeal.

[6] Specifically, the financial affidavit indicated that he had a weekly income of $2 from dividends and interest payments.

Intermountain Industries were not contemplated when the prenuptial agreement was signed and that enforcement of the agreement would be unconscionable in light of these unforeseen events. Accordingly, the defendant requested that the trial court not enforce the agreement and, instead, order a property division "[that] . . . would permit the defendant to purchase a home in close proximity [to the plaintiff's home] to provide the minor children a comparable quality of life between both parent households."

The plaintiff contended before the trial court that, to the contrary, the events cited by the defendant were not beyond the contemplation of the parties when they executed the prenuptial agreement. She also referred to evidence presented at trial that would support findings that, after the defendant received insurance proceeds for the destruction of his house, paid off two mortgages on the house and sold the land, he retained net proceeds of $775,587.73, as compared with equity of $20,309.58 at the time that the prenuptial agreement was executed; the value of the Yacht Club property on December 31,2017, was $14,900,000, $3,000,000 more than its value on the date that the prenuptial agreement was executed; and the defendant's family was responsible for the failure of Intermountain Industries. Accordingly, the plaintiff argued that, even if the events were not contemplated, it would not be unconscionable to enforce the prenuptial agreement, in part because it would be unfair to require the plaintiff bear the burden of the defendant's neglectful and unproductive behavior.

In its memorandum of decision, the trial court found that, at the time of trial, the plaintiff was forty-one years old and in good health. She had a bachelor's degree in journalism and was two credits short of receiving her master's degree in science from New York University. She had a net weekly income of $34,284,[7] and the fair

[7] In determining this amount, the trial court relied on a child support guidelines worksheet dated February 12, 2019, in which the plaintiff stipu-

market value of her assets was $27.4 million. The defendant was forty-four years old and in good health. He had a bachelor's degree in geography from the University of Montana. He had no significant income[8] and his assets had a fair market value of $2.1 million.[9]

The trial court determined that the defendant was at fault for the breakdown of the marriage. The court observed that, after the parties' three children were born, "the defendant continued to live a life full of drinking and partying. Instead of trying to provide for the plaintiff and their young children, the defendant remained stagnant and engulfed in a selfish mentality until he lost his footing in his business and his marriage." The marriage "suffered as the defendant slept most of the day, stayed out all night, and did not make the plaintiff or the children even a remote priority in his life."

The trial court further found that, at the time that they entered into the prenuptial agreement, the parties had not contemplated that they would have three children, the defendant's house would be destroyed by fire, the Yacht Club would be destroyed by a hurricane and that Intermountain Industries would fail, depriving the defendant of his primary source of income.[10] Although

lated that she received $48,361 in gross weekly income and mandatory deductions of $14,077, for a net weekly income of $34,284. The plaintiff submitted a subsequent financial affidavit to the trial court dated February 20, 2019, indicating that her net weekly income was $24,505. This figure appears to have been a clerical error, as the same affidavit indicates that her gross weekly income was $48,361, and mandatory deductions were $14,491, which would yield a net weekly income of $33,870.

[8] The parties stipulated that, for child support purposes only, the defendant had a gross weekly income of $3720 and a net weekly income of $2569.

[9] The trial court made no finding on the issue, but the undisputed evidence showed that the defendant had liabilities of $1.35 million, yielding a net worth of approximately $750,000.

[10] The trial court stated that, "[a]lthough the defendant was not financially crippled after his home burned down, the Yacht Club was underinsured, and the insurance proceeds could not fully restore the property to its prior form. In addition to the defendant's financial losses from these unforeseen events, he was no longer able to generate revenue from the Yacht Club after it was destroyed, significantly diminishing his assets."

the court concluded that these events were not specifically contemplated by the parties when they entered into the agreement, it determined that they were not events that would render enforcement of the terms of the agreement unconscionable.

When it came to the enforcement of the attorney's fees provision, however, the trial court concluded that, under the circumstances existing at the time of trial, enforcement of that provision would be unconscionable. The court observed that the plaintiff "has great financial wealth and [was] not incapable of paying for her own attorney's fees." In addition, the court found it "unlikely that the parties considered paying millions of dollars in attorney's fees to the other party in the event of a marital dissolution" and that the enforcement of the attorney's fees provision "would financially cripple the defendant's remaining assets . . . ."[11] In light of these findings, the court concluded that, "while the totality of the agreement is not unconscionable, [the provision requiring a party who unsuccessfully challenges the prenuptial agreement to pay the attorney's fees of the other party] is unconscionable and should be stricken from the antenuptial agreement. The remainder of the parties' antenuptial agreement shall be enforced . . . ." Accordingly, the trial court rendered judgment dissolving the parties' marriage, striking the attorney's fees provision from the prenuptial agreement and, consistent with the severability provision of the agreement, concluding that the remainder of the agreement was enforceable. The court also incorporated the final parenting plan into the judgment, pursuant to which the children were to reside primarily with the plaintiff but would spend time with defendant pursuant to a regular visitation schedule. In addition, the parties

[11] Evidence presented at trial showed that the plaintiff had paid attorney's fees in the amount of $1,559,713.17 defending against the defendant's cross complaint seeking invalidation of the prenuptial agreement.

stipulated that the defendant would pay weekly child support in the amount of $57, in accordance with the child support guidelines. Thus, although the parties had joint legal custody of the children, the plaintiff was to have primary physical custody.

This appeal followed.[12] On appeal, the defendant contends that the trial court incorrectly determined that it would not be unconscionable to enforce the prenuptial agreement when it found that the parties did not initially contemplate that the defendant would be helping to raise three young children at a time when he had no income and greatly diminished assets.[13] The plaintiff contends that, even if the parties did not initially contemplate these events, the trial court correctly determined that they were not so far beyond their contemplation as to render the enforcement of the agreement unconscionable.[14] We agree with the plaintiff.

[12] After this appeal was filed, the plaintiff filed a motion for leave to file a late conditional cross appeal in which she requested permission to cross appeal from the trial court's ruling invalidating the attorney's fees provision in the event that the Appellate Court reversed the judgment and remanded the case to the trial court for a new trial without resolving the issue of the enforceability of the prenuptial agreement. The Appellate Court denied the motion, and this claim is not before us.

[13] The defendant also claims that the trial court improperly precluded him from soliciting testimony as to whether the parties contemplated certain events when they entered into the prenuptial agreement. Because we conclude that enforcement of the agreement is not unconscionable, even assuming that the events at issue were not contemplated by the parties, we need not address this claim.

[14] The plaintiff also contends, essentially as an alternative ground for affirmance, that the trial court incorrectly determined that the parties did not contemplate that they would have children, that the defendant's house would be destroyed by fire, that the Yacht Club would be destroyed by a hurricane and that Intermountain Industries would fail. There appear to be two separate bases for this claim. First, the plaintiff appears to contend that these events were contemplated by the parties *as a matter of law* because the prenuptial agreement expressly provided that "[n]o change in circumstances of the parties shall render [the] [a]greement unconscionable if enforcement hereof is sought at any time in the future." Second, the plaintiff claims that these events were, as a factual matter, within the contemplation of the parties. We are doubtful, however, whether a "no change in

We begin our analysis with the standard of review. Pursuant to § 46b-36g (a), "[a] premarital agreement . . . shall not be enforceable if the party against whom enforcement is sought proves that . . . (2) [t]he agreement was unconscionable when it was executed or when enforcement is sought . . . ." Whether the prenuptial agreement is enforceable is a mixed question of fact and law. See *Friezo* v. *Friezo*, 281 Conn. 166, 180–81, 914 A.2d 533 (2007), overruled in part on other grounds by *Bedrick* v. *Bedrick*, 300 Conn. 691, 17 A.3d 17 (2011). Although the underlying historical facts found by the trial court may not be disturbed unless they are clearly erroneous; see *Kovalsick* v. *Kovalsick*, 125 Conn. App. 265, 270–71, 7 A.3d 924 (2010); whether a prenuptial agreement is unconscionable in light of those facts, if not clearly erroneous, is a question of law subject to plenary review. See *Crews* v. *Crews*, 295 Conn. 153, 163–64, 989 A.2d 1060 (2010); see also General Statutes § 46b-36g (c) ("[a]n issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law").

"Unconscionable is a word that defies lawyer-like definition. . . . The classic definition of an unconscionable contract is one which no [individual] in his senses, not under delusion, would make, on the one hand, and which no fair and honest [individual] would accept, on the other." (Internal quotation marks omitted.) *Beyor* v. *Beyor*, 158 Conn. App. 752, 758, 121 A.3d 734, cert. denied, 319 Conn. 933, 125 A.3d 206 (2015).

We have previously recognized that § 46b-36g was intended to endorse, clarify and codify the standards

circumstance" provision could save a prenuptial agreement that otherwise would be unenforceable as unconscionable. We need not resolve these issues here, however, because we conclude that the trial court correctly determined that the existence of these uncontemplated events did not render the enforcement of the prenuptial agreement unconscionable.

set forth in this court's decision in *McHugh* v. *McHugh*, 181 Conn. 482, 436 A.2d 8 (1980). See, e.g., *Friezo* v. *Friezo*, supra, 281 Conn. 185–86 n.23. In *McHugh*, this court held that "an antenuptial agreement will not be enforced where the circumstances of the parties at the time of the dissolution are so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice. . . . Thus, where a marriage is dissolved not because it has broken down irretrievably, but because of the fault of one of the parties, an antenuptial waiver of rights executed by the innocent party may not be enforceable, depending [on] the circumstances of the particular case and the language of the agreement. . . . Likewise, where the economic status of [the] parties has changed dramatically between the date of the agreement and the dissolution, literal enforcement of the agreement may work injustice." (Citations omitted.) *McHugh* v. *McHugh*, supra, 489. Other unforeseen changes that may, depending on the circumstances, render a prenuptial agreement unenforceable include the birth of a child, loss of employment or a move to another state. *Bedrick* v. *Bedrick*, supra, 300 Conn. 706.

"Absent such unusual circumstances, however, antenuptial agreements freely and fairly entered into will be honored and enforced by the courts as written." *McHugh* v. *McHugh*, supra, 181 Conn. 489. "Unfairness or inequality alone does not render a [prenuptial] agreement unconscionable;[15] spouses may agree on an unequal distribution of assets at dissolution. [T]he mere fact that hindsight may indicate the provisions of the agreement were improvident does not render the agree-

[15] *Bedrick* involved the enforceability of a postnuptial agreement. See *Bedrick* v. *Bedrick*, supra, 300 Conn. 693. The same principle, however, applies to prenuptial agreements. See id., 696–97; *Crews* v. *Crews*, supra, 295 Conn. 167 ("equitable considerations codified in our statutes . . . have no bearing on whether [a prenuptial] agreement should be enforced" (internal quotation marks omitted)).

ment unconscionable. . . . Instead, the question of whether enforcement of an agreement would be unconscionable is analogous to determining whether enforcement of an agreement would work an injustice. . . . Marriage, by its very nature, is subject to unforeseeable developments, and no agreement can possibly anticipate all future events." (Citations omitted; footnote added; internal quotation marks omitted.) *Bedrick* v. *Bedrick*, supra, 300 Conn. 705–706. Indeed, if every event that the parties did not anticipate could provide a basis for invalidating a prenuptial agreement, no such agreement would be enforceable. Thus, "the party seeking to challenge the enforceability of the antenuptial contract bears a heavy burden." *Crews* v. *Crews*, supra, 295 Conn. 169; see id., 170 ("proving uncontemplated, dramatically changed circumstances requires a significant showing"); see also id. ("*McHugh* requires an extraordinary change in economic status and . . . the threshold for finding such a dramatic change is high" (internal quotation marks omitted)).

In the present case, we assume without deciding that the trial court correctly found that the parties did not contemplate the births of their three children, the destruction of the defendant's house by fire, the destruction of the Yacht Club by a hurricane or the failure of Intermountain Industries when they entered into the prenuptial agreement.[16] We further assume that the resulting diminishment in the value of the defendant's assets and his loss of income from Intermountain Industries also were not contemplated. As we explained, however, it is clear under our case law that, standing alone, the fact that existing circumstances were beyond

[16] As we indicated; see footnote 14 of this opinion; we need not address the plaintiff's challenge to the trial court's factual findings on these issues because, even assuming that, contrary to the plaintiff's claim, the findings were correct, we agree with the trial court's legal conclusion that those facts did not render the prenuptial agreement unconscionable.

the parties' initial contemplation does not establish that enforcement of a prenuptial agreement would be unconscionable. Rather, we must determine whether these circumstances were "so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice." *McHugh* v. *McHugh*, supra, 181 Conn. 489; see also *Crews* v. *Crews*, supra, 295 Conn. 168 (if court determines that circumstances at time of dissolution were beyond parties' initial contemplation, court must then determine "whether enforcement would cause an injustice"). In making this determination, we must consider all of the relevant facts and circumstances. See, e.g., *Crews* v. *Crews*, supra, 163.

We first address the defendant's contention that the trial court improperly failed to recognize that enforcement of the prenuptial agreement would be unconscionable in light of the uncontemplated births of the parties' children and his loss of assets and income because the "children are entitled to continue the lifestyle to which [they were] accustomed and the standard of living [they] enjoyed before the divorce . . . ."[17] (Internal quotation marks omitted.) *Hornung* v. *Hornung*, 323 Conn. 144, 162, 146 A.3d 912 (2016). We are not persuaded. There is no question in the present case that the children are being supported by the plaintiff at the same standard of living that they enjoyed before the dissolution. As far as the record reveals, they continue to live in the same house, to sleep there most nights, to attend the same schools, to receive the same level of health care and to enjoy the same food, clothing, vacations, entertainment and the like as they did before

[17] The defendant testified at trial that, since the dissolution action was brought, he has paid rent of $3500 per month for a 983 square foot, three bedroom house in the Rowayton neighborhood of Norwalk. He further testified that the house has a garage that he has converted into a playroom, laundry room, workshop and storage area.

the marital dissolution. Thus, it is difficult to perceive the relevance of *Hornung* in the present case. Contrary to the defendant's suggestion, the fact that a child spends a limited amount of time with a noncustodial parent who has a somewhat lower standard of living than the child does not, ipso facto, mean that *the child's* standard of living is reduced. See *Maturo* v. *Maturo*, 296 Conn. 80, 108, 995 A.2d 1 (2010). Moreover, the defendant concedes that, as a *noncustodial* parent, he would not be entitled to a child support award under any circumstances. As we stated in *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 46 A.3d 112 (2012), "the legislature viewed the provision of custody as the premise underlying the receipt of child support payments; the legislature did not envision that the custodian would be required to pay child support to a person who does not have custody, as well as (in cases in which the obligor obtains custody) expend resources to provide directly for the care and welfare of the child. In fact, under the Child Support and Arrearage Guidelines . . . child support award is defined as the entire payment obligation of the *noncustodial* parent . . . ."[18] (Emphasis in original; internal quotation marks omitted.) Id., 554.

The defendant also appears to claim that, for the sake of the children, *he* is entitled to enjoy his predissolution

[18] See Regs., Conn. State Agencies § 46b-215a-1 (6). The current version of the child support guidelines recognizes that there has been "a trend away from 'custodial/noncustodial' and 'visitation' language toward the concept of shared parenting." Child Support and Arrearage Guidelines (2015), preamble, § (g), p. xii. The guidelines also recognize that, "within the context of shared physical custody, both parents are essentially custodial." Id. When that is the case, the guidelines provide that "the most practical approach [is] for [child support] to be paid by the parent with the higher income." Id. As we have indicated, in the present case, the plaintiff has primary physical custody of the children, and the defendant has made no claim that he is entitled to child support on the ground that the parties have shared custody. To the contrary, he agreed to pay child support to the plaintiff and concedes that he is not entitled to receive child support from her.

standard of living because an "extraordinary disparity in parental income may hinder [the] lower income [noncustodial] parent's ability to foster a relationship with the child . . . ." (Internal quotation marks omitted.) See *Maturo* v. *Maturo*, supra, 296 Conn. 101. Again, we are not persuaded. This court recognized in *Maturo* that, when there is an "extraordinary disparity" in parental income, the court may depart from the child support guidelines when the custodial parent has the higher income and deviation from the presumptive support amount "would enhance the lower income [noncustodial] parent's ability to foster a relationship with the child . . . ." (Internal quotation marks omitted.) Id.; see also Regs., Conn. State Agencies § 46b-215a-5c (b) (6) (B) (when there is extraordinary disparity between parents' net incomes, court may deviate from presumptive support amounts if deviation would "enhance the lower income parent's ability to foster a relationship with the child" and "sufficient funds remain for the parent receiving support to meet the basic needs of the child after deviation"). In other words, *Maturo* recognized that a lower income noncustodial parent may be permitted to *pay less* than the presumptive child support amount to a higher income custodial parent if there is an extraordinary disparity in their incomes and the other conditions of the regulation are met—relief that the defendant in the present case did not seek. Thus, although § 46b-215a-5c (b) (6) (B) admittedly was intended to address the problems that may arise when divorced parents have disparate incomes and standards of living, the remedy that it provides is quite limited. *Maturo* does not suggest that a lower income noncustodial parent has any right under the regulation to *receive* child support from a higher income custodial parent for the purpose of enhancing the ability of the noncustodial parent to "foster a relationship" with a child who shares the custodial parent's higher standard of living. Cf. *Zheng* v. *Xia*, 204 Conn. App. 302, 312, 253 A.3d 69

(2021) (under *Maturo*, trial court *improperly* ordered parent with higher income to pay supplemental, lump sum child support to custodial parent with no income other than child support on basis of "significant disparity" in parties' income). In *Maturo*, the court recognized that, "[w]hen a parent has an ability to pay a large amount of support, the determination of a child's needs can be generous, but all any parent should be required to pay, regardless of his or her ability, is a fair share of the amount *actually necessary* to maintain the *child* in a reasonable standard of living. Court-ordered support that is more than reasonably needed for the child becomes, in fact, [tax free] alimony." *Maturo* v. *Maturo*, supra, 105–106. (Emphasis altered; internal quotation marks omitted.) Indeed, as we have already explained, a *noncustodial* parent is not entitled to a child support award under any circumstances. See *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 554.

The defendant contends that the fact that a noncustodial parent cannot receive child support *supports* his argument that the prenuptial agreement is unconscionable because it demonstrates that, if the agreement is enforced, the trial court will be "without the tools to account properly *for the best interests of* [*the*] *children*, putting both the noncustodial parent and them in an untenable place." (Emphasis added.) Thus, the defendant appears to suggest that, in the absence of the prenuptial agreement, the trial court would be authorized to award alimony or a property distribution to him for the purpose of ensuring that he can provide for the *children* in the same manner as the plaintiff. This court has held, however, that it is improper to disguise a child support award as alimony, and that alimony should be used only to address the needs of the recipient parent.[19]

[19] We note that there is considerable overlap between the factors that the trial court must consider when crafting an alimony award pursuant to General Statutes § 46b-82 and the factors that it must consider when assigning property pursuant to General Statutes § 46b-81. Neither statute authorizes the court to consider the ability of a spouse to support his or her children,

See *Loughlin* v. *Loughlin*, 280 Conn. 632, 655, 910 A.2d 963 (2006). Moreover, we observed in *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 555, that "permitting the diversion of funds away from the [custodial] parent [who is] providing for the care and well-being of minor children . . . would contravene the purpose of child support." Although we were referring in *Tomlinson* to a situation in which a former noncustodial parent takes custody of the children and becomes responsible for supporting them but continues to pay child support to the former custodial parent; see id., 541–42; the same principle would hold true whenever a custodial parent is required to pay any form of support to a noncustodial parent based on the fiction that the payment is for the support of the *children*.[20]

In short, we see nothing in our statutes or case law to suggest that it is the public policy of this state that a noncustodial parent is entitled to receive any form of

and the defendant has cited no authority for the proposition that, unlike an alimony award, it is proper to assign property for that purpose.

[20] The court in *Melrod* v. *Melrod*, 83 Md. App. 180, 574 A.2d 1, cert. denied, 321 Md. 67, 580 A.2d 1077 (1990), observed that the failure to award an indefinite award of alimony to the plaintiff wife might be unconscionable because "it could not help but have some effect upon the child to go back and forth between a father who can afford to live in luxury and a mother who is required to exercise some degree of frugality." Id., 197. *Melrod* involved a Maryland statute providing that a court may award alimony for an indefinite period if the court finds that, "even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate." Md. Code Ann., Fam. Law § 11-106 (c) (2) (1984); see *Melrod* v. *Melrod*, supra, 196. Connecticut has no such statute, and, as we explained, alimony may not be used in this state to disguise child support. Although we recognize that it may be difficult for some children under some circumstances to grapple with the fact that their parents have disparate standards of living, we do not agree with the court in *Melrod* to the extent that it concluded that it is *unconscionable* to permit a child who enjoys the same high standard of living that he or she did before the dissolution to have a relationship with a parent who lives in a somewhat more modest manner. Indeed, spending time with a less affluent parent could be just as beneficial to a child as time spent with an affluent parent.

postdissolution support for the sole purpose of ensuring that he or she has the ability to provide for the children of the marriage in the same manner as the custodial parent.[21] Indeed, § 46b-215a-5c (b) (6) (B) of the regulations expressly contemplates that, after a marital dissolution, the parents of a child may have an "[e]xtraordinary disparity" in income. It follows that the regulation contemplates that a child may well have a higher standard of living than his or her noncustodial parent while continuing to have a relationship with that parent. We conclude, therefore, that *Maturo* does not support the proposition that it would be unfair, much less unconscionable, to enforce a prenuptial agreement merely because there is an extraordinary disparity between the incomes or standards of living of the custodial parent and the children, on the one hand, and the noncustodial parent, on the other hand.[22]

The defendant also relies on this court's decision in *Bedrick* v. *Bedrick*, supra, 300 Conn. 691, to support his contention that enforcement of the prenuptial agreement would be unconscionable. In *Bedrick*, the parties executed a postnuptial agreement in 1977, providing that, in the event of a marital dissolution, neither party

[21] As we indicated, if the parents have *shared* physical custody of the children, the parent with the lower income can make a claim for child support. See footnote 18 of this opinion. That is not the case here. If the legislature believes there is a gap in the statutory scheme governing marital dissolutions and financial awards in this regard, it is free to address that gap legislatively. It is not the role of this court to create public policy in this highly regulated area.

[22] In such a situation, the fact that the lower income noncustodial parent is unable to provide for *himself* in the same manner as when the prenuptial agreement was executed may, depending on all of the relevant facts and circumstances, justify invalidating the agreement and awarding alimony *on that ground*. See footnote 27 of this opinion. We are aware of no authority, however, for the proposition that a noncustodial parent who otherwise would not be entitled to alimony would be entitled to it solely on the basis of his "need" to provide for his *children* in the same manner as the custodial parent. See, e.g., *Loughlin* v. *Loughlin*, supra, 280 Conn. 655 (it is improper to disguise child support as alimony).

would receive alimony.[23] Id., 693–94. Instead, the plaintiff wife would receive a cash settlement in an amount to be periodically reviewed. Id., 694. A May 18, 1989 addendum to the agreement provided for a cash settlement in the amount of $75,000. Id. The plaintiff waived her interest in the defendant's car wash business, and the defendant agreed that the plaintiff would not be held liable for his personal and business loans. Id. In the early 1990s, the defendant's car wash business became successful. Id., 707. In 1991, when the parties were forty-one years old, their child was born. Id. By the time of trial, the plaintiff had worked for that business for thirty-five years, providing administrative and bookkeeping support. Id. Since 2001, when the business began to deteriorate, the plaintiff had managed all business operations except for maintenance. Id. In 2004, the plaintiff worked outside of the business to provide the family with additional income. Id. The trial court concluded that "[t]he economic circumstances of the parties had changed dramatically since the execution of the agreement and that enforcement of the postnuptial agreement would have worked injustice." (Internal quotation marks omitted.) Id. Accordingly, it concluded that the agreement was unenforceable. Id. This court concluded that "[t]he facts and circumstances . . . clearly support the findings of the trial court that, as a matter of law, enforcement of the agreement would be unconscionable." Id., 708.

In the present case, the defendant contends that *Bedrick* stands for the proposition that a prenuptial

[23] This court concluded in *Bedrick* that postnuptial agreements are subject to stricter scrutiny than prenuptial agreements when a court is determining whether they are enforceable at the time of execution. *Bedrick* v. *Bedrick*, supra, 300 Conn. 703–704. Specifically, unlike prenuptial agreements, postnuptial agreements "are subject to special scrutiny and the terms of such agreements must be both fair and equitable at the time of execution . . . ." Id., 697. Courts apply the same standard, however, when determining whether postnuptial and prenuptial agreements are enforceable at the time of enforcement, namely, whether the agreement was unconscionable. Id., 704.

agreement is unenforceable whenever (1) a child was unexpectedly born during the marriage, and (2) a spouse has undergone dramatic economic changes. We conclude that *Bedrick* is easily distinguishable from the present case. First, in *Bedrick*, the plaintiff gave birth to the parties' child after sixteen years of marriage when both parties were forty-one years old. See *Bedrick* v. *Bedrick*, Docket No. FA-07-4007533, 2009 WL 1335100, *4 (Conn. Super. April 24, 2009). By contrast, in the present case, the parties' three children were all born within five years of the marriage, when both parties were in their thirties. Although the children may not have been "contemplated" when the parties executed the prenuptial agreement, it is reasonable to conclude that their births were less of a bolt from the blue than the birth of the parties' child in *Bedrick*. Indeed, when asked at trial whether he and the plaintiff "plan[ned] on having children during the course of the marriage," the defendant replied, "[y]eah." When asked what his plan was, he replied, "[t]o be fruitful and multiply."[24] Second, the plaintiff in *Bedrick* worked for the defendant's car wash business for thirty-five years, including

[24] The defendant suggests that this testimony related to his expectations *during the marriage*, not at the time that he executed the prenuptial agreement. As we have indicated, we assume, without deciding, that the trial court correctly determined that the parties did not "contemplate" having three children when the agreement was executed. As we have also suggested, however, the question of whether an event was "contemplated" is not a black and white one but involves shades of gray. Although the parties may not have "contemplated" having three daughters within five years of the marriage in the sense that they did not expressly discuss the matter and had no specific plan when they entered into the agreement shortly before the marriage, it seems highly implausible that they had a conscious plan to have *no* children at that time but that several months after the marriage when the plaintiff became pregnant, the defendant suddenly developed a plan to "be fruitful and multiply." We conclude, therefore, that, even if the births of the three children were not contemplated when the agreement was executed, in the sense that the births were not consciously and explicitly planned, they were not so completely beyond or contrary to expectation that enforcement of the agreement would work an injustice. See *McHugh* v. *McHugh*, supra, 181 Conn. 489.

the entire thirty-two year duration of the marriage, often seven days per week. *Bedrick* v. *Bedrick*, supra, 300 Conn. 707; *Bedrick* v. *Bedrick*, supra, 2009 WL 1335100, *3. The business floundered after the dissolution action was instituted and the plaintiff ceased working for it. *Bedrick* v. *Bedrick*, supra, 300 Conn. 707. In the present case, there is no evidence that the defendant contributed to the success of any business or enterprise of the plaintiff. Third, in *Bedrick*, the plaintiff secured employment "outside of the [car wash] business in order to provide the *family* with additional income." (Emphasis added.) Id. Although the defendant in the present case may have contributed to the support of his children during the marriage, there is no evidence that he provided financial support to the plaintiff.[25] Finally, the plaintiff in *Bedrick* was fifty-seven years old at the time of the marital dissolution, did not have a college degree and had been diagnosed with diabetes, which was controlled by medication. *Bedrick* v. *Bedrick*, supra, 2009 WL 1335100, *3–4. In the present case, the defendant was forty-four years old at the time of dissolution, had a college degree and was in good health.

[25] The defendant points out that, after the marriage, the parties lived in the defendant's house, "where he paid the carrying costs," until it was destroyed in the fire. They then leased another house using insurance proceeds. The evidence also showed, however, that the plaintiff provided approximately 75 percent of the furnishings for the defendant's house, for which she received insurance compensation, and she spent $50,000 to $60,000 on improvements to the defendant's property, for which she never made any claim. The trial court made no finding as to whether the evidence that the plaintiff lived in the defendant's house supported the conclusion that the defendant provided financial support to the plaintiff, and we conclude that the evidence does not compel the conclusion that he did. The only finding that the trial court made on this issue was that "[t]he parties kept their money separate and devoted vastly different amounts of effort and respect into their marriage . . . . Instead of trying to provide for the plaintiff and their young children, the defendant remained stagnant and engulfed in a selfish mentality until he lost his footing in his business and his marriage."

We further note that the defendant had significant assets at the time of the marital dissolution and is adequately provided for, at least in the near term. Although we recognize that his assets may not be sufficient to meet his needs for his entire lifetime, nothing in the record would support a conclusion that he is incapable of earning an income.[26] To the contrary, the evidence showed that the defendant was an educated, healthy forty-four year old with some business experience, and he testified at trial that, once he expended his assets, he was "going to have to hustle and figure some things out, get . . . some salaried or . . . contract work . . . and hope that what [he's] been working on for the last three years will come to fruition down in the . . . Virgin Islands." In addition, the defendant's counsel admitted to the trial court that the defendant "is intelligent, he is healthy, and he is capable of working." Accordingly, we cannot conclude that it would be unconscionable to expect the defendant to obtain employment to replace the unexpected loss of his

[26] The defendant contends that this court is precluded from considering his ability to provide for himself because the trial court did not expressly specify his earning capacity. See, e.g., *Tanzman* v. *Meurer*, 309 Conn. 105, 117, 70 A.3d 13 (2013) (trial court must specify dollar amount of party's earning capacity when that factor provides basis for financial award because failure to do so "leaves the relevant party in doubt as to what is expected from him or her, and makes it extremely difficult, if not impossible, both for a reviewing court to determine the reasonableness of the financial award and for the trial court in a subsequent proceeding on a motion for modification to determine whether there has been a substantial change in circumstances"). The defendant fails to recognize that the trial court in the present case was not determining the amount of a financial award pursuant to § 46b-82 (a) and General Statutes § 46b-86, as in *Tanzman*, but was determining whether enforcement of the prenuptial agreement would be unconscionable under § 46b-36g (a) (2) in light of all of the relevant facts and circumstances. The defendant bore the heavy burden of proving an extraordinary change in circumstances to prevail on that issue. See, e.g., *Crews* v. *Crews*, supra, 295 Conn. 169. The defendant has pointed to no evidence that would support a finding that, as of the date of the dissolution, he was no longer capable of earning an income, and he made no such claim to the trial court or on appeal.

income from Intermountain Industries.[27] Indeed, if we were to conclude otherwise, an employed person who entered into a prenuptial agreement and, after the marriage, lost his or her job could simply refuse to seek employment and then claim that his or her lack of employment was a dramatic change in circumstances warranting invalidation of the agreement.

Moreover, there is no evidence that the defendant, unforeseeably or otherwise, gave up any income earn-

[27] The defendant's counsel contended at oral argument before this court that the defendant should not be required to establish that he will be unable to provide for his basic needs before the enforcement of the prenuptial agreement can be found to be unconscionable under § 46b-36g (a) (2), because such an interpretation of that statute would render § 46b-36g (b) superfluous. See General Statutes § 46b-36g (b) ("[i]f a provision of a premarital agreement modifies or eliminates spousal support and such modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid such eligibility"). We agree with the defendant that there may be circumstances in which the enforcement of a prenuptial agreement would be unconscionable even though the party seeking to invalidate the agreement would be able to provide for his or her basic needs if the agreement were to be enforced. Cf. *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 273–74, 242 A.3d 542 (2020) (trial court correctly concluded that enforcement of prenuptial agreement would be unconscionable when "there was evidence in the record that [a motor vehicle accident resulting in a mild traumatic brain injury] impaired the plaintiff's ability to work full-time, and, as a result, she was forced to obtain part-time employment at a salary far lower than the one she earned at the time the agreement was executed"). That does not mean that the question of whether the party seeking to invalidate the agreement will be able to provide for his or her basic needs if the agreement is enforced is always irrelevant to the determination of whether enforcement would be unconscionable. Indeed, there may be cases in which, under all of the relevant facts and circumstances, the enforcement of a prenuptial agreement would not be unconscionable despite a significant reduction in the income of the party seeking invalidation, provided that the court finds that the party can still provide for his or her basic needs. We need not resolve that issue in the present case, however, because the defendant presented *no* evidence that he is no longer capable of earning an income comparable to the income that he was earning when he executed the prenuptial agreement. See footnote 26 of this opinion.

ing or asset building opportunities as a result of his marriage or the births of the children, or that he made significant and ongoing contributions to family life, such as shopping, doing household chores, entertaining the plaintiff's associates and family, or caring for the children, for which it would be unfair, much less unconscionable, not to compensate him. Cf. *Hornung* v. *Hornung*, supra, 323 Conn. 163 ("[b]ecause the plaintiff's efforts as a homemaker and the primary caretaker of the children increased the defendant's earning capacity at the expense of her own, she is entitled to [an alimony award that will allow her to] maintain [her high predissolution] standard of living after the divorce, to the extent possible"). To the contrary, the trial court found that the defendant "did not make the plaintiff or the children even a remote priority in his life." We conclude, therefore, that the trial court correctly determined that enforcement of the prenuptial agreement in the present case would not be unconscionable in light of all of the relevant facts and circumstances.

Finally, the defendant contends that it was inconsistent for the trial court to conclude that it would be unconscionable to enforce the provision of the prenuptial agreement requiring a party who unsuccessfully seeks to invalidate any portion of it to pay the attorney's fees of the other party but not unconscionable to enforce the remainder of the agreement. We disagree. Significantly, the prenuptial agreement contained a severability clause that expressly contemplated that, if one or more of its terms were found to be invalid, the rest of the agreement would survive. See A. Rutkin et al., 8A Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 50.53, p. 256; cf. *Venture Partners, Ltd.* v. *Synapse Technologies, Inc.*, 42 Conn. App. 109, 118, 679 A.2d 372 (1996) (discussing principles of severability under Connecticut contract law). In sister states that, like Connecticut, have premarital agree-

ment statutes like § 46b-36g that are modeled after the Uniform Premarital Agreement Act; see, e.g., *Friezo* v. *Friezo*, supra, 281 Conn. 183–84; the presence of a severability clause renders enforceable the remainder of a prenuptial agreement that contains a provision that is unconscionable or invalid as a matter of law. See, e.g., *In re Marriage of Heinrich*, 7 N.E.3d 889, 906 (Ill. App. 2014) (concluding that severability clause left "remainder of the agreement . . . unaffected by [court's] holding" that agreement's "[attorney fee shifting] ban as to [child related] issues violates [Illinois] public policy and is unenforceable" as to those issues); *Sanford* v. *Sanford*, 694 N.W.2d 283, 293 (S.D. 2005) (emphasizing presence of savings clause in concluding that "[p]rovisions in a prenuptial agreement purporting to limit or waive spousal support are void and unenforceable as they are contrary to public policy, and [that they] may be severed from valid portions of the prenuptial agreement without invalidating the entire agreement"); cf. *Rivera* v. *Rivera*, 149 N.M. 66, 72–73, 243 P.3d 1148 (N.M. App.) (premarital agreement was unenforceable because it contained provision waiving right to seek spousal or child support in violation of state statute, and "agreement [did] not contain a severability clause, and [w]ife [made] no argument that the remainder of the agreement should not be affected by the invalidity of the support provisions"), cert. denied, 149 N.M. 64, 243 P.3d 1146 (2010). Accordingly, the trial court did not act inconsistently as a matter of law in concluding that the effect of enforcing the attorney's fees provision was unconscionable because it would "financially cripple" the defendant, while also finding that the remainder of the agreement was enforceable. Because enforcement of the remainder of the agreement would, as we explained, leave the defendant with significant assets sufficient to provide for his needs until he can obtain a source of income, the trial court

properly allowed the parties the benefit of the bargain to which they had agreed before their marriage.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* DANTE ALEXANDER HUGHES (SC 20268)

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

Syllabus

Convicted of the crimes of manslaughter in the first degree with a firearm and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to this court, claiming that the state had failed to satisfy its burden of disproving his claim of self-defense beyond a reasonable doubt and that the trial court improperly had denied his motion for a new trial on the ground of juror misconduct. While the defendant and his girlfriend, K, were drinking and socializing at a bar, they began to argue, and K struck the defendant in the face with a beer bottle. K then left the bar with the keys to their vehicle, and the defendant followed her. At the request of a bartender, several patrons, including the victim, went outside to check on K. As K was seated in the driver's seat of the couple's vehicle, the defendant punched her in the face. The victim and another patron pulled the defendant away from K, and the defendant and the victim started to argue. Another patron intervened, and the situation appeared to have calmed down, but, moments later, the defendant shot the victim three times with a gun that he had removed from the vehicle and then fled the scene. Shortly thereafter, the defendant fled to Canada. At trial, the defendant asserted that he had acted in self-defense and offered his account of the events. He testified, inter alia, that, at the time of the shooting, he thought that the victim was reaching for a gun because the victim had threatened him and had reached into the waistband of his pants. Following his conviction, the defendant filed a motion for a new trial on the ground of juror misconduct after learning that, during deliberations, a juror, J, had consulted a dictionary for the definition of "manslaughter." Following a hearing, at which the jurors, including J, were individually questioned, the trial court, relying on the standard set forth in *State* v. *Johnson* (288 Conn. 236), denied the defendant's motion, concluding that no actual prejudice had resulted from J's misconduct. *Held*:

1. The state presented sufficient evidence to satisfy its burden of disproving the defendant's claim of self-defense beyond a reasonable doubt, there having been ample evidence to support a finding that, at the time of the shooting, the defendant did not subjectively or reasonably believe that the victim was about to draw a gun and to use deadly physical force against him: the evidence provided a reasonable basis for the jury to find that the victim was not armed and never acted in a violent or menacing manner toward the defendant and that, from the victim's perspective, the confrontation had deescalated and appeared to be resolved just before the shooting; moreover, the jury was free to discredit the defendant's version of events and to credit the testimony of the other witness and reasonably could have rejected the defendant's dubious explanation that he had retrieved his loaded gun, moments before shooting the victim, to safeguard it rather than to use it to shoot the victim; furthermore, the jury could have given weight to the fact that, prior to the defendant's interview with the police, he never claimed to have acted in self-defense and the fact that, when he finally did so, he gave inconsistent accounts, and there was significant consciousness of guilt evidence from which the jury was free to infer that the defendant knew that his conduct was wrongful.
2. This court concluded that the presumption of prejudice articulated in *Remmer* v. *United States* (347 U.S. 227) applies when a defendant demonstrates that a juror consulted a dictionary definition of a material term that substantively differed from the legal definition of that term provided by the trial court, thereby shifting the burden to the state to prove that the exposure to the definition was harmless beyond a reasonable doubt; in the present case, the defendant established his entitlement to the presumption of prejudice, as the dictionary definition that the juror consulted was of an essential legal term and it differed materially from the trial court's definition of the elements of manslaughter.
3. The trial court properly denied the defendant's motion for a new trial, that court having correctly concluded that the juror misconduct caused no actual prejudice to the defendant, and, accordingly, the state's burden of proving that the misconduct was harmless necessarily was met: this court was not persuaded by the defendant's contention that the trial court applied an incorrect legal standard simply because it framed its inquiry into the juror misconduct in terms of the misconduct's effect on the jurors' impartiality, as it was apparent that that court ascribed the proper, broader meaning to the term impartiality and that it used the term to encompass the critical questions relevant to a proper inquiry into the matter; moreover, the record clearly established that there was no reasonable possibility that any member of the jury relied on the dictionary definition to the defendant's detriment in reaching the verdict, as the trial court credited J's testimony that he had relied on only the court's instruction defining manslaughter and that the dictionary definition of manslaughter did not influence his decision in the case,

and the other jurors credibly testified that their impartiality remained unaffected by any potential exposure to the extrinsic dictionary definition, which dispelled any concern about their ability to be fair and impartial; furthermore, the trial court's conclusion was bolstered by the fact that the misconduct occurred before the court specifically directed the jury not to consult the dictionary and to rely exclusively on the elements noted in the court's instruction on the crime of manslaughter, and it was reasonable to presume that the jurors followed the court's instructions.

Argued March 31—officially released November 23, 2021*

Procedural History

Substitute informations charging the defendant with the crimes of murder and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, where the murder charge was tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm; thereafter, the charge of criminal possession of a firearm was tried to the court, *Jongbloed, J.*; finding of guilty; judgment of guilty in accordance with the jury's verdict and the court's finding; subsequently, the court denied the defendant's motion for a new trial, and the defendant appealed this court. *Affirmed.*

Vishal K. Garg, for the appellant (defendant).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, former state's attorney, and *Paul J. Narducci*, state's attorney, for the appellee (state).

Opinion

KELLER, J. Following a jury trial, the defendant, Dante Alexander Hughes, was convicted of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a, after the jury found him not

* November 23, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

guilty of murder but rejected his claim of self-defense. In a subsequent trial to the court, the defendant was found guilty of criminal possession of a firearm in violation of General Statutes § 53a-217 in connection with the same incident. On appeal,[1] the defendant claims that the evidence presented at trial was insufficient to disprove, beyond a reasonable doubt, any of the elements of self-defense because the state failed to present affirmative evidence that discredited the defendant's testimonial account of the incident. The defendant also claims that the trial court improperly denied his motion for a new trial on the ground of juror misconduct, specifically, a juror's consultation of a dictionary definition of "manslaughter," because the court applied an incorrect legal standard and misallocated the burden of proof. We affirm the judgment of conviction.

The record reveals the following facts, which the jury reasonably could have found, and procedural history.[2] In the early morning hours of December 11, 2016, the defendant and his girlfriend, Latoya Knight, stopped for a drink at Ryan's Pub, a neighborhood bar in Groton, after Knight picked the defendant up from work in the couple's Nissan Armada. Knight was already intoxicated when the couple arrived at the pub. While the defendant and Knight were inside the pub, the defendant engaged in a friendly conversation with two other patrons, John Hoyt and then the victim, Joseph Gingerella.

At some point, the defendant and Knight started arguing. Knight slapped a beer bottle out of the defendant's hand, picked it up, and hit him in the face with it. She then demanded the keys to the Armada and stormed outside through the pub's side door with the

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

[2] The defendant does not challenge his conviction of criminal possession of a firearm. We therefore limit the facts to those relevant to the manslaughter conviction.

keys in hand. When the defendant went to follow her, the pub's bartender, Rachel Smith, tried to stop him because she could see that he was angry and told him not to hurt Knight. The defendant pushed Smith away and continued to follow Knight. Smith then asked Andrew Flynn, another patron, Hoyt, and the victim to check on Knight.

When the defendant reached the Armada, Knight was sitting in the driver's seat. The defendant opened the door and punched Knight multiple times in the face, causing her nose to bleed. Hoyt and the victim then approached the Armada, positioned themselves on either side of the defendant, and attempted to stop the assault. Hoyt put his hands underneath the defendant's arms and tried to pull him away. The victim also tried to pull the defendant away from Knight and yelled, "[y]ou're not gonna hit her like that! . . . [Y]ou're not gonna put your hand[s] on her!" The defendant and the victim continued arguing, and Flynn intervened by extending his arms between the two of them and telling them to "chill."

Another pub patron observing the incident, Elvira Gonzalez, saw both Flynn and the victim gesture with their hands for the defendant to calm down. Smith, who had gone outside to tell everyone to calm down, saw Flynn gesture to her that everything was okay. Seconds later, several witnesses present at the scene heard multiple gunshots fired, but no one saw the defendant pull the trigger or observed the victim immediately before he was fatally shot.[3] After Hoyt heard the shots, he turned around to see what had happened and saw the defendant holding a gun and the victim lying on the

[3] An autopsy performed by a state medical examiner revealed that the victim sustained three gunshot wounds: to his left shoulder, to his left leg, and to his torso, in the abdominal area. The bullets that caused the shoulder and leg wounds entered the victim's body from the back. The sequence of the gunshots could not be determined.

ground, shielding himself with his hand up. The defendant then fled the scene.

The defendant went to his home, changed his clothes, and made phone calls to his two brothers, his sister, and his mother. Thereafter, one of the defendant's brothers picked him up and drove him to the Norwich home of their uncle, Shelton Rawls. The defendant told Rawls that he had shot someone after telling that person to mind his own business and to leave him and Knight alone, and that he thought he had killed this person. He asked Rawls to cut his hair, and Rawls then cut off the defendant's green dreadlocks. The defendant's other brother met the defendant at Rawls' house later that morning to give the defendant a new prepaid cell phone. Before turning off the subscriber phone that he had been using, the defendant sent a text message to his work supervisor that stated, "[n]ot coming in for a long time . . . ."

The defendant made arrangements to be driven to Boston, Massachusetts, by one of his brother's friends and decided to make his way across the Canadian border from there. While heading to Canada, the defendant called several family members using the prepaid phone but used a function on the phone that prevents the person receiving the call from seeing the phone number of the person who is calling. The defendant made a stop at Niagara Falls, New York, and threw the gun that he had used to shoot the victim into the Niagara River. Afterward, he walked across a bridge into Canada, where he was detained by Canadian border agents.

Nine days after the shooting, Groton police detectives drove to Canada, took custody of the defendant, and brought him back to Connecticut, where he was placed under arrest. Groton detectives subsequently interrogated the defendant. For most of the approximately two hour interrogation, the defendant denied any

involvement in the shooting. He falsely claimed that he had left the area before the shooting occurred and had no idea how it happened. He also falsely claimed that he did not own a gun, had fought with Knight outside the pub but no one intervened, had left the pub after calling a cab to take him to the bus station, had cut his hair in Buffalo, New York, because he had an upcoming job interview, and had traveled to Canada for enjoyment. At one point, when the interrogating officers urged the defendant to tell them the real story because they already knew that he had shot the victim, he responded, "[y]ou got no cameras." Approximately one hour and forty minutes into the interrogation, the defendant admitted that he had shot the victim but claimed to have done so in self-defense. He claimed that the victim had started to pull up his shirt, and the defendant "thought [that the victim] was reaching for something . . . that he was going for a gun." He stated that he was trying to protect himself and was "not trying to kill [the victim]." He also indicated that he "didn't know [that the victim] didn't have nothin'."

In two substitute informations, the defendant was charged with murder in violation of General Statutes § 53a-54a (a) and criminal possession of a firearm. At trial, the defendant asserted a defense of self-defense. The state disputed that the defendant had acted in self-defense but also argued that he was not entitled to the defense because he had a duty to retreat.[4] At the close of evidence, pursuant to the state's request, the trial court instructed the jury on both murder and the lesser included offense of manslaughter in the first degree with a firearm. The court also instructed the jury on its obligation to consider whether the defendant acted

[4] "[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . ." General Statutes § 53a-19 (b) (1).

in self-defense, if it found the defendant guilty of either crime.

The jury found the defendant guilty of manslaughter in the first degree with a firearm, and the court thereafter found the defendant guilty of criminal possession of a firearm. The court rendered judgment in accordance with the verdict and its finding, and imposed a total effective sentence of fifty years of imprisonment, execution suspended after forty-five years, followed by five years of probation.

Following his conviction, the defendant filed a motion for a new trial on the ground of juror misconduct, after learning that, during deliberations, a juror had consulted a dictionary for the definition of "manslaughter." The trial court recognized that misconduct had occurred but, following a hearing, denied the motion, concluding that no actual prejudice resulted from the misconduct. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that he is entitled to an acquittal on the charge of manslaughter in the first degree with a firearm because the state failed to meet its burden, pursuant to General Statutes § 53a-12 (a), of disproving, beyond a reasonable doubt, any of the elements of his self-defense claim. He contends that the state was obligated to present affirmative evidence to discredit his testimonial account of what occurred at the precise moment of the shooting. Specifically, he claims that the state failed (1) to present affirmative evidence that the victim did not make a gesture that the defendant could reasonably have believed was as an attempt to reach for a deadly weapon, or (2) to establish the statutory disqualification for self-defense of failure to retreat. The state asserts that it can, and did, satisfy its burden of persuasion through direct and

circumstantial evidence proving that the defendant did not reasonably believe that the victim was about to use deadly physical force against him. We agree with the state. Therefore, we need not consider the state's alternative claim that, even if the defendant had held such a belief, the jury reasonably could have concluded that he had a duty to retreat.

The defendant did not raise this insufficiency claim in the trial court, but his unpreserved claim is nonetheless reviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). We have previously recognized that "any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of *Golding*."[5] (Internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 777, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). Because there is no independent significance of a *Golding* analysis in this context, we review an unpreserved sufficiency of the evidence claim as though it had been preserved. See *State* v. *Adams*, 225 Conn. 270, 276 n.3, 623 A.2d 42 (1993).

We begin with the theory of self-defense advanced by the defendant and then turn to the relevant legal principles. The defendant offered the following account in his testimony. The defendant was assaulting Knight inside the Armada while Hoyt and the victim were trying

[5] In order to prevail on an unpreserved claim, a defendant must show that (1) the record is adequate to review the alleged claim of error, (2) the claim is of constitutional magnitude alleging the violation of a fundamental right, (3) the alleged constitutional violation exists and deprived the defendant of a fair trial, and (4) if the claim is subject to harmless error analysis, the state has failed to demonstrate harmlessness beyond a reasonable doubt. See, e.g., *In re Yasiel R.*, supra, 317 Conn. 779, 781. A claim is reviewable if the first two prongs are met; the second two prongs involve a determination of whether the defendant may prevail. See id., 779 n.6.

to pull him off of her. During the struggle between the defendant and the victim, the victim called him a "bitch ass" and an offensive racial epithet, and also stated that he would "F [him] up . . . ." The defendant did not have a gun on him at that time but retrieved his Glock nine millimeter pistol from the overhead console of the Armada and placed it in his pocket when he saw that Knight was starting the Armada in an attempt to leave. He did so because he was concerned that, given Knight's intoxicated state, the police might stop the Armada and, in turn, discover the gun. The gun was already loaded and cocked when the defendant removed it from the Armada. The defendant then started to walk away from the Armada, while Hoyt and the victim remained with Knight. When he got one or two parking spaces past the Armada, where it was kind of dark, he had an "urge" to turn around and, upon doing so, saw the victim approximately fifteen feet away. The victim said nothing, but he reached into his waistband. The defendant thought that the victim was going to shoot him, so the defendant "came up and just shot." The defendant was unsure whether any bullets actually struck the victim.

On cross-examination, the defendant admitted that, after the shooting, he had contacted relatives, changed his appearance (clothes and hair), switched cell phones, tried to conceal the source of his outgoing calls, and gone to Canada. He also admitted that he gets "fired up" when people lay hands on him. In explaining why Knight deserved the beating that he had inflicted on her, he stated, "you know, you just take nothing from nobody. Once somebody puts their hands on you, you know, you have [a] right to defend yourself."

We assess this evidence, as well as the other evidence adduced by the state, pursuant to the following principles. "Under our Penal Code, self-defense, as defined in [General Statutes] § 53a-19 (a) . . . is a defense, rather than an affirmative defense. See General Statutes

§ 53a-16." (Citation omitted.) *State* v. *Clark*, 264 Conn. 723, 730, 826 A.2d 128 (2003). Whereas an affirmative defense requires the defendant to establish his claim by a preponderance of the evidence; see General Statutes § 53a-12 (b); a properly raised defense places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. See General Statutes § 53a-12 (a). "Consequently, a defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Clark*, supra, 730–31. "As these principles indicate, therefore, only the state has a burden of persuasion regarding a self-defense claim . . . ." (Internal quotation marks omitted.) *State* v. *O'Bryan*, 318 Conn. 621, 631, 123 A.3d 398 (2015).

Because the state bears the burden of disproving self-defense, the standard for reviewing claims of insufficient evidence in conjunction with a defense of justification such as self-defense is essentially the same standard used when examining claims relating to insufficient proof of the elements of a charged offense. See *State* v. *Revels*, supra, 313 Conn. 778. "A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden." (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 233, 249 A.3d 683 (2020). In reviewing the sufficiency of evidence, we apply a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative

force of the evidence established guilt beyond a reasonable doubt . . . ." (Internal quotation marks omitted.) *State* v. *Allan*, 311 Conn. 1, 25, 83 A.3d 326 (2014). In doing so, we are mindful that "the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier [of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 158, 49 A.3d 962 (2012). "[W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Rhodes*, supra, 229. "[I]t does not diminish the probative force of the evidence that it consists, in whole or in part, of evidence that is circumstantial rather than direct." (Internal quotation marks omitted.) *State* v. *Niemeyer*, 258 Conn. 510, 517, 782 A.2d 658 (2001). Thus, in the present case, we construe the evidence and all the reasonable inferences drawn therefrom in the light most favorable to supporting the jury's rejection of the defendant's defense.

Section 53a-19 sets forth the narrow circumstances in which a person is justified in using deadly physical force on another person in self-defense. Under § 53a-19 (a), "a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly physical force is necessary to repel such attack. . . . [T]he test a jury must apply . . . is a subjective-objective one. The jury must view the situation from the perspective of the defendant . . . [but] . . . the defendant's belief

ultimately must be found to be reasonable."[6] (Internal quotation marks omitted.) *State* v. *Reddick*, 174 Conn. App. 536, 552, 166 A.3d 754, cert. denied, 327 Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

Thus, with regard to the first requirement of self-defense, the jury must make two separate affirmative determinations for the defendant's claim of self-defense to succeed. The jury must determine whether, on the basis of all of the evidence presented, the defendant in fact believed that the victim was about to use deadly physical force.[7] See, e.g., *State* v. *Prioleau*, 235 Conn. 274, 286, 664 A.2d 743 (1995). This initial determination typically requires the jury to assess the veracity of witnesses, often including the defendant, and to determine whether the defendant's account of his belief is in fact credible. Id. If the jury determines that the defendant did not believe that the victim was about to use deadly physical force when the defendant employed deadly force, the defendant's self-defense claim must fail. Id., 287. Even if the jury finds that the defendant may have held such a belief, if that belief was not objectively reasonably, the self-defense claim must fail. See id.

It bears emphasizing that, in making these determinations, the trier of fact is entitled to believe or disbelieve

[6] Although our case law typically states this subjective-objective framework in connection with challenges to the second requirement regarding the degree of force necessary to respond; see, e.g., *State* v. *O'Bryan*, supra, 318 Conn. 632; *State* v. *Saunders*, 267 Conn. 363, 373, 838 A.2d 186, cert. denied, 541 U.S. 1036, 124 S. Ct. 2113, 158 L. Ed. 2d 722 (2004); *State* v. *Clark*, supra, 264 Conn. 732; the fact that both requirements are premised on a reasonable belief makes this framework equally applicable to the first requirement, which is the focus of the parties' arguments in the present case. See *Burke* v. *Mesniaeff*, 334 Conn. 100, 128, 220 A.3d 777 (2019).

[7] Although the self-defense statute also permits this defense when the defendant reasonably believes that he is at risk of great bodily harm; see General Statutes § 53a-19 (a) (2); the defendant's theory in the present case is that he believed that the victim was drawing a gun.

all, part, or none of any witness' testimony, and the fact that certain evidence is not controverted does not mean that it must be credited. See *State* v. *DeMarco*, 311 Conn. 510, 520 n.4, 88 A.3d 491 (2014); *State* v. *Brown*, 299 Conn. 640, 648, 11 A.3d 663 (2011); E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 6.23.8, p. 378. The credibility of a witness may be impeached by showing, inter alia, that the witness is biased due to having an interest in the matter; see Conn. Code Evid. § 6-5; or that the witness made a prior inconsistent statement. See Conn. Code Evid. § 6-10.

These well established principles disprove the defendant's contention that, in the absence of affirmative evidence from at least one other witness of what happened between the defendant and the victim in the moments immediately before the defendant fired his gun, the jury must accept the defendant's testimony in determining whether he reasonably believed that the victim was reaching for a gun, thereby justifying his use of deadly physical force on the victim. This argument ignores the fact that the jury was free to reject the defendant's testimony as to his belief after considering any other evidence, including other portions of the defendant's testimony and his prior statements, that was inconsistent with his self-defense claim. The jury similarly was free to discredit the defendant's version of the events immediately preceding and following the shooting and, instead, could have credited the testimony of the other witnesses. When presented with conflicting accounts, the jury is not required to accept the testimony and inferences offered on behalf of the defendant. See, e.g., *State* v. *James E.*, 154 Conn. App. 795, 815, 112 A.3d 791 (2015) (evidence was sufficient to disprove self-defense beyond reasonable doubt), aff'd, 327 Conn. 212, 173 A.3d 380 (2017).

The defendant's argument mistakenly assumes that his testimony was the only evidence presented to the

jury that was relevant to his claim of self-defense. As we explain more fully hereinafter, it was not. Although the jury is not free to merely disbelieve the defendant and to conclude that the opposite of what he said was true; see *Ventura* v. *East Haven*, 330 Conn. 613, 641–42, 199 A.3d 1 (2019); *State* v. *Alfonso*, 195 Conn. 624, 634, 490 A.2d 75 (1985); the jury may reject his self-defense claim if other evidence and reasonable inferences drawn therefrom undermine the credibility of his account. See *State* v. *Grasso*, 189 Conn. App. 186, 212–13, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019) (evidence of blackmail by victim and its effect on defendant supports jury's rejection of self-defense claim, even though only victim and defendant were present when shooting occurred); *State* v. *Cruz*, 75 Conn. App. 500, 519, 816 A.2d 683 (2003) (defendant's argument, based mostly on his own testimony, that only reasonable conclusion jury could have reached was that he acted in self-defense "relates to witness credibility, not sufficiency of the evidence"), aff'd, 269 Conn. 97, 848 A.2d 445 (2004).

Having reviewed the evidence in its entirety, and construing it in the light most favorable to sustaining the verdict, we conclude that there was a rational view of the evidence that proved beyond a reasonable doubt that, at the time of the shooting, the defendant did not reasonably believe that the victim was about to use deadly physical force against him.

The evidence provided an ample basis for the jury to find that the victim was not in fact armed and never acted in a violent or menacing manner toward the defendant. No weapon was found on or near the victim after the shooting.[8] The defendant did not claim that the

[8] Although the availability of the defense of self-defense does not depend on whether the victim was *in fact* using or about to use deadly physical force because it is the defendant's belief that is material; see, e.g., *State* v. *Clark*, supra, 264 Conn. 732; the presence of a weapon would lend support to the defendant's belief.

victim ever mentioned having a gun or any other weapon. None of the witnesses to the events occurring outside the pub, including the victim's nearby companions, heard the victim threaten the defendant or use the language the defendant described.[9] The victim attempted to pull the defendant away from Knight but never attempted to inflict any physical injury on the defendant. Flynn testified that the argument between the defendant and the victim "didn't seem too serious."

The evidence also provided a reasonable basis for the jury to find that, from the victim's perspective, the confrontation had deescalated and then appeared to have been resolved just before the shooting. Gonzalez saw both Flynn and the victim gesture with their hands for the defendant to calm down and observed what she characterized as a peaceful conversation. After Smith went outside to tell everyone to calm down so that she would not have to call the police, Flynn gestured to her that everything was okay, and she returned inside. Flynn, Smith, and Gonzalez turned away from observing the defendant and the victim, and headed back toward the pub because they believed that the situation had been amicably resolved. According to the testimony of Knight, Hoyt, Smith, and Gonzalez, there was no cause for the victim to become further agitated. Knight was safe, and the effort undertaken by the victim and his friends to defend her had concluded. The defendant

[9] Knight was not a particularly helpful witness to either side. The police interviewed her on two occasions. Both interviews were video-recorded. In the first interview, which took place a few hours after the incident in question, Knight stated that she knew nothing about what had happened and that she was alone in the Armada until she tried to leave the pub's parking lot. The second interview took place a few days later, after she was charged with interfering with the police investigation. Knight acknowledged that she had been less than truthful during the first interview. When Knight testified at trial, her recollection of the events at issue was poor, and the state introduced portions of both of her video-recorded statements to the police as prior inconsistent statements under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

had begun to walk away. The collective force of this evidence provided a persuasive basis for the jury to conclude that, even if it were to accept the defendant's assertion that the victim moved his hand in the vicinity of the waistband of his pants, there was no reasonable basis for the defendant to believe that the victim was about to draw a gun.

The jury also reasonably could have rejected the dubious explanation that the defendant gave for retrieving his loaded gun, moments before firing three shots at the victim. If the defendant actually had been concerned about the consequences of Knight's driving while intoxicated and being found in possession of an illegal firearm, the most effective course of action would have been to withhold the keys to the Armada in the first place or to take them back from her, not to retrieve the gun from the console. His choice of action and its timing left the jury free to infer that the defendant had retrieved the gun not to safeguard it but to use it.

The jury also could have given weight to the fact that, prior to his video-recorded interview with the police approximately nine days after the shooting, the defendant never claimed to have acted in self-defense. He admitted that he had never suggested it to the relatives and friends with whom he spoke after the shooting. Instead, he told Rawls, hours after the shooting, that he had shot and possibly killed someone after that person had interceded in an argument between the defendant and Knight and the defendant told him to mind his own business. Rawls inferred from what he had been told that the victim must not have heeded the defendant's direction. When the defendant finally claimed to have acted in self-defense, he gave inconsistent accounts, in his police interview and at trial, of the particulars.

Finally, the jury's verdict was supported by significant consciousness of guilt evidence. In the self-defense

context, such evidence "tend[s] to show that the defendant believed that what he had done was not merely an act of self-defense, but [was] something that was considered wrong in the eyes of the law." *State* v. *Thomas*, 50 Conn. App. 369, 384, 717 A.2d 828 (1998), appeal dismissed, 253 Conn. 541, 755 A.2d 179 (2000). After shooting the victim, the defendant attempted to disguise himself by changing his appearance, fled the state, and then attempted to flee the country. He also attempted to conceal his whereabouts and to destroy evidence. The jury was free to reject his explanations for these actions and to infer that he was deliberately eluding the police to avoid prosecution for conduct he knew was wrongful. See *State* v. *Ferrara*, 176 Conn. 508, 516–18, 408 A.2d 265 (1979).

In its totality, the evidence provides ample support for the jury to conclude that the defendant did not believe, subjectively or reasonably, that the victim was about to draw a gun on him. Rather, the evidence supports the jury's reasonable conclusion that, when the defendant fired his gun at the victim, he was still propelled by the rage he had just unleashed on Knight and angry about the victim's interference in his business. We therefore conclude that there was sufficient evidence to disprove the defendant's claim of self-defense beyond a reasonable doubt.

II

The defendant also claims that the trial court improperly denied his motion for a new trial on the ground of juror misconduct. He contends that the court's conclusion that he suffered no actual prejudice from a juror's consultation of a dictionary definition of "manslaughter" rested on an incorrect legal standard and a misallocation of the burden of proof. We conclude that the trial court properly denied the defendant's motion for a new trial.

The record reveals the following additional relevant facts. In its final instructions to the jury, the trial court set forth the elements that the state was required to prove to establish murder or, alternatively, manslaughter in the first degree with a firearm if it found the defendant not guilty of murder, as well as the elements of self-defense to consider should it find the defendant guilty of either offense. With respect to manslaughter, the court provided the statutory elements—that the defendant must have (1) engaged in conduct that created a grave risk of death, (2) acted recklessly, (3) acted under circumstances evincing an extreme indifference to human life, and (4) caused the death of the victim.[10] See General Statutes § 53a-55 (a) (3). The court also instructed the jury not to "look up anything on the Internet or make any private investigations of any kind," an instruction it had given numerous times during trial. It did not, however, reiterate an instruction given at the commencement of jury selection, almost one month earlier, that the jury should not look up any terms in a dictionary.[11]

On the second day of deliberations, the jury sent a note asking the court to clarify certain aspects of the murder instruction and "whether it is permissible to look up the word manslaughter in the dictionary." The

[10] The court also instructed the jury that the state was required to prove that the defendant used a firearm to cause the victim's death. See General Statutes § 53a-55a.

[11] At the commencement of jury selection, the court provided the following admonishment to prospective jurors: "Please do not do any legal research into any of the issues involved in this case. Please don't look up anything on the Internet, any terms in the dictionary, review any medical textbooks or look up the statutes which might be at issue here. . . . I will instruct you as to the definitions of any terms you need to know, and the lawyers will elicit from the witnesses any explanations of terms or principles which the lawyers believe will be necessary in your deliberations." In its instructions at the commencement of trial two weeks later, the court also admonished the jury that "[i]t is your duty to accept the law and to follow it as I give it to you, whether or not you agree with it."

court consulted with counsel and, with their agreement, instructed the jury that it "should use the definition of the specific charge of manslaughter as explained by its elements in [the court's] instructions and not look up anything in any outside sources, including the dictionary."[12]

The following day, on July 26, 2018, the jury of twelve unanimously found the defendant guilty of manslaughter in the first degree with a firearm. The jurors were individually polled, and each juror unequivocally affirmed his or her agreement with the verdict.

On July 31, 2018, one of the jurors, D.M.,[13] engaged in a postverdict conversation with courthouse staff. In that conversation, D.M. mentioned that one of the other jurors had looked up the definition of manslaughter in a dictionary. This information was reported to the trial court, which then scheduled a hearing to determine whether the jury, or any member thereof, had in fact looked up the definition of manslaughter in a dictionary, and what impact, if any, that action may have had on the jury's deliberations.[14]

[12] Although the jury's note reasonably may have been interpreted to imply that no juror had yet consulted a dictionary, the present case demonstrates that the better practice under these circumstances would be for the trial court to conduct an inquiry to confirm that no such action had been taken. Had the court done so in the present case, it could have considered whether to excuse the juror who had in fact already consulted the dictionary and to replace him with an alternate juror. See, e.g., *State* v. *Klafta*, 73 Haw. 109, 123, 831 P.2d 512 (1992).

[13] The jurors are referred to by their initials to protect their privacy interests. See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 30 n.28, 6 A.3d 790 (2010).

[14] When a trial court is presented with allegations of juror misconduct in a criminal case, it must conduct, on the record, an inquiry into the allegations. See *State* v. *Brown*, 235 Conn. 502, 526, 668 A.2d 1288 (1995). The nature of such an inquiry lies within the trial court's discretion and may vary from a preliminary inquiry of counsel to a full evidentiary hearing. See id., 529. If the court determines that an evidentiary hearing is warranted, it has wide discretion in deciding how to conduct the hearing to determine the nature and effect of information that comes to a juror improperly and its potential effect on the entire jury if it learns of it. See id. There is no claim in the present case that the procedure was in any way deficient or improper.

Prior to the hearing, counsel agreed to the questions that would be posed by the court to each juror. In accordance with that agreement, each juror was questioned as to whether the dictionary definition of manslaughter had been raised during deliberations, and, if so, when this occurred; whether any outside information had affected the juror's ability to sit fairly and impartially; whether any outside information had affected the juror's ability to follow the court's instructions; and whether the juror had considered only the evidence presented in the courtroom and only the court's instructions. After each juror was questioned, counsel was given the opportunity to propose follow-up questions.

Although a few jurors recalled hearing a discussion about such a definition, they indicated that the discussion had been promptly shut down and that this incident had prompted the jury's note to the court. Those jurors also testified that no dictionary had been brought into the jury room and that either no definition had been read aloud or they could not recall any dictionary definition. Each of the twelve jurors affirmed that no outside information had affected the juror's ability to sit fairly and impartially, that no outside information had affected the juror's ability to follow the court's instructions, and that the juror had considered only the evidence presented in the courtroom and only the court's instructions.

One juror, J.B., admitted in the following exchange, however, that he had consulted a dictionary to obtain a definition of manslaughter:

"The Court: . . . [I]t has come to the court's attention that there may have been a reference to or a discussion regarding a dictionary definition of manslaughter. . . . [W]hat can you tell us about that in terms of your knowledge of that?

"[J.B.]: My knowledge of it, I had a general idea what manslaughter was, and I looked it up in the dictionary and [came] up with a definition.

"The Court: All right. And then was that something you mentioned?

"[J.B.]: Absolutely.

"The Court: Yes. All right. . . . [D]o you recall whether that was before in time or after the note came out?

"[J.B.]: That was before.

"The Court: All right. So . . . after the note came out and the answer was received to the note that you were to consider the definition that the court provided . . . without going into any of the specific mental processes of the jury's deliberation . . . did that outside information or any outside information affect your ability to sit fairly and impartially as a juror in this case?

"[J.B.]: Yeah, it did. I mean, the—it wasn't the outcome I wanted, I could tell you that, but I mean, it is what it is, I think.

"The Court: I guess my question is, you've indicated that you looked up the definition.

"[J.B.]: Yep.

"The Court: And you mentioned it. Then the jury sent out the note.

"[J.B.]: Yep.

"The Court: And the jury was given instructions from the court at that time. And those instructions were to consider only the definition that the court provided.

"[J.B.]: Correct.

"The Court: And my question is, did you follow the court's instructions?

"[J.B.]: I did."

In response to the court's next questions—whether that outside information, the dictionary definition, affected J.B.'s ability to sit fairly and impartially as a juror in the case and whether he considered information outside of the evidence in the courtroom and the court's instructions in this case—J.B. started to address his own thought process and the vote count on the charges at a certain point in the deliberations. The trial court interrupted J.B. and emphasized that he should not reveal anything about any juror's mental process in reaching a verdict.[15] The inquiry then continued:

"The Court: . . . [S]o, without going into that, my question is really whether any outside information, and you've indicated that you did have some outside information, and then you were told to . . . consider only the definition that the court provided, so my question is, did you in fact—did any outside information affect your ability to fairly and impartially decide this case?

"[J.B.]: No.

"The Court: And then, did you in fact consider—or did any outside information affect your ability to follow the court's instructions in this case?

"[J.B.]: No. I mean, I don't know. I believe I settled. That's what I believed. You know what I mean?

"The Court: All right. I think I understand what you're saying.

[15] We have omitted J.B.'s comments that reveal aspects of his, or any other juror's, deliberative process. The trial court's questions clearly were not aimed at eliciting such information, and the trial court properly disregarded any such statements in its decision on the defendant's motion. See *Aillon* v. *State*, 168 Conn. 541, 551–52, 363 A.2d 49 (1975); see also Practice Book § 42-33.

"[J.B.]: Yes.

"The Court: And, I guess lastly, were you able to consider and limit your consideration only to the evidence in the case, as well as the court's instructions?

"[J.B.]: Yes."

After defense counsel requested follow-up questions to ascertain what J.B. had reviewed and why, the court elicited the following additional information. J.B. had looked up the definition of manslaughter in a Webster's Dictionary, which he recalled defined the term as "taking a man's life without forethought or malice . . . ." J.B. indicated that the "without forethought" aspect of the definition was important for the other jurors to know because it confirmed J.B.'s prior understanding of manslaughter to mean "an accidental thing." This exchange then ensued:

"The Court: All right. And are you telling us that the reason you looked it up was because it seemed inconsistent with what you had thought or—

"[J.B.]: Sort of.

"The Court: All right. I don't want to put any words into your mouth.

"[J.B.]: I mean, yeah. I mean, I just wanted to have an actual definition of what it was and—

"The Court: All right. And then the court explained that you needed to use the definition that the court had provided.

"[J.B.]: After that, I had done that, correct.

"The Court: And that was afterward?

"[J.B.]: Yes.

"The Court: And did you follow the court's instructions?

"[J.B.]: I mean, basically, I did."

The defendant thereafter filed a motion for a new trial on the ground of prejudicial juror misconduct. The trial court denied the motion, concluding that "no actual prejudice resulted from the conduct" at issue. The court relied on the standard articulated in *State* v. *Johnson*, 288 Conn. 236, 951 A.2d 1257 (2008), in which this court emphasized the limitations on postverdict inquiry of jurors and then observed: "[O]nce a verdict has been reached, the proper inquiry does not involve a determination of what conclusions the jurors *actually* drew but, rather, of whether the jurors were aware of or actually exposed to [extrinsic material], whether it affected their ability to be impartial and whether it was of such a nature that it *probably* rendered the juror[s] unfair or partial." (Emphasis in original; internal quotation marks omitted.) Id., 262–63.

The trial court then applied these three inquiries to the present case. It first found that exposure to the dictionary definition was limited to one juror and that, with regard to the other jurors' awareness, their responses credibly dispelled any concern that J.B.'s actions had tainted them. Second, the court found that the jurors' credible assurances that their impartiality remained unaffected by any potential exposure to the extrinsic dictionary definition dispelled any concern about the jurors' ability to be impartial. With respect to J.B. specifically, the court found that some of his answers were nonresponsive but interpreted those comments to simply reflect J.B.'s frustration that he had compromised to reach consensus with other jurors. The court found that J.B.'s subsequent answers dispelled any concerns of impartiality. Finally, the court found that the nature of the information was not of the sort to compel a finding of prejudice. The court concluded that our appellate case law did not deem reference to a dictionary inherently prejudicial. It also

found no prejudice under the particular facts of this case because "utilization of [the] dictionary definition [of manslaughter] would be inconsistent with the actual verdict reached," given the difference between that definition and the statutory definition that the jury applied.[16] In considering the second and third *Johnson* inquiries, the court also relied on the black letter principle that, "[i]n the absence of a clear indication to the contrary, [the court] must presume that the jury followed [the court's] instruction." *State* v. *Asherman*, 193 Conn. 695, 737–38, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). The trial court rejected the defendant's reliance on case law from other jurisdictions, concluding that each case was factually distinguishable.

In his appeal to this court, the defendant's challenge to the legal standard applied by the trial court has several threads. We glean three distinct points. First, the defendant contends that the trial court incorrectly relied on the impartiality standard in *State* v. *Johnson*, supra, 288 Conn. 262–63, because the misconduct in the present case is not of the type that raises concerns of juror partiality. He asserts that the trial court, instead, should have considered whether the extrinsic information interfered with J.B.'s ability to judge the case solely on the basis of the definition provided by the court, and whether the verdict was influenced by J.B.'s arguments in deliberations in reliance on the dictionary definition. Second, the defendant contends that the trial court improperly placed the burden on him to prove prejudice. Although there is a split of authority in other jurisdictions with respect to this issue, he contends that this court's case law suggests that we follow the

[16] It is unclear what the trial court meant by this comment. Nonetheless, as we explain in this opinion; see footnote 25 of this opinion; the differences in the definitions could not have prejudiced the defendant under the circumstances of the present case.

jurisdictions that would apply a presumption of prejudice, which in turn would require the state to prove that there was no reasonable possibility that J.B.'s consultation of a dictionary influenced the verdict. Third, the defendant contends that the trial court improperly failed to determine that the state did not meet this burden. He asserts that this conclusion is compelled either by the testimony adduced at the hearing or under various objective tests applied by other jurisdictions to assess prejudice under such circumstances.[17]

The state questions the defendant's preservation of some of these issues but contends that, in any event, the trial court unambiguously allocated the burden of proof to the state, consistent with the state's acknowledgment during the hearing on the motion for a new trial that a presumption of prejudice applied and that

[17] The defendant identifies three tests applicable to the present circumstances, which he characterizes as follows: (1) a "[d]efinitional" test, which compares the statutory requirement or legal definition provided by the trial court to the dictionary definition and assesses whether application of the dictionary definition could have been harmful to the defendant; see, e.g., *Commonwealth* v. *Wood*, 230 S.W.3d 331, 333–34 (Ky. App. 2007); *State* v. *Abell*, 383 N.W.2d 810, 812–13 (N.D. 1986); (2) a "typical juror" test, which, in recognition of the fact that the trial court is precluded from eliciting evidence regarding the actual effect of the extrinsic information on the jurors, applies an objective, multifactor test to determine whether there is a reasonable possibility that the extrinsic information influenced the verdict to the defendant's detriment; see, e.g., *People* v. *Harlan*, 109 P.3d 616, 625–26 (Colo.), cert. denied, 546 U.S. 928, 126 S. Ct. 399, 163 L. Ed. 2d 277 (2005); and (3) the "*Mayhue*" test; see *Mayhue* v. *St. Francis Hospital of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992), which sets forth a multifactor, nonexclusive test to assess prejudice from jurors' use of dictionary definitions. Id., 924; see also *United States* v. *Lawson*, 677 F.3d 629, 646–51 (4th Cir.) (applying *Mayhue* factors), cert. denied sub nom. *Hutto* v. *United States*, 568 U.S. 889, 133 S. Ct. 393, 184 L. Ed. 2d 162 (2012).

Although this court previously has indicated that the effect of juror misconduct or external influences would be assessed under an objective test; see *Sawicki* v. *New Britain General Hospital*, 302 Conn. 514, 523–24, 29 A.3d 453 (2011); *State* v. *Johnson*, supra, 288 Conn. 263 n.26; see also *State* v. *Berrios*, 320 Conn. 265, 287 and n.20, 129 A.3d 696 (2016) (citing with approval objective standard of Second Circuit Court of Appeals); we have not yet had occasion to adopt any particular test.

it had the burden to prove that there was no prejudice. The state further contends that it met this burden of proof no matter which test is applied.[18]

Insofar as the defendant's claims bear on the proper legal standard, they are subject to plenary review. See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) (legal standard generally); *In re Jason R.*, 306 Conn. 438, 452, 51 A.3d 334 (2012) (misallocation of burden of proof). Insofar, however, as they challenge the trial court's assessment of the credibility of the jurors' testimony at the hearing inquiring into the alleged misconduct, or the reasonableness of inferences drawn from such testimony, we review such assessments under the abuse of discretion standard. See, e.g., *State* v. *Dixon*, 318 Conn. 495, 506–507, 122 A.3d 542 (2015); *State* v. *Small*, 242 Conn. 93, 113, 700 A.2d 617 (1997). See generally *State* v. *Newsome*, 238 Conn. 588, 628, 682 A.2d 972 (1996) (motion for new trial based on allegations of juror misconduct "is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds" (internal quotation marks omitted)).

We agree with the defendant, and the state's concession, that J.B.'s consultation of a dictionary definition of manslaughter was presumptively prejudicial under the circumstances in the present case and that the state bore the burden of proving that this juror misconduct was harmless. We do not share the state's confidence that the trial court necessarily allocated the burden of proof to the state, as this matter was not expressly

[18] Because we conclude that the trial court properly relied on the jurors' testimony, we need not consider whether the defendant is entitled to review of his claim regarding the various objective tests he proposes. Insofar as the state suggests that the defendant is not entitled to review of his claim that the trial court improperly placed the burden of proof on him, we see no preservation problem in light of the state's concession before the trial court that it had the burden of proof.

decided in the court's decision on the defendant's motion.[19] Nonetheless, if the court correctly determined that the facts demonstrated that the defendant suffered *no* actual prejudice from the juror misconduct, the state's burden of proof would be met.[20] See *State* v. *Berrios*, 320 Conn. 265, 299, 129 A.3d 696 (2016) (concluding that state overcame presumption of prejudice by proof that jurors' impartiality was not affected by third-party contact); see also *United States* v. *Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("There may be cases [in which] an intrusion should be presumed prejudicial . . . but a presumption of prejudice as opposed to a specific analysis does not change the ultimate inquiry: Did the intrusion affect the jury's deliberations and thereby its verdict?" (Citations omitted.)). We conclude that the trial court's determination is supported by the law and the record in this case.

A

Our analysis is guided by the following principles. "Under the constitution of Connecticut, article first, § 8, and the sixth amendment to the United States constitution, the right to a trial by jury guarantees to the crimi-

[19] Although we apply a presumption that the trial court properly allocated the burden of proof when the court's decision is silent on that matter; see *Bisson* v. *Wal-Mart Stores, Inc.*, 184 Conn. App. 619, 630 n.11, 195 A.3d 707 (2018); the decision in the present case has statements that appear to conflict on this matter without resolving that conflict. We acknowledge that these ambiguities in the trial court's decision are a reflection of a lack of clarity in our own case law. The trial court quoted this court's case law stating that, "[i]f . . . the trial court is not at fault for the alleged juror misconduct . . . [the] defendant . . . bears the burden of proving that actual prejudice resulted from the misconduct"; (internal quotation marks omitted) *State* v. *Roman*, 320 Conn. 400, 409, 133 A.3d 441 (2016); as well as case law stating that "[c]onsideration of extrinsic evidence is presumptively prejudicial . . . ." *State* v. *Asherman*, supra, 193 Conn. 736.

[20] We underscore that the court's decision potentially could satisfy either standard because it rested on evidence that the court credited, not the defendant's failure to present evidence.

nally accused a fair trial by a panel of impartial, indifferent jurors." (Internal quotation marks omitted.) *State* v. *Roman*, 320 Conn. 400, 408, 133 A.3d 441 (2016); see also *Morgan* v. *Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). A necessary component of the right to an impartial jury is the right to have the jury decide the case "solely on the basis of the evidence and arguments given [it] in the adversary arena after proper instructions on the law by the court." *State* v. *Rodriguez*, 210 Conn. 315, 325, 554 A.2d 1080 (1989); see also *Hughes* v. *Borg*, 898 F.2d 695, 700 (9th Cir. 1990) ("[s]tate defendants have a federal constitutional right to an impartial jury and jurors have a correlative duty to consider only the evidence that is presented in open court").

"Consideration of extrinsic evidence is jury misconduct and has been found to be sufficient to violate the constitutional right to a trial by an impartial jury." *State* v. *McCall*, 187 Conn. 73, 80, 444 A.2d 896 (1982). Most courts treat a juror's exposure to any extra-record information, whether relating to the facts or the law in the case, as a form of extrinsic evidence or influence. See, e.g., *United States* v. *Pagán-Romero*, 894 F.3d 441, 446–47 (1st Cir.), cert. denied, U.S. , 139 S. Ct. 391, 202 L. Ed. 2d 299 (2018); *United States* v. *Rosenthal*, 454 F.3d 943, 949 (9th Cir. 2006); *United States* v. *Aguirre*, 108 F.3d 1284, 1288 (10th Cir.), cert. denied, 522 U.S. 931, 118 S. Ct. 335, 139 L. Ed. 2d 260 (1997); *United States* v. *Martinez*, 14 F.3d 543, 550 (11th Cir. 1994); see also *United States* v. *Steele*, 785 F.2d 743, 746 (9th Cir. 1986) ("extraneous information" and "extrinsic material"); *State* v. *Klafta*, 73 Haw. 109, 122, 831 P.2d 512, 519 (1992) (" 'extraneous definitions or statements of law' "); *Allers* v. *Riley*, 273 Mont. 1, 9, 901 P.2d 600 (1995) ("extraneous materials"); *State* v. *Abell*, 383 N.W.2d 810, 812 (N.D. 1986) ("improper extraneous information"); *Ryser* v. *State*, 453 S.W.3d 17, 41 (Tex.

App. 2014, pet. ref'd) (" 'outside influence' "). Information obtained through juror consultation of a dictionary is generally considered to be extrinsic information and thus misconduct.[21] See *United States* v. *Pagán-Romero*, supra, 447; *United States* v. *Aguirre*, supra, 1288; *United States* v. *Martinez*, supra, 550.

"It is well established, however, that not every incident of juror misconduct requires a new trial." *State* v. *Newsome*, supra, 238 Conn. 627. "[D]ue process seeks to assure a defendant a fair trial, not a perfect one. . . . [T]he constitution does not require a new trial every time a juror has been placed in a potentially compromising situation . . . [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (Internal quotation marks omitted.) *State* v. *Tomasko*, 242 Conn. 505, 513, 700 A.2d 28 (1997); see also *State* v. *Asherman*, supra, 193 Conn. 736 ("Juror misconduct [that] results in substantial prejudice to the defendant is not to be tolerated. But not every irregularity in a juror's conduct compels reversal. The dereliction must be such as to deprive the defendant of the continued, objective and disinterested judgment of the juror, thereby foreclosing the accused's right to a fair trial." (Internal quotation marks omitted.)). "The question is whether . . . the misconduct has prejudiced the defendant to the extent

[21] This is not to say that courts have uniformly approached this issue. Some courts distinguish extrinsic information that may be relied on to decide the facts of the case from information that implicates the law in the case. Compare *United States* v. *Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988) (factual and legal information do not raise same concerns), with *United States* v. *Lawson*, 677 F.3d 629, 645–46 (4th Cir.) (many of same concerns arise when juror uses dictionary as when juror consults with third party), cert. denied sub nom. *Hutto* v. *United States*, 568 U.S. 889, 133 S. Ct. 393, 184 L. Ed. 2d 162 (2012). Some courts distinguish between information obtained from a "standard" dictionary, deeming it reflective of common meaning that jurors may be presumed to know and thus not extrinsic information, and information obtained from a legal dictionary. See, e.g., *Rutland* v. State, 60 So. 3d 137, 144 (Miss. 2011); see also *Ryser* v. *State*, supra, 453 S.W.3d 41.

that he has not received a fair trial. . . . The defendant has been prejudiced if the misbehavior is such to make it probable that the juror's mind was influenced by it so as to render him or her an unfair and prejudicial juror." (Citation omitted; internal quotation marks omitted.) *State* v. *Newsome*, supra, 628.

Although these principles are broadly accepted, courts are divided on whether exposure to certain extrinsic influences should be deemed presumptively prejudicial and, if so, whether such a presumption shifts the burden to the state to prove the harmlessness of the misconduct. See *State* v. *Berrios*, supra, 320 Conn. 284–92. This divide largely turns on whether the court has concluded that the presumption of prejudice articulated in *Remmer* v. *United States*, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654 (1954) (*Remmer* presumption), a jury tampering case, retains its vitality or whether the court has interpreted subsequent United States Supreme Court case law to indicate that the due process holding in *Remmer* only entitles the defendant to a hearing, at which he bears the burden of proving actual prejudice. Although this court seemed to endorse the latter view in one case; see *State* v. *Johnson*, supra, 288 Conn. 254; we expressly left this issue open in several other cases because the party claiming the presumption could not prevail, even if the burden of proof shifted to the state. See *State* v. *Berrios*, supra, 282–83 (noting that uncertainties resulting from post-*Remmer* cases created inconsistencies in our own case law and citing cases).

In *State* v. *Berrios*, supra, 320 Conn. 266–67, we finally weighed in on this issue. In that case, the defendant had moved for a mistrial after a juror reported that the defendant's mother had made comments about the case to the juror during a trial recess. Id., 269; see footnote 24 of this opinion. The trial court denied the defendant's motion following a hearing at which the jurors were

questioned about the contact and its effect. Id., 269–73. We held that "the *Remmer* presumption is still good law with respect to external interference with the jury's deliberative process via private communication, contact, or tampering with jurors that relates directly to the matter being tried." (Footnote omitted.) Id., 292. We explained that the defendant bears an initial burden of proving that the *Remmer* presumption applied, through proof that an extrajudicial contact or communication occurred and that the contact or communication pertained to the matter before the jury. Id., 293–94. We further explained that "the *Remmer* presumption is not conclusive. The burden rests heavily on the government to establish that the contact was harmless"; (internal quotation marks omitted) id., 294; meaning that "there was no reasonable possibility that the tampering or misconduct affected the [jurors'] impartiality." (Internal quotation marks omitted.) Id.

Although the holding in *Berrios* was limited to an extrinsic influence initiated by a third party, several factors indicate that the *Remmer* presumption also should apply in cases in which the extrinsic influence is brought to bear by a juror, at least in some such cases. We made a point in *Berrios* of favorably citing the position of the United States Court of Appeals for the Second Circuit that it is "well-settled that any extra-record information of which a juror becomes aware is presumed prejudicial"; (internal quotation marks omitted) id., 287; as well as that of other jurisdictions that apply a presumption of prejudice to "serious, or not innocuous claims of external influence, such as jury tampering, bribery, or use of extra-record evidence." (Internal quotation marks omitted.) Id., 288–89. One of the cases we favorably cited applied a presumption of prejudice to a juror's use of a dictionary; see id., 288, citing *United States* v. *Lawson*, 677 F.3d 629 (4th Cir.), cert. denied sub nom. *Hutto* v. *United States*, 568 U.S.

889, 133 S. Ct. 393, 184 L. Ed. 2d 162 (2012); see also *United States* v. *Lawson*, supra, 645 ("[the *Remmer*] presumption likewise is applicable when a juror uses a dictionary or similar resource to research the definition of a material word or term at issue in a pending case"). The court in *Lawson* observed that there is a split of authority as to whether a juror's consultation of a dictionary is presumptively prejudicial that mirrors the jurisdiction's view of the vitality of the *Remmer* presumption. *United States* v. *Lawson*, supra, 645.

We also observe that, even among those jurisdictions that do not view jurors' consultation of a dictionary to be inherently prejudicial as a general matter, courts have recognized that an exception may exist when jurors are exposed to a dictionary definition of a material term that is manifestly inconsistent with the one provided by the court. See, e.g., *United States* v. *Pagán-Romero*, supra, 894 F.3d 447–48 ("In general, the use of a dictionary will pose a qualitatively less serious risk of harm [than exposure to facts that could be used as evidence]. . . . Of course, exceptions to this general approach may arise, in cases where, for example, the dictionary definition was contrary to, or confusingly inconsistent with, the instructions, where the jurors confirmed that they had actually relied on the misleading definition, or where the court made an inadequate effort to inquire into the impact of the taint." (Citation omitted.)). See generally *Ryser* v. *State*, supra, 453 S.W.3d 42 (discussing cases); annot., 35 A.L.R.4th 626, 631, 653, §§ 2[b] and 5[b] (1985) (same).

Our lone "dictionary" case is not to the contrary. In *State* v. *Asherman*, supra, 193 Conn. 736, this court set forth the general proposition that "[c]onsideration of extrinsic evidence is presumptively prejudicial because it implicates the defendant's constitutional right to a fair trial before an impartial jury. . . . But unless the nature of the misconduct on its face implicates his

constitutional rights the burden is on the appellant to show that the error of the trial court is harmful." (Citations omitted.) We concluded in *Asherman* that the defendant was not prejudiced as a result of a juror's consultation of a dictionary. Id., 737. In that case, notably, the dictionary had been consulted for the meaning of a generic term, "inference," which the trial court used but did not specifically define in its instructions, and the defendant's concern that the jury could interpret one of the dictionary definitions to allow it to base inferences on speculation was alleviated by the trial court's instructions regarding the use of inferences. Id. We adopted the logic that some other courts have followed; see footnote 21 of this opinion; under which definitions in a standard dictionary are assumed to be common knowledge and, thus, constitute knowledge that jurors are presumed to possess in the absence of an indication to the contrary. See *State* v. *Asherman*, supra, 737. See generally *State* v. *Harris*, 340 S.C. 59, 64, 530 S.E.2d 626 (2000) ("[c]ourts have almost uniformly found no prejudice to the defendant when the dictionary definition did not vary from the ordinary meaning of the words or from the meaning contained in the trial court's instructions"). We had no occasion to consider whether a presumption of prejudice should apply when jurors consider a dictionary definition of a material term that directly conflicts with the legal definition provided by the trial court.

We agree with those jurisdictions that have concluded that a presumption of prejudice applies if the defendant can demonstrate that a juror consulted a dictionary and was thereby exposed to a definition of a material term that substantively differed from the legal definition provided by the court, shifting the burden to the state to prove that this exposure was harmless beyond a reasonable doubt. See *United States* v. *Lawson*, supra, 677 F.3d 645–46 (holding that *Remmer* pre-

sumption applies when juror uses dictionary to research definition of "a material word or term at issue in a pending case" and that it was of particular concern when dictionary was consulted for definition of term that addressed contested element of offense); *United States* v. *Aguirre*, supra, 108 F.3d 1288 ("jury's exposure to extrinsic information [such as a dictionary definition] gives rise to a rebuttable presumption of prejudice"); *United States* v. *Martinez*, supra, 14 F.3d 550 (holding, in case involving several categories of extrinsic evidence, including unauthorized use of dictionary to define terms discussed during deliberations, that "we assume prejudice and thus, we must consider whether the government rebutted that presumption"); *Marino* v. *Vasquez*, 812 F.2d 499, 505 (9th Cir. 1987) (holding that unauthorized use of dictionary definitions is reversible error and that government must establish that error is harmless beyond reasonable doubt); *State* v. *Klafta*, supra, 73 Haw. 122 ("[A] juror's obtaining of extraneous definitions or statements of law differing from that intended by the court is misconduct [that] may result in prejudice to the defendant's constitutional right to a fair trial. . . . A new trial will not be granted if it can be shown that the jury could not have been influenced by the alleged misconduct." (Citation omitted; internal quotation marks omitted.)); *Allers* v. *Riley*, supra, 273 Mont. 2, 9 (applying rebuttable presumption of prejudice when jury used extraneous materials—two dictionaries—to redefine critical element of case that was already correctly defined in court's instructions); see also *United States* v. *Console*, 13 F.3d 641, 665–66 (3d Cir. 1993) (applying presumption of prejudice in case in which juror discussed definition of Racketeer Influenced and Corrupt Organizations Act with attorney sister and shared definition with other jurors during deliberations), cert. denied sub nom. *Curcio* v. *United States*, 511 U.S. 1076, 114 S. Ct. 1660, 128 L. Ed. 2d 377

(1994), and cert. denied sub nom. *Markoff* v. *United States*, 513 U.S. 812, 115 S. Ct. 54, 130 L. Ed. 2d 21 (1994)

B

Mindful of these principles, we turn to the particular claims raised by the defendant. We agree with the defendant that he established his entitlement to the presumption of prejudice. The dictionary definition that J.B. consulted was of an essential legal term, and it differed materially from the trial court's definition of the elements of manslaughter. The dictionary purportedly defined manslaughter as the taking of a life "without forethought or malice," whereas the elements provided by the court required proof of recklessness and extreme indifference to human life. As we previously indicated, although we cannot say with certainty whether the trial court imposed the burden on the state to prove that consultation of the dictionary was harmless, the state's burden necessarily would be met if the trial court correctly determined that the evidence established that this conduct caused no actual prejudice to the defendant.

To resolve this issue, we begin with the defendant's contention that the trial court applied an incorrect legal standard. Specifically, he contends that the court's application of the standard from *State* v. *Johnson*, supra, 288 Conn. 262–64, was incorrect because jurors' consultation of a dictionary does not implicate concerns about the jurors' impartiality but, rather, the possible misuse of the definition in reaching a verdict. We are not persuaded that the trial court applied an incorrect legal standard simply because it framed its inquiry in terms of the misconduct's effect on the jurors' impartiality. As we previously indicated, the right to have a jury decide the case solely on the basis of the evidence presented and the court's instructions on the law is subsumed under the right to a fair and impartial jury. See *State* v. *Rodriguez*, supra, 210 Conn. 325; see also

Hughes v. *Borg*, supra, 898 F.2d 700. Although we agree that, in light of the term's common meaning and in the absence of any context suggesting a different meaning, a juror likely would interpret a question asking about their ability to be impartial as one inquiring about any bias they might have against the defendant,[22] we are satisfied that the trial court ascribed the proper, broader meaning to the term. The trial court's questions were not limited to those concerning impartiality but specifically concerned whether a dictionary definition of manslaughter had been consulted or raised, whether any outside information had affected the jurors' ability to follow the court's instructions, and whether the jurors considered only the evidence presented and the court's instructions. It is apparent, therefore, that the trial court used the term impartiality to encompass those critical questions.

We agree with the defendant that, when jurors have improperly consulted a dictionary to obtain a definition of a legal term, the ultimate inquiry is whether there is "a [reasonable] possibility that the extrinsic material could have affected the verdict." (Internal quotation marks omitted.) *United States* v. *Steele*, supra, 785 F.2d 746; see *United States* v. *Weiss*, 752 F.2d 777, 783 (2d Cir.), cert. denied, 474 U.S. 944, 106 S. Ct. 308, 88 L. Ed. 2d 285 (1985); *State* v. *Abell*, supra, 383 N.W.2d 812; *Ryser* v. *State*, supra, 453 S.W.3d 41; see also *State* v. *Rhodes*, 248 Conn. 39, 49 n.16, 726 A.2d 513 (1999) ("the critical consideration . . . is not whether prejudice may be assumed from [exposure to such information], but, rather, whether, under the specific facts of the case, any such impropriety actually affected the verdict"). The trial court effectively concluded in the present case that no such possibility existed when it found that J.B. credibly testified that he had relied on only

[22] See, e.g., American Heritage College Dictionary (4th Ed. 2007) p. 694 (defining "impartial" to mean "[n]ot partial or biased; unprejudiced").

the trial court's instruction defining manslaughter and that the dictionary definition of manslaughter did not influence his decision in the case.

The defendant challenges the propriety of this conclusion but does so on the basis of the record, not as a matter of law.[23] Specifically, the defendant argues that the trial court could not properly credit J.B.'s ultimate answers because there was other evidence indicating that J.B. in fact did rely on the dictionary definition of manslaughter in the jury deliberations: J.B. recalled the dictionary definition more than one month after trial; he initially gave equivocal responses to the court's questions about relying on the dictionary and only gave the " 'right' " answers after the court steered him in that direction; and his conduct had been sufficiently egregious that, weeks later, another juror reported to court staff that a juror had consulted an outside dictionary during deliberations. The defendant further argues that, because the court could not properly credit J.B.'s responses indicating that he did not rely on the dictionary definition of manslaughter, the court also could not assume that J.B.'s arguments to other jurors were unaffected by this taint. Because the trial court is not

[23] It is significant that the defendant does not contend either that the trial court should not have inquired about whether the jurors used the dictionary definition (i.e., outside information) in their deliberations or that negative responses to such inquiries are per se an improper consideration. See *State* v. *Suschank*, 595 S.W.2d 295, 298 (Mo. App. 1979) (because defendant did not object to questioning of jury after verdict, trial court could properly consider testimony of jurors in determining prejudicial effect of use of dictionary). Some jurisdictions do not permit the trial court to inquire whether the jurors actually relied on the definition in deciding the case, viewing such questions as intruding on the deliberative process. See, e.g., *State* v. *Duncan*, 3 Kan. App. 2d 271, 275, 593 P.2d 427 (1979) ("[i]t is not permissible to inquire whether . . . the dictionary definition of 'assault' was given weight by the jury"); *Commonwealth* v. *Wood*, 230 S.W.3d 331, 333 (Ky. App. 2007) (court should consider juror testimony concerning any overt acts of misconduct but not "secret thoughts of jurors"). In such cases, the court would proceed to an objective inquiry as to whether consideration of the definition would affect the verdict of a typical juror.

permitted to ask the other jurors questions that would gauge the influence of J.B.'s arguments on them, the defendant asserts that the court was required to consider how a typical, hypothetical juror would be affected by the difference between the definitions. See footnote 17 of this opinion (setting forth tests identified by defendant).

We conclude that, although perhaps the trial court reasonably could have drawn the inferences advanced by the defendant, it was not compelled to do so. "[T]he trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature." (Internal quotation marks omitted.) *State* v. *Rodriguez*, supra, 210 Conn. 331. This court must defer to the credibility assessment of the trial court, which has had the opportunity to observe first hand each juror's demeanor and attitude and, therefore, is in the best position to judge his or her credibility and draw inferences therefrom. See *State* v. *Dixon*, supra, 318 Conn. 506. The testimony of the jurors that each was, or would be, fair and impartial, although not determinative, is significant, and "[we] are not inclined to disregard the statements of those jurors . . . as inevitably suspect." (Internal quotation marks omitted.) *State* v. *Rodriguez*, supra, 330; see also *United States* v. *Gillespie*, 61 F.3d 457, 460 (6th Cir. 1995) ("[T]he court should determine whether the jury actually used the dictionary definition to reach [its] verdict. . . . [A] juror's declaration at the hearing exploring these questions is not inherently suspect."). No doubt "[t]he nature and quality of the juror's assurances is of paramount importance; the juror must be unequivocal about his or her ability to be fair and impartial." (Internal quotation marks omitted.) *State* v. *Berrios*, supra, 320 Conn. 296. Although this court may review the transcript to ascertain whether it reveals textual evidence of equivocation, "[e]valuation of any

equivocation evinced in tone or manner remains in the province of the trial judge." Id., 296–97.

Some of J.B.'s responses could be viewed as equivocal or nonresponsive. Part of the problem in characterizing those responses is J.B.'s repeated efforts to interject his thoughts about the case and tentative votes by the jury—both of which were forbidden matters that the trial court was assiduously attempting to avoid. The trial court, therefore, reasonably attempted to secure unequivocal answers to its questions.

In *State* v. *Berrios*, supra, 320 Conn. 265, in which we applied a presumption of prejudice to a third party's improper contact with a juror midtrial; id., 294; we concluded that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial because the state had proved that this contact was harmless beyond a reasonable doubt through the jurors' testimonial assurances that the impermissible contact did not affect their impartiality or their ability to decide the case based solely on the evidence admitted at trial. Id., 296. We observed that the trial court's discretion to credit these assurances was reasonable because the jurors' testimony was unequivocal and supported by other facts in the record.[24] See id., 296–99.

[24] The testimony adduced at the hearing in *Berrios* established that the defendant's mother had approached one of the jurors during a recess from presentation of evidence, that she had made a negative comment about the truthfulness of one of the state's witnesses, and that all of the jurors became aware of that contact. See *State* v. *Berrios*, supra, 320 Conn. 269–70. The trial court rejected the defendant's suggestion that the impropriety was extraordinarily prejudicial because it could lead jurors to suspect that the defendant had instigated the jury tampering and had done so in an effort to cause a mistrial, which would cause the jurors to regard him unfavorably in their deliberations. Id., 277, 299. In concluding that the trial court properly could credit the jurors' assurances that they could be impartial despite the improper contact, we pointed to the fact that J, the juror who was approached by the defendant's mother, had reported the incident to the court, whereas, "[h]ad the actions of the defendant's mother left [J] inclined to be less than fair and impartial toward the defendant, [J] likely would have kept that information to himself in an attempt to ensure that he remained

Stricter scrutiny may be warranted when jurors are asked *postverdict* whether they acted impartially and in accordance with the court's instructions, especially when the question is posed to a juror who has committed misconduct. See *State* v. *Dixon*, supra, 318 Conn. 507 ("[t]he trial court's assessment of the juror's assurances, [although] entitled to deference, must be realistic and informed by inquiries adequate in the context of the case to ascertain the nature and import of any potential juror bias" (internal quotation marks omitted)); see also, e.g., *State* v. *Holt*, 79 S.D. 50, 53, 107 N.W.2d 732 (1961) (trial court properly relied on jurors' affidavits stating that their use of dictionary for terms relevant to lesser included offenses did not influence their verdict to overcome presumption of prejudice given that verdict on principal charge eliminated consideration of lesser included offenses). In the present case, the trial court's conclusion is bolstered by the fact that the misconduct occurred *before* the court specifically directed the jury not to consult the dictionary and to rely exclusively on the elements in the court's manslaughter instruction. The court's initial charge to the jury did not include such a pointed instruction, and it is reasonably possible that J.B. did not recall the court's specific prohibition on consulting dictionaries from jury selection approximately one month earlier. See footnote 11 of this opinion. The fact that other jurors sent the note to the court to shut down any further efforts by J.B. to discuss the dictionary definition suggests that they would have alerted the court, before the verdict was rendered, if J.B.'s comments suggested that he continued to rely on the dictionary definition after the court

on the jury to vote to convict the defendant." (Internal quotation marks omitted.) Id., 297–98. We also noted that, because jurors J and L had expressed understanding for the actions of the defendant's mother, given her obvious concern for the defendant's future, such expressions supported the trial court's determination that the jurors were not biased against the defendant as a result of his mother's actions. Id., 298.

responded to the note. The jury deliberated until the day after the court responded to the note, without further incident. Cf. *Jordan* v. *Brantley*, 589 So. 2d 680, 682 (Ala. 1991) ("[t]he evidence reflects that the jury had not been able to reach a verdict until the dictionary was used"). Under these circumstances, it is reasonable to presume that the jurors followed the court's instructions. See, e.g., *State* v. *Rodriguez*, supra, 210 Conn. 333 ("[t]he jury, in the absence of a fair indication to the contrary, is presumed to have followed the instructions of the court" (internal quotation marks omitted)).

The trial court correctly concluded that the juror misconduct caused no actual prejudice to the defendant. The record clearly establishes that there was no reasonable possibility that any member of the jury relied on the dictionary definition to the defendant's detriment in reaching the verdict. The state proved that the misconduct was harmless beyond a reasonable doubt. The trial court therefore properly denied the defendant's motion for a new trial.[25]

The judgment is affirmed.

In this opinion the other justices concurred.

[25] We note that the defendant would not be entitled to a new trial even if the trial court should have discounted the jurors' assurances. See *United States* v. *Chanthadara*, 230 F.3d 1237, 1251 (10th Cir. 2000) ("prejudice presumed, even if not cured by subsequent instructions and juror assurances of impartiality, may be proven harmless if the government can establish there was overwhelming evidence of the defendant's guilt"), cert. denied, 534 U.S. 992, 122 S. Ct. 457, 151 L. Ed. 2d 376 (2001). The defendant's complaint is that the dictionary definition of manslaughter omitted two elements of the statutory definition—that he must have acted recklessly and under circumstances evincing an extreme indifference to human life. See General Statutes § 53a-55 (a) (3). These elements, however, were effectively uncontested. It was undisputed that the defendant fired his gun multiple times at the victim in a dark parking lot where others were present. Defense counsel conceded during his closing argument that the jury could find the defendant guilty of either murder or manslaughter but that such a finding was immaterial because the state could not prove that he had not acted in self-defense. See *State* v. *Singleton*, 292 Conn. 734, 749, 974 A.2d 679 (2009) ("self-defense is a justification for engaging in otherwise criminal conduct"

WELLS FARGO BANK, N.A. *v.* ERIC LORSON ET AL. (SC 20194)

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

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants. The defendants had executed a promissory note, which was secured by the mortgage on the defendants' property. The mortgage, which was guaranteed and insured by the Federal Housing Administration (FHA), was later assigned to the plaintiff. Both the note and the mortgage contained provisions that conditioned the plaintiff's acceleration of the debt owed on the mortgage and the plaintiff's initiation of foreclosure proceedings, in the event of a default, on compliance with the federal Department of Housing and Urban Development (HUD) regulatory requirements. The defendants subsequently defaulted, and the plaintiff accelerated payment of the debt and commenced this foreclosure action. The trial court rendered a judgment of strict foreclosure, from which the defendants appealed to the Appellate Court. On appeal, the defendants claimed, inter alia, that compliance with the applicable HUD regulations was a condition precedent to acceleration of the debt and the initiation of foreclosure proceedings, the plaintiff was therefore required to prove compliance, and, because it had not done so, the trial court's finding that the plaintiff had proven its case was clearly erroneous. The Appellate Court affirmed the trial court's judgment, concluding that the burden was on the defendants to plead and prove noncompliance with the HUD regulations and that they waived that

(emphasis omitted; internal quotation marks omitted)). The defendant cannot, therefore, establish prejudice. See, e.g., *United States* v. *Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988) (no prejudice when dictionary definition was not relevant to only disputed issue); *State* v. *Duncan*, 3 Kan. App. 2d 271, 275, 593 P.2d 427 (1979) ("[w]e agree that the difference in definitions is substantial, but the evidence of [the] defendant's guilt of aggravated assault . . . was overwhelming if not irrefutable"); cf. *State* v. *Padua*, 273 Conn. 138, 167, 869 A.2d 192 (2005) ("a jury instruction that improperly omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error" (emphasis omitted; internal quotation marks omitted)).

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

special defense because they failed to assert it. On the granting of certification, the defendants appealed to this court, claiming that the Appellate Court had incorrectly determined that the burden was on them to plead and prove noncompliance with the applicable HUD regulations. *Held* that compliance with the applicable HUD regulations is a condition precedent to accelerating the debt and foreclosing on a mortgage that is guaranteed or insured by the FHA, such compliance, contrary to the Appellate Court's decision, must be pleaded and ultimately proven by the plaintiff lender, and, because the trial court did not require the plaintiff to establish compliance with the applicable HUD regulations, the case was remanded for a new trial limited to that issue: this court concluded, on the basis of its review of the applicable HUD regulations, their purpose, and the public policies that the compliance provisions in the note and mortgage were intended to advance, that those compliance provisions were intended to constrain the ability of lenders to accelerate the mortgage debt or foreclose without first providing homeowners with an opportunity to take informed steps to retain their homes, and, accordingly, the compliance provisions served as a condition precedent such that, if the condition of compliance was not fulfilled, the lender's right to acceleration and foreclosure did not come into existence; moreover, there was no merit to the plaintiff's claim that its compliance with the applicable HUD regulations was a condition subsequent rather than a condition precedent, as a lender's failure to comply with the applicable HUD regulations could not suspend a preexisting right to acceleration and foreclosure because there was no identifiable date on which the failure to comply occurred and no defined temporal period preceding the failure to comply during which the right to acceleration and foreclosure could have been asserted; furthermore, this court rejected the plaintiff's argument that, even if compliance with the applicable HUD regulations is a condition precedent to the foreclosure of a mortgage insured by the FHA, the defendant borrower should still shoulder the burden of pleading and proving noncompliance as a special defense, as HUD's policy statement with respect to the compliance provisions at issue and case law concerning that burden did not compel such a conclusion, and a lender is in the best position to know what specific steps it has taken to comply with the HUD regulations; accordingly, this court adopted a burden shifting procedure pursuant to which the plaintiff lender has the initial burden of pleading compliance with the applicable HUD regulations, if the defendant borrower contests compliance, he or she then has the burden of pleading noncompliance, after which the burden shifts back to the plaintiff lender to prove compliance, and, because the trial court never considered whether the plaintiff complied with the applicable HUD regulations, the Appellate Court's conclusion that, even if the burden was on the plaintiff to plead and prove compli-

ance, evidence in the record supported the conclusion that it had met its burden was speculative.

Argued February 26, 2020—officially released December 3, 2021**

Procedural History

Action to foreclose a mortgage on certain of the defendants' real property, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Richard P. Gilardi*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment of strict foreclosure, from which the defendants appealed to the Appellate Court, *Elgo*, *Bright* and *Beach*, *Js.*, which affirmed the trial court's judgment, and the defendants, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Ridgely Whitmore Brown, with whom, on the brief, was *Benjamin Gershberg*, for the appellants (defendants).

David M. Bizar, for the appellee (plaintiff).

J.L. Pottenger, *Jr.*, *Jeffrey Gentes*, and *Stephanie Garlock* and *Keith Woolridge*, law student interns, filed a brief for the Housing Clinic of the Jerome N. Frank Legal Services Organization as amicus curiae.

Opinion

McDONALD, J. The issue that we must resolve in this appeal is whether compliance with federal Department of Housing and Urban Development (HUD) regulatory requirements applicable to mortgage loans guaranteed or insured by the Federal Housing Administration (FHA) is a condition precedent to acceleration of the debt, enforcement of the note, and foreclosure of the mortgage, such that the burden is on mortgagees

** December 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to plead and prove compliance. The defendants, Eric Lorson and Laurin Maday, executed a mortgage note in favor of The McCue Mortgage Company (McCue) and a mortgage deed to secure payment of the note. The note and mortgage deed, which were guaranteed and/or insured by the FHA, were ultimately assigned to the plaintiff, Wells Fargo Bank, N.A. Under the terms of the note and mortgage deed, the plaintiff was not authorized to accelerate payment of the debt or to initiate foreclosure proceedings unless permitted by HUD regulations. The defendants defaulted on the note and mortgage, and the plaintiff accelerated payment of the debt and commenced a foreclosure action. After a trial, the trial court found that the plaintiff had met its burden proving its case and that the defendants had failed to prove their special defenses of equitable estoppel and unclean hands. Accordingly, the court rendered a judgment of strict foreclosure. The defendants then appealed to the Appellate Court, claiming, among other things, that the trial court's finding that the plaintiff had proved its case was clearly erroneous because compliance with applicable HUD regulations is a condition precedent to acceleration of the debt and the initiation of foreclosure proceedings, and, therefore, the plaintiff was required to prove compliance, which it had not done. The Appellate Court affirmed the judgment of the trial court; *Wells Fargo Bank, N.A.* v. *Lorson*, 183 Conn. App. 200, 224, 192 A.3d 439 (2018); concluding that the burden was on the defendants to plead and prove noncompliance and that, "by failing to assert that special defense, [they had] waived it." Id., 216. We then granted the defendants' petition for certification on the following issue: "Did the Appellate Court correctly hold that noncompliance with [HUD] regulations is a special defense that the defendant must plead and prove?" *Wells Fargo Bank, N.A.* v. *Lorson*, 330 Conn. 920, 193 A.3d 1214 (2018). We conclude that compliance with applicable

HUD regulations is a condition precedent to enforcement of the note and foreclosure of the mortgage, and must be pleaded and ultimately proved by the mortgagee. Because the trial court did not require the plaintiff to establish compliance with HUD regulations at trial, we further conclude that the case must be remanded to the trial court for a trial on that issue. Accordingly, we reverse the judgment of the Appellate Court affirming the trial court's judgment of strict foreclosure.

The opinion of the Appellate Court sets forth the following facts and procedural history, which we supplement with additional facts as necessary. "The defendants and [McCue] executed a promissory note on December 1, 2008 (note). The note was secured by a mortgage on the defendants' property at 40 McGuire Road in Trumbull (property), in favor of Mortgage Electronic Registration Systems, Inc., as nominee for McCue. The mortgage was recorded on the Trumbull land records on December 1, 2008. The mortgage was assigned to the plaintiff on December 16, 2011, and the assignment was recorded on the Trumbull land records on December 21, 2011. It is undisputed that the plaintiff is the holder of both the note and the mortgage." *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 202.

"The defendants' mortgage was guaranteed and insured by the [FHA and, therefore, was subject to certain] . . . HUD regulations. Section 6 (b) of the note provides in relevant part that, '[i]f [the] [b]orrower defaults by failing to pay in full any monthly payment, then [the] [l]ender may, except as limited by regulations of the [s]ecretary [of HUD] in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. [The] [l]ender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by

the [s]ecretary [of HUD] will limit [the] [l]ender's rights to require immediate payment in full in the case of payment defaults. This [n]ote does not authorize acceleration when not permitted by HUD regulations.' Section 9 (a) of the mortgage deed provides in relevant part: '[The] [l]ender may, except as limited by regulations issued by the [s]ecretary [of HUD] in the case of payment defaults, require immediate payment in full of all sums secured by this [s]ecurity [i]nstrument . . . .' " (Footnote omitted.) Id., 207–208. Section 9 (d) of the mortgage deed provides: "In many circumstances regulations issued by the [s]ecretary [of HUD] will limit [the] [l]ender's rights, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This [s]ecurity [i]nstrument does not authorize acceleration or foreclosure if not permitted by regulations of the [s]ecretary."

"The plaintiff filed this foreclosure action on October 19, 2011. The complaint alleged that the note and mortgage were in default by virtue of nonpayment of the installments of principal and interest due on November 1, 2010, and each and every month thereafter. The complaint further alleged that the plaintiff is entitled to collect the debt evidenced by the note and to enforce the terms of the mortgage, that the plaintiff had elected to accelerate the balance of the note, and that the plaintiff requested a foreclosure of the mortgaged premises." *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 202.

After failed foreclosure mediation proceedings that have no bearing on this appeal, "[t]he defendants filed an answer [to the foreclosure complaint] on July 19, 2013, in which they effectively denied each allegation and left the plaintiff to its proof. The defendants also filed two special defenses alleging unclean hands and equitable estoppel. The plaintiff filed a motion for summary judgment on November 12, 2013. The defendants

filed an amended answer and special defenses along with their objection to the plaintiff's summary judgment motion on February 19, 2014. In the amended answer, the defendants alleged a third special defense titled 'Mortgage Modification Agreement,' claiming that the plaintiff refused to issue a permanent modification and 'breached the terms of the agreement' by requiring payment of the judgment lien.

"The [trial] court denied the plaintiff's motion for summary judgment on March 21, 2014, ruling that 'the counteraffidavit submitted by the defendants in opposition to the motion raises issues of fact relating to the defendants' special defenses of unclean hands and equitable estoppel to be resolved at trial.' The plaintiff filed a reply to the defendants' special defenses and a certificate of closed pleadings on October 22, 2015." Id., 204–205.

Eight days later, on October 30, 2015, "the defendants moved to amend their answer . . . . In the proposed amended answer, the defendants added a special defense titled 'Breach of Contract,' which alleged the plaintiff's noncompliance with various [HUD] regulations . . . as set forth in 24 C.F.R. § 203.500 et seq. (HUD regulations). The plaintiff filed an objection to the defendants' request to amend on November 9, 2015, and the [trial] court sustained the plaintiff's objection on December 1, 2015, the first day of trial.

"Following a two day bench trial, the court rendered judgment of strict foreclosure in favor of the plaintiff on January 6, 2016. On January 20, 2016, the defendants [appealed to the Appellate Court from the judgment of strict foreclosure]. The defendants filed a motion for articulation on August 4, 2016, requesting an explanation for the judgment of strict foreclosure. On November 25, 2016, the court issued a written response 'to the allegations contained in the defendants' motion [for]

articulation and, specifically, the defendants' misrepresentations and failure to disclose necessary evidence within their knowledge.' In that response, the court stated: '[On the basis of] the factual history of this litigation, it is the finding of this court that the plaintiff has established [its] burden of proof with respect to the allegations of the complaint. The court further finds that the defendants failed to submit sufficient evidence with respect to their burden of proof [as] to the denial of the complaint, as well as the special defenses of unclean hands and equitable estoppel. Accordingly, judgment is [rendered] in favor of the plaintiff with respect to the complaint and special defenses.' The court denied the motion for articulation and stated as follows: 'With respect to the motion for articulation, it is the finding of the court that the motion is based on the misrepresentations and intentional omissions of necessary evidence. The docket sufficiently provides the basis for the rulings by the court. Accordingly, the motion for articulation is denied.' "[1] Id., 205–206.

On appeal to the Appellate Court, the defendants claimed, among other things, that the trial court's finding that "the plaintiff had sustained its burden of proving that it had satisfied the conditions precedent in the note and mortgage, [i.e., compliance with HUD regulations], was clearly erroneous." The Appellate Court concluded that "the defendants had the affirmative duty to plead the special defense of the plaintiff's noncompliance with the HUD regulations and, by failing to assert that special defense, waived it. Consequently, they may not challenge the plaintiff's compliance on appeal." *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 216; see id., 215 ("in this particular context, it makes much

[1] Thereafter, the defendants filed a motion for review of the trial court's denial of their motion for articulation with the Appellate Court, which the Appellate Court denied. See *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 206.

more sense to require the defendant to plead the specific requirements that have not been met and [to] bear the burden of proving the plaintiff's noncompliance with those requirements"). The Appellate Court further concluded that, even if the plaintiff had the burden of pleading and proving compliance, because there was evidence in the record to support the conclusion that the plaintiff had complied, and no evidence to the contrary, the trial court's ruling that the plaintiff had satisfied its prima facie case was not clearly erroneous. Id., 217 n.10. After also rejecting the defendants' other claims on appeal, the Appellate Court affirmed the judgment of the trial court. Id., 224.

This certified appeal followed.[2] The defendants contend that the Appellate Court incorrectly determined that the burden was on them to plead and prove noncompliance with applicable HUD regulations because compliance with those regulations is a condition precedent to accelerating payment of the debt and foreclosing on a mortgage. See, e.g., *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392, 89 A.3d 392 ("the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied" (internal quotation marks omitted)), cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014). In addition, the defendants contend that the Appellate Court incorrectly determined that, even if the plaintiff had the burden of proving compliance, the evidence established that it had done so. The plaintiff contends that, to the contrary, compliance with applicable HUD regulations is not a condition precedent to accelerating the debt and bringing a foreclosure

[2] After the defendants filed this appeal, we granted permission to the Housing Clinic of the Jerome N. Frank Legal Services Organization to file an amicus curiae brief in support of the defendants' position.

action but, instead, is a condition subsequent. Accordingly, it contends, the Appellate Court correctly held that the burden was on the defendants to plead and prove noncompliance as a special defense. The plaintiff further contends that, even if compliance with HUD regulations is a condition precedent, policy concerns mandate that the burden should be on the defendants to plead and prove noncompliance. Finally, the plaintiff contends that, even if it had the burden of proving compliance, the Appellate Court correctly determined that it had done so.

We conclude that compliance with applicable HUD regulations is a condition precedent to accelerating the debt and foreclosing a mortgage that is guaranteed or insured by the FHA. We further conclude that, in this context, it is appropriate to adopt a burden shifting procedure pursuant to which the plaintiff has the burden of pleading its compliance with the applicable regulations. If they deny the plaintiff's allegation relating to that compliance, the defendants have the burden of pleading that the plaintiff has not complied with specific regulations that are applicable. In that event, the burden would then shift back to the plaintiff to prove compliance with the specific regulations alleged by the defendants. Finally, we conclude that, because the trial court did not apply this procedure, the case must be remanded to that court for a new trial limited to this issue.

We note, preliminarily, that the defendants' claim that the burden was on the plaintiff to prove compliance with applicable HUD regulations is unpreserved because they did not raise it before the trial court. Accordingly, the claim ordinarily would be unreviewable. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial"). Nevertheless, because the plaintiff did not raise this preservation issue before the Appellate Court and has not raised it before this court, we will

review the claim here. See *Mueller* v. *Tepler*, 312 Conn. 631, 643–44, 95 A.3d 1011 (2014) (when plaintiff didnot argue before Appellate Court that defendants'claim was unpreserved, this court would considerissue in certified appeal, and defendants' claim was reviewable).[3]

We begin our analysis with the defendants' threshold claim that the provisions of the mortgage stating that it "does not authorize acceleration or foreclosure if not permitted by regulations of the [s]ecretary [of HUD]" and of the note stating that it "does not authorize acceleration when not permitted by HUD regulations" (compliance provisions) created a contractual condition precedent to debt acceleration and foreclosure by the plaintiff. "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. . . . Whether a provision in a contract is a condition the [nonfulfillment] of which excuses performance depends [on] the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." (Internal quotation marks omitted.) *Blitz* v. *Subklew*, 74 Conn. App. 183, 189, 810 A.2d 841 (2002), quoting *Lach* v. *Cahill*, 138 Conn. 418, 421, 85 A.2d 481 (1951).

[3] We acknowledge that the plaintiff claimed before the Appellate Court that the defendants "waived the argument [that the plaintiff bore the initial burden of proving that it complied with HUD regulations] by failing to plead *non*compliance with the HUD regulations as a special defense." (Emphasis in original.) But this argument is directed at an alleged pleading defect; the plaintiff does not claim that the defendants failed to preserve the HUD compliance issue. Indeed, the Appellate Court reached and decided the legal issue of whether the plaintiff had the burden of proving compliance with HUD regulations with no objection from the plaintiff, and now the plaintiff urges us to uphold that decision in this certified appeal.

One of the relevant circumstances to consider in our condition precedent analysis is the public policy that the compliance provisions of the note and mortgage were intended to advance. See, e.g., *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, 937 N.E.2d 853, 864 (Ind. App. 2010) (court considered "precedents, the language of the HUD regulations, and the public policy of HUD" in determining whether compliance provisions created condition precedent). Accordingly, we look to the public policy underlying FHA guaranteed loans for guidance. "The FHA, which was created by the National Housing Act of 1934, is the largest government insurer of mortgages in the world. . . . The FHA, which is a part of HUD, provides mortgage insurance on single-family, multifamily, manufactured homes, and hospital loans made by FHA-approved lenders throughout the United States and its territories. . . . Under this program, mortgagee/lenders are induced to make essentially risk-free mortgages by being guaranteed against loss in the event of default by the mortgagor. . . . This program allows mortgagees to offer loans to [low income] families at a more favorable rate than would otherwise be available in the market. . . . The availability of affordable mortgages, in turn, promotes [Congress'] national goal of a decent home and suitable living environment for every American family." (Citations omitted; internal quotation marks omitted.) Id., 860.

"Because these government-insured mortgage loan programs recognize that [their] mortgagors will often have difficulty making full and timely payments, HUD promulgated very specific regulations outlining the mortgage servicing responsibilities of mortgagees, which include notice requirements that are integral to the program. . . . These notice requirements [e]nsure that financially strapped homeowners will have every oppor-

tunity to take informed steps to retain their homes." (Citation omitted; footnote omitted.) *HSBC Bank USA, N.A.* v. *Teed*, 48 Misc. 3d 194, 196, 4 N.Y.S.3d 826 (2014).

The court in *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 937 N.E.2d 853, explained the underlying considerations of public policy: "Families who receive HUD-insured mortgages do not meet the standards required for conventional mortgages. It would be senseless to create a program to aid families for whom homeownership would otherwise be impossible without promulgating mandatory regulations for HUD-approved mortgagees to [e]nsure that objectives of the HUD program are met. Foreseeable obstacles to these families' maintaining regular payments, such as temporary illness, unemployment or poor financial management, should be handled with a combination of understanding and efficiency by mortgagees or servicers. Poor servicing techniques such as computerized form letters and unrealistic forbearance agreements . . . defeat the purpose of the National Housing Act and the HUD program. The prevention of foreclosure in HUD mortgages [whenever] possible is essential. The HUD program's objectives cannot be attained if HUD's involvement begins and ends with the purchase of the home and the receipt of a mortgage by a [low income] family." (Internal quotation marks omitted.) Id., 863.

"The regulations regarding a mortgagee's servicing responsibilities of such mortgages are codified in [t]itle 24, [p]art 203 (Single Family Mortgage Insurance), [s]ubpart C (Servicing Responsibilities) [subpart C] of the Code of Federal Regulations . . . . 24 C.F.R. §§ [203.500 through 203.681]. Subpart C contains mortgagee servicing responsibilities and also provides certain relief for the mortgagor, e.g., conditions of special forbearance, 24 C.F.R. § 203.614, mortgage modification, 24 C.F.R. § 203.616, and a requirement that [c]ollec-

tion techniques must be adapted to individual differences in mortgagors and take account of the circumstances peculiar to each mortgagor, 24 C.F.R. § 203.600." (Internal quotation marks omitted.) *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 937 N.E.2d 860. Significantly, title 24 of the 2011 edition of the Code of Federal Regulations, § 203.500, provides in relevant part: "It is the intent of [HUD] that no mortgagee shall commence foreclosure or acquire title to a property until the requirements of [subpart C] have been followed."

The purpose of the HUD regulations is not only to help ensure that homeowners will have every opportunity to retain their homes, but also to ensure that lenders will take all "appropriate actions which can reasonably be expected to generate the smallest financial loss to [HUD]." 24 C.F.R. § 203.501 (2011). To ensure uniform advancement of these goals, it is the policy of HUD that lenders participating in the program must use the mortgage and note forms that HUD promulgates, which contain the compliance provisions. See Requirements for Single Family Mortgage Instruments, 54 Fed. Reg. 27,596, 27,601 (June 29, 1989) ("[m]ortgagees must use the model form [for mortgage provisions], Exhibit A, and the footnotes accompanying the model form, with only such adaptation as may be necessary to conform to state or local requirements"); id. ("[m]ortgagees must use the model form [for note provisions], Exhibit B, and the footnotes accompanying the form, with only such adaptation as may be necessary to conform to state or local requirements"); see also id., 27,603–608 (model mortgage form); id., 27,609–10 (model note form).

With this background in mind, we conclude that the compliance provisions of the note and mortgage clearly were intended to constrain the ability of lenders to accelerate the debt payment or to foreclose without *first* providing the homeowners with "every opportu-

nity to take informed steps to retain their homes," as provided in the regulations. *HSBC Bank USA, N.A.* v. *Teed*, supra, 48 Misc. 3d 196. It follows that the compliance provisions are conditions precedent to accelerating the debt and initiating foreclosure proceedings such that, "[i]f the condition[s] [are] not fulfilled, the right to enforce the contract does not come into existence." (Internal quotation marks omitted.) *Blitz* v. *Subklew*, supra, 74 Conn. App. 189. This conclusion is bolstered by the language of the Code of Federal Regulations providing that "[i]t is the intent of [HUD] that no mortgagee shall *commence* foreclosure or acquire title to a property until the requirements of [subpart C] have been followed." (Emphasis added.) 24 C.F.R. § 203.500 (2011); see 24 C.F.R. § 203.606 (a) (2011) ("[*b*]*efore* initiating foreclosure, the mortgagee must ensure that all servicing requirements of [subpart C] have been met" (emphasis added)). Numerous other courts have reached the same conclusion. See, e.g., *Bates* v. *JPMorgan Chase Bank, N.A.*, 768 F.3d 1126, 1132 (11th Cir. 2014) (under Georgia law, compliance provision of FHA insured mortgage "clearly makes compliance with HUD regulations a condition precedent to the bank's right to accelerate the debt or exercise the power of sale"); *Pfeifer* v. *Countrywide Home Loans, Inc.*, 211 Cal. App. 4th 1250, 1279, 150 Cal. Rptr. 3d 673 (2012) (agreeing with court that held that compliance provision of FHA insured mortgage was condition precedent); *Palma* v. *JPMorgan Chase Bank, National Assn.*, 208 So. 3d 771, 775 (Fla. App. 2016) (like notice provision of standard mortgage, compliance provisions of FHA insured mortgage are conditions precedent to right to accelerate debt payment and to foreclose); *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 937 N.E.2d 864 ("HUD servicing responsibilities . . . are binding conditions precedent that must be complied with before a mortgagee has the right to foreclose on a HUD prop-

erty"); *Wells Fargo Bank, N.A.* v. *Cook*, 87 Mass. App. 382, 386, 31 N.E.3d 1125 ("compliance with the [HUD] regulations has been held to be a condition precedent to foreclosure of FHA-insured mortgages"), review denied, 472 Mass. 1107, 36 N.E.3d 31 (2015); *Wells Fargo Bank, N.A.* v. *Awadallah*, 41 N.E.3d 481, 487 (Ohio App. 2015) ("[when] compliance with HUD regulations is required by a note and mortgage, such compliance is a condition precedent to bringing a foreclosure action"); *Mathews* v. *PHH Mortgage Corp.*, 283 Va. 723, 736, 724 S.E.2d 196 (2012) (HUD regulation is "a condition precedent to the accrual of the rights of acceleration and foreclosure").

The plaintiff contends that the compliance provisions are not conditions precedent but conditions subsequent and, therefore, that the defendants were required to raise noncompliance with HUD regulations as a special defense. Unlike a condition precedent, which "is a fact or event [that] the parties intend must exist or take place before there is a right to performance"; (internal quotation marks omitted) *Blitz* v. *Subklew*, supra, 74 Conn. App. 189; nonperformance of a condition subsequent operates to cut off an existing right. See, e.g., *Karp* v. *Urban Redevelopment Commission*, 162 Conn. 525, 530, 294 A.2d 633 (1972) ("[t]his limitation is to be regarded as creating a condition subsequent, by which an existing right is cut off by the nonperformance of the condition, rather than a condition precedent to a continuing right" (internal quotation marks omitted)). A classic example of a condition subsequent is compliance with the applicable statute of limitations. See, e.g., *Bulkley* v. *Norwich & Westerly Railway Co.*, 81 Conn. 284, 287, 70 A. 1021 (1908) (comparing statutory notice provision that "ma[de] the giving of a prescribed notice a condition precedent to the existence of [the right of action] under any and all circumstances" with statutory notice provision that "simply place[d] a limitation, anal-

ogous to the general statute of limitations, [on] the right of an injured party to prosecute such an action," which constituted condition subsequent).[4] This is because, when a person fails to comply with an applicable statute of limitations, the right to recover that had existed from

[4] See also, e.g., *Fields* v. *Housing Authority*, 63 Conn. App. 617, 621, 777 A.2d 752 (when compliance with statutory notice provision is not essential to determination of liability but concerns only whether plaintiff has taken proper steps to warrant recovery, provision operates as condition subsequent to liability rather than condition precedent, but statutory notice provision is condition precedent when statute containing provision creates new cause of action unrecognized by common law), cert. denied, 257 Conn. 910, 782 A.2d 133 (2001). It seems to us that there is a difference between an ordinary statute of limitations and a statutory notice provision, in that a person need not take any action—other than to assert the right at issue—before the statute of limitations has expired to preserve the right to recover, whereas the *failure* to comply with a statutory notice provision bars the right to recover even before the time for filing the notice has expired. Ordinarily, if the right to performance does not exist *until* an act takes place, the act is considered a condition precedent. Indeed, *contractual* notice provisions are considered conditions precedent to performance. See, e.g., *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 710, 807 A.2d 968 ("when the terms of the note and mortgage require notice of default, proper notice is a condition precedent to an action for foreclosure" (internal quotation marks omitted)), cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002). Moreover, it is difficult to understand why the distinction between common-law causes of action and purely statutory causes of action should have any bearing on whether a notice provision is properly characterized as a condition subsequent or a condition precedent, as those terms are ordinarily understood. To say that a notice provision is not of the essence and that compliance with it may be waived may mean that the provision is not, strictly speaking, a condition precedent, but it is difficult to understand why it should mean that the provision is a condition subsequent. We recognize, however, that there are historical reasons for sometimes treating statutory notice provisions like conditions subsequent, even though they do not fit neatly into that category. Accordingly, to the extent that the plaintiff in the present case relies on the cases treating some statutory notice provisions as conditions subsequent to support its contention that ongoing noncompliance with HUD regulations would constitute nonperformance of a condition subsequent, we conclude that its reliance is misplaced. Indeed, it is arguable that, outside the law of contracts, the concepts of conditions precedent and conditions subsequent no longer serve a particularly useful purpose and that the question of whether compliance with a particular statutory notice provision is an element of the plaintiff's case or, instead, must be pleaded and proved by the defendant, and whether compliance is a prerequisite to the court's

the time that the cause of action accrued is thereby *lost*. In contrast, when a person fails to comply with a condition precedent to initiating a cause of action, the right to recover never comes into existence. "A defense predicated on a condition subsequent, and limitations generally, need not be anticipated and negatived by the plaintiff. They may properly be left to be pleaded by the defendant." *Karp* v. *Urban Redevelopment Commission*, supra, 531–32.

In the present case, the plaintiff contends that compliance with applicable HUD regulations requiring lenders to give defaulting homeowners every opportunity to retain their homes before accelerating the debt or initiating foreclosure proceedings is a condition subsequent because a lender's rights to accelerate and foreclose "come into existence when the borrower defaults on the loan," and the regulations merely act as a limitation on or exception to those preexisting rights. The plaintiff points to the language in § 6 (b) of the note providing that the "[l]ender may, *except as limited by regulations of the* [*s*]*ecretary* in the case of payment defaults, require immediate payment in full," and "[t]his [n]ote does not authorize acceleration *when not permitted by HUD regulations*." (Emphasis added.) Similarly, § 9 (a) of the mortgage provides in relevant part that the "[l]ender may, *except as limited by regulations issued by the* [*s*]*ecretary* in the case of payment defaults, require immediate payment in full . . . ." (Emphasis added.) Section 9 (d) of the mortgage further provides: "In many circumstances regulations issued by the [s]ecretary *will limit* [*the*] [*l*]*ender's rights*, in the case of payment defaults, to require immediate payment in full and foreclose if not paid. This [s]ecurity [i]nstrument does not authorize acceleration or foreclosure *if not permitted by regulations* of the [s]ecretary."

subject matter jurisdiction or, instead, is merely a prerequisite to recovery, should be resolved solely on policy grounds.

(Emphasis added.) According to the plaintiff, "[t]his language expressly presupposes that the lender already has existing 'rights' to accelerate and foreclose and imposes certain limitations on those rights."

We disagree with this analysis. The distinction between conditions precedent and conditions subsequent is not that conditions subsequent *limit* or *restrict* rights whereas conditions precedent do not. Rather, they both limit and restrict rights but in different ways. Specifically, the nonoccurrence of a condition precedent limits a right by preventing it from coming into existence; see, e.g., *Blitz* v. *Subklew*, supra, 74 Conn. App. 189 ("A condition [precedent] . . . is merely a *limiting or modifying* factor. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. (Emphasis added; internal quotation marks omitted.)); whereas the nonoccurrence of a condition subsequent limits the right by extinguishing it. See, e.g., *Karp* v. *Urban Redevelopment Commission*, supra, 162 Conn. 530 ("[t]his *limitation* is to be regarded as creating a condition subsequent, by which an existing right is cut off by the nonperformance of the condition" (emphasis added; internal quotation marks omitted)).

Accordingly, contrary to the plaintiff's contention, the fact that the loan instruments use words of limitation does not expressly presuppose that the right was in existence before the condition—compliance with applicable HUD regulations—failed to occur. Indeed, unlike a statute of limitations, noncompliance with which occurs on a specific date, *after* which the right to recover, which had existed for a defined period up to that time, is "cut off," it is difficult to conceive how the ongoing failure to comply with HUD regulations could "cut off" any right because there simply is no identifiable date on which the failure occurred and no defined temporal period preceding the failure to comply during which the right could have been asserted in the

first place. Contrary to the plaintiff's claim, the right to accelerate payments and to foreclose did not come into existence when the defendants defaulted on the note and mortgage because that right was *conditioned* on the plaintiff's compliance with applicable HUD regulations. Indeed, the plaintiff has not cited a single case in which a court has concluded that the compliance provisions of an FHA note and mortgage are conditions subsequent. Accordingly, we reject the plaintiff's claim that the compliance provisions are not conditions precedent.

Ordinarily, compliance with conditions precedent to foreclosing on a mortgage must be pleaded and proved by the lender. See, e.g., *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013) ("[i]n order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence . . . that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied"); cf. *Young* v. *American Fidelity Ins. Co.*, 2 Conn. App. 282, 285, 479 A.2d 244 (1984) ("one instituting an action [on] an insurance policy is . . . obliged to allege in his complaint . . . that the various conditions precedent stated in the policy have been fulfilled" (internal quotation marks omitted)). The plaintiff contends, for a variety of reasons, however, that, even if the compliance provisions are conditions precedent, for purposes of FHA insured mortgages, the burden should be on the homeowner to plead and prove noncompliance with the provisions as a special defense.

First, the plaintiff contends that HUD has interpreted the compliance provisions as requiring homeowners to raise noncompliance with HUD regulations as a special defense. See Requirements for Single Family Mortgage Instruments, supra, 54 Fed. Reg. 27,599 ("we believe that a borrower could appropriately raise [a violation of 24 C.F.R. § 203.606, prohibiting foreclosure unless three full monthly payments due on the mortgage are

unpaid] in his or her defense"). The plaintiff contends that this interpretation is binding on all courts because, "[w]hen dealing with uniform contract language imposed by the United States, it is the meaning of the United States that controls. In interpreting such a government mandated term, a court's assessment of context and purpose is informed by the traditional tools of legislative and regulatory construction. This is a matter of law to be determined by a court. When the United States mandates that private parties use uniform language for a certain type of contract, the United States is enacting a policy that all parties to that type of contract should be subject to identical obligations. Those obligations are the ones the United States intended them to be, as determined by a court, regardless of the personal interpretation offered by a party. If such contracts were subjected to different meanings depending merely on whether a particular party's interpretation was plausible, it would not only undermine the efficiency benefits of standardization, but it would also undermine the federal policy that motivated the United States to impose uniform contractual obligations on parties in the first place." (Footnote omitted.) *Kolbe* v. *BAC Home Loans Servicing, L.P.*, 738 F.3d 432, 442 (1st Cir. 2013).

We are not persuaded that this policy statement by HUD requires the states to treat noncompliance with applicable HUD regulations as a special defense to a foreclosure action to be pleaded and proved by the homeowner. As the amicus points out, the statement that a homeowner could raise noncompliance with applicable regulations "in his or her defense"; Requirements for Single Family Mortgage Instruments, supra, 54 Fed. Reg. 27,599; reasonably can be interpreted as meaning merely that noncompliance could prevent the lender from prevailing in the foreclosure action, not as mandating any particular mode of procedure for raising the issue. There is no reason to believe that HUD has

any deep familiarity with local pleading procedures and practices in the various states and intended, for some reason, to prohibit states from requiring lenders to plead and prove compliance, even though the compliance provisions were intended to be conditions precedent. Rather, it is reasonable to conclude that HUD was simply rejecting the proposition that a lender's duty of compliance runs *only* to HUD, not to homeowners as well. In this regard, it is significant that HUD made this statement in response to a person who had commented on the proposed uniform mortgage form and who was concerned that the mandated compliance provisions "would create foreclosure proceedings that would be more [time-consuming] and expensive." Id. HUD responded that, "[a]s long as [mandatory requirements remain] in the regulations, we do not expect mortgagees to violate [them] even though the mortgage fails to repeat the requirement, and we believe that a borrower could appropriately raise the regulatory violation in his or her defense." Id. It bears noting that HUD followed up this statement by stating that it "retains the general position recited in 24 C.F.R. § 203.500, that whether a mortgagee's refusal or failure to comply with servicing regulations is a legal defense is a matter to be determined by the courts." Id. At the time HUD made this statement in June, 1989, § 203.500 contained the following sentence: "[HUD] takes no position on whether a mortgagee's refusal or failure to comply with §§ 203.640 through 203.658 is a legal defense to foreclosure; that is a matter to be determined by the courts." 24 C.F.R. § 203.500 (1989); see Temporary Mortgage Assistance Payments, 52 Fed. Reg. 6908, 6915 (March 5, 1987) (to be codified at 24 C.F.R. pts. 203 and 204). Accordingly, courts that hold that noncompliance with HUD regulations bars relief to a foreclosing lender abide by this "interpretation" of the compliance provisions, regardless of whether they treat compliance as an element of a fore-

closure action that must be pleaded and proved by the lender or treat noncompliance as a defense to be pleaded and proved by the homeowner.

Second, the plaintiff contends that "[e]very jurisdiction to have considered the issue . . . has followed HUD's interpretation and found that borrowers may raise certain instances of HUD noncompliance to defend against foreclosures. By contrast, no jurisdiction has burdened a lender with proving compliance with all HUD regulations as part of its prima facie case."

Again, we are not persuaded. Although a number of jurisdictions have concluded that noncompliance with HUD regulations should be raised by the homeowner as an affirmative defense,[5] many of the cases cited by the plaintiff merely hold that noncompliance with applicable HUD regulations can be raised as a "defense" to a foreclosure action in the generic or colloquial sense that, if established (or not disproved), noncompliance will bar relief to the lender, and do not analyze who has the burden of pleading and proof. See, e.g., *PNC*

[5] See, e.g., *Bankers Life Co.* v. *Denton*, 120 Ill. App. 3d 576, 579, 458 N.E.2d 203 (1983) ("we believe that the failure to comply with these servicing regulations which are mandatory and have the force and effect of law can be raised in a foreclosure proceeding as an affirmative defense"); *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 937 N.E.2d 864 (holding, without analysis regarding who has burden of proof, that homeowner "can properly raise as an affirmative defense that [the lender] failed to comply with the HUD servicing regulations prior to commencing this foreclosure action"); *Wells Fargo Home Mortgage, Inc.* v. *Neal*, 398 Md. 705, 727, 922 A.2d 538 (2007) ("we are of the opinion that the violations of the HUD mortgage servicing regulations alleged of [the lender] by [the homeowner] may be asserted effectively as an affirmative defense within the injunctive relief apparatus provided" by Maryland statute). We note that the issue in both *Bankers Life Co.* and *Lacy-McKinney* was whether homeowners were intended to be beneficiaries of the applicable HUD regulations *at all* or, instead, whether HUD was the sole beneficiary. See *Bankers Life Co.* v. *Denton*, supra, 579; *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 864. There was no analysis as to whether noncompliance must be pleaded by the homeowner or, instead, compliance must be pleaded by the lender.

Bank, National Assn. v. *Wilson*, 74 N.E.3d 100, 105 (Ill. App.) ("it is undisputed . . . that the failure to comply with HUD's mortgage services requirements contained in its regulations is a defense to a mortgage foreclosure action"), appeal denied, 89 N.E.3d 763 (Ill. 2017); *ABN AMRO Mortgage Group, Inc.* v. *Tullar*, Docket No. 06-0824, 2009 WL 1066511, *4 (Iowa App. April 22, 2009) (decision without published opinion, 770 N.W.2d 851) ("HUD foresaw—and approved—the concept that failure to comply with its so-called 'mitigation' or 'forbearance' rules could be raised as a defense in a foreclosure proceeding"); *HSBC Bank USA, N.A.* v. *Teed*, supra, 48 Misc. 3d 197 ("compliance with the appropriate federal regulations is not merely a procedural requirement but is a condition precedent to the imposition of liability," and, therefore, "the failure to comply with the HUD servicing requirements is a complete defense to a mortgage foreclosure action"); *Federal Land Bank of Saint Paul* v. *Overboe*, 404 N.W.2d 445, 449 (N.D. 1987) ("various courts have held that the failure of a lender to follow HUD regulations governing mortgage servicing constitutes a valid defense sufficient to deny the lender the relief it seeks in a foreclosure action"); *Fleet Real Estate Funding Corp.* v. *Smith*, 366 Pa. Super. 116, 124, 530 A.2d 919 (1987) ("a mortgagor of an FHA-insured mortgage may raise as an equitable defense to foreclosure . . . the mortgagee's deviation from compliance with the forbearance provisions of the HUD Handbook and regulations").

More important, contrary to the plaintiff's contention that *no* court has *ever* placed the burden of pleading and proving compliance with HUD regulations on the lender, the defendants have cited two cases in which a state's appellate court expressly did so. In *Palma* v. *JPMorgan Chase Bank, National Assn.*, supra, 208 So. 3d 771, the court held that compliance with HUD regulations, like other conditions precedent to initiating a

foreclosure action, must be generally pleaded by the lender. See id., 775. The burden then shifts to the borrower to specifically deny compliance with particular regulations. Id. In turn, once the borrower has pleaded a specific denial, the burden shifts back to the lender to prove at trial that it complied with the regulations. Id. Similarly, in *Wells Fargo Bank, N.A.* v. *Awadallah*, supra, 41 N.E.3d 481, the court held that "compliance with [HUD] regulations is a condition precedent and [the] bank must [therefore] generally plead in its complaint that it has complied with the . . . regulations, which shifts the burden to the borrower to plead with particularity in the answer . . . which specific regulations were not complied with, in order to preserve the issue. Then upon summary judgment, the burden shifts back again to the bank, which must provide evidence sufficient to dispel a genuine issue of material fact, that it complied with the specific HUD regulation raised by the borrower in its answer." (Internal quotation marks omitted.) Id., 487. Accordingly, we reject the plaintiff's contention that the great weight of authority favors its position that the burden should be on the defendants to plead and prove noncompliance.

Third, the plaintiff contends that the Appellate Court correctly determined that "[r]equiring mortgagees to plead and prove compliance with all HUD regulations would undermine this state's policy of promoting economy and efficiency in foreclosure actions . . . ." See *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 215 (if lenders had burden of pleading and proving compliance, "[f]oreclosure trials, and motions for summary judgment in foreclosure actions, in which the facts are largely undisputed, would become drawn out, expensive affairs as a plaintiff presents evidence regarding a lengthy list of requirements"). The plaintiff points out that foreclosure trials are entitled to priority by statute; see General Statutes § 52-192; see also, e.g.,

Suffield Bank v. *Berman*, 25 Conn. App. 369, 373, 594 A.2d 493 ("due to the nature of foreclosure actions, the spirit of the rules is to expedite matters"), cert. dismissed, 220 Conn. 913, 597 A.2d 339 (1991), and cert. denied, 220 Conn. 914, 597 A.2d 340 (1991); and contends that, because the HUD regulations are so voluminous and Byzantine, the position taken by the defendants and the amicus "would saddle mortgagees with a massive and complex burden that would greatly complicate, lengthen, and add expense to foreclosures . . . of mortgages containing the HUD uniform covenants."

As the plaintiff recognizes, however, this court has held in another context that, "in the very exceptional situation created by the [existence of a contract containing] numerous conditions [precedent]," a burden shifting approach is appropriate, with the plaintiff retaining the ultimate burden of proving compliance. *Harty* v. *Eagle Indemnity Co.*, 108 Conn. 563, 566, 143 A. 847 (1928). Specifically, "it has become the established law of this [s]tate that one instituting an action [on] an insurance policy is only obliged to allege in his complaint, in general terms, that the various conditions precedent stated in the policy have been fulfilled; that it is then incumbent [on] the defendant, by way of special defense,[6] to set up such failures to comply with such conditions as it proposes to claim; that the burden rests [on] the plaintiff to prove compliance with the conditions so put in issue, but that, as to other conditions precedent, compliance is presumed, without offer of proof by the plaintiff." (Footnote added.) Id., 565. The "underlying reason for the rule . . . [is] that, in the

[6] We note that this pleading is a special defense in form only, inasmuch as the defendant ordinarily has the ultimate burden of proving a special defense. See, e.g., *Wyatt Energy, Inc.* v. *Motiva Enterprises, LLC*, 308 Conn. 719, 736, 66 A.3d 848 (2013) ("the party raising a special defense has the burden of proving the facts alleged therein"). As a practical matter, this pleading functions as a specific denial of the plaintiff's general pleading of compliance.

interest of economy of time and effort and of simplicity of procedure, the plaintiff should be relieved of the necessity of pleading and proving facts which the defendant never proposes to put in actual issue." Id.

There are two additional reasons that placing the ultimate burden of proof on the plaintiff makes sense in the present context. First, "the task of proving a negative [i.e., *non*compliance with HUD regulations] is an inherently difficult one, and it may be further complicated by the opposing party's interest in concealment." *Arrowood Indemnity Co.* v. *King*, 304 Conn. 179, 203, 39 A.3d 712 (2012). Second, mortgagees possess their own records and are in the best position to know what specific steps they have taken to comply with specific HUD regulations that control their actions or, if they have taken no such steps, to explain why they believed that doing so was unnecessary under the circumstances. Cf. id. ("[i]mposing this difficult task [of proving lack of prejudice from failure to comply with a notice provision] on the insured—the party least well equipped to know, let alone demonstrate, the effect of delayed disclosure on the investigatory and legal defense capabilities of the insurer—reduces the likelihood that the fact finder will possess sufficient information to determine whether prejudice has resulted from delayed disclosure").

The Appellate Court nevertheless concluded that, pursuant to Practice Book § 10-50,[7] the defendants had

[7] Practice Book § 10-50 provides: "No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus, accord and satisfaction, arbitration and award, duress, fraud, illegality not apparent on the face of the pleadings, infancy, that the defendant was non compos mentis, payment (even though nonpayment is alleged by the plaintiff), release, the statute of limitations and res judicata must be specially pleaded, while advantage may be taken, under a simple denial, of such matters as the statute of frauds, or title in a third person to what the plaintiff sues upon or alleges to be the plaintiff's own."

the affirmative duty to plead the plaintiff's noncompliance with HUD regulations as a special defense. See *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 213–14. The Appellate Court reasoned, "[t]here are potentially dozens of HUD requirements that a defendant could argue are necessary prerequisites to the bringing of a foreclosure action. . . . It is inconsistent with our expectation that trials are not supposed to be a game of blindman's bluff to expect a plaintiff in a foreclosure action to anticipate which HUD requirement a defendant will seize upon to argue after the plaintiff rests that it has failed to prove its case. . . . Consequently, in this particular context, it makes much more sense to require the defendant to plead the specific requirements that have not been met and bear the burden of proving the plaintiff's noncompliance with those requirements." Id., 215. We disagree that a lender's noncompliance with HUD regulations is most appropriately pleaded by the borrower as a special defense and conclude that, because compliance with the various HUD regulations is a condition precedent, compliance must be generally pleaded by the lender.

As we explained, "[a] condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . A condition is distinguished from a promise in that it creates no right or duty in and of itself but is merely a limiting or modifying factor. . . . *If the condition is not fulfilled, the right to enforce the contract does not come into existence*. . . . Whether a provision in a contract is a condition the [nonfulfillment] of which excuses performance depends [on] the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all

Although Practice Book § 10-50 was amended in 2017, the amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current version of that rule.

the surrounding circumstances when they executed the contract." (Emphasis added; internal quotation marks omitted.) *Blitz* v. *Subklew*, supra, 74 Conn. App. 189, quoting *Lach* v. *Cahill*, supra, 138 Conn. 421. For the reasons we have explained, language in the mortgage and note makes clear that compliance with HUD regulations is a condition precedent to debt acceleration and foreclosure by the plaintiff. Specifically, the mortgage provides that it "does not authorize acceleration or foreclosure if not permitted by regulations of the [s]ecretary [of HUD]." The note similarly provides that it "does not authorize acceleration when not permitted by HUD regulations." Our conclusion that compliance with HUD regulations is a condition precedent is supported by the policy of those regulations. "It is the intent of [HUD] that no mortgagee commence foreclosure or acquisition of the property until the requirements of [§§ 203.650 through 203.662 of the HUD regulations] or instructions issued pursuant to said sections have been complied with." Mortgage Servicing Generally, 45 Fed. Reg. 29,573, 29,574 (May 5, 1980) (to be codified at 24 C.F.R. pt. 203); see Temporary Mortgage Assistance Payments, supra, 52 Fed. Reg. 6915 ("[b]efore initiating foreclosure, the mortgagee must ensure that all servicing requirements of [subpart C] have been met"). This is because "[t]he prevention of foreclosure in HUD mortgages [whenever] possible is essential. The HUD program's objectives cannot be attained if HUD's involvement begins and ends with the purchase of the home and the receipt of a mortgage by a [low income] family." (Internal quotation marks omitted.) *Lacy-McKinney* v. *Taylor, Bean & Whitaker Mortgage Corp.*, supra, 937 N.E.2d 863; see 24 C.F.R. § 203.501 (2011) (purpose of HUD regulations is not only to help ensure that homeowners will have every opportunity to retain their homes, but also to ensure that lenders will take all "appropriate actions which can reasonably be

expected to generate the smallest financial loss to [HUD]"). It is clear that HUD intended that, like a quintessential condition precedent, the right to enforce the note and to foreclose on the mortgage would not come into existence unless the various HUD regulations, designed to avoid foreclosure in the first place, had been complied with. Indeed, unlike with a special defense, notwithstanding a lender's noncompliance with HUD regulations, the lender still has a cause of action; it simply does not have the right to enforce the terms of the mortgage and note until it complies with the regulations.

Given our conclusion that compliance with the HUD regulations is a condition precedent, a lender must necessarily plead compliance. See, e.g., *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 176 ("[i]n order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence . . . that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied"). The policy underlying the HUD regulations—prevention of foreclosures—would be undermined if a lender were not required to plead compliance with the regulations and, instead, a borrower had to raise noncompliance as a special defense.

Moreover, in many circumstances, a borrower would have no way of knowing whether a lender failed to comply with specific HUD regulations until he has access to discovery.[8] Although a borrower may be

[8] It is also for this reason that we decline to adopt the burden shifting procedure this court has employed in the insurance context. See, e.g., *Harty* v. *Eagle Indemnity Co.*, supra, 108 Conn. 565. The rationale underlying the burden shifting procedure in the insurance context—"that, in the interest of economy of time and effort and of simplicity of procedure, the plaintiff should be relieved of the necessity of pleading and proving facts which the defendant never proposes to put in actual issue"—is different from the rationale in the foreclosure context. Id. Unlike an insurance company that likely has reason to know that an insured did not comply with the terms of an insurance policy and, therefore, pleads noncompliance as a special

aware of the various payment plans a lender offered him pursuant to HUD regulations, he would not know whether the lender complied with other requirements under the HUD regulations; see 24 C.F.R. § 203.500 et seq.; such as the requirement that the lender must evaluate various loss mitigation techniques. See 24 C.F.R. §§ 203.501 and 203.605. As the amicus curiae contends, "lenders are the *only* party equipped to assure trial courts of compliance." (Emphasis added.) Lenders and servicers possess their own records and are in the best position to know whether they have complied with the HUD regulations that control their actions.

In addition to the lack of a good faith basis to make such an allegation, a defendant could not allege noncompliance with HUD regulations generally as a special defense. Practice Book § 10-50 requires that "[f]acts which are consistent with [the plaintiff's statements of fact] but show, notwithstanding, that the plaintiff has no cause of action, must be *specially alleged*." (Emphasis added.) Indeed, "[t]he fundamental purpose of a special defense, like other pleadings, is to apprise the court and opposing counsel of the issues to be tried, so that basic issues are not concealed until the trial is underway." (Internal quotation marks omitted.) *Almada* v. *Wausau Business Ins. Co.*, 274 Conn. 449, 456, 876 A.2d 535 (2005). A general allegation in a special defense that a plaintiff failed to comply with HUD regulations, without more specificity, would not meet the requirement under § 10-50 that facts that show why the plaintiff has no cause of action must be "specially alleged" and would not serve to apprise the court and opposing counsel of the issues to be tried. See, e.g., *Standard Petroleum Co.* v. *Faugno Acquisition, LLC*, 330 Conn. 40, 72, 191 A.3d 147 (2018) ("Each of the special defenses states a summary legal conclusion, lacking any support-

defense, a borrower would have no reason to know whether a lender complied with specific HUD regulations.

ing facts or indication as to which counts they are directed. As such, they would not even meet our fact pleading requirements for special defenses as set forth in . . . § 10-50."). As we have explained, a burden shifting procedure has been adopted by at least two jurisdictions in the context of foreclosures of FHA insured mortgages. See *Palma* v. *JPMorgan Chase Bank, National Assn.*, supra, 208 So. 3d 775; *Wells Fargo Bank, N.A.* v. *Awadallah*, supra, 41 N.E.3d 487. Under this burden shifting procedure, once a plaintiff lender generally pleads compliance with HUD regulations, a defendant borrower will have access to discovery to determine whether the plaintiff actually complied with the various regulations. Should the defendant discover a basis to allege that the plaintiff failed to comply with specific HUD regulations, the defendant would move to dismiss the action. We conclude that this procedure strikes the appropriate balance between the interests of the parties, and, therefore, we adopt the procedure in the present context. Accordingly, we reverse the holding of the Appellate Court that the burden was on the defendants to plead and prove that the plaintiff had not complied with HUD regulations before accelerating the debt and initiating foreclosure proceedings.

We turn finally to the defendants' claim that the Appellate Court incorrectly determined that, even if the burden was on the plaintiff to establish compliance with HUD regulations, because there was evidence in the record to support the conclusion that the plaintiff had complied, and no evidence to the contrary, the trial court's ruling that the plaintiff had satisfied its prima facie case was not clearly erroneous. See *Wells Fargo Bank, N.A.* v. *Lorson*, supra, 183 Conn. App. 217 n.10. The defendants contend that, because the trial court never considered this issue, the Appellate Court's conclusion that the plaintiff had met its burden of proof

was speculative.[9] We agree with the defendants. Although the plaintiff presented testimony that it was in possession of documents showing that it had complied with HUD regulations, as well as evidence of actions that it took to comply with specific regulations, the defendants had no reason to present any evidence of noncompliance with specific regulations, or to rebut the plaintiff's evidence of compliance, because the trial court had denied their request to amend their answer to include the special defense of noncompliance. Similarly, the plaintiff was not on notice that it was required to present evidence of compliance with any specific HUD regulation. We conclude, therefore, that the case must be remanded to the trial court for a new trial limited to the issue of whether the plaintiff complied with the specific HUD regulations with which the defendants claim the plaintiff was noncompliant. The plaintiff need not establish that it has satisfied the other elements of its prima facie case, as the defendants make no other claim of error with respect to the trial court's finding on that issue. See, e.g., *Ostrowski* v. *Avery*, 243 Conn. 355, 368, 703 A.2d 117 (1997) (remanding matter to trial court for new trial limited to issue on which trial court misallocated burden of proof).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to the trial court for a new trial limited to the issue of whether the plaintiff complied with applicable HUD regulations before accelerating payment of the defendants' debt and initiating foreclosure proceedings.

In this opinion the other justices concurred.

[9] We have already rejected the plaintiff's contention that the defendants "waived" this issue when they failed to raise the special defense that the plaintiff had not complied with HUD regulations. See footnote 3 of this opinion.

HELEN Z. BENJAMIN ET AL. *v.* RALPH P. CORASANITI, TRUSTEE, ET AL. (SC 20491)

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

Syllabus

The plaintiffs, H and the cotrustees of certain trusts of which H was a beneficiary, appealed to the trial court from the decision of the Probate Court, which concluded that H's brother, P, had validly exercised his testamentary powers of appointment under certain trusts established for his benefit by directing in his will that the proceeds of the sale of stock in a family corporation, H Co., be distributed to a charitable trust that P had established. P and his five siblings, including H, were each a beneficiary of two trusts established by their father in 2002 and 2005, which were governed by Illinois and Connecticut law, respectively. In 2011, P and his siblings, except H, transferred their shares in H Co. to separate trusts, which also were governed by Illinois law. Pursuant to P's 2002, 2005 and 2011 trust instruments, P was granted a nongeneral testamentary power of appointment over the H Co. shares held in trust for his use and benefit. P could exercise his power of appointment only by specific reference in his will, but not in favor of himself, his creditors, his estate, or the creditors of his estate. Furthermore, if P failed to validly exercise his power of appointment, his trust property would be distributed equally to the trusts of his surviving siblings. In addition, the H Co. shareholder's agreement provided that, if a sibling exercises his or her power of appointment with respect to the H Co. shares held in his or her trusts, those shares shall be sold, within nine months of the sibling's death, in equal amount to the surviving siblings' trusts. After an accident rendered P a quadriplegic, P established the charitable trust in 2016, the purpose of which was to provide financial assistance to quadriplegics and their caregivers and to fund quadriplegia related research and initiatives. P thereafter executed a will in which he stated that he was exercising his testamentary powers of appointment over the H Co. shares held in his 2002, 2005 and 2011 trusts and directed that the proceeds from the sale of the H Co. shares be distributed to the 2016 charitable trust. P died in 2017, survived by his five siblings, and his will was admitted to probate. The Probate Court concluded that P's exercise of his powers of appointment was valid and ordered the trustees of the siblings' respective trusts to fund the 2016 charitable trust with the net proceeds of the sale of the H Co. stock. On appeal to the trial court, the plaintiffs claimed that P's exercise of his powers of appointment was invalid under both Connecticut and Illinois law because the 2016 charitable trust was not funded prior to P's death.

The trial court, however, upheld the decision of the Probate Court and rendered judgment in favor of the defendants, which included P's siblings other than H, their descendants, the trustees of their family trusts, and the trustees of P's trusts. On the plaintiffs' appeal, *held* that the trial court correctly concluded that P effectively and validly exercised his nongeneral testamentary powers of appointment to direct the proceeds of the sale of the H Co. stock held in his 2002, 2005 and 2011 trusts to the 2016 charitable trust, even though the 2016 trust was unfunded at the time of P's death: under both Connecticut and Illinois law, the exercise of a nongeneral power of appointment is valid and effective if the donee expresses an intent to exercise the power of appointment and the donee complies with any conditions imposed on the exercise of the power of appointment by the donor; in the present case, it was undisputed that P expressed in his will a clear and unequivocal intent to exercise his powers of appointment, and P complied with the conditions imposed on the exercise of those powers by the 2002, 2005, and 2011 trusts, as the 2016 charitable trust was an organization other than P, P's creditors, P's estate, or the creditors of P's estate, and P exercised his powers by specific reference in a valid will that was admitted to probate; moreover, although the 2016 charitable trust was unfunded prior to P's death and, therefore, was not a valid and enforceable charitable trust during P's lifetime, a trust need not be funded contemporaneously with the execution of the trust documents, and the 2016 charitable trust became valid and enforceable when it was funded, after P's death, through the exercise of P's powers of appointment in his will; furthermore, contrary to the plaintiffs' claim, the fact that P appointed the proceeds of the sale of the H Co. stock to a trust, rather than a trustee, did not render the exercise of his powers of appointment invalid and ineffective, as a trustee may be temporarily absent without destroying the trust or preventing its creation, especially in light of the axiom that a charitable trust must be construed liberally in order to carry out the charitable purposes of the individual who created the trust.

Argued April 1—officially released December 6, 2021*

Procedural History

Appeal from the decision of the Probate Court for the district of Darien-New Canaan confirming that the decedent had validly exercised his testamentary power of appointment when he appointed certain property held in trust to an unfunded charitable trust, brought to the Superior Court in the judicial district of Stamford-

*December 6, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Norwalk and transferred to the judicial district of Waterbury, where Scott A. Weisman et al. were substituted for the named plaintiff only in her former capacity as trustee and added as plaintiffs; thereafter, the case was tried to the court, *Bellis*, *J.*; judgment affirming the decision of the Probate Court, from which the plaintiffs appealed. *Affirmed.*

Steven M. Frederick, with whom were *David G. Keyko*, pro hac vice, and, on the brief, *Christopher Fennell*, pro hac vice, and *Gessi Giarratana*, for the appellants (plaintiffs).

Helen Harris, with whom, on the brief, were *John W. Cerreta*, *Thomas D. Goldberg* and *Michael Schoeneberger*, for the appellees (named defendant et al.).

Charles W. Pieterse, with whom were *Wyatt R. Jansen* and *Lynn K. Neuner*, for the appellees (defendant William T. Ziegler et al.).

Frederic S. Ury, with whom, on the brief, was *Deborah M. Garskof*, for the appellees (defendant Karl H. Ziegler et al.).

Gary W. Hawes, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Karen Gano*, assistant attorney general, for the appellee (defendant attorney general).

ECKER, J. In July, 2015, Peter M. Ziegler (Peter), a scion of a wealthy Connecticut family, suffered a tragic accident that rendered him a quadriplegic. Approximately one year later, Peter executed a trust instrument to create a charitable trust, Peter's Yellow Submarine Trust, for the purpose of providing financial assistance to other quadriplegics and their caregivers. The trust was not funded during Peter's lifetime, but Peter, who had nongeneral testamentary powers of appointment under various Ziegler family trusts, exercised his pow-

ers of appointment in his will to direct the proceeds of the sale of stock in a Ziegler family corporation, Hay Island Holding Corporation (HIHC), to Peter's Yellow Submarine Trust. Peter's sister, Helen Z. Benjamin (Helen), subsequently challenged the validity of Peter's exercise of his nongeneral testamentary powers of appointment, alleging that a trust that remains unfunded during a testator's lifetime does not exist as a matter of law and, therefore, is an impermissible appointee. The Probate Court disagreed, and the trial court affirmed, concluding that Peter's Yellow Submarine Trust was a permissible appointee even though it was not funded prior to Peter's death. On appeal, we must determine whether an unfunded charitable trust is a permissible appointee of the exercise of a nongeneral testamentary power of appointment. We answer that question in the affirmative and, accordingly, affirm the judgment of the trial court.

The record reflects the following stipulated or otherwise undisputed facts. In 2002, Peter's father, William Ziegler III, created The William Ziegler III Family Irrevocable Trust (2002 Trust), which established separate trusts for the benefit of Peter and each of his five siblings: Melissa J. Ziegler, William T. Ziegler, Karl H. Ziegler, Cynthia Z. Brighton, and Helen. The 2002 Trust holds shares of HIHC, which is wholly owned by the Ziegler family and their trusts. Pursuant to § 3.4 of the 2002 Trust, Peter was granted a nongeneral testamentary power of appointment over the HIHC shares held in trust for his use and benefit. Section 3.4 (A) of the 2002 Trust provides in relevant part that, upon Peter's death, his 2002 Trust "shall terminate" and that, "by specific reference in his . . . will, [Peter] may appoint the remaining trust property in such amounts, either outright or in further trust . . . to or for the benefit of any one or more persons or charitable organizations . . . provided, however, that such limited power of

appointment shall not be exercisable in favor of [Peter], his . . . creditors, his . . . estate, or the creditors of his . . . estate . . . ." (Emphasis in original.) If Peter failed validly to exercise his nongeneral testamentary power of appointment, his trust property would be distributed equally to his descendants or, alternatively, to the 2002 Trusts of his surviving siblings. The 2002 Trust is governed by Illinois law.

In 2005, William Ziegler III created a second trust, The William Ziegler III Revocable Trust, which, among other things, created a Trust C (2005 Trust C) holding HIHC shares for the use and benefit of each of the six Ziegler siblings. Under § 3.12 of the 2005 Trust C, Peter was granted a nongeneral testamentary power of appointment substantially similar to that contained in the 2002 Trust, which could not be exercised in favor of Peter, his creditors, his estate, or the creditors of his estate.[1] Also similar to the 2002 Trust, Peter's failure to validly exercise his nongeneral testamentary power of appointment would result in the distribution of his trust property equally to his descendants or, alternatively, to the trusts of his surviving siblings. The 2005 Trust C is governed by Connecticut law.

In 2011, all of the Ziegler siblings, with the exception of Helen, transferred their shares in HIHC to separate trusts. Pursuant to Peter's 2011 Irrevocable Trust (2011 Trust), which was established by his wife, Marie Longner Ziegler, Peter was granted a nongeneral testamentary power of appointment that, like the other two trusts,

[1] Section 3.12 of the 2005 Trust C provides in relevant part: "Upon the [b]eneficiary's death . . . Trust C shall terminate; and the trustees shall distribute the then remaining property of such trust in such amounts, either outright or in further trust, to or for the benefit of any one or more persons or organizations, as the [b]eneficiary by specific reference in his or her will shall appoint to receive the same; provided, however, that this limited testamentary power of appointment . . . shall not be exercisable in favor of the [b]eneficiary, his or her creditors, his or her estate, or the creditors of his or her estate . . . ." (Emphasis in original.)

could not be exercised in favor of Peter, his creditors, his estate, or the creditors of his estate.[2] Similarly, if Peter died without validly exercising his nongeneral testamentary power of appointment, the trust property would be distributed equally to his descendants or, alternatively, to the 2002 Trusts of his surviving siblings. The 2011 Trust, like the 2002 Trust, is governed by Illinois law.

In December, 2012, the shareholders in HIHC, including Peter, his siblings, and the trustees of their respective trusts, entered into an Amended and Restated Shareholder's Agreement of Hay Island Holding Corporation (shareholder's agreement). The shareholder's agreement provides that, if a Ziegler sibling exercises his or her nongeneral testamentary power of appointment with respect to the HIHC shares in the 2002 Trust, the 2005 Trust C, or the 2011 Trust, "the shares as to which the testamentary power of appointment was exercised shall be sold in equal shares to the surviving Ziegler [s]iblings' [family] [t]rusts." The sale must "take place within nine . . . months of the date of death of the deceased Ziegler [s]ibling," and the shares shall be valued "as of the date of death of the Ziegler [s]ibling . . . ."

As we previously mentioned, Peter suffered a tragic accident in 2015 that rendered him a quadriplegic.

[2] Section 3.2 of the 2011 Trust provides in relevant part: "Upon the [p]rimary [b]eneficiary's death, the [p]rimary [b]eneficiary, by specific reference in his or her will, may appoint the remaining property of the [p]rimary [b]eneficiary's [t]rust in such amounts, either outright or in further trust, as follows:

"(A) If my husband, Peter M. Ziegler, is the [p]rimary [b]eneficiary, he shall have a limited power to appoint all or any portion of the property of the [p]rimary [b]eneficiary's [t]rust to or for the benefit of any one or more persons and/or charitable organizations.

* * *

"(C) Notwithstanding the foregoing, no limited power of appointment granted to the [p]rimary [b]eneficiary hereunder shall be exercisable in favor of such [p]rimary [b]eneficiary, his or her creditors, his or her estate, or the creditors of his or her estate."

Approximately one year later, on August 5, 2016, Peter signed a trust instrument establishing Peter's Yellow Submarine Trust and designating himself and two of his siblings as trustees. The express purpose of Peter's Yellow Submarine Trust "is to make distributions, loans, or grants exclusively for [c]haritable [p]urposes . . . with special emphasis on distributions, loans, or grants related to (1) providing housing assistance to quadriplegics, (2) providing assistance with the development and distribution of assistive devices and tools for quadriplegics, (3) providing assistance and education to caregivers of quadriplegics, and (4) providing funding for research related to paralysis and returning motor and nerve function to quadriplegics." The Peter's Yellow Submarine Trust instrument provides that the res of the trust is the "property listed in Schedule A attached hereto," but there is no evidence that a Schedule A ever was attached or that the trust was funded prior to Peter's death.

In October, 2016, Peter executed a will, which references his "testamentary powers of appointment over the [HIHC] [s]hares held" in the 2002 Trust, the 2005 Trust C, and the 2011 Trust, and which states that "I hereby exercise such powers and direct that all of the [s]hares be sold in accordance with the [s]hareholder's [a]greement and the net proceeds of such sale shall be distributed to . . . Peter's Yellow Submarine Trust, to be added to principal and applied for such organization's charitable purposes." Approximately one year later, Peter died without descendants, and his will was admitted to probate. Peter is survived by all five Ziegler siblings.

In May, 2018, Peter's sister Helen received a copy of the Peter's Yellow Submarine Trust instrument and learned that it was not funded prior to Peter's death. After voicing concerns about the validity of Peter's exercise of his nongeneral testamentary powers of appoint-

ment and the pending nine month deadline for the sale of Peter's shares of HIHC stock under the terms of the shareholder's agreement, Helen entered into a memorandum of understanding with the trustees of the respective Ziegler family trusts, which provided that they would "file a petition in Connecticut Probate Court seeking a determination as to the validity of Peter's exercise of the [p]owers of [a]ppointment," and, "if a final [nonappealable] court determination has not been issued prior to November 20, 2018, validating the exercise of any [p]ower of [a]ppointment," the sale of Peter's stock will be rescinded and the respective trusts will be returned to their "status prior to June 5, 2018, so as to avoid incurring any income tax liability . . . ."

In order to meet the nine month deadline set forth in the shareholder's agreement, Peter's HIHC stock in the 2002 Trust, the 2005 Trust C, and the 2011 Trust was sold on June 5, 2018, yielding "approximately $184 million in proceeds of cash and promissory notes, of which $7,513,353 was attributable to the shares held by the 2002 Trust, $150,678,000 to the shares held by the 2005 Trust [C], and $25,909,767 to the shares held by the 2011 Trust."[3]

On June 26, 2018, pursuant to the memorandum of understanding, the named defendant, Ralph P. Corasaniti, who is the cotrustee of the Ziegler family trusts, filed a petition for construction of trusts and confirmation of exercise of powers of appointment in the Probate Court, seeking a judicial construction of Peter's 2002 Trust, 2005 Trust C, and 2011 Trust and confirmation that the exercise of Peter's powers of appointment in favor Peter's Yellow Submarine Trust was valid. Following briefing and oral argument, the Probate Court concluded that Peter's exercise of his powers of appointment was valid because Peter's intent to establish a

[3] The sale later was rescinded pursuant to the memorandum of understanding. The rescission has no apparent bearing on this appeal.

charitable trust by exercising his powers of appointment was clear and consistent with the "modern practice of Connecticut attorneys [to] recognize the validity of testamentary transfers to unfunded trusts through [the] use of a power of appointment." Accordingly, the Probate Court ordered the trustees of the respective trusts to "fund Peter's Yellow Submarine Trust with the net . . . proceeds of the [sale of the] HIHC [stock]."

The plaintiffs, Helen and the cotrustees of her Ziegler family trusts,[4] filed an appeal in the Superior Court pursuant to General Statutes § 45a-186, alleging that Peter's exercise of his nongeneral testamentary powers of appointment was invalid under both Connecticut and Illinois law because Peter's Yellow Submarine Trust was not funded prior to his death. The defendants, Peter's other siblings, their descendants, the trustees of their family trusts, the trustees of Peter's trusts, and the attorney general,[5] opposed the plaintiffs' appeal and

[4] At the time she filed her complaint, Helen and Corasaniti were cotrustees of Helen's Ziegler family trusts. During the pendency of the present litigation, Helen resigned as cotrustee and removed Corasaniti as cotrustee, replacing herself and Corasaniti with Stephen D. Benjamin (Stephen) and Scott A. Weisman, respectively. Weisman and Stephen subsequently were substituted as plaintiffs on behalf of Helen's family trusts. Helen continued to remain a plaintiff in her individual capacity. We hereinafter collectively refer to Helen, Weisman, and Stephen as the plaintiffs.

[5] The descendants of the other Ziegler siblings are Renfrew Brighton, Whitney Brighton, Hadley Brighton, Kelson Brighton, Anabel Brighton, Mac Brighton, Jackie Ziegler, Cecily Ziegler, and Thomas James Story. In addition to participating in the present litigation in their individual capacities, Karl H. Ziegler, Cynthia Z. Brighton, and Renfrew Brighton also represent the interests of Peter's Yellow Submarine Trust as trustees and cotrustee, respectively, and William T. Ziegler and Karl H. Ziegler represent the interests of Trusts A and C under The William Ziegler III Revocable Trust as trustees. Corasaniti is a party to the present action as the trustee of Peter's 2002 Trust, 2005 Trust C, and 2011 Trust.

The attorney general entered an appearance in the present action pursuant to General Statutes § 3-125, which provides in relevant part that the attorney general "shall represent the public interest in the protection of any gifts, legacies or devises intended for public or charitable purposes. . . ."

We hereinafter collectively refer to these parties as the defendants.

sought to enforce the Probate Court's order requiring Peter's Yellow Submarine Trust to be funded by the net proceeds of the sale of the HIHC stock in Peter's 2002 Trust, 2005 Trust C, and 2011 Trust.

The trial court conducted a two day bench trial, at which the parties stipulated to the operative facts and presented expert testimony regarding the validity of Peter's exercise of his nongeneral testamentary powers of appointment under Illinois law. At the conclusion of the bench trial, the trial court determined that Peter effectively had exercised his powers of appointment under Connecticut and Illinois law because his intent to exercise his powers of appointment was clear and Peter's Yellow Submarine Trust was a permissible appointee despite its unfunded status at the time of Peter's death. Accordingly, the trial court upheld the decision of the Probate Court and rendered judgment in favor of the defendants. This appeal followed.[6]

On appeal, it is undisputed that Peter expressed a clear and unequivocal intent to exercise his nongeneral testamentary powers of appointment in favor of Peter's Yellow Submarine Trust. The parties dispute, however, whether Peter's exercise of these powers was valid and effective given that Peter's Yellow Submarine Trust was not funded during Peter's lifetime. The plaintiffs contend that Peter's Yellow Submarine Trust was not a permissible appointee under both Connecticut and Illinois law because, in the absence of trust property, it was not a legal entity to which property could be appointed in Peter's will. The defendants respond that a trust need not be funded at the time of its creation but may be funded at a later date by the transfer of property to the trust, including by the exercise of a

[6] The plaintiffs 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 § 65-2.

testamentary power of appointment. They contend that Peter's unequivocal exercise of his nongeneral testamentary powers of appointment in accordance with the limits set forth in the 2002 Trust, the 2005 Trust C, and the 2011 Trust funded Peter's Yellow Submarine Trust at the time of Peter's death, thereby creating a valid and enforceable charitable trust. We agree with the defendants.

The validity of Peter's exercise of his nongeneral testamentary powers of appointment is a question of law over which we exercise plenary review. See, e.g., *Powers* v. *Olson*, 252 Conn. 98, 105, 742 A.2d 799 (2000) ("[w]hen . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record" (internal quotation marks omitted)). "A power of appointment is a power of disposition given to a person over property not his own by someone who directs the mode in which that power shall be exercised by a particular instrument. . . . The donor does not vest in the donee of the power title to the property, but simply vests in the donee power to appoint the one to take the title. The appointee under the power takes title from the donor, and not from the donee of the power. . . . The ultimate beneficiary really takes from the person who created the power, the donee of the power acting as a mere conduit of the former's bounty."[7] (Citations omitted; internal quotation marks omitted.) *Linahan* v. *Linahan*, 131 Conn. 307, 324, 39 A.2d 895 (1944). Thus, "[a] power of appointment cannot transcend the limits upon it set by the donor . . . ." (Citations omitted.) *Union &*

[7] "The donor is the person who brings the power of appointment into existence," and "[t]he donee is the powerholder." 2 Restatement (Second), Property, Donative Transfers § 11.2 (1) and (2), p. 12 (1986). In this case, William Ziegler III and Marie Longner Ziegler were the donors, and Peter was the donee.

New Haven Trust Co. v. *Taylor*, 133 Conn. 221, 228, 50 A.2d 168 (1946).

To determine whether Peter's exercise of his nongeneral testamentary powers of appointment was valid and effective, we must examine the law governing the trusts from which he derived his powers. See 2 Restatement (Second), Conflict of Laws § 274 (a), p. 188 (1971) ("[a]n appointment made in the exercise of a power created under a trust to appoint interests in movables is valid . . . if made . . . in accordance with the law [that] determines the validity of the trust"); see also *Morgan Guaranty Trust Co. of New York* v. *Huntington*, 149 Conn. 331, 340–41, 179 A.2d 604 (1962) (New York judgment applying New York law to donee's exercise of testamentary power of appointment was not subject to collateral attack in Connecticut, even though donee was domiciled in Connecticut and donee's will was governed by Connecticut law, because donor's trust was executed in New York and trust property was located in New York); 2 Restatement (Second), supra, § 274, comment (b), p. 189 ("[a]n appointment made in the exercise of a power under a trust created by will or inter vivos to appoint interests in movables is valid if it is valid under the local law of the state [that] determines the validity of the trust itself"). The 2005 Trust C is governed by Connecticut law, whereas the 2002 and 2011 Trusts are governed by Illinois law.

Under both Connecticut and Illinois law, the exercise of a nongeneral power of appointment is valid and effective if two conditions are met: (1) the donee expressed an intent to exercise the power of appointment, and (2) the donee complied with any conditions imposed on the exercise of the power of appointment by the donor. See, e.g., General Statutes § 45a-573 (donee of nongeneral power of appointment "may appoint to anyone not expressly excluded from the class of permissible appointees"); *DiSesa* v. *Hickey*, 160 Conn. 250, 258,

278 A.2d 785 (1971) (exercise of testamentary power of appointment is valid and effective only if "the will contains a reference to the power itself or to the subject of it, [or] . . . the intention to execute [the power] is manifest from the fact that the will would remain inoperative without the aid of the power, or is so clearly demonstrated by words or acts . . . that the transaction is not fairly susceptible of any other interpretation" (internal quotation marks omitted)); *Union & New Haven Trust Co.* v. *Bartlett*, 99 Conn. 245, 255, 122 A. 105 (1923) ("[t]he intention to execute the power must be apparent and clear, so that the transaction is not susceptible of any other interpretation, and, if it be doubtful under all the circumstances, that doubt will prevent it from being deemed an execution" (internal quotation marks omitted)); see also *In re Estate of MacLeish*, 35 Ill. App. 3d 835, 838, 342 N.E.2d 740 (1976) ("For an exercise of a testamentary power of appointment to be valid and effective, two requirements must be satisfied. First, the intention of the testator to exercise the power must be shown. Second, there must be compliance with any conditions established by the donor for its exercise.").

Because it is undisputed that Peter expressed a clear and unequivocal intent to exercise his powers of appointment, we need only address whether he complied with the conditions imposed on his exercise of those powers. Under the terms of the 2002 Trust, 2005 Trust C, and 2011 Trust, Peter was granted nongeneral powers of appointment that could be exercised in favor of any person or charitable organization other than himself, his creditors, his estate, or the creditors of his estate. See *Ahern* v. *Thomas*, 248 Conn. 708, 739 n.31, 733 A.2d 756 (1999) (" 'A power of appointment is general if it is exercisable in favor of any one or more of the following: the [donee] of the power, the [donee's] creditors, the [donee's] estate, or the creditors of the [donee's] estate. . . . Any other power of appointment

is a nongeneral one.' "), quoting 2 Restatement (Second), Property, Donative Transfers § 11.4, p. 17 (1986); *Cooley* v. *Cooley*, 32 Conn. App. 152, 161–62, 628 A.2d 608 (same), cert. denied, 228 Conn. 901, 634 A.2d 295 (1993); see also *BMO Harris Bank N.A.* v. *Towers*, 43 N.E.3d 1131, 1139 (Ill. App. 2015) ("[a] power [of appointment] is said to be general when it is exercisable in favor of any person whom the donee may select, and special, limited, or particular when it is exercisable only in favor of persons or a class of persons designated or described in the instrument creating the power" (internal quotation marks omitted)). Additionally, Peter's powers of appointment could be exercised only "by specific reference in his . . . will," meaning that Peter could not exercise his powers "during his lifetime . . . ." *Northern Trust Co.* v. *Porter*, 368 Ill. 256, 263, 13 N.E.2d 487 (1938); see also 2 Restatement (Second), Property, Donative Transfers, supra, § 18.2, comment (b), p. 250 ("[w]hen the donor prescribes that the power be exercised 'by will,' it is to be inferred that the donor meant by these words an instrument [that] is formally sufficient to be admitted to probate under the applicable law"). The record reflects that Peter satisfied these conditions because Peter's Yellow Submarine Trust is a charitable organization other than Peter, Peter's creditors, Peter's estate, or the creditors of Peter's estate, and Peter exercised his powers by specific reference in a valid will that was admitted to probate.[8]

[8] The plaintiffs contend, for the first time in their reply brief, that Peter's exercise of his powers of appointment was invalid and ineffective because the charitable purpose of Peter's Yellow Submarine Trust is not apparent from the face of Peter's will and, therefore, that it is unclear whether Peter's Yellow Submarine Trust is a permissible appointee without consulting extratestamentary evidence of Peter's intent, such as the trust instrument, in violation of the donors' requirement that Peter exercise his powers by specific reference in his will. "It is a well established principle that arguments cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *Bovat* v. *Waterbury*, 258 Conn. 574, 585 n.11, 783 A.2d 1001 (2001). Arguments must be raised in an appellant's "original brief . . . so that the issue as framed . . . can be fully responded to by the appellee in its brief,

The plaintiffs contend that Peter's exercise of his powers of appointment, even if otherwise valid, failed by operation of law in the present case because Peter's Yellow Submarine Trust was not funded during Peter's lifetime and, therefore, was not a legal entity to which property could be appointed. This claim is without merit.

Under both Connecticut and Illinois law, the delivery of trust property to a trustee is one of the essential elements for the creation of a valid and enforceable trust. See, e.g., *Palozie* v. *Palozie*, 283 Conn. 538, 545, 927 A.2d 903 (2007) ("[t]he requisite elements of a valid and enforceable trust are: '(1) a trustee, who holds the trust property and is subject to duties to deal with it for the benefit of one or more others; (2) one or more beneficiaries, to whom and for whose benefit the trustee owes the duties with respect to the trust property; and (3) trust property, which is held by the trustee for the beneficiaries' "), quoting 1 Restatement (Third), Trusts § 2, comment (f), p. 21 (2003); see also *Eychaner* v. *Gross*, 202 Ill. 2d 228, 253, 779 N.E.2d 1115 (2002) ("[i]n Illinois, creation of an express trust requires: (1) intent of the parties to create a trust, which may be shown by a declaration of trust by the settlor or by circumstances which show that the settlor intended to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specifications of a trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee"). It is well settled that "[a] trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust. . . . In the absence of trust property there is at most an instrument of trust, or a plan or promise to create a trust." (Citation omitted.) 1 Restatement (Third),

and so that [an appellate court] can have the full benefit of that written argument." (Internal quotation marks omitted.) Id., 585–86 n.11. We therefore decline to address the plaintiffs' belated argument.

Trusts, supra, § 2, comment (i), pp. 22–23. Nonetheless, "a trust may . . . be created later if and when a transfer of property to the trustee is made with reference to that agreement or instrument." Id., p. 23. Thus, a trust need not be funded contemporaneously with the execution of the trust documents, so long as it is funded at a later point in time by the delivery of trust property to a trustee.

Peter's Yellow Submarine Trust was unfunded prior to Peter's death and, therefore, was not a valid and enforceable charitable trust during Peter's lifetime. Nonetheless, it became a valid and enforceable charitable trust after Peter's death through the exercise of his nongeneral testamentary powers of appointment in his will to fund Peter's Yellow Submarine Trust with the proceeds of the sale of the HIHC stock in his 2002 Trust, 2005 Trust C, and 2011 Trust. Indeed, under the common law, a trust need not exist prior to the exercise of a power of appointment. Instead, "a trust may be created by . . . an exercise of a power of appointment by appointing property to a person as trustee for one or more persons who are objects of the power . . . ."[9] Id., § 10 (d), p. 145; see *In re Breault's Estate*, 29 Ill. 2d 165, 178, 193 N.E.2d 824 (1963) (implicitly recognizing that trust may be created by exercise of testamentary power of appointment if will reflects donee's clear intent to exercise power of appointment); see also *Gar-*

[9] Because Peter funded Peter's Yellow Submarine Trust through the exercise of a nongeneral testamentary power of appointment, rather than a bequest or devise, we conclude that the Uniform Testamentary Additions to Trusts Acts of Connecticut and Illinois are inapplicable to the present case. See General Statutes § 45a-260 (a) (2) ("[a] will may validly *devise* or *bequeath* property to the trustee or trustees of a trust . . . regardless of the existence, size, or character of the corpus of the trust" (emphasis added)); 755 Ill. Comp. Stat. Ann. 5/4-4 (West 2007) ("[t]he existence, size or character of the corpus of the trust is immaterial to the validity of the *bequest*" (emphasis added)). Instead, we focus our analysis on the law governing the creation of a trust via a donee's exercise of a power of appointment.

field v. *State Street Trust Co.*, 320 Mass. 646, 657, 70 N.E.2d 705 (1947) (donee validly exercised general testamentary power of appointment to create valid trust); *Shriners Hospital for Crippled Children* v. *Citizens National Bank, Covington, Virginia*, 198 Va. 130, 136–37, 92 S.E.2d 503 (1956) (same). Peter exercised his nongeneral testamentary powers of appointment by directing in his will "that all of the [HIHC] [s]hares be sold in accordance with the [s]hareholder's [a]greement and the net proceeds of such sale shall be distributed to . . . Peter's Yellow Submarine Trust, to be added to principal and applied for such organization's charitable purposes," and fulfilled the formal requirements necessary to complete the creation of Peter's Yellow Submarine Trust as a valid and enforceable charitable trust.

Section 401 (3) of the Uniform Trust Code, which recently was adopted in Connecticut and Illinois, codifies this common-law rule.[10] See Unif. Trust Code § 401 (3) (2000), 7D U.L.A. 134 (2018). Under both Connecticut and Illinois law, "[a] trust may be created by . . . exercise of a power of appointment . . . in favor of a trustee . . . ." General Statutes § 45a-499v (3); accord 760 Ill. Comp. Stat. Ann. 3/401 (3) (West Cum. Supp. 2020).[11] The official commentary accompanying the Uni-

[10] Section 401 (3) of the Uniform Trust Code provides that "[a] trust may be created by . . . exercise of a power of appointment in favor of a trustee." Unif. Trust Code § 401 (3) (2000), 7D U.L.A. 134 (2018).

[11] Both § 45a-499v and 760 Ill. Comp. Stat. Ann. 3/401 (3) became effective after the commencement of the present action but are retroactively applicable to trusts created and judicial proceedings commenced before their effective date, "unless the court in which the judicial proceeding is pending finds that application of a particular provision . . . would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." General Statutes § 45a-487t (3); see also 760 Ill. Comp. Stat. Ann. 3/1506 (4) (West Cum. Supp. 2020). For the reasons explained in the text of this opinion, the trial court correctly determined that retroactive application of these statutes does not substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties because the "applicable language . . . merely confirms and codifies preexisting law; it does not authorize a new method of trust creation [or] change the rights of the parties."

form Trust Code confirms that an inter vivos trust that was not funded during the donee's lifetime may be completed by the testamentary exercise of a power of appointment. See *Yale University* v. *Blumenthal*, 225 Conn. 32, 38, 621 A.2d 1304 (1993) ("[a] court can properly consider the official comments as well as the published comments of the drafters as a source for determining the meaning of an ambiguous provision [of a uniform act]") (internal quotation marks omitted)); see also *Zaabel* v. *Konetski*, 209 Ill. 2d 127, 134–35, 807 N.E.2d 372 (2004) (considering official comment to uniform act to clarify statutory ambiguity). According to the commentary accompanying § 401 of the Uniform Trust Code, "a trust is not created until it receives property," but trust property "need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death." Unif. Trust Code § 401, comment, supra, 7D U.L.A. 134. Accordingly, it is clear that, pursuant to § 45a-499v (3) and 760 Ill. Comp. Stat. Ann. 3/401 (3), Peter created a valid and enforceable charitable trust, Peter's Yellow Submarine Trust, through the exercise of his nongeneral testamentary powers of appointment.

The plaintiffs also contend that Peter's exercise of his nongeneral testamentary powers of appointment was invalid and ineffective because he appointed the proceeds of the sale of the HIHC stock to a *trust*, rather than a *trustee*. We disagree for two reasons. First, although a trustee, like trust property, is necessary for the creation of a "complete trust," a trustee "may be temporarily absent without destroying the trust or preventing its creation." 1 Restatement (Third), Trusts, supra, § 2, comment (f), p. 21; see *White* v. *Fisk*, 22

Conn. 31, 53 (1852) ("[o]ur courts have recognized the validity of charitable bequests, not only where the gifts have been to a person or corporation, having a legal capacity to take, but also to voluntary unincorporated associations existing for benevolent or charitable purposes, and have supplied these latter with trustees to receive, hold and manage the funds given for the uses designated, even though these were somewhat undefined and uncertain"); *Golstein* v. *Handley*, 390 Ill. 118, 125, 60 N.E.2d 851 (1945) ("[I]t is elementary that courts of equity will not permit a trust to fail because no trustee is designated. In such cases, the court will appoint a trustee for the purpose of carrying out the trust."); Unif. Trust Code § 401, comment, supra, 7D U.L.A. 134 ("[w]hile this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office"). Because "[a] trust can . . . be created without notice to or acceptance [of the trust property] by a trustee"; Unif. Trust Code § 401, comment, supra, 7D U.L.A. 134; we perceive no critical distinction in this context between the appointment of trust property to a trust and the appointment of such property to a trustee.

Second, it is axiomatic that charitable trusts, which are intended to confer a public benefit on "the welfare of . . . individuals and . . . the community," must be construed "with the utmost liberality, in order to carry out the charitable purposes of the donor." (Internal quotation marks omitted.) *Bridgeport-City Trust Co.* v. *Bridgeport Hospital*, 120 Conn. 27, 32, 179 A. 92 (1935); see *Coit* v. *Comstock*, 51 Conn. 352, 377 (1884) ("Charities are highly favored in law, and they have always received a more liberal construction than the law allows to gifts to individuals. . . . Gifts to charitable uses are highly favored in law, and will be most liberally construed in order to accomplish the intent of the donor; and trusts [that] cannot be supported in ordi-

nary cases . . . will be established and carried into effect [when] it is to support a charitable use." (Citations omitted; internal quotation marks omitted.)); *Hinsdale* v. *Chicago City Missionary Society*, 375 Ill. 220, 231, 30 N.E.2d 657 (1940) ("[c]haritable gifts are viewed with peculiar favor by the courts, and every presumption consistent with the language contained in the instruments of gift will be employed in order to sustain them"); *Franklin* v. *Hastings*, 253 Ill. 46, 50, 97 N.E. 265 (1911) ("[Charitable] gifts are looked upon with peculiar favor by the courts, which take special care to enforce them, and every presumption consistent with the language used will be indulged to sustain them. If a testator has manifested a general intention to give to charity, the charity is regarded as the matter of substance, and the gift will be sustained, though it may not be possible to carry it out in the particular manner indicated."). Peter expressed a clear and unequivocal intent to create a charitable trust for the exclusive benefit of quadriplegics and their caregivers, and we must construe Peter's exercise of his nongeneral testamentary powers of appointment liberally to effectuate his charitable purpose. In light of the rule of liberal construction, we conclude that Peter validly and effectively exercised his nongeneral testamentary powers of appointment to direct the proceeds of the sale of the HIHC stock held in his 2002 Trust, his 2005 Trust C, and his 2011 Trust to Peter's Yellow Submarine Trust.

The judgment is affirmed.

In this opinion the other justices concurred.

L. H.-S. *v.* N. B.*
(SC 20596)

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

Syllabus

Pursuant to the statute (§ 46b-16a (a)) governing the issuance of certain civil protection orders, "[a]ny person who has been the victim of . . . stalking may make an application" for such an order, and the statute defines "stalking" as "two or more wilful acts, performed in a threatening, predatory or disturbing manner of . . . [h]arassing . . . or sending unwanted . . . messages to another person . . . that causes such person to reasonably fear for his or her physical safety."

The plaintiff applied for a civil protection order against the defendant pursuant to § 46b-16a, claiming that she feared for her life. The plaintiff and the defendant had attended the same high school and were friends. The plaintiff was also friends with the defendant's sister, C. Due to certain events that occurred within the circle of friends of which the plaintiff and the defendant had been a part, the defendant indicated to the plaintiff that he did not want to socialize in public with her any longer. Thereafter, while the plaintiff and C, who was in her bedroom, were talking to each other via FaceTime, a video and audio conferencing platform, the defendant came into C's bedroom and joined the conversation. The plaintiff and C both teased the defendant that they were going to attend his upcoming volleyball game, and the defendant told the plaintiff that he did not want her to go to the game. The defendant then left C's bedroom and began sending text messages to the plaintiff, including, "I'll shoot you," "can't wait to kill your ass in school," among other threatening and derogatory comments. While the plaintiff was receiving these text messages, she continued to communicate with C via FaceTime, read the messages aloud to C, and laughed. The plaintiff responded to the text messages with a variety of comments teasing the defendant, as well as with emojis and acronyms that indicated laughter. Days after the foregoing incident, the plaintiff's mother discovered the text messages and called the police, who intervened. After the police interviewed the defendant, his father voluntarily surrendered nine firearms that had been in his home. The plaintiff alleged in her application that her fear was based on the defendant's text messages and her subsequent discovery that the defendant's father had firearms in his home.

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any party protected or sought to be protected under a protective order that was issued or applied for, or others through whom that party's identity may be ascertained.

The trial court conducted a hearing on the plaintiff's application, at which it heard testimony from the plaintiff, the defendant, and C that the defendant meant the texts as a joke and that the plaintiff knew the texts were intended as a joke. The trial court ultimately denied the plaintiff's application on the ground that the plaintiff had failed to establish that she in fact feared for her physical safety. In doing so, the court applied a subjective-objective standard for purposes of assessing the plaintiff's fear, that is, it required the plaintiff to establish that she in fact feared for physical safety and that a reasonable person under the existing circumstances would fear for his or her own physical safety. The plaintiff, upon certification by the Chief Justice, pursuant to statute (§ 52-265a), that a matter of substantial public interest is at issue, appealed to this court from the trial court's denial of her application for a civil protection order. *Held*:

1. The plaintiff could not prevail on her claims that § 46b-16a is ambiguous with respect to whether to apply a subjective-objective standard for determining whether the applicant for the civil protection order fears for his or her physical safety, that the legislative history of the statute supports an objective-only standard, and that any other interpretation would yield an absurd or bizarre result, and, accordingly, the trial court did not improperly interpret § 46b-16a as creating an subjective-objective standard: this court applied the last antecedent rule to the term "such person" in § 46b-16a and concluded that that phrase clearly refers back to "another person," or the person being stalked, and, therefore, the plaintiff, to establish fear, was required to establish that she subjectively feared for her personal safety, in addition to showing that such fear was reasonable; moreover, this interpretation of the statute was consistent with a prior Appellate Court case that had addressed the fear element of § 46b-16a, and, contrary to the plaintiff's claim that it would be absurd to deny her application for a protection order after she had received death threats from the defendant, under the statute's clear and unambiguous language, the legislature did not intend for courts to issue protection orders in situations in which an applicant did not take the threat seriously or did not actually fear for his or her physical safety, or in situations in which any established fear was not objectively reasonable under the circumstances.
2. The trial court's findings relating to whether the plaintiff, in fact, feared for her physical safety were not clearly erroneous: the trial court credited the testimony of the defendant and C that the defendant meant the text messages as a joke and that the plaintiff was laughing as she read the messages aloud to C, and the testimony of C that the plaintiff never expressed fear when she received the text messages or later the same day, when C and the plaintiff spoke again; moreover, the plaintiff responded to the defendant's text messages with further teasing and joking, and with acronyms and emojis indicating laughter, the plaintiff testified that she did not inform her parents or anyone else about the

text messages, and, in the days following the text exchange, and before her mother discovered the text messages, the plaintiff continued to communicate with C and never mentioned any fear of the defendant; furthermore, the plaintiff's challenge to the trial court's finding that the defendant's father had voluntarily surrendered all firearms in his home and that there were no more firearms there was unavailing, as no evidence presented at trial could support an inference that additional firearms were in the defendant's home after the voluntary surrender.

3. The trial court did not abuse its discretion in excluding testimony that the defendant had requested that the plaintiff provide him with nude photographs of her and testimony regarding whether the defendant ever had had suicidal thoughts or had taken medication for his mental health: the trial court properly declined to admit the testimony regarding the defendant's request for nude photographs insofar as the plaintiff had failed to establish that that request created or increased her fear for her physical safety or that the text messages were in retaliation for the plaintiff's denial of the request, as the plaintiff testified that the defendant stopped asking for nude photographs when she refused his request and that they continued to interact afterward; moreover, the trial court did not preclude all testimony regarding the defendant's suicidal thoughts or use of medication, as it allowed the plaintiff's counsel to inquire about the defendant's use of medication when he sent the text messages and at the time of his testimony at trial, as well as whether his text messages showed suicidal ideations or an intent to harm himself, and, accordingly, the trial court properly limited these inquiries to the relevant time periods.

4. The plaintiff's unpreserved claim that § 46b-16a violated the equal protection clause of the Connecticut constitution insofar as that statute had a disparate impact on women failed under the first prong of *State* v. *Golding* (213 Conn. 233), as the plaintiff failed to introduce at trial any evidence regarding this alleged disparate impact, and, therefore, the record was inadequate to review her claim.

Argued September 8—officially released December 15, 2021**

Procedural History

Application for a civil protection order, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Wilson*, *J.*, who denied the application, and the plaintiff, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a

** December 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

matter of substantial public interest is at issue, appealed to this court. *Affirmed.*

Randi L. Calabrese, with whom, on the brief, was *Zachary Mazza*, certified legal intern, for the appellant (plaintiff).

A. Ryan McGuigan, for the appellee (defendant).

Opinion

D'AURIA, J. In this public interest appeal, authorized pursuant to General Statutes § 52-265a, we are called on to clarify the standard courts must apply to determine whether an applicant for a civil protection order under General Statutes § 46b-16a[1] has established the element of fear, which is necessary before such an order may issue. The plaintiff, L. H.-S., claims that the trial court improperly interpreted § 46b-16a as creating a subjective-objective fear standard, rather than a purely objective standard. She also claims that the trial court improperly interpreted the statute as limiting the time period for assessing her subjective fear and requiring proof of the intent of the defendant, N. B. Finally, the plaintiff claims that (1) the trial court abused its discretion in denying her application for a civil protection order by relying on clearly erroneous facts, (2) the trial court improperly excluded testimony regarding the defendant's requests for nude photographs of her, as well as testimony regarding his mental health history, and (3) § 46b-16a violates the equal protection clause of the state constitution.[2] We disagree with all of these claims and, accordingly, uphold the trial court's denial of the protective order.

[1] We note that, although § 46b-16a has been amended since the events at issue in this case; see Public Acts 2021, No. 21-104, § 17; that amendment is not relevant to this appeal. We therefore refer to the current revision of the statute.

[2] Article first, § 20, of the Connecticut constitution provides in relevant part: "No person shall be denied the equal protection of the law . . . ."

The record and the findings set forth in the trial court's memorandum of decision disclose the following facts that are relevant to our resolution of this appeal. In March, 2020, the plaintiff and the defendant attended the same high school and became friends. At that time, the plaintiff was dating the defendant's best friend, J, and all three were part of the same group of friends who socialized together. The plaintiff also befriended the defendant's sister, C. In November, 2020, the plaintiff's mother smelled vaping fumes on the plaintiff and a group of her friends while driving them to a movie theater. The plaintiff's mother reported this incident to the other children's parents, causing the plaintiff's friends to become upset with her for "snitch[ing]" on them. Because of this incident and J's subsequent breakup with the plaintiff, she found herself ostracized from her group of friends. The defendant, however, who had not been part of the vaping incident, remained her friend, despite feeling pressure to pick between the plaintiff and J. Although the defendant and the plaintiff remained friends and continued to communicate, the defendant told the plaintiff that they could not socialize in public any longer.

On March 20, 2021, the plaintiff and C, who was in her bedroom at her house at the time, were talking to each other on FaceTime. As they were talking, the defendant came into C's bedroom and briefly joined the conversation. During this conversation, in response to the plaintiff's and C's teasing him that they were going to come and cheer him on at his upcoming volleyball game, the defendant told the plaintiff that he did not want her to go to the game. The defendant was bothered by the teasing because he thought that, if the plaintiff went to the game, J, who also was a member of the volleyball team, would be upset and that it would put the defendant in a difficult position with his group of friends. The defendant subsequently left C's bedroom

and began sending texts to the plaintiff that read, among other things, "I'll shoot you," "[c]an't wait to kill your ass in school," "I got shooters on your ass," and other derogatory and threatening comments. For a portion of the time that the defendant sent these text messages, the plaintiff remained on FaceTime with C, reading the text messages aloud to her and laughing. The plaintiff responded to the texts with a variety of teasing comments along with various emojis and abbreviations that were slang for laughing. The trial court heard testimony from the plaintiff, the defendant and C that the defendant meant the texts as a joke and that the plaintiff knew the texts were intended as a joke. The defendant has not sent any text messages to the plaintiff since March 20, 2021. In fact, the defendant is no longer enrolled in the same high school as the plaintiff.

Four days after the text conversation at issue and after checking her daughter's phone, the plaintiff's mother discovered the defendant's text messages and called the police, who subsequently interviewed both the plaintiff and the defendant. After the police interviewed the defendant, his father voluntarily surrendered nine firearms that had been in their house. The plaintiff then applied for a civil protection order with an attached affidavit in which she averred that the text messages the defendant sent made her fear for her life and that this fear was based in part on her having learned that the defendant's father had guns in their house. The trial court held an evidentiary hearing on the application over the course of three days. The trial court subsequently issued a memorandum of decision in which it denied the application for a civil protective order on the ground that the plaintiff had failed to establish that she in fact feared for her physical safety. The plaintiff then sought certification to appeal under § 52-265a, which the Chief Justice granted. We will discuss additional facts and procedural history as necessary.

We first note that we agree with the Appellate Court that the same standard of review applies in the present case as in cases involving civil restraining orders under General Statutes § 46b-15. See, e.g., *C. A.* v. *G. L.*, 201 Conn. App. 734, 738–39, 243 A.3d 807 (2020); *S. A.* v. *D. G.*, 198 Conn. App. 170, 179, 232 A.3d 1110 (2020); *Kayla M.* v. *Greene*, 163 Conn. App. 493, 504, 136 A.3d 1 (2016). "Thus, we will not disturb a trial court's orders unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion . . . we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Kayla M.* v. *Greene*, supra, 504. "Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. . . . [Questions] of law [however, are] entitled to plenary review on appeal." (Internal quotation marks omitted.) Id.

I

The plaintiff's primary claim on appeal challenges the trial court's interpretation of the phrase "causes such person to reasonably fear for his or her physical safety" as clearly and unambiguously creating a subjective-objective standard for establishing fear under § 46b-16a.[3] Specifically, as to the fear element under

[3] The plaintiff also claims that, in determining whether she established the element of fear, the trial court improperly interpreted § 46b-16a by (1) limiting its consideration of the evidence to her conduct at the time she received the alleged threats, and (2) including consideration of the defendant's intent. Both claims lack merit.

The plaintiff is correct that § 46b-16a clearly and unambiguously does not limit the time period for assessing her subjective fear. See *State* v. *Russell*, 101 Conn. App. 298, 319–20, 922 A.2d 191 (in assessing fear element under General Statutes (Rev. to 2003) § 53a-181e, court considered entirety of victim's testimony and was not limited to particular time frame), cert. denied, 284 Conn. 910, 931 A.2d 934 (2007). The plaintiff is incorrect, however, that the trial court limited its consideration of the evidence regarding her fear to the time that she received the text messages. The trial court specifically "consider[ed] all of the evidence, and the totality of the circumstances,"

§ 46b-16a, the trial court required the plaintiff to establish that she in fact feared for her physical safety, as well as that a reasonable person under the existing circumstances would fear for his or her own physical safety. The plaintiff argues that § 46b-16a is ambiguous with respect to this standard, that legislative history supports applying an objective-only standard, and that any other interpretation would yield an absurd or bizarre result. We are not persuaded.

Our review of this claim, which requires us to construe § 46b-16a, is plenary. See, e.g., *777 Residential, LLC* v. *Metropolitan District Commission*, 336 Conn. 819, 827, 251 A.3d 56 (2020). In construing § 46b-16a, our analysis is guided by General Statutes § 1-2z, and, thus, we begin with the text of § 46b-16a. See id., 827–29. Section 46b-16a (a) provides in relevant part that " 'stalking' means two or more wilful acts, performed

including the nature of the defendant's text messages, the plaintiff's responses to those text messages, and her demeanor and conduct both when the text messages were sent and afterward. The trial court simply did not credit the plaintiff's testimony that the text messages made her fear for her life and physical safety, and that this fear grew over time. This court cannot reweigh a witness' credibility.

As for the trial court's reliance on the defendant's intent, the plaintiff misconstrues the trial court decision. See *S. B-R.* v. *J. D.*, 208 Conn. App. 342, 348–49, 351, A.3d (2021) (explaining that it is plaintiff's apprehension, not defendant's thoughts, action or intent, that is relevant); *C. A.* v. *G. L.*, supra, 201 Conn. App. 742 n.7 ("[t]he statute makes no mention of the defendant's intent with respect to the element that he caused the plaintiff to fear for her physical safety" (emphasis omitted)). The trial court did not require the plaintiff to establish the defendant's intent; nor did it premise its finding of her subjective absence of fear on the defendant's intent. Rather, after considering the evidence, the trial court credited the testimony of the defendant and C that, not only did he intend his comments to be a joke but that the plaintiff reacted in a way that showed she recognized that he was joking, including by laughing with C, teasing the defendant, appearing to be happy following the text conversation, and not reporting the text conversation to her parents. As the Appellate Court has explained, "[t]he [trial] court's conclusion must be evaluated with the nature and the history of [the parties'] relationship in mind. Context is important." *C. A.* v. *G. L.*, supra, 742–43. In the present case, the trial court considered context in assessing the plaintiff's subjective fear, including the plaintiff's own actions and demeanor.

in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to another person directly, indirectly or through a third person, by any method, device or other means, that causes *such person to reasonably fear* for his or her physical safety." (Emphasis added.)

Neither party disputes that the phrase "reasonably fear" creates an objective standard. Rather, the plaintiff's claim focuses on the meaning of the word "such," and, in particular, whether it adds a subjective element to the standard. The statute does not define either the term "such" or the phrase "such person." Therefore, we construe the term according to its "commonly approved usage"; General Statutes § 1-1 (a); "mindful of any peculiar or technical meaning it may have assumed in the law. We may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme. . . . Additionally, we may look to prior case law defining the term at issue." (Citation omitted; internal quotation marks omitted.) *777 Residential, LLC* v. *Metropolitan District Commission*, supra, 336 Conn. 831.

The parties focus on the dictionary definition of the term "such," correctly noting that Black's Law Dictionary defines it as, "[o]f this or that kind . . . [t]hat or those; having just been mentioned . . . ." Black's Law Dictionary (11th Ed. 2019) p. 1732; see also American Heritage College Dictionary (4th Ed. 2007) p. 1378 (defining "such" as "[o]f this kind," "[o]f a kind specified or implied," and "[o]f a degree or quality indicated"). According to the plaintiff, this definition confirms that "such" has two reasonable interpretations and is therefore ambiguous. Specifically, she contends that, under this definition, the phrase "such person" does not necessarily mean that the applicant herself or himself is fear-

ful but may plausibly be interpreted to mean that "someone in the applicant's position" is fearful. The first interpretation creates a subjective standard and the second creates an objective standard. The defendant, without providing any analysis, contends that it is clear and unambiguous that the legislature intended for this language to create a subjective standard. The parties ignore, however, our relevant tools of statutory construction, specifically, the last antecedent rule, including its well established exception when the statutory language at issue includes commas.

Under the last antecedent rule, which this court has applied on numerous occasions, "[r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. Thus a proviso usually applies to the provision or clause immediately preceding it." (Footnotes omitted; internal quotation marks omitted.) 2A N. Singer & S. Singer, Sutherland Statutes and Statutory Construction (7th Ed. 2014) § 47:33, pp. 494–99. This court similarly has summarized this rule: "[A] limiting clause or phrase is read as modifying only the noun or phrase that immediately precedes it . . . unless the limiting language is separated from the preceding noun or phrase by a comma, in which case one may infer that the qualifying phrase is intended to apply to all its antecedents, not only the one immediately preceding it." (Citations omitted; internal quotation marks omitted.) *Karas* v. *Liberty Ins. Corp.*, 335 Conn. 62, 102–103, 228 A.3d 1012 (2019); see id. (applying rule); see also *Corsair Special Situations Fund, L.P.* v. *Engineered Framing Systems, Inc.*, 327 Conn. 467, 475, 174 A.3d 791 (2018); *State* v. *Rodriguez-Roman*, 297 Conn. 66, 76 n.7, 3 A.3d 783 (2010). Although Connecticut appellate courts previously have not had the opportunity to apply

the last antecedent rule to the term "such" or the phrase "such person," our trial courts and other jurisdictions consistently have applied this rule to the phrase "such person," holding that the phrase modifies or refers to the phrase immediately preceding it in the statute. See, e.g., *Soler* v. *Progressive Casualty Ins. Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6016003-S (October 2, 2013) (56 Conn. L. Rptr. 704, 705); *Montville* v. *Loiler*, Superior Court, judicial district of New London, Docket No. CV-12-6012277-S (July 10, 2013) (57 Conn. L. Rptr. 50, 52); see also *People ex rel. Negron* v. *Superintendent*, 36 N.Y.3d 32, 37, 160 N.E.3d 1266, 136 N.Y.S.3d 819 (2020); *Vermillion State Bank* v. *Dept. of Transportation*, 895 N.W.2d 269, 272–73 (Minn. App. 2017); *State* v. *Wagner*, 295 Neb. 132, 138–39, 888 N.W.2d 357 (2016); *Board of Trustees of Firemen's Relief & Pension Fund* v. *Templeton*, 184 Okla. 281, 284–85, 86 P.2d 1000 (1939).

When we apply the last antecedent rule to the language of § 46b-16a (a), including the rule's well established exception when commas are present in the language at issue, the phrase "such person" clearly refers back to the applicant. Specifically, the statute provides in relevant part that "[a]ny person who has been the victim of sexual abuse, sexual assault or stalking may make an application to the Superior Court for relief under this section . . . . As used in this section, 'stalking' means two or more wilful acts, performed in a threatening, predatory or disturbing manner of: Harassing, following, lying in wait for, surveilling, monitoring or sending unwanted gifts or messages to *another person* directly, indirectly or through a third person, by any method, device or other means, that causes *such person* to reasonably fear for his or her physical safety." (Emphasis added.) General Statutes § 46b-16a (a). Pursuant to the last antecedent rule's stated exception, because of the presence of commas, we would interpret

"such person" to refer back to "a third person" and "another person," as long as "no contrary intention appears and the construction does not otherwise impair the meaning of the sentence." (Internal quotation marks omitted.) *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 491, 55 A.3d 251 (2012). In this particular context, however, it would, in fact, impair the meaning of the sentence for "such person" to refer back to "a third person." Specifically, it would make no sense for the alleged stalking victim to have to prove that the third party who facilitated the stalking had to fear for their safety when the statute's stated purpose is to protect stalking victims, not the facilitators of stalking. Therefore, we conclude that the phrase "such person" plainly refers back only to "another person," that is, to the person being stalked. As a result, to establish fear, the plaintiff was required to establish that she subjectively feared for her personal safety. Additionally, "such person['s]" fear must be "reasonabl[e] . . . ." General Statutes § 46b-16a (a). This language adds an objective requirement. In other words, the plaintiff's subjective fear also had to be objectively reasonable. Thus, under our tools of statutory construction, § 46b-16a unambiguously creates a subjective-objective standard for purposes of assessing fear.

This interpretation of § 46b-16a is consistent with the first and only appellate level case addressing the fear element of § 46b-16a. In *C. A.* v. *G. L.*, supra, 201 Conn. App. 734,[4] without conducting a § 1-2z analysis of the pertinent language, the Appellate Court stated that "[t]he standard to be applied in determining the reasonableness of the victim's fear in the context of the crime

[4] The plaintiff argues that *C. A.* is inconsistent with *S. A.* v. *D. G.*, supra, 198 Conn. App. 191, which, she claims, required the plaintiff to establish only an objectively reasonable fear under § 46b-16a. But the plaintiff's fear was not at issue on appeal in *S. A.* Rather, that appeal focused on whether, to secure a civil protection order, the plaintiff was required to establish that the defendant had been lying in wait for her. See id., 190.

of stalking is a subjective-objective one. . . . As to the subjective test, the situation and the facts must be evaluated from the perspective of the victim, i.e., did she in fact fear for her physical safety? . . . If so, that fear must be objectively reasonable, i.e., a reasonable person under the existing circumstances would fear for his or her physical safety." (Internal quotation marks omitted.) Id., 740, quoting *State* v. *Russell*, 101 Conn. App. 298, 319, 922 A.2d 191, cert. denied, 284 Conn. 910, 931 A.2d 934 (2007).

In support of this proposition, which did not appear to be challenged on appeal, the Appellate Court in *C. A.* quoted *State* v. *Russell*, supra, 101 Conn. App. 319, which, in turn, had quoted *State* v. *Cummings*, 46 Conn. App. 661, 678, 701 A.2d 663, cert. denied, 243 Conn. 940, 702 A.2d 645 (1997). In *Cummings*, the court did not apply § 46b-16a but, rather, applied one of our criminal statutes that proscribe stalking, General Statutes (Rev. to 1993) § 53a-181d, which, at the time of the incidents at issue in *Cummings*, defined stalking in the second degree as occurring "when, with intent to cause another person to fear for his physical safety, [the defendant] wilfully and repeatedly follows or lies in wait for *such other person* and causes such other person to reasonably fear for his physical safety."[5] (Emphasis added.)

[5] In 2012, the legislature amended General Statutes (Rev. to 2011) § 53a-181d to define stalking as occurring "when . . . [s]uch person knowingly engages in a course of conduct directed at a specific person that would *cause a reasonable person* to fear for such person's physical safety or the physical safety of a third person . . . or . . . [s]uch person intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person that would cause a reasonable person to fear that such person's employment, business or career is threatened, where (A) such conduct consists of the actor telephoning to, appearing at or initiating communication or contact at such other person's place of employment or business, provided the actor was previously and clearly informed to cease such conduct, and (B) such conduct does not consist of constitutionally protected activity." (Emphasis added.) Public Acts 2012, No. 12-114, § 12. The Appellate Court since has interpreted this amended language as creating an objective-only fear standard. See *Kayla M.* v. *Greene*, supra, 163 Conn. App. 505–506.

General Statutes (Rev. to 1993) § 53a-181d; see *State* v. *Cummings*, supra, 668. In interpreting and applying this language, the Appellate Court in *Cummings* held that it created a subjective-objective standard under which the victim had to fear for his or her physical safety and that such fear had to be reasonable based on the circumstances. See *State* v. *Cummings*, supra, 678. Given the similarity in the language used in General Statutes (Rev. to 2011) § 53a-181d, as amended by Public Acts 2012, No. 12-114, § 12; see footnote 5 of this opinion; and § 46b-16a, along with the fact that both statutes protect against stalking, we agree with the Appellate Court's application of this subjective-objective standard to § 46b-16a in *C. A.*

Nevertheless, the plaintiff argues that, even if this language is clear and unambiguous, it would be "undeniably absurd" to deny a plaintiff a protective order after she had received numerous death threats. Of course, we by no means condone the defendant's conduct, which led to tumult within at least two families and one school, and to the intervention of a police department and the court system. But it does not follow that it is absurd to conclude that, under the statute's clear and unambiguous language, the legislature did not intend for courts to issue civil protective orders in situations in which an applicant did not take the threat seriously, did not actually fear for his or her physical safety, and any such fear, to the extent it existed, was not objectively reasonable under the circumstances. The plaintiff's absurdity argument essentially seeks to prohibit courts from considering context in assessing fear. Such an interpretation of § 46b-16a could lead to every threat, regardless of context, resulting in a civil protection order, a consequence we conclude the legislature did not intend by the language it employed.

Moreover, "[t]here are a number of statutory provisions granting the court the authority to issue protective

or restraining orders." *S. A.* v. *D. G.*, supra, 198 Conn. App. 186; see, e.g., General Statutes § 53a-40e (standing criminal protective orders); General Statutes § 54-1k (criminal protective orders).[6] As amended by Public Acts 2017, No. 17-99, § 1, § 46b-16a provides an additional judicial remedy to protect those who fear for their safety. The statute's subjective-objective standard requires a careful weighing of the evidence presented. These cases can be challenging, calling for a judicial determination of whether one person's fear is real and, if it is, whether it is realistic, and then requiring the balancing of that determination against another person's liberty interests. Often, as in this case, the parties'

[6] The plaintiff also argues that the plain and unambiguous language of § 46b-16a, as amended by Public Acts 2017, No. 17-99, § 1 (P.A. 17-99), yields a bizarre result in that it conflicts with the legislature's intent, as evidenced by the legislative history surrounding the 2012 amendment to the criminal statutes that proscribe stalking, to use the reasonable person standard of fear to ensure a more inclusive opportunity for stalking victims to achieve protection. The short answer is that we may not consider legislative history in determining whether a statute is ambiguous, absurd, or bizarre. See, e.g., *State* v. *Bischoff*, 337 Conn. 739, 746, 258 A.3d 14 (2021). The longer answer is that the legislative history does not support the plaintiff's argument. It is true that, in 2012, the legislature amended the criminal statutes that proscribe stalking so that the fear element was based on an objective-only standard. See Public Acts 2012, No. 12-114, § 12; see also *Kayla M.* v. *Greene*, supra, 163 Conn. App. 505–506. This amendment clearly shows that the legislative was aware of the Appellate Court's jurisprudence interpreting the prior versions of these statutes as having a subjective-objective fear standard and intended to change the standard in the criminal context. See *State* v. *Bischoff*, supra, 754–55. By contrast, the original version of § 46b-16a, enacted in 2014, defined stalking to be "as described in sections 53a-181c, 53a-181d and 53a-181e . . . ." Public Acts 2014, No. 14-217, § 186. As a result, stalking, under § 46b-16a as originally enacted, was synonymous with the criminal definition of stalking, which, as explained, applied an objective-only standard. In 2017, however, the legislature amended § 46b-16a by altering the definition of stalking; see P.A. 17-99, § 1; although no similar amendment was made to the criminal statutes that proscribe stalking. If the legislature had intended for the fear element under § 46b-16a to continue to be subject to an objectively-only standard, it would not have had to alter the definition of stalking in 2017. Rather, by amending the definition of stalking in 2017, the legislature clearly departed from the standard applied under the criminal statutes that proscribe stalking.

stories may be in stark opposition. The statute and the truth-seeking function of the courts necessarily place the responsibility for issuing or declining to issue these orders squarely on the good judgment of our trial court judges as the finders of fact. It is they who are best situated to assess credibility—to determine if the applicant's fear is real and objectively reasonable—which, as we will see in part II of this opinion, often takes center stage in the determination of whether the protective order issues.

II

We next address the plaintiff's multipronged attack on the trial court's factual findings. In addition to the fact that we do not reweigh the evidence to determine if it supports the challenged findings, it is axiomatic that "we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 750 n.3, 250 A.3d 648 (2020). Further, "[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached," and whether we might have reached a different result were we sitting as the trial court is irrelevant. (Internal quotation marks omitted.) *Rostain* v. *Rostain*, 214 Conn. 713, 715–16, 573 A.2d 710 (1990).

The trial court found insufficient evidence to justify the issuance of a civil protection order mainly because it found the plaintiff's testimony that she was, and continued to be, in fear of her life and physical safety, not credible in light of her conduct and behavior. In other words, the trial court determined that the plaintiff failed to establish her subjective fear for her physical safety. The court found that the plaintiff did not in fact fear

for her physical safety because the defendant meant the texts he sent to the plaintiff as a joke and that the plaintiff knew the texts were a joke. As a result, the trial court also discredited the plaintiff's testimony that her fear for her physical safety grew when she learned that there were guns in the defendant's household. On the basis of our review of the evidence before the trial court, we cannot conclude that these findings are clearly erroneous, although we acknowledge that another trial judge may have reached a different conclusion under these circumstances.

Specifically, the trial court credited the testimony of the defendant and C, who had testified that, not only did the defendant mean the texts as a joke but, also, at the time these text messages were sent, the plaintiff and C had been teasing the defendant that the plaintiff was going to go to the defendant's volleyball game to cheer him on. This upset the defendant, as it put him in an awkward position with J, who was his best friend and the plaintiff's former boyfriend. The defendant and C testified that the plaintiff had been laughing as she read the defendant's coarse and facially threatening texts aloud to C.[7] C further testified that the plaintiff never expressed fear at the time she received the texts or later that evening when C and the plaintiff spoke again. Screenshots taken by C while she was on FaceTime with the plaintiff the evening after the text exchange show the plaintiff smiling. In the days following the text exchange, and before her mother discovered the text messages, the plaintiff continued to communicate with C and never mentioned any fear of the defendant.

[7] Specifically, C testified that, while she and the plaintiff were on FaceTime, the plaintiff "was reading the text that my brother was sending her out loud. And she was laughing about them. She had to take breaks in between reading them because she had to catch her breath; she was hysterically laughing at them because she knew he was kidding." The plaintiff herself had even admitted that, when the text messages first began, she and C were teasing the defendant, joking, and laughing.

Additionally, the text conversation was not one-sided. The plaintiff responded to the defendant's texts with further teasing and jokes. In particular, she replied with various smiley faced emojis, which are slang for laughing, and texts stating, "[a]we ur so sweet," "too bad so sad," "DAMNNN OK SHORT ASS MF," and "scaryyyyy." Further, the plaintiff testified that she did not inform her parents or anyone else about the texts. From this evidence, we cannot hold that the trial court clearly erred in finding that the defendant meant the texts as a joke and that the plaintiff knew the texts were a joke and, therefore, did not fear for her physical safety.

Nevertheless, we note that the facts that the plaintiff laughed in response to the defendant's text messages and reacted in ways that at least suggested that she recognized his texts were jokes do not mean that such conduct requires the denial of a civil protective order. Even adults—let alone children—react differently to perceived threats, and a joking reply does not necessarily mean that the recipient of a perceived threat was not in fear at the time the threat was made or later upon further reflection. Faced with these or similar facts in another case, another trial judge might make different credibility determinations and findings regarding a plaintiff's fear. Under our applicable standard of review in the present case, however, we cannot hold that the trial court's factual findings were clearly erroneous regarding the plaintiff's fear.

The plaintiff also challenges the trial court's finding that the defendant's father had voluntarily surrendered all firearms in his household to the police and that there were no additional firearms in the house. In support of its finding that there were no additional firearms in the defendant's house after his father voluntarily surrendered nine firearms to the police, the trial court credited the testimony of the defendant, who testified that, although at the time he sent the text messages at issue,

there were firearms in his house, he had never seen them and did not have access to them. Additionally, Sergeant Robert Mulhern testified that the defendant's father voluntarily had surrendered nine firearms on the day that the plaintiff's mother contacted the police regarding the text messages. The defendant's father represented to Mulhern that these were all the firearms in the house. No other evidence presented at trial could support an inference that additional firearms were in the defendant's home after the voluntary surrender. Moreover, understanding that the trial court could not be 100 percent certain that the defendant's father had surrendered all of the firearms he had in the house, the plaintiff cannot establish harm because the defendant's access to these guns ultimately played no role in the trial court's determination of the plaintiff's subjective fear. The trial court did not credit the plaintiff's testimony that she was fearful when she received the defendant's text messages or that she grew more fearful upon learning that there had been firearms in the defendant's house. Whether any firearms remained in the defendant's house does not alter this fact.

Thus, we conclude that none of the trial court's findings was clearly erroneous.

III

The plaintiff also claims that the trial court abused its discretion by improperly excluding (1) testimony that the defendant had requested that the plaintiff provide him with nude photographs of her; and (2) testimony about the defendant's mental health history, including whether he ever had suicidal thoughts or ever had taken medication for his mental health. The defendant responds that the trial court properly excluded this testimony because it was irrelevant.

Evidentiary rulings in relation to a civil order of protection are reviewed under the same well established

standard as in other cases. See, e.g., *S. A.* v. *D. G.*, supra, 198 Conn. App. 183–84. "[R]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion." (Internal quotation marks omitted.) *State* v. *Kalil*, 314 Conn. 529, 540–41, 107 A.3d 343 (2014).

Applying these principles to the present case, we conclude that the trial court did not abuse its discretion in determining that the contested evidence was not relevant and, thus, inadmissible.

A

As to the requests for nude photographs, on direct examination, the plaintiff was asked whether the defendant ever had asked her to send him such photographs. The defendant's counsel objected on the basis of relevance, to which the plaintiff's counsel responded that he was laying a foundation to show "retaliatory behavior" on the defendant's part. The trial court granted the plaintiff's counsel leeway to establish this foundation. The plaintiff then testified that the defendant had asked her for nude photographs a "couple [of] times" but stopped after she refused his requests. Additionally, she testified that, after these requests, she and the defendant continued to interact as friends, although their relationship was more distant.

The trial court then struck the plaintiff's testimony, explaining that it "didn't understand how [the requests for nude photographs] leads up to the retaliatory text

messages that she got regarding, 'I'll kill you.' . . . I can't connect the naked pictures to those text messages saying, 'I'll kill you.' I thought you were going to say that she—when she refused to send the naked pictures, that he immediately texted her and was kind of irate with her for not sending them, which then continued and led up to that, but that's not—you just stopped . . . ." The plaintiff's counsel then attempted to clarify that the plaintiff's testimony showed the changes in the defendant's temperament, to which the trial court responded that it did not "make the connection . . . . And she's a young girl. To have her testify as to that, I'm striking that testimony."

The plaintiff argues that the trial court improperly excluded her testimony based on its prejudicial effect on her despite its relevance. Contrary to the plaintiff's contention, however, the trial court did not exclude this testimony on the ground of prejudice but because it determined the testimony to be irrelevant in light of the plaintiff's failure to connect it to the text messages at issue. Although it is true that the Appellate Court has explained that, "obsessive behaviors, even in the absence of threats of physical violence, [may] reasonably [cause] their victims to fear for their physical safety"; (internal quotation marks omitted); *Kayla M.* v. *Greene*, supra, 163 Conn. App. 506; as the trial court noted, despite some leeway, the plaintiff failed to establish that the defendant's requests for nude photographs created or increased her fear for her physical safety or that the text messages at issue were in retaliation for the plaintiff's denial of these requests. Rather, she testified that the defendant stopped asking her for these photographs when she refused his requests and that they continued to interact afterward. Although another judge might have admitted this testimony, in light of the lack of connection between this testimony and the

text messages at issue, we cannot hold that the trial court abused its discretion.

B

The plaintiff's counsel sought to question the defendant about any mental health history he had, including whether he was taking medication for any mental health conditions or had had any suicidal ideations. The plaintiff's counsel first asked the defendant if he currently was taking any medications, to which the defendant responded in the negative. As a follow-up, the plaintiff's counsel inquired whether he was taking any "mental health medication . . . ." The defendant's counsel objected on the grounds of privilege, relevance, and prejudice. The trial court sustained the objection in general but permitted the plaintiff's counsel to inquire into whether the defendant had taken any such medication at or about the time of the text messages at issue, as well as whether he continued to take those medications. The defendant testified that he was not on any medication, including any mental health medications, at the time of the text conversation.

Subsequently, in reviewing the text messages that the defendant sent the plaintiff, her counsel asked the defendant whether his texts stating, "I'd rather die than talk to you," and "I'd rather die than be friends with you," were conveying an intent to harm himself or suicidal ideations. The defendant responded in the negative and clarified that he meant those texts as a joke, albeit an inappropriate and bad joke. The plaintiff's counsel followed up by asking if the defendant ever had been suicidal, to which the defendant's counsel objected on the ground of relevance. The trial court sustained the objection.

Based on this record, we cannot conclude that the trial court abused its discretion by placing limits on the defendant's testimony. The trial court did not preclude

all testimony into these areas of inquiry. The plaintiff's counsel was allowed to ask the defendant about his medication usage at the time he sent the text messages and at the time of his testimony at trial, as well as about whether his text messages showed suicidal ideations or an intent to harm himself. The plaintiff's counsel was prevented from asking the defendant only about whether he *ever* took medication for his mental health or *ever* had suicidal ideations. The trial court merely limited these inquires to the relevant time periods, and, as a result, we cannot conclude that it abused its discretion.

IV

Finally, the plaintiff claims that § 46b-16a violates the equal protection clause of the state constitution. See footnote 2 of this opinion. Although she admits that this statute is facially neutral, she argues that it has a disparate impact on women, "as stalking more often affects women than men." The plaintiff concedes that she did not raise this claim before the trial court but nevertheless seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

To establish her claim that § 46b-16a, a facially neutral law, should be treated as if it classifies individuals on the basis of sex, the plaintiff was required to show that the law has a disproportionate impact on women. See, e.g., *Broadnax* v. *New Haven*, 294 Conn. 280, 300–301, 984 A.2d 658 (2009). As a result, the plaintiff was required to demonstrate some factual basis for her assertion that women are affected disproportionately under § 46b-16a. The plaintiff did not provide any evidence in this regard at trial,[8] and, thus, the record is

[8] In her brief to this court, the plaintiff relies on various articles, reports, and statistics in support of her argument that women are the victims of stalking more often than men. It is well established, however, that this court cannot find facts, and a party may not supplement the factual record with

inadequate to review her claim. See, e.g., *State* v. *Dyous*, 153 Conn. App. 266, 277–79, 100 A.3d 1004 (2014) (equal protection claim was not reviewable under first prong of *Golding* because defendant did not offer any evidence at trial to establish disparate impact), appeal dismissed, 320 Conn. 176, 128 A.3d 505 (2016); *State* v. *Turner*, 133 Conn. App. 812, 839, 37 A.3d 183 (equal protection claim was not reviewable under first prong of *Golding* because facts defendant alleged were not part of record), cert. denied, 304 Conn. 929, 42 A.3d 390 (2012). Accordingly, the plaintiff's equal protection claim fails under the first prong of *Golding* and is not reviewable. See, e.g., *State* v. *Rodriguez*, 337 Conn. 175, 186–87, 252 A.3d 811 (2020) ("[u]nder the first prong of *Golding*, for the record to be adequate for review, the record must contain sufficient facts to establish that a violation of constitutional magnitude has occurred").

The trial court's denial of the plaintiff's application for a civil protective order is affirmed.

In this opinion the other justices concurred.

JERMAINE WOODS *v.* COMMISSIONER OF CORRECTION (SC 20487)

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

Argued October 21—officially released December 15, 2021*

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, granted the respon-

facts that were not presented at trial. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 496, 102 A.3d 52 (2014); *State* v. *Turner*, 133 Conn. App. 812, 839, 37 A.3d 183, cert. denied, 304 Conn. 929, 42 A.3d 390 (2012).

* December 15, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

dent's motion to dismiss and rendered judgment dismissing the petition; thereafter, the court denied the petitioner's petition for certification to appeal, and the petitioner appealed to the Appellate Court, *Lavine*, *Alvord* and *Keller*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Appeal dismissed.*

Vishal K. Garg, for the appellant (petitioner).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Nancy L. Walker*, assistant state's attorney, *Maureen Platt*, state's attorney, and *Eva Lenczewski*, supervisory assistant state's attorney.

Opinion

PER CURIAM. The petitioner, Jermaine Woods, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court dismissing his appeal from the judgment of the habeas court, which dismissed his third petition for a writ of habeas corpus. *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 599–600, 232 A.3d 63 (2020). On appeal, the petitioner contends that the Appellate Court improperly construed his petition for a writ of habeas corpus, which he had filed as a self-represented party, in concluding that it did not raise a claim that counsel at the petitioner's second habeas trial, which was held in 2011, provided ineffective assistance by not challenging the failure of defense counsel at his 2006 murder trial to present evidence as to his diminished capacity.

[1] We granted the petitioner's petition for certification to appeal from the judgment of the Appellate Court, limited to the following issue: "Did the Appellate Court correctly conclude that the petitioner's petition for a writ of habeas corpus, which was filed pro se, did not raise a claim of ineffective assistance of counsel with respect to the petitioner's second habeas trial?" *Woods* v. *Commissioner of Correction*, 335 Conn. 938, 248 A.3d 708 (2020).

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

The appeal is dismissed.