CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* KEITH BELCHER
(SC 20531)

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

Syllabus

The defendant appealed from the trial court's denial of his motion to correct an illegal sentence. The defendant's lengthy prison sentence had been imposed in connection with his conviction of kidnapping in the first degree, sexual assault in the first degree, robbery in the first degree, burglary in the first degree, and attempt to commit sexual assault in the first degree. In his motion to correct, the defendant claimed, inter alia, that his sentence was imposed in an illegal manner insofar as the sentencing court relied on materially false information, namely, a baseless and subsequently discredited theory alleging the rise of teenage superpredators who would terrorize society. The defendant specifically claimed that the sentencing court improperly imposed his sentence on the basis of its characterization of the defendant as a "charter member" of that group of superpredators. The trial court rejected the defendant's claim, concluding, inter alia, that the evidence supported the determination that the defendant fit the definition of a "superpredator," regardless of the validity of that theory, and that the sentencing court's remarks about the superpredator theory were not central to its sentencing decision. On appeal from the trial court's denial of the defendant's motion,

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices D'Auria, Mullins, Kahn, Ecker and Keller. Thereafter, Justice McDonald was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

the defendant claimed that the trial court had abused its discretion in concluding that the sentencing court did not substantially rely on materially false information in sentencing him. *Held* that the trial court abused its discretion in denying the defendant's motion to correct an illegal sentence because the superpredator theory constituted materially false and unreliable evidence on which the sentencing court substantially relied in imposing the defendant's sentence: this court reviewed social science research and government reports and concluded that the superpredator theory was baseless when it originally was espoused by a university professor in the mid-1990s and has since been thoroughly debunked and universally rejected as a myth; moreover, this court determined that, in the context of the sentencing of the defendant, a Black teenager, the sentencing court's invocation of the baseless superpredator theory was especially detrimental to the integrity of the sentencing procedure, as the sentencing court relied on materially false, racial stereotypes that perpetuate systemic racial inequities, which historically have pervaded the criminal justice system, and as the sentencing court treated the characteristics of youth, namely, impulsivity, submission to peer pressure, and deficient judgment, as an aggravating, rather than a mitigating, factor, in violation of the precedent of this court and the United States Supreme Court; furthermore, the sentencing court substantially relied on the materially false superpredator theory when it sentenced the defendant, as that court gave explicit attention to the theory when it expressly referenced the defendant's supposed status as a charter member of the superpredator group prior to imposing the defendant's sentence, and the court's discussion of the superpredator theory throughout its brief sentencing remarks demonstrated that the sentencing court's view of the defendant was shaped by the theory that there was a group of youths, including the defendant, who were destined to live an irredeemable life of violence; accordingly, the trial court's decision to deny the defendant's motion to correct an illegal sentence was reversed, and the case was remanded with direction to grant the defendant's motion and for resentencing.

Argued January 11, 2021—officially released January 21, 2022**

Procedural History

Substitute information charging the defendant with two counts each of the crimes of kidnapping in the first degree and sexual assault in the first degree, and with one count each of the crimes of robbery in the first degree, burglary in the first degree, and attempt to commit sexual assault in the first degree, brought to the

** January 21, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Superior Court in the judicial district of Fairfield and tried to the jury before *Hartmere*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the Appellate Court, *Foti*, *Schaller* and *Daly*, *Js.*, affirmed the trial court's judgment; subsequently, the court, *Devlin*, *J.*, dismissed in part and denied in part the defendant's motion to correct an illegal sentence, and the defendant appealed. *Reversed*; *further proceedings.*

Michael W. Brown, with whom, on the brief, was *Alexandra Harrington*, deputy assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Keith Belcher, a juvenile offender, appeals from the trial court's denial of his motion to correct an illegal sentence.[1] After his conviction, the defendant received a total effective sentence of sixty years of incarceration. He claims, inter alia, that the trial court improperly denied his motion to correct on the basis of the court's conclusion that the sentencing court did not impose the sentence in an illegal manner by relying on materially false information.[2]

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

We note that the trial court dismissed in part the defendant's motion to correct. We are concerned only with the trial court's denial of that motion; see footnote 3 of this opinion; and our reversal of the trial court's ruling pertains to the denial rather than the dismissal in part of that motion.

[2] The issue of whether a sentencing court has imposed a sentence in an illegal manner by relying on materially false information frequently has arisen when the court relied on factually inaccurate information in a presentence investigation report in imposing a defendant's sentence. See, e.g., *State* v. *Parker*, 295 Conn. 825, 832, 992 A.2d 1103 (2010). Our decisions, however,

Our review of the record reveals that the defendant established that the sentencing court substantially relied on materially false information in imposing his sentence, specifically, on the court's view that the defendant was a "charter member" of a mythical group of teenage "superpredators." Therefore, we conclude that the trial court abused its discretion in denying the defendant's motion to correct. Accordingly, we reverse the judgment of the trial court, and the case is remanded with direction to grant the defendant's motion and for resentencing.[3]

The following facts and procedural history are relevant to this appeal. "The defendant was fourteen years of age when, on December 24, 1993, he and a companion approached the victim in front of her apartment in Bridgeport. The victim was unloading groceries from her car when the defendant approached her from behind, pulled out a gun and demanded that she give

have used the phrases "inaccurate information," "false information" and "misinformation" interchangeably for purposes of applying the standard. See, e.g., *State* v. *Ward*, 341 Conn. 142, 156, A.3d (2021) ("inaccurate information"); *State* v. *Parker*, supra, 832 ("misinformation"); id., 844 ("inaccurate information" and "materially false" information (internal quotation marks omitted)); *State* v. *Collette*, 199 Conn. 308, 319, 507 A.2d 99 (1986) ("false information"). We recognize that there is a distinction between the inaccuracy of facts set forth in a report and the falsity of a theory. Both share, however, the core defect that renders a sentence illegal—in each instance, the sentencing court has relied on something that is not true. In the present case, we believe that the phrase "false information" is the best fit for the sentencing court's reliance on a false theory.

[3] The defendant also raises two other claims. First, he claims that the trial court incorrectly denied his motion to correct an illegal sentence because his sentence is disproportionate, in violation of the eighth amendment to the United States constitution. Second, the defendant asserts that the trial court incorrectly concluded that it lacked jurisdiction over his claim that, in light of evolving standards of decency, his sentence was disproportionate, in violation of article first, §§ 8 and 9, of the Connecticut constitution. Because our resolution of the defendant's claim that the sentencing court relied on materially false information requires us to remand the case for resentencing, resolution of these additional claims is not necessary to this appeal.

him her purse. When she informed the defendant that the purse was upstairs, he dragged her up to the apartment to retrieve it, all the time holding the gun on her." *State* v. *Belcher*, 51 Conn. App. 117, 119, 721 A.2d 899 (1998). While in the apartment, the defendant sexually assaulted the victim twice, attempted to do so a third time, and pistol-whipped her. See id., 120.

Soon thereafter, based on the victim's identification of him from police photographs, the police arrested the defendant. Id. Proceedings against him were initiated in the docket for juvenile matters of the Superior Court. See id. Following a hearing, the court granted the state's motion to transfer the defendant's case to the regular criminal docket of the Superior Court. Id., 120–21. The state charged the defendant with two counts each of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B) and sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), and with one count each of attempt to commit sexual assault in the first degree in violation of General Statutes § 53a-49 (a) (2) and § 53a-70 (a) (1), robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and burglary in the first degree in violation of General Statutes (Rev. to 1993) § 53a-101 (a) (1). See id., 118–19, 121. The defendant was convicted on all seven counts. Id., 121. The sentencing court imposed a total effective sentence of sixty years of incarceration.[4]

[4] The court sentenced the defendant, on the first count, for kidnapping in the first degree, to twenty years, on the second count, for kidnapping in the first degree, to twenty years, on the third count, for robbery in the first degree, to ten years, on the fourth count, for sexual assault in the first degree, to twenty years, on the fifth count, for sexual assault in the first degree, to twenty years, on the sixth count, for attempt to commit sexual assault in the first degree, to ten years, and, on the seventh count, for burglary in the first degree, to ten years. The court further ordered counts two, five and six to run concurrently to count one, and counts three, four and seven to run consecutively to count one, for a total effective sentence of sixty years of imprisonment.

In the decades following the defendant's sentencing, juvenile sentencing law has undergone significant developments. These changes had their genesis in the decision of the United States Supreme Court in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). In *Roper*, the court held that the execution of persons for crimes committed when they were children (under eighteen years of age) constitutes disproportionate punishment in violation of the eighth amendment to the federal constitution. Id., 564, 568, 575, 578. Children, the court explained, are different from adults for purposes of culpability and punishment, as certain characteristics of youth are, by their nature, mitigating. See id., 569–70. Children's " 'lack of maturity,' " " 'underdeveloped sense of responsibility,' " vulnerability to peer pressure and other outside influences, as well as the transient nature of their personality traits, led the court to conclude that "juvenile offenders cannot with reliability be classified among the worst offenders." Id.

Following *Roper*, decisions by this court and the United States Supreme Court have relied on these mitigating characteristics of youth to further define the constitutional limits of juvenile sentencing law. We recently summarized those limitations. "Under the federal constitution's prohibition on cruel and unusual punishments, a juvenile offender cannot serve a sentence of imprisonment for life, or its functional equivalent, without the possibility of parole, unless his age and the hallmarks of adolescence have been considered as mitigating factors. *Miller* v. *Alabama*, 567 U.S. 460, 476–77, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 60–61, 115 A.3d 1031 (2015), cert. denied sub nom. *Semple* v. *Casiano*, 577 U.S. 1202, 136 S. Ct. 1364, 194 L. Ed. 2d 376 (2016); *State* v. *Riley*, 315 Conn. 637, 641, 110 A.3d 1205 (2015), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376 (2016)." *State* v. *Williams-Bey*, 333 Conn. 468, 470, 215 A.3d 711 (2019). Thus, "[t]o comport with federal constitutional

requirements, the legislature passed No. 15-84 of the 2015 Public Acts (P.A. 15-84) . . . [which] retroactively provided parole eligibility to juvenile offenders sentenced to more than ten years in prison." (Footnote omitted.) *State* v. *McCleese*, 333 Conn. 378, 383, 215 A.3d 1154 (2019). In addition, "[§] 2 of P.A. 15-84 . . . requires a court to consider the *Miller* factors [which are the aforementioned hallmarks of youth] when imposing certain sentences [on] juvenile offenders." Id., 400.

Relying on those changes to juvenile sentencing law, the defendant filed a motion to correct an illegal sentence, claiming that (1) the sentencing court failed to consider his youth, as required by *Miller* and its progeny, including the decision of this court in *State* v. *Riley*, supra, 315 Conn. 641 (sentencing court must consider age related evidence in mitigation when deciding whether to irrevocably sentence juvenile offender to term of life imprisonment, or equivalent, without parole), (2) his sentence was disproportionate in violation of the eighth amendment to the United States constitution, (3) his sentence was disproportionate in violation of article first, §§ 8 and 9, of the Connecticut constitution, and (4) his sentence was imposed in an illegal manner because the sentencing court relied on materially false information, namely, a baseless and subsequently discredited theory alleging the rise of teenage superpredators who would terrorize society.

After hearing argument on the motion, the trial court initially concluded that the defendant was entitled to a new sentencing hearing pursuant to *Riley*. The court grounded its decision on its finding that the sentencing court had failed to give "mitigating effect to the defendant's young age and its hallmarks." Because the trial court's conclusion as to the defendant's *Miller* claim was dispositive, the court did not address the defendant's remaining three claims. Thereafter, the trial court stayed its order, pending the resolution of the appeals

in *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016), and *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016). *Boyd* and *Delgado* addressed whether the parole eligibility retroactively conferred by P.A. 15-84 remedied a violation of the defendants' federal constitutional rights, as explicated in *Miller*. See *State* v. *Boyd*, supra, 820; *State* v. *Delgado*, supra, 802–804. Answering that question in the affirmative, we held that the trial court properly dismissed those defendants' motions to correct an illegal sentence for lack of subject matter jurisdiction. *State* v. *Boyd*, supra, 820–21; *State* v. *Delgado*, supra, 810–11, 816. Relying on those decisions, the trial court vacated its order granting the defendant a new sentencing hearing and dismissed, for lack of subject matter jurisdiction, the defendant's claim that the sentencing court had failed to give mitigating effect to the defendant's youth in violation of *Miller* and *Riley*.[5] The trial court also rejected the defendant's remaining three claims.[6]

The defendant appealed from the trial court's ruling to the Appellate Court. That court stayed the appeal,

[5] We emphasize that our holding today is grounded solely on the sentencing court's imposition of the defendant's sentence in an illegal manner by relying on materially false information. That is, we do not ground our holding on the sentencing court's failure to give mitigating effect to the defendant's youth and its hallmark features. As we have explained, our decisions have held that such a pre-*Miller* failure would not require resentencing. See *State* v. *Williams-Bey*, supra, 333 Conn. 470; *State* v. *Delgado*, supra, 323 Conn. 804.

[6] Specifically, the trial court held that, in light of the gravity of the underlying offenses, the defendant's sentence was not disproportionate, in violation of the eighth amendment. The court concluded that it lacked jurisdiction over the defendant's claim that the passage of No. 15-183 of the 2015 Public Acts—which bars, but for one narrow exception, the transfer of fourteen year olds to the regular criminal docket—demonstrated that contemporary standards of decency dictated that sentencing a fourteen year old to sixty years of incarceration was disproportionate, in violation of article first, §§ 8 and 9, of the Connecticut constitution. Finally, the trial court rejected the defendant's claim that, by stating in its ruling that the defendant was a "charter member" of an alleged demographic group of teenage "superpredators," the sentencing court relied on materially false information in sentencing him.

pending this court's disposition of *State* v. *McCleese*, supra, 333 Conn. 378, and *State* v. *Williams-Bey*, supra, 333 Conn. 468.[7] Following the official release of *McCleese* and *Williams-Bey* on August 23, 2019, and the decision of the Appellate Court lifting the stay, this appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

Relevant to the resolution of this appeal, the defendant claims that the trial court abused its discretion in concluding that the sentencing court did not substantially rely on materially false information, in violation of his right to due process, in sentencing him to a total effective sentence of sixty years of incarceration. Specifically, the defendant claims that his sentence was imposed in an illegal manner because the sentencing court relied on the erroneous and subsequently discredited theory of teenage superpredators in making its sentencing decision. We agree with the defendant and, accordingly, reverse the trial court's ruling.

The following additional facts and procedural history are relevant to this claim. Prior to the defendant's sentencing hearing on January 24, 1997, the sentencing court had reviewed the presentence investigation report (PSI), which the court stated was thorough and included school records and psychological reports.[8] The court heard argument from the prosecutor and defense counsel. In his remarks, the prosecutor emphasized the trauma suffered by the victim, who testified at trial that she would never be the same. The prosecutor also

[7] Both decisions held that the parole eligibility granted retroactively by P.A. 15-84, § 1, remedies a *Miller* violation under the Connecticut constitution. See *State* v. *Williams-Bey*, supra, 333 Conn. 470, 472–73, 477; *State* v. *McCleese*, supra, 333 Conn. 381, 383, 387.

[8] The PSI revealed that the defendant had an extensive juvenile delinquency history, including an incident in which he shot his younger sister. The PSI also revealed that the defendant had rejected "any efforts at rehabilitation" and had been diagnosed with " 'severe conduct disorder.' "

highlighted the defendant's "extensive juvenile record." In fact, when the defendant committed his crimes, he was on a holiday furlough from Long Lane School, which was a facility for delinquent children. School officials indicated that the defendant showed no remorse for his prior actions. The prosecutor referred the sentencing court to the PSI, arguing that the information therein supported a "substantial sentence . . . ."

Defense counsel argued in mitigation that the defendant was only fourteen years old when he committed his crimes, that he came from a "troubled background," and that this was his first conviction as an adult. Counsel acknowledged the defendant's juvenile history but pointed out that, with the exception of one conviction for assault in the second degree, that history involved nonviolent offenses.

The defendant's claim that his sentence was imposed in an illegal manner arises from the sentencing court's brief remarks prior to imposing the sentence. The court began by stating that, in arriving at the defendant's sentence, it relied on the PSI and the evidence presented at trial. Of particular import, the court explained, was the victim's testimony, which the court found "most compelling . . . ." On the basis of the evidence, the court said: "To say that the conduct here was extremely serious and egregious is simply to understate the facts of what happened. The conduct here was just so inhumane as to be considered subhuman. This is despite the fact that, as disclosed in the [PSI], [the defendant's] . . . testing shows average intelligence. He could have chosen another lifestyle, even at his very young age, but deliberately chose not to. *Professor John* [*J. DiIulio, Jr.*], *of Princeton University has coined the term 'superpredator,' which refers to a group of radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize. Mr. Belcher, you are a charter member of that group.* You have no fears,

from your conduct, of the pains of imprisonment; nor do you suffer from the pangs of conscience. I agree with the [prosecutor], the probation officer, and the victim, who, incidentally, still suffers physically and psychologically from your conduct, who all ask for substantial incarceration to ensure the safety of the community." (Emphasis added.)

In rejecting the defendant's claim that the sentencing court's remarks demonstrated that it had substantially relied on materially false information in sentencing him, the trial court reasoned that the superpredator theory did not constitute "information." Specifically, the trial court observed that the term "superpredator" is descriptive, rather than factual. Additionally, the trial court noted that, although the superpredator theory has since been discredited, at the time of sentencing, the sentencing court had a reasonable basis to rely on the theory. The trial court finally observed both that the evidence supported the conclusion that the defendant fit the definition of a "superpredator," regardless of the truth of the theory, and that the sentencing court's remarks about the superpredator theory were not central to the sentencing decision. The trial court went on to say that "[t]he superpredator reference was just a gloss. This court has no doubt that, had Professor DiIulio repudiated his theory before sentencing, [the sentencing court] would have imposed the same sentence."

We begin by setting forth the legal principles that govern our review of the trial court's denial of the defendant's motion to correct a sentence imposed in an illegal manner. "[A] claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is [typically] reviewed pursuant to the abuse of discretion standard . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Bischoff*, 337 Conn. 739, 745, 258 A.3d 14 (2021). We have explained, in pertinent part, that "[s]entences imposed in an illegal

manner have been defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be sentenced by a judge relying on accurate information or considerations solely in the record . . . ." (Internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839, 992 A.2d 1103 (2010). We have emphasized that the protection against sentencing in an illegal manner "reflects the fundamental proposition that [t]he defendant has a legitimate interest in the character of the procedure [that] leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." (Internal quotation marks omitted.) Id.

We also have acknowledged that "[a] sentencing judge has very broad discretion in imposing any sentence within the statutory limits and in exercising that discretion he may and should consider matters that would not be admissible at trial. . . . Consistent with due process the trial court may consider responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted person's life and circumstance. . . . It is a fundamental sentencing principle that a sentencing judge may appropriately conduct an inquiry broad in scope, and largely unlimited either as to the kind of information he may consider or the source from which it may come. . . . Finally, although a trial court's discretion is not completely unfettered, and information may be considered as a basis for a sentence only if it has some minimal indicium of reliability . . . [a]s long as the sentencing judge has a reasonable, persuasive basis for relying on the information which he uses to fashion his ultimate sentence, an appellate court should not interfere with his discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Bletsch*, 281 Conn. 5, 20–21, 912 A.2d 992 (2007).

To prevail on a claim that the sentencing court violated his due process rights by relying on materially false information, a defendant cannot merely allege that the information relied on by the court contained factual inaccuracies or inappropriate information. "[T]he mere reference to information outside of the record does not require a sentence to be set aside unless the defendant shows: (1) that the information was materially false or unreliable; and (2) that the trial court substantially relied on the information in determining the sentence." *State* v. *Collette*, 199 Conn. 308, 321, 507 A.2d 99 (1986). "A sentencing court demonstrates [substantial] reliance on misinformation when the court gives explicit attention to it, [bases] its sentence at least in part on it, or gives specific consideration to the information before imposing sentence." (Internal quotation marks omitted.) *State* v. *Parker*, supra, 295 Conn. 843 n.12.

We consider each of these factors in turn. First, a review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information. In the mid-1990s, Professor DiIulio of Princeton University coined the term "superpredator." J. DiIulio, "The Coming of the Super-Predators," The Weekly Standard, November 27, 1995, available at https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators (last visited January 20, 2022). DiIulio, whose work the sentencing court referenced specifically, warned that "the demographic bulge of the next [ten] years will unleash an army of young male predatory street criminals who will make even the leaders of the Bloods and Crips . . . look tame by comparison." Id. DiIulio predicted that this coming wave of superpredators would include "elementary school youngsters who pack guns instead of lunches" and "have absolutely no respect for human life . . . ." Id. He further warned: "On the horizon . . . are tens of thousands of severely morally impoverished

juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons (for example, a perception of slight disrespect or the accident of being in their path). They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality. In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them. So for as long as their youthful energies hold out, they will do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high." Id.

These dire predictions centered disproportionately on the demonization of Black male teens. DiIulio warned readers that, although "the trouble will be greatest in [Black, inner city] neighborhoods," those in other areas should expect a "spill over" of morally impoverished, "crime-prone young males." Id. A few months later, in an article about race, crime and law enforcement, DiIulio wrote: "[N]ot only is the number of young [B]lack criminals likely to surge, but also the [B]lack crime rate, both black-on-black and black-on-white, is increasing, so that as many as [one] half of these juvenile super-predators could be young [B]lack males." J. DiIulio, "My Black Crime Problem, and Ours," City Journal, Spring, 1996, available at https://www.city-journal.org/html/my-black-crime-problem-and-ours-11773.html (last visited January 20, 2022).

Extensive research data and empirical analysis quickly demonstrated that the superpredator theory was baseless. In fact, contrary to DiIulio's assertion, even at the time that he coined the term in the mid-1990s, juvenile offense rates already had dropped significantly from their peak across demographic groups. The falsity of DiIulio's claim was demonstrated in a 2000 bulletin of

the United States Department of Justice, which provided a data-driven assessment of juvenile crime patterns through the 1990s. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Challenging the Myths, 1999 National Report Series: Juvenile Justice Bulletin (February, 2000), available at https://www.ojp.gov/pdffiles1/ojjdp/178993.pdf (last visited January 20, 2022), adopted from H. Snyder & M. Sickmund, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report (September, 1999), available at https://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html (last visited January 20, 2022). The bulletin revealed that, although serious juvenile offense rates did peak in the late 1980s into the early 1990s, "by 1995, the rate had returned to its traditional level." Id., p. 2. The bulletin concluded that, therefore, "[r]ather than providing evidence for development of a juvenile superpredator, the . . . data indicate that, despite a temporary increase, the rate of serious juvenile offending as of the mid-[1990s] was comparable to that of a generation ago." Id.

In 2001, the United States Office of the Surgeon General labeled the superpredator theory a myth. See U.S. Dept. of Health & Human Services, Youth Violence: A Report of the Surgeon General (2001) c. 1, p. 5, available at https://www.ncbi.nlm.nih.gov/books/NBK44297/?report=reader (last visited January 20, 2022) ("There is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. . . . There is no scientific evidence to document the claim of increased seriousness or callousness . . . ." (Citation omitted.));[9] see also, e.g., F. Zimring, American Youth

[9] By the late 1990s, after a steady decline in juvenile crime, DiIulio recanted his theory and expressed regret that he had promulgated it. See, e.g., E. Becker, "As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets," N.Y. Times, February 9, 2001, p. A19 ("DiIulio said, while praying at Mass on Palm Sunday in 1996, that he had an 'epiphany' . . . . He tried, he said, to put the brakes on the superpredator theory, which had all but taken on

Violence (1998) pp. 61–63 (critiquing use of temporal spike in youth violence to predict future trends); F. Zimring, "The Youth Violence Epidemic: Myth or Reality?," 33 Wake Forest L. Rev. 727, 728 (1998) (challenging predictions of "'coming storm'" of juvenile superpredators as distortion of statistics and "fundamentally unscientific" guesswork). We conclude that the superpredator theory was baseless when it originally was espoused and has since been thoroughly debunked and universally rejected as a myth, and it therefore constituted false and unreliable information that a sentencing court ought not consider in crafting a sentence for a juvenile offender.

In the context of the sentencing of the defendant, a Black teenager, the court's reliance on the materially false superpredator myth is especially detrimental to the integrity of the sentencing procedure for two reasons. First, reliance on that myth invoked racial stereotypes, thus calling into question whether the defendant would have received as lengthy a sentence were he not Black. Second, the use of the superpredator myth supported treating the characteristics of youth as an aggravating, rather than a mitigating, factor. To fully appreciate how the use of this term was not simply a

a life of its own. 'I couldn't write fast enough to curb the reaction . . . .' "). He admitted, on more than one occasion, that his views had turned out to be completely wrong. See, e.g., id. ("DiIulio . . . conceded today that he wished he had never become the [1990s] intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators' ").

Notably, in the landmark case of *Miller* v. *Alabama*, supra, 567 U.S. 460, DiIulio signed on to an amici curiae brief filed in support of the petitioners, which denounced the superpredator theory as a "myth" grounded on "baseless" predictions. *Miller* v. *Alabama* (No. 10-9646), United States Supreme Court Briefs, October Term, 2011, Amici Curiae Brief of Jeffrey Fagan et al., p. 8. The United States Supreme Court ultimately sided with the juvenile offenders, writing that a young person's immaturity reduces his or her accountability and that juveniles have an inability to assess consequences, are often rash, and prone to risk-taking—mitigating factors that should be considered at sentencing. See *Miller* v. *Alabama*, supra, 471, 476–77.

gloss but, rather, an inappropriate sentencing consideration, some historical and sociological context is needed.[10]

The superpredator theory tapped into and amplified racial stereotypes that date back to the founding of our nation. Specifically relevant to the present case, the dehumanization of Black children pervades this country's history. In 1776, when Thomas Jefferson, a slave owner, declared "all men are created equal," in many of the colonies, Black adults and children were property and "were not legally considered human . . . ." (Internal quotation marks omitted.) J. Bell, W. Haywood Burns Institute for Youth Justice Fairness & Equity, Repairing the Breach: A Brief History of Youth of Color in the Justice System (2015) p. 1, available at https://burnsinstitute.org/wp-content/uploads/2020/09/Repairing-the-Breach-BI_compressed.pdf (last visited January 20, 2022).

As one legal scholar has observed, throughout the history of our country, our policies have reflected that only some children—white ones—have deserved societal protection. See K. Nunn, "The Child as Other: Race and Differential Treatment in the Juvenile Justice System," 51 DePaul L. Rev. 679, 679–82 (2002). Professor Kenneth B. Nunn explained that the mid-nineteenth century saw the birth of the concept of "adolescence," resulting in a shift from the understanding of children over the age of ten as a labor resource for families to a class of persons deserving of societal protection. Id., 679–80. A particular part of this shift arose from concerns regarding a rise in childhood poverty and a perception of increasing crime among children. See, e.g.,

[10] We do not intend to provide a comprehensive review of the relevant historical background of the ideas underlying the superpredator myth. Instead, we highlight some aspects of that background that are particularly helpful to understanding why the superpredator theory constitutes materially false information for purposes of sentencing. For thorough discussions of the historical underpinnings of the disparate treatment of Black children in the juvenile justice system, see G. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice (2012), and Our Children, Their Children (D. Hawkins & K. Kempf-Leonard eds., 2005).

T. Birckhead, "The Racialization of Juvenile Justice and the Role of the Defense Attorney," 58 B.C. L. Rev. 379, 395–96 (2017). Those concerns prompted social reforms, grounded in the doctrine of parens patriae,[11] aimed at directing " 'wayward youth' " to reform schools rather than incarcerating them with adult prisoners. Id., 396–97. Notably, the protections and progressive social innovations afforded by these reforms were not provided to Black children, who were considered " 'unsalvageable and undeserving' " of the "citizen-building ideals" that had prompted the changes. Id., 398; see, e.g., G. Ward, The Black Child-Savers: Racial Democracy and Juvenile Justice (2012) pp. 52–62 (discussing role of race in differential treatment of white and Black juveniles during antebellum period); see also, e.g., id., 52 (noting that, during antebellum period, "[e]arly . . . reformatories were typically first open exclusively to whites"). As a result, by 1850, rather than being sent to reform schools, "a disproportionate number of Black youths were jailed in cities with majority white populations."[12] T. Birckhead, supra, 398.

[11] "Parens patriae" literally means " 'parent of the country' " and "refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles . . . ." (Citation omitted.) Black's Law Dictionary (6th Ed. 1990) p. 1114.

[12] We recognize that the protections afforded to adolescents in the juvenile justice system have not followed a direct trajectory. That is, the recognition of adolescence as a stage of human development has not guaranteed that teenagers receive an ever increasing, or even stable, level of protection under the law. Instead, it is widely acknowledged that juvenile justice has swung in a pendulum between the goals of rehabilitation and punishment. See, e.g., J. Radice, "The Juvenile Record Myth," 106 Geo. L.J. 365, 378–83 (2018) (providing historical overview of shifts between rehabilitative and punitive purposes of juvenile justice system); C. Loomis-Gustafson, "Adjusting the Bright-Line Age of Accountability Within the Criminal Justice System: Raising the Age of Majority to Age 21 Based on the Conclusions of Scientific Studies Regarding Neurological Development and Culpability of Young-Adult Offenders," 55 Duq. L. Rev. 221, 225–27 (2017) (same). Through each swing of the pendulum, however, Black children always have been seen as less capable of rehabilitation than white children because of the pervasive view of Black children as subhuman. See, e.g., K. Nunn, supra, 51 DePaul L. Rev. 679–81.

At the time that adolescence was being recognized as a distinct developmental stage for white children, many Black children remained enslaved and were viewed as subhuman. See, e.g., K. Nunn, supra, 51 DePaul L. Rev. 680. In contrast to white children in their teens, Black children could be separated from their parents, bought and sold like chattel. See, e.g., id.; see also, e.g., J. Bell, supra, p. 6. The nascent concept of adolescence, therefore, did not apply to them. See, e.g., K. Nunn, supra, 680. The historical fiction that Black adolescents are not actually "children," meriting societal protection, stems from the dehumanization of Black Americans and is one of the roots of the disparate treatment of Black teens by the justice system. See, e.g., P. Goff et al., "The Essence of Innocence: Consequences of Dehumanizing Black Children," 106 J. Personality & Soc. Psych. 526, 526–29, 539–41 (2014) (documenting connection between dehumanization of Black male children, perception that they are older and less innocent than white peers, and disparate treatment of Black male children in juvenile justice system); see also footnote 14 of this opinion (illustrating disparate treatment).

Against this backdrop, the superpredator myth employed a particular tool of dehumanization—portraying Black people as animals. See, e.g., P. Goff et al., supra, 106 J. Personality & Soc. Psych. 528 (documenting historical dehumanizing association of Black people, including first Black president of United States, with nonhuman primates). A "predator" is defined as "one that preys, destroys, or devours," or "an animal that depends on predation for its food . . . ." Webster's Third New International Dictionary (2002) p. 1785. The superpredator metaphor invoked images of packs of teens prowling the streets. The news coverage in the mid-1990s, which depicted "young Black males, showing them [handcuffed] and shackled, held down by [the] police, or led into courtrooms wearing orange jumpsuits";

T. Birckhead, supra, 58 B.C. L. Rev. 410; left little doubt that the "packs" were Black teens.

The superpredator myth triggered and amplified the fears inspired by these dehumanizing racial stereotypes, thus perpetuating the systemic racial inequities that historically have pervaded our criminal justice system. Looming on the apocalyptic horizon were tens of thousands of these fabricated, subhuman superpredators, who would "do what comes 'naturally': murder, rape, rob, assault, burglarize, deal deadly drugs, and get high." J. DiIulio, "The Coming of the Super-Predators," supra. A threat on this scale called for a response. And the response came in the form of a public panic and media frenzy, prompting nearly every state in the country to step up the sentencing and punishment of juveniles. See, e.g., J. Short & C. Sharp, Disproportionate Minority Contact in the Juvenile Justice System (2005) p. 7 ("[b]etween 1992 and 1999, [forty-nine] states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation");[13] see also, e.g., F. Zimring, "The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s," 71 La. L. Rev. 1, 8 (2010); D. Bishop, "Juvenile Offenders in the Adult Criminal Justice System," 27 Crime & Just. 81 (2000). This shift in the law subjected "juvenile offenders to sentencing regimes that were originally conceived for adults . . . ." *Miller* v. *Alabama* (No. 10-9646), United States Supreme Court Briefs, October Term, 2011, Amici Curiae Brief of Jeffrey Fagan et al., pp. 7–8.

[13] Like many other states, in the mid-1990s, Connecticut revised its laws to make it easier to try juveniles as adults. See, e.g., Public Acts 1995, No. 95-225, § 13 (revising juvenile transfer provision to allow automatic transfer to regular criminal docket for child charged with commission of capital felony, class A or B felony, or violation of General Statutes § 53a-54d; previous language required court to make written findings, after hearing, that probable cause existed to believe child committed charged crime prior to such transfer).

And the consequences of the changes to juvenile justice fell disproportionately on Black teens.[14]

[14] In 1999, the United States Department of Justice reported: "Overrepresentation of [B]lack juveniles occurs at all stages of the juvenile justice system. In 1996–97, while 26 [percent] of juveniles arrested were [B]lack, they made up 45 [percent] of cases involving detention. Thirty-two percent of adjudicated cases involved [B]lack youth, yet 40 [percent] of juveniles in residential placement are [B]lack. Even recognizing the overrepresentation of [B]lack juveniles involved in violent crimes reported by victims (39 [percent]), they still accounted for a disproportionate share of juvenile arrests for violent crime (44 [percent]) and confinement (45 [percent])." Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, Minorities in the Juvenile Justice System, 1999 National Report Series: Juvenile Justice Bulletin (December, 1999) p. 2, available at https://www.ojp.gov/pdffiles1/ojjdp/179007.pdf (last visited January 20, 2022), adopted from H. Snyder & M. Sickmund, supra.

Particularly relevant to the present case were the racial disparities in the sentencing stage. Specifically, in 1998, the Office of Juvenile Justice and Delinquency Prevention reported that "[j]uvenile court judges [were] more likely to place [Black] youth in residential placement facilities, and less likely to place [Black] youth on probation in comparison to similarly situated white youth. Although 32 [percent] of cases adjudicated delinquent involved [Black youth], a larger proportion of those cases (36 [percent]) were ordered into residential placement facilities than received probation (31 [percent]). Overall, white youth were underrepresented among cases receiving residential placement and overrepresented among cases receiving probation. The disparity between white and Black children [was] present across all offense categories . . . ." (Footnotes omitted.) K. Nunn, supra, 51 DePaul L. Rev. 686.

Connecticut reported similar disparities within the state's juvenile justice system during the relevant time period. See E. Hartstone & D. Richetelli, An Assessment of Minority Overrepresentation in Connecticut's Juvenile Justice System (1995), available at https://www.ojp.gov/pdffiles1/Digitization/155321NCJRS.pdf (last visited January 20, 2022). In order to comply with the 1988 amendment to the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109, the state of Connecticut commissioned a study to evaluate overrepresentation of minority children in secure facilities. Id., p. 1. The study evaluated data from 1990 to 1992. See id., pp. 14, 20, 21. Although 1990 census data reflected that roughly 11 percent of Connecticut's population of ten to sixteen year olds were Black, Black youth accounted for approximately 28.6 percent of youths referred to the court of juvenile matters for instant offenses, including felonies, misdemeanors, violation or status charges, 46 percent of youths placed in detention for such offenses, and 46.6 percent of youths placed in Long Lane School for such offenses. See id., p. 21 (figure 2).

In Bridgeport specifically, where the defendant committed his offenses, although white juveniles accounted for 61 percent of the 10 to 16 year old

The second reason the superpredator myth constituted particularly harmful materially false information for sentencing purposes is because it turns upside down the constitutional mandate of *Roper* and its progeny. By labeling a juvenile as a superpredator, the very characteristics of youth that should serve as mitigating factors in sentencing—impulsivity, submission to peer pressure, deficient judgment—are treated instead as aggravating factors justifying harsher punishment. The superpredator theory and the correspondingly harsh punishment of juvenile offenders cannot be reconciled with the recognition in *Roper* v. *Simmons*, supra, 543 U.S. 551, that the medical and social science research demonstrates that "the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." (Internal quotation marks omitted.) Id., 570; see, e.g., *Miller* v. *Alabama*, supra, 567 U.S. 477 (requiring that, in sentencing juveniles to life without possibil-

population, they comprised only 27 percent of those referred to court, 10 percent of those placed in detention, and less than 6 percent of those placed in Long Lane School. Id., p. 28. By contrast, Black juveniles accounted for less than 20 percent of the 10 to 16 year old population, yet comprised 40 percent of those referred to court, 52 percent of those placed in detention and 54 percent of those placed in Long Lane School. Id.

The Connecticut study revealed that, "[f]or all types of offenses, Black juveniles were several times more likely than [w]hite juveniles to be placed in detention." Id., 41. Furthermore, those Black juveniles charged with serious juvenile offenses remained in detention longer than white juveniles charged with similar offenses. See id., 65. This disparity was particularly notable in Bridgeport. Id.

Black juveniles charged with nonserious juvenile offenses were more likely than white juveniles charged with similar offenses to be handled judicially. Id. Black juveniles charged with serious juvenile offenses were more likely than white juveniles charged with similar offenses to be adjudicated for serious juvenile offenses. Id., 66. The report clarified that "[r]ace/ethnicity was found to indirectly impact this decision, as race/ethnicity significantly predicts detention decisions and detention predicts [a serious juvenile offense] adjudication." (Emphasis omitted.) Id. Similarly, "race/ethnicity was found to be an indirect predictor of court commitment to Long Lane School" because "race/ethnicity significantly predicts detention decisions and detention predicts commitment to Long Lane School." Id.

ity of parole, courts must consider in mitigation child's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"); *State* v. *Riley*, supra, 315 Conn. 659–60 (applying *Miller* to sentence of functional equivalent of life imprisonment without possibility of parole and holding that *Miller* applies to discretionary sentencing schemes, as well as mandatory ones).

In summary, by invoking the superpredator theory to sentence the young, Black male defendant in the present case, the sentencing court, perhaps even without realizing it, relied on materially false, racial stereotypes that perpetuate systemic inequities—demanding harsher sentences—that date back to the founding of our nation. In addition, contrary to *Roper* and its progeny, in relying on the superpredator myth, the sentencing court counted the characteristics of youth as an aggravating factor against the defendant. Although we do not mean to suggest that the sentencing judge intended to perpetuate a race based stereotype, we cannot overlook the fact that the superpredator myth is precisely the type of materially false information that courts should not rely on in making sentencing decisions. Whether used wittingly or unwittingly, reliance on such a baseless, illegitimate theory calls into question the legitimacy of the sentencing procedure and the sentence.

Having concluded that the superpredator doctrine was materially false information, we next must determine whether the sentencing court *substantially relied* on the materially false and unreliable superpredator theory in arriving at the defendant's sentence. In other words, we review the record to determine whether the sentencing court gave explicit attention to the superpredator theory, whether that court based its sentence at least in part on it, or whether that court gave specific consideration to the theory before imposing sentence.

See *State* v. *Parker*, supra, 295 Conn. 843 n.12. Because the test is framed in the disjunctive, any of the three conditions would suffice. We conclude that the sentencing court did all three.

We already have observed that the sentencing court's remarks were brief—the court's comments occupied less than one and one-half pages of the sentencing transcript. The court expressly referenced the defendant's supposed status as a "charter member" of the superpredator group, and the court's comments regarding the superpredator theory comprised a substantial portion of its brief remarks. Given that the court's brief remarks were heavily directed at and shaped by the superpredator theory, it is evident that the court gave explicit attention to the theory, gave specific consideration to it and also based its sentence, in part, on the fact that it considered the defendant a superpredator.

Furthermore, the sentencing court's discussion of the superpredator theory throughout its brief remarks demonstrates that the court's view of the defendant was shaped by this theory that there was a group of youths who were destined to live an irredeemable life of violence and that the defendant was a "member" of that group. The sentencing court described the superpredator group as "a group of radically impulsive, brutally remorseless youngsters who assault, rape, rob and burglarize." Echoing DiIulio's description of superpredators, the court stated to the defendant: "You have no fears, from your conduct, of the pains of imprisonment; nor do you suffer from the pangs of conscience." The court went further and called the defendant a "charter member" of that fictitious group. This was more than a mere gloss or broad statement. The court's reliance on the superpredator theory, and its view that it had to protect society from a charter member of this remorseless group, dominated its sentencing remarks. The superpredator theory, and the court's application of

that theory to the defendant, was central to the court's sentencing determination. It was the prism through which the court viewed this defendant. The sentencing court's explicit attention to the superpredator theory demonstrates that the court substantially relied on that baseless and now debunked theory when sentencing the defendant. See, e.g., *State* v. *Parker*, supra, 295 Conn. 843 n.12. Consequently, we conclude that reliance on the false and pernicious superpredator theory in the present case so infected the sentencing that the sentence was imposed in an illegal manner.

It is axiomatic "that [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence . . . ." (Internal quotation marks omitted.) Id., 839. We conclude that, because the superpredator theory constituted materially false, and, therefore, unreliable, evidence on which the sentencing court substantially relied, the trial court abused its discretion in denying the defendant's motion to correct an illegal sentence. The defendant's sentence was imposed in an illegal manner, in violation of his right to due process.

The trial court's decision is reversed and the case is remanded to that court with direction to grant the defendant's motion to correct an illegal sentence and for resentencing.

In this opinion the other justices concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* EDGE FITNESS, LLC, ET AL.
(SC 20538)

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

Syllabus

Pursuant to the Public Accommodation Act (§ 46a-64 (a)), "[i]t shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public

accommodation . . . because of . . . sex . . . [or] to discriminate, segregate or separate on account of . . . sex . . . ."

Pursuant further to that act (§ 46a-64 (b) (1)), the provisions of § 46a-64 prohibiting sex discrimination "shall not apply to . . . separate bathrooms or locker rooms based on sex."

The plaintiff, the Commission on Human Rights and Opportunities, appealed to the trial court from the decision of the commission's human rights referee, who found that the defendants, E Co. and C Co., had not engaged in discriminatory public accommodations practices by providing separate women's only workout areas in their otherwise public fitness facilities. The complainants, two members of the defendants' respective gyms who both identified as male, filed complaints with the commission after they experienced delays in completing their workouts because they had to wait for other members to finish using the equipment in the coed portions of the facilities. The human rights referee concluded that the defendants did not violate § 46a-64 by maintaining women's only workout areas and dismissed their complaints. On appeal to the trial court, that court recognized that a women's only workout area is neither a bathroom nor a locker room but nonetheless concluded that the defendants' provision of such areas did not violate the sex discrimination provisions of the Public Accommodation Act because there was an implied customer gender privacy exception encompassed within § 46a-64 (b) (1). In so concluding, the court considered the privacy interests underlying the bathroom and locker room exceptions, as well as the burden that the elimination of women's only areas would place on women of certain religious practices. The trial court observed that, without an implied gender privacy exception, the provision of other types of separate facilities, such as showers, dressing rooms and hospital rooms, would constitute a violation of the act. Accordingly, the court rendered judgment dismissing the commission's administrative appeal, from which the commission appealed. *Held* that the trial court incorrectly concluded that § 46a-64 (b) (1) contains an implied gender privacy exception that exempted the defendants' provision of women's only workout areas from the act's general prohibition against sex discrimination, and, accordingly, this court reversed the trial court's judgment and remanded the case with direction to render judgment sustaining the commission's administrative appeal: it was undisputed that the defendants' gyms are places of public accommodation and that their provision of women's only workout areas constitutes a discriminatory practice under the act unless subject to a statutory exception, and, because women's only workout areas did not fit within the plain meaning of the terms "bathroom" or "locker room," as gleaned from their dictionary definitions, this court concluded that the exceptions set forth in § 46a-64 (b) (1) plainly and unambiguously did not encompass women's only workout areas; moreover, if the legislature had intended to include an additional exception to the act's general ban on sex based discrimination

in public accommodations, it could have done so, as it did in the statute (§ 46a-60 (b) (1)) providing for an exception to the general ban on sex discrimination when sex constitutes a bona fide occupational qualification for a position of employment, and interpreting § 46a-64 (b) (1) to include an implied gender privacy exception would be inconsistent with the maxim that remedial statutes, like the act, should be construed liberally but that exceptions to remedial statutes should be construed narrowly; furthermore, the legislative history indicated that the legislature had rejected a version of the act that exempted the provision of separate facilities for males and females "based on considerations of privacy and modesty" as being too broad and subjective, instead adopting the cabined exception limited to "separate bathrooms or locker rooms based on sex"; in addition, the fact that this court's construction of § 46a-64 may lead to results unintended by the legislature, as posited by the parties, the referee and the trial court with respect to lactation and dressing rooms, was not a reason to depart from the plain and unambiguous statutory text of the statute, and the sensitivity of the determination of where to limit antidiscrimination protections on the basis of sex rendered the issue uniquely well suited for consideration in the first instance by the legislature.

Argued May 5, 2021—officially released January 25, 2022*

Procedural History

Appeal from the decision of the plaintiff that the named defendant and the defendant Club Camel, Inc., Bloomfield, did not engage in discriminatory public accommodations practices, brought to the Superior Court in the judicial district of New Britain, where the case was tried to the court, *Cordani*, *J.*; judgment dismissing the appeal, from which the plaintiff appealed. *Reversed*; *judgment directed.*

Michael E. Roberts, human rights attorney, for the appellant (plaintiff).

James F. Shea, with whom was *Allison P. Dearington*, for the appellee (named defendant).

Mario R. Borelli, for the appellee (defendant Club Camel, Inc., Bloomfield).

* January 25, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Kenneth J. Bartschi filed a brief for the GLBTQ Legal Advocates & Defenders et al. as amici curiae.

Kevin M. Barry filed a brief for the Quinnipiac University School of Law Legal Clinic as amicus curiae.

Erick M. Sandler filed a brief for the Jewish Federation of Greater Hartford et al. as amici curiae.

Dan Barrett filed a brief for the American Civil Liberties Union of Connecticut as amicus curiae.

Opinion

ROBINSON, C. J. This appeal presents a significant question of first impression with respect to whether the Public Accommodation Act, General Statutes § 46a-64,[1] contains an implied customer gender privacy exception to its general prohibition against sex based discrimination.[2] The plaintiff, the Commission on Human Rights

[1] General Statutes § 46a-64 provides in relevant part: "(a) It shall be a discriminatory practice in violation of this section: (1) To deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran, of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons; (2) to discriminate, segregate or separate on account of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, intellectual disability, mental disability, learning disability, physical disability, including, but not limited to, blindness or deafness, or status as a veteran . . . .

"(b) (1) The provisions of this section with respect to the prohibition of sex discrimination shall not apply to (A) the rental of sleeping accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or (B) separate bathrooms or locker rooms based on sex. . . ."

[2] For purposes of this opinion, we describe the claim at issue as "sex discrimination" because that is the nature of the claim as raised and described by the complainants. This description is consistent with this court's general practice of accepting the parties' characterization of the nature of the discrimination at issue. See, e.g., *Spiotti* v. *Wolcott*, 326 Conn. 190, 193, 163 A.3d 46 (2017) (considering complainant's allegations of sex

and Opportunities (commission), appeals[3] from the judgment of the trial court dismissing its administrative appeal from the decision of the commission's human rights referee (referee), who found that the defendants Edge Fitness, LLC (Edge Fitness) and Club Camel, Inc., Bloomfield, doing business as Club Fitness (Club Fitness),[4] did not engage in discriminatory public accommodations practices. On appeal, the commission claims that the trial court incorrectly concluded that women's only workout areas in otherwise public gyms did not violate § 46a-64 because that statute contains an implied customer gender privacy exception. We conclude that the exceptions to the general prohibition against discrimination on the basis of sex in public accommodations are limited to those expressly provided by the plain language of § 46a-64 and, therefore, that there is no implied customer gender privacy exception to the statute. Accordingly, we reverse the judgment of the trial court.

discrimination). We do, however, recognize that the terms "sex" and "gender" are not specifically defined by the statutory scheme and that the understanding of them has evolved over time. See, e.g., R. Oliveri, "Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After *Bostock* v. *Clayton County*," 69 U. Kan. L. Rev. 409, 423–25 (2021). Resolution of this appeal does not, however, require us to delve further into the definitions of the terms "sex" or "gender," as used in the statutory scheme.

[3] The commission appealed from the judgment of the trial court to the Appellate Court, and we subsequently transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[4] "Due to unusual procedures applicable to proceedings before the commission, in this administrative appeal, the commission is named as both a plaintiff (in its own capacity) and as a defendant (in its capacity as the agency under which the . . . referee issued the decision from which the commission appealed). See General Statutes § 46a-94a." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 157 n.1, 140 A.3d 190 (2016). Likewise, the complainants before the commission, Alex Chaplin and Daniel Brelsford, were named as defendants in the administrative appeal, but they did not participate therein. Accordingly, unless otherwise indicated, all references herein to the defendants are to Edge Fitness and Club Fitness, collectively.

The record reveals the following undisputed facts and procedural history. The complainants, Alex Chaplin and Daniel Brelsford, were members of the defendants' gyms, Club Fitness and Edge Fitness, respectively. Both individuals identify as males and used the larger coed portions of the facilities. While using equipment in the main workout areas, the complainants experienced slight delays in completing their workouts because they had to wait for other members to finish using that equipment. This led the complainants to believe that the defendants, by providing separate women's only fitness areas in their facilities, had discriminated against them on the basis of sex, and they filed complaints with the commission challenging the practice. The referee concluded that the defendants did not violate § 46a-64 by maintaining women's only workout areas and dismissed the complaints.

The commission filed an administrative appeal from the decision of the referee with the trial court pursuant to General Statutes § 4-183. In its memorandum of decision, the trial court first recognized that a women's only fitness area is neither a bathroom nor a locker room. The court then questioned whether "§ 46a-64 (b) (1) allow[s] for exceptions to the sex based antidiscrimination prohibitions in cases other than bathrooms or locker rooms [in which] the same gender privacy interests that allowed for the exceptions for bathrooms and locker rooms are in play." The trial court observed that, "unless the statute is read to include a gender privacy exception similar to the express exception for bathrooms and locker rooms, it would be a violation to provide separate showers, dressing rooms and hospital rooms for men and women in public accommodations." The trial court further considered the burden that the elimination of women's only workout areas would place on women of certain religious practices. The trial court, therefore, concluded that "the provision of women's

only exercise areas in fitness centers of public accommodation does not violate the sex based antidiscrimination provisions of . . . § 46a-64." Accordingly, the trial court rendered judgment dismissing the commission's administrative appeal. This appeal followed.[5] See footnote 3 of this opinion.

On appeal, the commission claims that the language of § 46a-64 (b) (1) is plain and unambiguous and does not contain a gender privacy exception to the general prohibition against sex discrimination. The commission asserts that a gender privacy exception is not a valid defense to an otherwise discriminatory sex based classification.[6] In response, the defendants argue that, because

[5] We note that, on March 2, 2021, we invited amici curiae to file briefs to address the following question: "In this administrative appeal, did the trial court and the [referee] properly determine that the provision of [women's] only workout areas by the defendant gyms did not violate . . . § 46a-64 (a) and its prohibition against sex discrimination in public accommodations?"

The following amici curiae accepted our invitation and filed briefs: (1) the Jewish Federation of Greater Hartford, the Muslim Coalition of Connecticut, and other religious organizations (collectively, interfaith amici); (2) the Quinnipiac University School of Law Legal Clinic; (3) the GLBTQ Legal Advocates & Defenders, Lambda Legal Education and Defense Fund, Inc., and the Connecticut Transadvocacy Coalition; and (4) the American Civil Liberties Union of Connecticut. We are grateful to the amici for their thoughtful advocacy in response to our invitation for briefs.

[6] We note that the commission also argues that Edge Fitness failed to plead the customer gender privacy exception before the referee and, therefore, waived the defense. We disagree. As the trial court observed in rejecting this claim, (1) "these matters were consolidated and tried as one matter," (2) "the formal requirements of pleading do not apply in administrative proceedings," (3) "these two issues were in fact specifically raised at the hearing, tried, and reflected in the [referee's] decision," (4) "issues such as the appropriateness of pleadings and evidentiary rulings in an administrative [proceeding] are reviewed on appeal . . . on an abuse of discretion basis," (5) "the issue presented in this matter is an important issue that has ramifications beyond the parties," and (6) "issues such as gender privacy and religious rights are legal principles that are naturally intertwined with a defense against the discrimination alleged." See generally *Presidential Village, LLC* v. *Phillips*, 325 Conn. 394, 412 n.15, 158 A.3d 772 (2017) ("[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)).

antidiscrimination statutes are to be construed broadly to effectuate their beneficent purpose, the remedial purpose of § 46a-64 is advanced by the defendants' provision of women's only workout areas. The defendants also contend that the commission's reading of the statute is so narrow that it would yield absurd results. We agree with the commission and conclude that the trial court's expansion of the exceptions in § 46a-64 (b) (1) to the general prohibition against sex discrimination was inconsistent with the plain language of the statute.

Whether the trial court correctly determined that there is an implied customer gender privacy exception encompassed within § 46a-64 (b) (1) is a question of statutory construction that presents a question of law, over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule in General Statutes § 1-2z in construing statutes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see, e.g., id., 45–46 (setting forth plain meaning rule).

In interpreting statutes, words and phrases not otherwise defined by the statutory scheme are construed according to their "commonly approved usage . . . ." General Statutes § 1-1 (a); see, e.g., *State* v. *Panek*, 328 Conn. 219, 227–28, 177 A.3d 1113 (2018). In determining the commonly approved usage of the statutory language at issue, we consult dictionary definitions. See, e.g., id., 229. It is well established that a statute is considered plain and unambiguous when "the meaning . . . is so strongly indicated or suggested by the [statutory] lan-

We therefore agree with the trial court's conclusion that Edge Fitness did not waive the special defense, which was raised and argued during the administrative proceeding, because the commission was on notice of it.

guage . . . that . . . it appears to be *the* meaning and appears to preclude any other likely meaning. . . . [I]f the text of the statute at issue . . . would permit more than one likely or plausible meaning, its meaning cannot be said to be plain and unambiguous." (Emphasis in original; internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 698 n.6, 258 A.3d 1268 (2021).

As required by § 1-2z, we first determine whether the statutory language is ambiguous. Section 46a-64 (a) provides in relevant part that it "shall be a discriminatory practice in violation of this section: (1) [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of . . . sex . . . [or] (2) to discriminate, segregate or separate on account of . . . sex . . . ." Section 46a-64 (b) (1) then sets forth the exceptions to the statute's general prohibition against discrimination based on sex, which it limits to "the rental of sleeping accommodations provided by associates and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex or . . . separate bathrooms or locker rooms based on sex." See footnote 1 of this opinion.

It is undisputed that the defendants' gyms are "place[s] of public accommodation" within the meaning of § 46a-64 (a) (1). It is also undisputed that the defendants' provision of women's only workout areas constitutes a "discriminatory practice"[7] in violation of that

[7] We note that, for purposes of the Public Accommodation Act, the legislature defines the term "discrimination" as "includ[ing] segregation and separation . . . ." General Statutes § 46a-51 (6); see also General Statutes § 46a-51 (8) (defining "discriminatory practice" as, inter alia, "a violation of" § 46a-64). The statutory scheme does not, however, define the terms "segregate," "segregation," "separate," or "separation." Looking to the dictionary for the common usage of those terms; see, e.g., *State* v. *Panek*, supra, 328 Conn. 229; we observe that Merriam Webster's Collegiate Dictionary defines the term "segregate" as "to separate or set apart from others or from the general

subsection unless it is subject to a statutory exception, which is the focus of our analysis in this appeal.

The legislature enacted the bathroom and locker room exceptions set forth in § 46a-64 (b) (1) as No. 94-238, § 4, of the 1994 Public Acts (P.A. 94-238). In determining the commonly approved usage of the terms "bathroom" and "locker room," we look to their dictionary definitions. See, e.g., *State* v. *Panek*, supra, 328 Conn. 229. Contemporary to the passage of the 1994 amendment to § 46a-64, "bathroom" was defined as "a room equipped for taking a bath or shower . . . toilet . . . ." Random House Unabridged Dictionary (2d Ed. 1993) p. 177. "Locker room" was defined as "a room containing lockers, as in a gymnasium, factory, or school, for changing clothes and for the storage and safekeeping of personal belongings." Id., p. 1128. The parties do not proffer alternative meanings for these terms or suggest that the women's only workout areas

mass: isolate . . . ." Merriam Webster's Collegiate Dictionary (10th Ed. 1993) p. 1058. Similarly, the term "segregation" refers to the "act or process of separation"; Black's Law Dictionary (6th Ed. 1990) p. 1358; or to "the separation or isolation of a race, class, or ethnic group by . . . divided educational facilities, or other discriminatory means . . . ." Webster's Third New International Dictionary (1961) p. 2057; accord Merriam Webster's Collegiate Dictionary, supra, p. 1058; see also *Sheff* v. *O'Neill*, 238 Conn. 1, 28 and n.31, 678 A.2d 1267 (1996) (similarly defining term "segregation," as used in article first, § 20, of state constitution). The term "separate" is defined as "set or kept apart," "not shared with another: INDIVIDUAL, SINGLE," "AUTONOMOUS, INDEPENDENT," and "DISTINCT, DIFFERENT . . . ." Webster's Third New International Dictionary, supra, p. 2069; see also Merriam Webster's Collegiate Dictionary, supra, p. 1067 (defining "separate" as "set or kept apart" and "existing by itself"). These definitions plainly and unambiguously prohibit, without qualification, any isolation, separation or keeping apart "on account of sex," within a "public accommodation," and do not by themselves account for isolation, separation or keeping apart to protect or advantage a class of people that might be deemed to need or deserve protection or advantage, as the defendants argue with respect to the salutatory effects of women's only fitness facilities. Cf. General Statutes § 46a-64 (b) (2) (prohibition on age discrimination "shall not apply to minors or to special discount or other public or private programs to assist persons sixty years of age and older").

fit within the plain meaning of those definitions as a factual matter.[8] Accordingly, we conclude that the exceptions set forth in § 46a-64 (b) (1) plainly and unambiguously do not encompass the women's only workout areas for purposes of the § 1-2z analysis.

Because the women's only workout spaces do not fall under an express exception, the defendants ask us to interpret § 46a-64 (b) (1) to include a third, implicit exception to the prohibition against sex based discrimination, namely, a broad gender privacy exception. The defendants argue that such an exception is implied by the bodily privacy interests that the enumerated exceptions protect and that the inclusion of a third exception would be consistent with other portions of the statutory scheme. The defendants further rely on General Statutes § 46a-60 (b) (1),[9] which provides for an exception to the general ban on sex discrimination in employment when sex constitutes a bona fide occupational qualification (BFOQ) for a position. The defendants ask us to read the statutes in relation to one another and to conclude that the inclusion of the BFOQ defense in the context of employment discrimination evidences a legislative intent to include an implied gender privacy

[8] We note that it is undisputed that the women's only workout areas at issue in this appeal do not fall within the plain meaning of the statutory terms "bathroom" or "locker room." More specifically, the record indicates that the women's only workout areas in each facility are separated from the larger portions of the gyms by doors with blinds and branding, as well as by walls without windows. The women's only areas are small relative to the rest of the facilities and, therefore, contain a lesser amount of the same equipment. There is no indication in the record that either of the women's only workout areas at issue contain showers, toilets, lockers, or any other feature associated with a bathroom or locker room.

[9] General Statutes § 46a-60 (b) (1) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . sex . . . ."

exception to the ban on discrimination in public accommodations. We disagree with this reading of § 46a-64 (b) (1).

It is well established "that the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law . . . ." (Internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 709, 998 A.2d 1 (2010). Declining to read a BFOQ like exception into § 46a-64 (b) (1) does not render it inconsistent with § 46a-60 (b) (1). Had the legislature intended to include a third exception to the general ban on sex based discrimination in public accommodations, it could have done so. Indeed, the legislature's inclusion of a BFOQ exception in § 46a-60 (b) (1) demonstrates that the legislature could have provided such an exception in the public accommodation statute but consciously elected not to do so. See, e.g., *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016) (common principle of statutory construction is that, when legislature expresses list of items, exclusion of particular item is deliberate); *Stafford* v. *Roadway*, 312 Conn. 184, 194, 93 A.3d 1058 (2014) ("[i]t is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted; internal quotation marks omitted)). As this court stated more than thirty years ago, "[a] review of our labor legislation discloses that our General Statutes treat employment discrimination separately from public accommodation discrimination. We deem it especially significant that only the former statute contains an express exception for a 'bona fide occupational qualification or need' . . . [in concluding that] [o]ur public accommodation statute . . . gives no indication that it was intended to encompass the proffer of services within its definition of discriminatory accommodation practices. The absence of a statutory

exception for a 'bona fide occupational qualification or need' in the text of [the public accommodation statute] is more consistent with a legislative intent to leave such practices to be regulated by statutes that address employment discrimination rather than by statutes directed to discrimination in public accommodations." (Citations omitted.) *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 302, 528 A.2d 352 (1987); see id., 302–303 (denying woman opportunity to serve as scoutmaster of Boy Scout troop did not deprive her of "accommodation" on basis of sex).

Declining to import a gender privacy exception into § 46a-64 is consistent with the maxim that "remedial statutes should be construed liberally in favor of those whom the law is intended to protect," but exceptions to those statutes "should be construed narrowly." (Internal quotation marks omitted.) *Fairchild Heights, Inc.* v. *Dickal*, 305 Conn. 488, 502, 45 A.3d 627 (2012); see *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731 (2002) ("recogniz[ing] the balance that the legislature has struck between the state's dual interest" in broadly prohibiting sex discrimination and narrowly exempting small employers); *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 473–74, 673 A.2d 484 (1996) ("provisos and exceptions to statutes are to be strictly construed with doubts resolved in favor of the general rule rather than the exception and . . . those who claim the benefit of an exception under a statute have the burden of proving that they come within the limited class for whose benefit it was established" (internal quotation marks omitted)). Particular caution is warranted in the construction of exceptions to antidiscrimination laws because a broad construction poses the risk of swallowing the rule. See, e.g., *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250

Conn. 763, 788–89, 739 A.2d 238 (1999) (concluding that " 'insufficient income' " exception to Fair Housing Act under General Statutes § 46a-64c (b) (5) does not categorically exclude tenants receiving section 8 assistance but, instead, receives "[a] narrow construction . . . [that] affords a landlord an opportunity to determine whether, presumably for reasons extrinsic to the section 8 housing assistance calculations, a potential tenant lacks sufficient income to give the landlord reasonable assurance that the tenant's portion of the stipulated rental will be paid promptly and that the tenant will undertake to meet the other obligations implied in the tenancy").

In this vein, we address the argument of the defendants and interfaith amici; see footnote 5 of this opinion; that a conclusion that the statutory text plainly and unambiguously lacks a gender privacy exception will lead to absurd or bizarre results by eliminating other women's only spaces and impeding the religious freedom of women seeking to use those facilities.[10] They rely on the prediction of the referee and the trial court that, if the statute's exceptions were construed strictly, the provision of separate showers, dressing rooms, lac-

[10] We note that no constitutional claim has been raised in this appeal. Thus, we do not consider the implications that § 46a-64 may have in relation to constitutional provisions and statutory safeguards such as the Connecticut Act Concerning Religious Freedom. See General Statutes § 52-571b. We leave these questions, including any gloss necessary to save § 46a-64 (a) from constitutional jeopardy, for another day, in a case that squarely presents them. See *Bostock* v. *Clayton County*, U.S. , 140 S. Ct. 1731, 1753–54, 207 L. Ed. 2d 218 (2020) (declining to address "[the employers'] fear that complying with Title VII's requirement [as to not discriminating against homosexual or transgender persons] may require some employers to violate their religious convictions" because "how [the] doctrines protecting religious liberty [namely, the first amendment and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq.] interact with Title VII [is a question] for future cases" given lack of religious liberty claim); see also *Fay* v. *Merrill*, 338 Conn. 1, 21 n.18, 256 A.3d 622 (2021) (noting "the general rule that [c]onstitutional issues are not considered unless absolutely necessary to the decision of a case" (internal quotation marks omitted)).

tation rooms, domestic violence shelters, and hospital rooms would constitute a violation of the statute. We disagree. First, although such facilities are not at issue in this appeal, it is not at all clear that they would not fall within the existing statutory exceptions for bathrooms, locker rooms, and sleeping accommodations, as interpreted using our rules of statutory construction. See General Statutes § 46a-64 (b) (1) and (2). Second, even if we were to assume, without deciding, that restricting the facilities identified by the referee and the trial court to women constitutes impermissible discrimination and that such a result is indeed absurd,[11] thus permitting resort to the legislative history of § 46a-64 (b) (1), that legislative history does not support the defendants' argument. See, e.g., *State* v. *Bischoff*, 337 Conn. 739, 746, 258 A.3d 14 (2021) ("[o]nly if we determine that the statute is not plain and unambiguous or yields absurd or unworkable results may we consider extratextual evidence of its meaning such as the legislative history and circumstances surrounding its enactment" (internal quotation marks omitted)). Instead, it indicates that the legislature has rejected the concept of abstract notions of gender privacy in favor of a more narrowly cabined exception when warranted.

As we noted previously, the bathroom and locker room exception in § 46a-64 (b) (1) was enacted in 1994 as § 4 of P.A. 94-238, which was first introduced as Substitute House Bill No. 5606. In his written testimony before the Judiciary Committee in support of Substitute

[11] We may consider hypothetical scenarios beyond the facts of the case before us in determining whether a construction of the plain language of a statute will lead to an absurd result. See, e.g., *State* v. *Brown*, 310 Conn. 693, 708–709, 80 A.3d 878 (2013) (determining that interpretation of special parole statute created absurd results on basis of hypothetical factual scenarios); *State* v. *Gelormino*, 291 Conn. 373, 383–84, 968 A.2d 379 (2009) (considering but rejecting defendant's argument that plain and unambiguous language of mandatory minimum sentencing statute yielded absurd result when considered in context of hypothetical fact patterns).

House Bill No. 5606,[12] then Attorney General Richard Blumenthal described the bill as intended to "clarif[y] that the prohibition against discrimination based on sex does not mean that places of public accommodations such as gyms, bars, and restaurants cannot provide separate bathroom and locker room facilities. *Although this is common sense, it is not clear that such an exception exists in the current statute.*" (Emphasis added.) Written testimony from Richard Blumenthal, Attorney General, submitted to the Joint Committee on Judiciary, Connecticut General Assembly (March 11, 1994);[13] see 37 H.R. Proc., Pt. 20, 1994 Sess., p. 7240, remarks of Representative Richard D. Tulisano ("this section . . . makes it clear that it's not illegal under the public accommodations act to have separate bathrooms in locker rooms for men and women"). The originally raised House Bill No. 5606 was expressly intended to allow "the provision of separate facilities for males and females where privacy concerns exist"; it would have exempted from the act "the provision of bathroom and locker room facilities *based on considerations of privacy and modesty.*" (Emphasis added.) Raised Bill No. 5606, 1994 Sess., § 1. During testimony on House Bill No. 5606 before the Judiciary Committee, Commission Counsel Philip A. Murphy, Jr., representing the commission, criticized the drafting of this proposed exception

[12] "[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or purposes for which the legislature used the language in question." (Internal quotation marks omitted.) *In re Elianah T.-T.*, 326 Conn. 614, 625–26 n.10, 165 A.3d 1236 (2017); see, e.g., *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314–15, 819 A.2d 260 (2003).

[13] We note that the written testimony of then Attorney General Blumenthal is not contained in the printed record of the Joint Standing Committee Hearings but is included in the legislative bill file available in the Connecticut State Library.

for its potential to "be interpreted too broadly and . . . [to] cause needless litigation." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 1994 Sess., p. 513. In his written testimony, Murphy urged that the "section [of the raised bill] be deleted or substantially rewritten," arguing that "the exception is so broad that it will result in the exception swallowing the discriminatory practice. Thus a public accommodation that wishes to serve only men can decline to provide women's restrooms or locker rooms and claim that it does not have to serve women because of 'privacy and modesty' concerns." Id., p. 591. Subsequently, the substitute bill, which was ultimately enacted as Public Act No. 94-238, addressed this criticism by eliminating the potentially problematic "considerations of privacy and modesty" language in favor of the more simple exception for "separate bathrooms or locker rooms based on sex." Substitute House Bill No. 5606, 1994 Sess., § 1. Our legislature elected, therefore, to address an application of the sex discrimination prohibition that might be inconsistent with "common sense," by using simpler terms, rather than qualifying the prohibition with reference to the subjective morass of "modesty" and "privacy" urged by the defendants and the amici. See *In re Valerie D.*, 223 Conn. 492, 518 n.19, 523, 613 A.2d 748 (1992) (noting that court ordinarily does not consider legislature's failure to act but considering "limited circumstances" of legislature's rejection of one bill and immediate adoption of competing bill "in its stead" as evidence of legislative intent); see also *Rainbow Housing Corp.* v. *Cromwell*, 340 Conn. 501, 519 n.10, A.3d. (2021).

Consistent with the concerns of the commission in advocating for the enactment of a bathroom and locker room exception that did not include vague language allowing for the "consideration of privacy and modesty," we observe that a reading of § 46b-64 (b) (1) to imply a gender privacy exception, although presumably

to benefit women, could also negatively affect the rights of women in a different way. As discussed in the amicus briefs filed by the Quinnipiac University School of Law Legal Clinic, the American Civil Liberties Union of Connecticut, and the GLBTQ Legal Advocates & Defenders, Lambda Legal Education and Defense Fund, Inc., and the Connecticut Transadvocacy Coalition, such an exception could be invoked to exclude women based on the privacy interests of *men* and could justify discrimination against transgender individuals because some customers, "due to modesty, find it uncomfortable" to be around such people. *Livingwell (North), Inc.* v. *Pennsylvania Human Relations Commission*, 147 Pa. Commw. 116, 121, 606 A.2d 1287, appeal denied, 533 Pa. 611, 618 A.2d 401 (1992); see id., 121–22 ("The privacy interest expressed involves situations [in which] the customers, due to modesty, find it uncomfortable to have the opposite sex present because of the physical condition in which they find themselves or the physical activity in which they are engaged as customers at the business entity. These customers would be embarrassed or humiliated if cared for or observed by members of the opposite sex."). Such a result of potentially limiting the access of women and transgender people access to spaces on the basis of the privacy interests of men or the "moral comfort" of customers defeats the purpose of our state's antidiscrimination legislation. See, e.g., *Corcoran* v. *German Social Society Frohsinn, Inc.*, 99 Conn. App. 839, 843–44, 916 A.2d 70 (noting legislative intent to broaden rather than limit scope of § 46a-64), cert. denied, 282 Conn. 910, 922 A.2d 1098 (2007).

Nevertheless, we acknowledge that our analysis of the plain and unambiguous statutory text of § 46a-64 may lead to a result that might well have been unintended by the legislature, including with respect to its application in hypothetical scenarios involving lactation

rooms or dressing rooms, as posited by the defendants, the referee, and the trial court. See footnotes 10 and 11 of this opinion and accompanying text. As the United States Supreme Court recently noted in construing the language "because of sex" in Title VII of the Civil Rights Act of 1964 to apply to employment discrimination against homosexual or transgender persons, this effect is not a reason to depart from the plain and unambiguous statutory text of § 46a-64. See *Bostock* v. *Clayton County*, U.S. , 140 S. Ct. 1731, 1737, 207 L. Ed. 2d 218 (2020) ("Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the [Civil Rights] Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands."); see also id., 1749 ("the fact that [a statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; instead, it simply demonstrates [the] breadth of a legislative command" (internal quotation marks omitted)). The purpose of the Public Accommodation Act is to provide all sexes "full and equal accommodations in any place of public accommodation . . . ." General Statutes § 46a-64 (a) (1). This purpose is not frustrated by a broad reading of the statutory language of § 46a-64 (a) or a narrow construction of the exceptions provided under subsection (b) of the statute.

Thus, the sensitivity of the determination of where to limit antidiscrimination protections, along with evolving contemporary understandings of the terms "gender" and "sex"; see footnote 2 of this opinion; renders this issue uniquely well suited for consideration in the first instance by the legislature, which is the policy-making branch of our government. See, e.g., *Thi-*

bodeau v. *Design Group One Architects, LLC*, supra, 260 Conn. 715 (recognizing policy-making role of legislature in context of sex discrimination); see also *Fay* v. *Merrill*, 338 Conn. 1, 51–52, 256 A.3d 622 (2021) ("[g]iven the reasonable policy concerns that support the parties' respective state constitutional arguments, in interpreting our state's constitution, we must defer to the legislature's primary responsibility in pronouncing the public policy of our state" (internal quotation marks omitted)); *State* v. *Lockhart*, 298 Conn. 537, 574, 4 A.3d 1176 (2010) (The court declined to adopt a state constitutional rule requiring the recording of custodial interrogations because, although the rule would likely be beneficial, "[d]etermining [its] parameters . . . requires weighing competing public policies and evaluating a wide variety of possible rules. . . . In [the court's] view, such determinations are often made by a legislative body because it is in a better position to evaluate the competing policy interests at play . . . ." (Citation omitted.)).

We therefore conclude that the defendants' gyms are places of public accommodation that have denied the complainants full and equal accommodations on the basis of their sex. We further conclude that that denial does not fall within an exception expressly provided for in § 46a-64 (b) (1), rendering the practice of maintaining women's only workout areas within an otherwise public gym a violation of the Public Accommodation Act.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the commission's administrative appeal.

In this opinion the other justices concurred.

O. A. *v.* J. A.*
(SC 20590)

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

Syllabus

The plaintiff sought to dissolve her marriage to the defendant. Thereafter, the defendant filed a cross complaint in which he sought enforcement of a postnuptial agreement that the parties had executed, which set forth terms for the distribution of property and for determining support awards in the event of the dissolution of the parties' marriage. The plaintiff subsequently filed motions for pendente lite alimony, attorney's fees, and expert fees. The trial court, relying on this court's decision in *Fitzgerald* v. *Fitzgerald* (169 Conn. 147), concluded that it was not required to determine, prior to deciding the plaintiff's motions, whether the parties' postnuptial agreement was enforceable and deferred its decision on that issue until the end of trial. The court, after considering each party's financial resources and the fact that the plaintiff was completely reliant on the defendant for financial support during the marriage, ordered the defendant to pay the plaintiff pendente lite alimony, attorney's fees, and expert fees. The defendant appealed from the trial court's orders, claiming that the trial court incorrectly had determined that it did not need to consider the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. *Held* that the trial court properly relied on *Fitzgerald* and acted within its discretion in deferring its decision on the enforceability of the parties' postnuptial agreement until the end of trial, and, accordingly, this court affirmed the trial court's orders: the trial court's broad equitable powers and discretion in deciding matters arising in a dissolution action include the discretion to defer a decision on the enforceability of a marital agreement until the parties have had a full and fair opportunity to litigate all issues in the case at a trial on the merits; moreover, contrary to the defendant's contention that *Fitzgerald* was distinguishable from the present case because it involved a separation agreement rather that a postnuptial agreement, the underlying principle in *Fitzgerald*, that the validity of a marital agreement may be assessed when the case is tried on its merits, applies equally to all marital agreements, including prenuptial, postnuptial and separation agreements, and there was no merit to the defendant's assertion that this court had indicated in *Bedrick* v. *Bedrick* (300 Conn. 691) that

* 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 or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

reliance on *Fitzgerald* in the context of postnuptial agreements is misplaced; furthermore, although this court was not unsympathetic to the defendant's argument that the holding in this case could work an injustice because the plaintiff would not have the means to make the defendant whole if the trial court ultimately determined, after a trial, that the parties' postnuptial agreement is enforceable and that it precludes an award of pendente lite alimony and litigation expenses, the defendant was not without a remedy in such circumstances, as the trial court could ultimately adjust any final financial orders to compensate the defendant for pendente lite payments that previously had been made in contravention of the agreement.

Argued September 17, 2021—officially released January 27, 2022**

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 court, *McLaughlin*, *J.*, issued certain orders awarding the plaintiff pendente lite alimony, attorney's fees, and expert fees, from which the defendant appealed. *Affirmed*.

James P. Sexton, with whom were *Thomas D. Colin*, *Julia K. Conlin* and, on the brief, *Emily Graner Sexton*, for the appellant (defendant).

Kenneth J. Bartschi, with whom was *Karen L. Dowd*, for the appellee (plaintiff).

Opinion

KELLER, J. In this interlocutory appeal,[1] we must decide whether a spouse seeking pendente lite alimony, attorney's fees, and expert fees during the pendency of a dissolution action must demonstrate that a postnuptial agreement that purportedly precludes such payments is invalid or otherwise unenforceable before the trial

** January 27, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] 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.

court properly may order the other spouse to make any such payments.

Shortly after their marriage in 2013, the plaintiff, O. A., and the defendant, J. A., executed a postnuptial agreement setting forth terms for the distribution of property and determining support awards in the event of the dissolution of their marriage. In 2019, the plaintiff brought this action, seeking, inter alia, dissolution of the marriage and temporary and permanent alimony. The defendant filed a cross complaint in which he sought, inter alia, enforcement of the parties' postnuptial agreement. Thereafter, the plaintiff filed motions for pendente lite attorney's fees, alimony, and expert fees. After an evidentiary hearing, the trial court granted in part the plaintiff's motions and ordered the defendant to pay the plaintiff (1) temporary alimony in the amount of $20,000 per month, (2) $114,019.99 in current attorney's fees and a retainer for legal counsel in the amount of $250,000, and (3) a contribution toward specified future expert fees in the amount of $25,000. On appeal, the defendant claims that the trial court incorrectly determined that it need not determine the enforceability of the parties' postnuptial agreement before awarding the plaintiff pendente lite alimony, attorney's fees, and expert fees (hereinafter alimony and litigation expenses), which the defendant contends the plaintiff is not entitled to under the agreement. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, which were either found by the trial court or are otherwise undisputed, are relevant to our resolution of this appeal. The plaintiff and the defendant married in Greenwich on September 29, 2013. At the time of marriage, the plaintiff was approximately twenty-eight years old, had no children, and had an approximate net worth of $275,400, and the defendant was forty-five years old, had one daughter from a previ-

ous marriage, and had an approximate net worth of $32 million.

Nearly four months after their marriage, on January 17, 2014, the parties entered into a postnuptial agreement in hopes that it would "settle questions with respect to certain marital rights and property to prevent strife and to enhance the prospects for marital harmony . . . ." Both parties were represented by separate and independent counsel and made financial disclosures to the other prior to executing the agreement. Pursuant to the agreement, the parties waived any legal right that they might otherwise have to the property of the other in the event of a "[t]ermination [e]vent," which is defined to include the filing of a dissolution action. The agreement further provides that, should a termination event occur, the parties will have restored to them the value of the individual property[2] that each party brought into the marriage plus the monetary value of any bequest, trust interest, inheritance, gift, insurance benefits, or the like that either party received during the marriage. The defendant also agreed to assume full financial responsibility for any child born to the marriage or adopted by the parties prior to the termination event.

With respect to marital property,[3] the agreement provides that it "shall be distributed to the parties in the same proportion to the value of their respective [i]ndi-

[2] Under the postnuptial agreement, individual property is defined as the "monetary value of property, which a party held on the [d]ate of [m]arriage, plus the monetary value on the date of transfer to a party of any bequest, trust interest, inheritance, gift, insurance benefits or the like received by a party after the [d]ate of [m]arriage and prior to a [t]ermination [e]vent . . . ."

[3] Marital property is defined in the postnuptial agreement as "the increase in value of the [i]ndividual [p]roperty of the parties held on the [d]ate of [m]arriage until a [t]ermination [e]vent . . . plus . . . the increase in the monetary value from the date of transfer to a party of any bequest, trust interest, inheritance, gift, insurance benefits or the like received by a party after the [d]ate of [m]arriage until a [t]ermination [e]vent."

vidual [p]roperty (each party's asset value on the [d]ate of [m]arriage plus the monetary value at the date of transfer of any subsequent gifts or inheritance received by either party during marriage and prior to a [t]ermination [e]vent)." With respect to spousal support, the agreement provides that the defendant waives any claim to receive alimony from the plaintiff but agrees to pay the plaintiff alimony, the amount of which is to be determined pursuant to a complex formula that takes into account various factors, including, but not limited to (1) the length of the parties' marriage, (2) whether they conceived children who were born alive, and (3) the amount of individual property returned to the defendant.

Of particular relevance here, the agreement provides that, if a termination event occurs between the fifth and eighth anniversaries of the date of the parties' marriage, a child was conceived prior to the termination event and later born alive, the plaintiff receives "an aggregate of [m]arital [p]roperty and alimony equaling less than $500,000," and "the value of [the defendant's] [i]ndividual [p]roperty restored to him by the court upon the termination of the marriage is in excess of $10,000,000, then . . . [the defendant] will be obligated to pay a minimum of $100,000 of alimony annually to [the plaintiff] until she receives gifts or inheritances having an aggregate value greater than $10,000,000, taking the value of each such gift or inheritance on the date of transfer, whether prior to or after the [t]ermination [e]vent."

The agreement does not expressly address the issue of pendente lite alimony. It defines the term "alimony" as "the dollar amount of the alimony award made by the court *upon the formal termination of the marriage*"; (emphasis added); a definition that would not clearly and unambiguously include an award of pendente lite alimony, which is made during the pendency of the

dissolution action, *prior* to the formal termination of the marriage. See, e.g., *Connolly* v. *Connolly*, 191 Conn. 468, 480, 464 A.2d 837 (1983) ("[p]endente lite orders necessarily cease to exist once a final judgment in the dispute has been rendered because their purpose is extinguished at that time"). The agreement also does not discuss attorney's fees or expert fees, except to state that, if a party unsuccessfully challenges the agreement or breaches it, then he or she will be responsible for the other party's attorney's fees.

After the execution of the postnuptial agreement, the parties began what the trial court described as a "fairly affluent" and "bicoastal" lifestyle, with family homes in Greenwich and Malibu, California. They later had two children—a girl, born in 2015, and a boy, born in 2017. During the marriage, the defendant was the sole financial provider for the family, and the plaintiff relied on him entirely for financial support. The defendant, who is self-employed, is involved in a number ofbusiness ventures. Specifically, "[h]e manages his own money through an investment [management firm] . . . . He [also] works with the plaintiff's brother on three real estate projects in Los Angeles, [California] . . . [and] founded a not-for-profit solar company . . . . Finally, the defendant serves on two boards of directors for life science companies . . . ." Despite the defendant's numerous business ventures, however, he testified that the parties had, and continue to have, significant " 'cash flow' " issues due to the illiquidity of the defendant's assets.

These " 'cash flow' " problems, as well as the plaintiff's mental health challenges, are two of the factors that precipitated the decline of the parties' marriage. Additionally, on a family trip to Colorado in December, 2018, the plaintiff and the defendant's then teenage daughter were involved in a physical altercation. Subsequently, in April, 2019, the plaintiff and the defendant

were involved in a physical altercation, after which the police were called and the plaintiff was arrested.[4]

In July, 2019, the plaintiff admitted herself into Silver Hill Hospital in New Canaan. The plaintiff testified that "she went to Silver Hill Hospital because she realized [that] she needed help after having gone through several difficult situations, including, in November, 2018, losing an election for public office in Malibu [California], shortly thereafter, having her home destroyed [by fire], then, the December, 2018 altercation with her stepdaughter, and, finally, in 2019 . . . a miscarriage." The plaintiff spent thirty days at Silver Hill Hospital and received treatment for a mild cannabis disorder and for managing her emotions.

The plaintiff was discharged from Silver Hill Hospital on August 21, 2019, and commenced this dissolution action two days later. On August 21, the defendant sought and was granted an ex parte restraining order against the plaintiff, barring her from the marital home and from contacting the defendant, his daughter, and the parties' children. On September 20, 2019, the defendant filed an answer and a cross complaint, seeking, inter alia, enforcement of the parties' postnuptial agreement. The plaintiff thereafter filed separate motions for pendente lite attorney's fees, temporary alimony, and expert fees.[5] In her reply to the defendant's cross complaint, the plaintiff sought avoidance of the parties' postnuptial agreement on a number of grounds, including that the agreement was signed by her under duress, that

[4] There are separate criminal charges pending against the plaintiff that relate to the April, 2019 altercation with the defendant.

[5] Specifically, the plaintiff's motions for pendente lite support requested that the court order the defendant to pay her (1) $25,000 per month in temporary alimony, retroactive to October 31, 2019; (2) $83,242 in past due attorney's fees, $250,000 in prospective attorney's fees, and $100,000 per month, beginning on May 1, 2020, in presumed ongoing attorney's fees; and (3) $25,000 for the retention and utilization of experts.

the defendant did not provide full, fair and reasonable financial disclosure prior to its execution, and that it would be unconscionable to enforce it in light of present circumstances. In response, the defendant filed a motion to bifurcate the trial, arguing that the trial court should first determine the enforceability of the parties' postnuptial agreement before awarding the plaintiff pendente lite alimony and litigation expenses to which she may not be entitled.

The trial court conducted an evidentiary hearing on the parties' motions, after which it issued orders regarding, inter alia, the postnuptial agreement and the pendente lite alimony and litigation expenses. Relying on this court's decision in *Fitzgerald* v. *Fitzgerald*, 169 Conn. 147, 362 A.2d 889 (1975), the trial court concluded, contrary to the defendant's assertion, that it was not required to determine, prior to deciding the motions, whether the postnuptial agreement was enforceable and, if so, whether it precluded an award of pendente lite alimony and litigation expenses. The court further explained that "[t]o preclude pendente lite support in a matter like this, where one party has no income and, during the course of the marriage, was completely reliant on the other for financial support, would work a great injustice by allowing one side to have access to unlimited resources while the other party [is] left to rely on the financial resources and kindness of family and friends. This is contrary to the basic purpose of temporary support [which is] to provide financial support to a spouse in need of [such support] until the entry of a final dissolution [judgment]." The court then found, on the basis of "all the credible evidence," that the defendant has an imputed net income or earnings in the amount of $900,000 annually or $75,000 per month. The court therefore determined that the defendant was "able to provide the plaintiff with the financial support she needs" and awarded the plaintiff temporary

alimony in the amount of $20,000 per month, retroactive to October 31, 2019, the date on which she filed her motion for pendente lite alimony.[6]

With respect to the pendente lite attorney's fees and expert fees, the court similarly concluded that, due to the financial disparity between the parties, an award of such fees was proper notwithstanding the defendant's assertion that the requested amount was unreasonable in light of the parties' postnuptial agreement, which, in the defendant's view, would preclude such an award if the agreement were found to be enforceable. In reaching its determination, the court observed: "The nature of the defendant's occupation and assets is complicated. At this juncture, it seems likely that valuing his assets will require considerable discovery and expert assistance. Further, this case has the added issues involving the [temporary restraining order]. Based on the pertinent evidence, statutory criteria, and the parties' financial affidavits, the court orders the defendant to pay the plaintiff $114,019.99, the current amount owed to her attorneys, and a $250,000 retainer as contributions toward her attorney's fees." The court further ordered the defendant to pay the plaintiff expert fees in the amount of $25,000.

On appeal, the defendant claims that the trial court incorrectly determined that it need not consider the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. Specifically, the defendant argues that this court "should . . . hold that a nuptial agreement is presumed to be valid and enforceable until the party challenging it successfully demonstrates

[6] Initially, the defendant's appeal raised a second claim, specifically, that the trial court abused its discretion in awarding pendente lite alimony and litigation expenses because its attribution of a net income to the defendant of $75,000 per month was in error. The defendant subsequently withdrew this claim, and, therefore, it is not before us on appeal.

otherwise" and that no pendente lite alimony or litigation expenses may be awarded until such a demonstration is made. The plaintiff responds that the trial court's decision to award pendente lite alimony and litigation expenses pending final disposition of the dissolution action comports with this court's decision in *Fitzgerald* and this state's public policy.[7] We agree with the plaintiff.

Whether the trial court properly deferred its decision on the enforceability of the parties' postnuptial agreement until the end of trial presents a question of law over which our review is plenary. See, e.g., *Bedrick* v. *Bedrick*, 300 Conn. 691, 697, 17 A.3d 17 (2011); see also *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008) ("[t]he trial court's determination of the proper legal standard in any given case is a question of law subject to our plenary review").

Although it is well established that "[t]he state does not favor divorces . . . [and] [i]ts policy is to maintain the family relation as a life[long] status"; (citation omitted) *McCarthy* v. *Santangelo*, 137 Conn. 410, 412, 78 A.2d 240 (1951); this court has long held that prospective spouses may contract with one another regarding certain issues that may arise in the event of the dissolution of their marriage, so long as the agreement complies with ordinary principles of contract law and does not violate the law or public policy.[8] See, e.g., *Crews*

[7] The plaintiff also argues, as an alternative ground for affirmance, that enforcing the postnuptial agreement now to preclude pendente lite alimony and litigation expenses on the facts found by the trial court would be unconscionable. As we discuss more fully in this opinion, any hearing on the enforceability of the postnuptial agreement will require extensive pretrial discovery and testimony, including the testimony of various experts. Accordingly, the existing record is inadequate for our review of this claim.

[8] "Prenuptial agreements entered into on or after October 1, 1995, are governed by the Connecticut Premarital Agreement Act, General Statutes § 46b-36a et seq. The statutory scheme provides that a prenuptial agreement is unenforceable when: (1) the challenger did not enter the agreement voluntarily; (2) the agreement was unconscionable when executed or enforced; (3) the challenger did not receive a fair and reasonable disclosure of the

v. *Crews*, 295 Conn. 153, 159–60, 989 A.2d 1060 (2010); *McHugh* v. *McHugh*, 181 Conn. 482, 485–86, 436 A.2d 8 (1980). We previously have explained that prenuptial agreements violate public policy if, for example, they promote, facilitate, or provide an incentive for divorce, or if the agreement or a provision thereof purports to relieve a prospective spouse of the obligation to support his or her children or the obligation to support his or her spouse throughout the duration of the marriage. See *McHugh* v. *McHugh*, supra, 488–89.

More recently, in *Bedrick* v. *Bedrick*, supra, 300 Conn. 691, this court held that postnuptial agreements, like prenuptial agreements, do not violate public policy but, instead, "realistically acknowledge the high incidence of divorce and its effect [on] our population." Id., 698; see also id., 699 ("[w]ith divorce as likely an outcome of marriage as permanence, we see no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs" (internal quotation marks omitted)). At the same time, we also recognized that "spouses [executing a postnuptial agreement] do not contract under the same conditions as either prospective spouses [executing a prenuptial agreement] or spouses who have determined to dissolve their marriage [executing a separation agreement]"; id., 701; and, therefore, that postnuptial agreements require stricter scrutiny in their assessment than do prenuptial agreements. Id., 703. Specifically, we held that "a court may enforce a postnuptial agreement only if it complies with applicable contract principles, and the terms of the agreement are both fair and equitable at the time of execution and not unconscionable at the

amount, character and value of property, financial obligations and income of the other party before execution of the agreement; or (4) the challenger did not have a reasonable opportunity to consult with independent counsel. General Statutes § 46b-36g . . . ." (Citation omitted; internal quotation marks omitted.) *Bedrick* v. *Bedrick*, supra, 300 Conn. 699–700.

time of dissolution"; (footnote omitted) id., 703–704; and that "the terms of a postnuptial agreement are fair and equitable at the time of execution if the agreement is made voluntarily, and without any undue influence, fraud, coercion, duress or similar defect. Moreover, each spouse must be given full, fair and reasonable disclosure of the amount, character and value of property, both jointly and separately held, and all of the financial obligations and income of the other spouse." Id, 704. "[I]n determining whether a particular postnuptial agreement is fair and equitable at the time of execution, a court should consider the totality of the circumstances surrounding execution." Id., 705. "[T]he ques-tion of unconscionability is a matter of law to be decided by the court based on all the facts and circumstances of the case." (Internal quotation marks omitted.) Id.

Just as we have recognized that spouses must be free to enter into contracts regarding the distribution of property and other financial matters in the event of divorce, we repeatedly have stated that spouses have a continuing duty to support each other throughout the duration of the marriage and, oftentimes, beyond. See, e.g., *Rubin* v. *Rubin*, 204 Conn. 224, 228, 527 A.2d 1184 (1987) ("[t]he purpose of alimony is to meet one's continuing duty to support" (internal quotation marks omitted)); A. Rutkin et al., 8 Connecticut Practice Series: Family Law and Practice with Forms (3d Ed. 2010) § 33:3, p. 35 ("[a]limony . . . is based primarily [on] a continuing duty to support arising out of the obligation of support which the spouses assume toward each other as a result of the marriage" (footnote omitted)). In particular, pendente lite alimony—also referred to as temporary alimony—ensures that a dependent spouse is supported while the parties are living apart pending the outcome of the dissolution action. See, e.g., *Stern* v. *Stern*, 165 Conn. 190, 196, 332 A.2d 78 (1973) ("[t]he

purpose of an order that a husband make payments of support pendente lite to his wife is to afford her a means of livelihood while she is living apart from him pending the determination of the question whether she has a right to separate maintenance").[9] Accordingly, General Statutes § 46b-83[10] authorizes the trial court to award alimony and support pendente lite to either party throughout the duration of a dissolution of marriage proceeding. In determining whether to make an alimony award pendente lite, the court is directed to consider the factors enumerated in General Statutes § 46b-82.[11] See General Statutes § 46b-83 (a).

[9] We recognize that much of our earlier case law addressing spousal support reflects the outdated and paternalistic gender hierarchy of a bygone era, when it was considered the husband's sole duty to provide for the wife and children. See, e.g., *Cary* v. *Cary*, 112 Conn. 256, 259, 152 A. 302 (1930) ("[t]he common-law obligation of the husband to give support to his wife is the foundation [on] which alimony in this [s]tate rests"). Indeed, earlier versions of our alimony statute provided for the payment of alimony only from the husband to the wife, presumably under a theory that a wife would never have a duty to support her husband. See, e.g., General Statutes (1918 Rev.) § 5287 ("[t]he superior court . . . may order alimony to be paid from the *husband's* income" (emphasis added)). Our current statute, however, provides for an award of alimony to either party; see General Statutes § 46b-82 ("the Superior Court may order *either* of the parties to pay alimony to the other" (emphasis added)); and this court has since emphasized the right of either party to receive such support, depending on the facts and circumstances of each case. See, e.g., *Fattibene* v. *Fattibene*, 183 Conn. 433, 441 n.4, 441 A.2d 3 (1981) ("[t]he Connecticut [alimony] statute avoids the equal protection constitutional infirmity of the statutes of some other states which provide that husbands, but not wives, may be required to pay alimony [by providing that the court can award alimony to either party]"). Moreover, other provisions of our General Statutes require relatives, including spouses, to furnish necessary support to a spouse or a child under the age of eighteen, according to such relative's ability. See General Statutes § 46b-215; see also General Statutes § 17b-745.

[10] General Statutes § 46b-83 (a) provides in relevant part: "At any time after the return day of a complaint under section 46b-45 or 46b-56 or after filing an application under section 46b-61, and after hearing, alimony and support pendente lite may be awarded to either of the parties from the date of the filing of an application therefor with the Superior Court. . . ."

[11] General Statutes § 46b-82 (a) provides in relevant part: "In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider . . . the length of the marriage, the causes

The trial court also has broad discretion to award attorney's fees or expert fees, pendente lite, if circumstances and justice so require. See General Statutes § 46b-62 (a) ("[i]n any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82"); *Eslami* v. *Eslami*, 218 Conn. 801, 818–21, 591 A.2d 411 (1991) (upholding awards of attorney's fees and expert witness fees as within trial court's sound discretion under § 46b-62); *Medvey* v. *Medvey*, 98 Conn. App. 278, 287–88, 908 A.2d 1119 (2006) (concluding that trial court did not abuse its discretion in awarding plaintiff expert witness fees under § 46b-62).

With this legal framework in mind, we turn to the defendant's claim that the trial court improperly declined to address the enforceability of the parties' postnuptial agreement prior to awarding the plaintiff pendente lite alimony and litigation expenses. As previously indicated, in declining the defendant's request to make a finding as to the agreement's enforceability prior to entering pendente lite orders, the trial court relied on this court's decision in *Fitzgerald*. The defendant contends that the trial court's reliance on *Fitzgerald* was misplaced because the agreement in that case was a separation agreement, whereas the agreement in the present case is a postnuptial agreement. We conclude that the distinction drawn by the defendant is one without a difference in the context of the present case and that the trial court properly relied on *Fitzgerald* in ordering the defendant to pay pendente lite alimony and litigation expenses.

for . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties . . . ."

In *Fitzgerald*, four months before the plaintiff wife filed a marital dissolution action, the parties entered into a written separation agreement governing alimony and child support—including temporary support—in contemplation of their approaching divorce. *Fitzgerald* v. *Fitzgerald*, supra, 169 Conn. 148. In her complaint, the plaintiff sought to invalidate the separation agreement and, later, moved for temporary alimony, custody, support, and counsel fees. Id., 149. The trial court, after hearing oral argument on the plaintiff's motion, ordered the defendant to pay the plaintiff temporary alimony and child support. Id. In so doing, "[t]he court recognized the existence of the separation agreement but ruled that its validity and effectiveness [were matters] to be determined at the time of trial on the merits of the plaintiff's complaint, which, in the first count, concerned the validity of the [agreement] and, in the second count, the divorce action. The court concluded that the validity and effectiveness of the [agreement] need not be determined in awarding temporary alimony and support." Id., 150.

On appeal to this court, the defendant argued, inter alia, that the trial court erred in failing to determine the enforceability of the separation agreement prior to ruling on the plaintiff's request for pendente lite support. See id. ("[t]he defendant's principal contention . . . is that the court erred in refusing to determine the validity of the separation agreement prior to ordering [him], contrary to that agreement, to pay temporary support"). We disagreed, reasoning that "[t]he court's authority to award alimony and support pendente lite at the time of the hearing was expressly provided for [by statute]" and that "[p]ayment pursuant to such an award is to provide for the wife and the dependent children while they are living apart from her husband pending a determination of the issues in the case." Id., 151; see also *Wolk* v. *Wolk*, 191 Conn. 328, 330–31, 464

A.2d 780 (1983) (explaining that pendente lite support is fundamentally different from final orders of support entered at conclusion of dissolution proceeding). We further reasoned that the proper time for a determination as to the enforceability of the parties' separation agreement was "when the case is tried on its merits," because only then "will [the parties] have an opportunity to be heard . . . in a meaningful manner." *Fitzgerald* v. *Fitzgerald*, supra, 169 Conn. 151; see also id., 152 ("[w]hether [certain] trusts may be relied [on] by the defendant to fulfill his primary duty to support his minor children is *for the court to decide upon the full hearing of the case, that is, when it is determined by the court whether the separation agreement is valid* and, if so found, whether [it] is fair and equitable under all the circumstances" (emphasis added)).

We find no merit in the defendant's contention that *Fitzgerald* is distinguishable because it involved a separation agreement rather than a postnuptial agreement. The underlying principle in *Fitzgerald*—namely, that a determination regarding the validity of an agreement may be made when the case is tried on its merits—applies equally to any marital agreement, regardless of whether it is a prenuptial, postnuptial, or separation agreement. Nor do we agree with the defendant that this court "signaled" in *Bedrick* "that reliance on *Fitzgerald* in the context of postnuptial agreements is misplaced." Indeed, to the extent that *Bedrick* is relevant at all, it is to underscore the propriety of the trial court's decision in the present case.

In *Bedrick*, we were required to determine whether a postnuptial agreement is per se violative of public policy and, therefore, unenforceable. See *Bedrick* v. *Bedrick*, supra, 300 Conn. 693. In deciding that issue, we explained that there are three types of marital agreements—prenuptial, postnuptial, and separation—and that, although separation agreements and postnuptial

agreements are both entered into during the marriage, they are distinguishable insofar as one is entered into in contemplation of divorce, whereas the other is entered into "after a couple weds, but before they separate, when the spouses plan to continue their marriage . . . and when separation or divorce is not imminent." (Citation omitted; internal quotation marks omitted.) Id., 693 n.1. We ultimately concluded that the differences were significant enough to require that a higher level of scrutiny be applied to postnuptial agreements than is applied to the other two agreements. Id., 703–704. Specifically, we explained that, "[b]ecause of the nature of the marital relationship, the spouses to a postnuptial agreement may not be as cautious in contracting with one another as they would be with prospective spouses, and they are certainly less cautious than they would be with an ordinary contracting party. With lessened caution comes greater potential for one spouse to take advantage of the other." Id., 703.

We further stated that spouses entering into a postnuptial agreement "do not contract under the same conditions as either prospective spouses or spouses who have determined to dissolve their marriage," meaning that "a postnuptial agreement stands on a different footing from both a [prenuptial agreement] and a separation agreement. Before marriage, the parties have greater freedom to reject an unsatisfactory [prenuptial agreement]. . . .

"A separation agreement, in turn, is negotiated when a marriage has failed and the spouses intend a permanent separation or marital dissolution. . . . The circumstances surrounding [postnuptial] agreements in contrast are pregnant with the opportunity for one party to use the threat of dissolution to bargain themselves into positions of advantage." (Internal quotation marks omitted.) Id., 701; see also id., 703 ("Prospective spouses share a confidential relationship . . . but spouses

share the institution of marriage, one of the most fundamental of human relationships . . . . Courts simply should not countenance either party to such a unique human relationship dealing with each other at arms' length." (Citations omitted; internal quotation marks omitted.)).

The defendant does not explain, nor can we perceive, how this court's statements in *Bedrick* explaining the differences between the three types of marital agreements takes this case outside of the holding in *Fitzgerald* that the validity of marital agreements should be assessed when the case is tried on its merits, or how it otherwise informs the question of when the trial court should decide the enforceability of a postnuptial agreement. However, to the extent that *Bedrick* has any bearing at all on that question, we believe that it reinforces our conclusion that the trial court acted within its discretion in deferring its decision until the end of trial given that, under *Bedrick*, the court is required to conduct a more searching inquiry into the circumstances surrounding the postnuptial agreement's execution than the trial court in *Fitzgerald* was required to undertake with respect to the separation agreement in that case.[12] See id., 703–704.

[12] The defendant argues that "the heightened scrutiny afforded postnuptial agreements . . . is nothing more than an obligation to apply the usual criteria that guide the relevant analysis with heightened diligence," arguing that the guideposts used to analyze prenuptial and postnuptial agreements are the same in Connecticut and, therefore, that the heightened scrutiny afforded to postnuptial agreements "fails to present any obstacle to determining their validity and enforceability at a preliminary hearing." (Citation omitted; internal quotation marks omitted.) We are unpersuaded. As we explained, and as the trial court found, such an inquiry will likely take considerable time and consume substantial resources, given the complexity of the defendant's finances, during which the plaintiff would be left without the very funds that she would need to litigate the matter. We can also imagine other issues relating to the enforceability of a marital agreement that can and likely will arise during the pendency of a dissolution action that would be ill-suited to summary adjudication at the pendente lite stage of a dissolution proceeding.

Indeed, as the trial court noted, because of the complexity of the defendant's finances, valuing his assets—a necessary step in determining the enforceability of the postnuptial agreement—will likely require considerable discovery and expert assistance, a process that could take a good deal of time during which, under the bifurcated approach advocated by the defendant, the plaintiff would be left without the means to support herself, to pay an attorney, and to hire an expert to make sense of the defendant's complicated finances.[13]

In reaching our conclusion, we are mindful that the "the question of whether enforcement of [a postnuptial] 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. Unforeseen changes in the relationship, such as having a child, loss of employment or moving to another state, may render enforcement of the agreement unconscionable." (Citation omitted.) Id., 706. This is why we held in *Bedrick* that "a court may enforce a postnuptial agreement only if it . . . [is] not unconscionable *at*

[13] Although the issue is not before us, we note that a number of courts have concluded that "an agreement of the parties that waives or limits the right to request temporary support and attorney's fees to a spouse in need in a pending dissolution action is a violation of public policy." *Khan* v. *Khan*, 79 So. 3d 99, 100 (Fla. App. 2012), citing *Belcher* v. *Belcher*, 271 So. 2d 7 (Fla. 1972); see also *McAlpine* v. *McAlpine*, 679 So. 2d 85, 90 (La. 1996) ("prenuptial waivers of alimony pendente lite [are] void as contrary to the public policy of this [s]tate"). See generally *Furer* v. *Furer*, Docket No. 51198, 2010 WL 3271504, *2 (Nev. June 10, 2010) (decision without published opinion, 126 Nev. 712, 367 P.3d 770) ("court has discretion in any divorce action to require either party to pay the other party money necessary for temporary maintenance or to enable the other party to participate in the case"). In *McHugh* v. *McHugh*, supra, 181 Conn. 489, this court observed that provisions of a prenuptial agreement purporting to relieve one spouse of the duty to support the other during the marriage have been held to contravene public policy.

the time of dissolution." (Emphasis added; footnote omitted.) Id., 703–704. We are not prepared to say that unforeseen changes cannot also occur during the pendency of a divorce action. This is all the more reason why the trial court's broad equitable powers and discretion in deciding matters arising in a dissolution action must include the discretion to postpone a decision as to the enforceability of a marital agreement until the parties have had a full and fair opportunity to litigate all issues in the case at a trial on the merits.[14] See, e.g., *Loughlin* v. *Loughlin*, 280 Conn. 632, 641, 910 A.2d 963 (2006) ("Although created by statute, a dissolution

[14] The defendant nevertheless argues that, "[a]s our sister states have held . . . [our] policy preferences are chilled when pendente lite relief is ordered that directly contravenes the terms of a nuptial agreement" and that "a majority of jurisdictions hold a preliminary hearing on the validity and enforceability of a nuptial agreement when the existence of such an agreement is [pleaded] as part of the dissolution action or [when] it is raised as a defense to pendente lite support." In support of this argument, the defendant cites a number of out-of-state cases, most of which are unreported, that he claims ought to persuade us to adopt the rule he advocates. Two of these cases, however, do not involve pendente lite support or a request for a preliminary hearing to determine the enforceability of a marital agreement. See *Volid* v. *Volid*, 6 Ill. App. 3d 386, 286 N.E.2d 42 (1972); *Ware* v. *Ware*, 224 W. Va. 599, 687 S.E.2d 382 (2009). These cases, therefore, have no value in the context of the present case. Some of the cases that do touch on the issue before us are inapposite because those states have criteria for evaluating the enforceability of marital agreements that are different from our own. See *Bamberger* v. *Hines*, Docket Nos. 2007-CA-000933-MR and 2007-CA-000992-MR, 2009 WL 1025122 (Ky. App. April 17, 2009); *Darr* v. *Darr*, 950 S.W.2d 867 (Mo. App. 1997); *Colon* v. *Colon*, Docket No. A-5986-02T5, 2006 WL 2318250 (N.J. Super. App. Div. August 11, 2006); *Simeone* v. *Simeone*, 525 Pa. 392, 581 A.2d 162 (1990); *Howell* v. *Howell*, Docket No. M2019-01205-COA-R3-CV, 2021 WL 408862 (Tenn. App. February 5, 2021), appeal denied, Tennessee Supreme Court, Docket No. M2019-01205-SC-R11-CV (May 12, 2021); *Gust* v. *Gust*, Docket Nos. 0901-15-2 and 0024-16-2, 2016 WL 2636612 (Va. App. May 10, 2016). To whatever extent any of the cited cases apply a similar framework to our own in evaluating marital agreements and nevertheless require that courts determine the enforceability of the agreement prior to awarding pendente lite support, such as *Trbovich* v. *Trbovich*, 122 App. Div. 3d 1381, 1383–84, 997 N.Y.S.2d 855 (2014), those courts are free to do as they see fit with respect to these matters. We remain convinced that our approach is the better course.

action is essentially equitable in nature. . . . The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances [that] arise out of the dissolution of a marriage. . . . [I]n the exercise of its inherent equitable powers it may also consider any other factors [besides those enumerated in the statute that] may be appropriate for a just and equitable resolution of the marital dispute." (Internal quotation marks omitted.)); *Gluck* v. *Gluck*, 181 Conn. 225, 228, 435 A.2d 35 (1980) ("[a] dissolution of a marriage, although a creature of statute, is essentially an equitable action").

The defendant contends that our decision today could work an injustice because, if the trial court ultimately determines that the postnuptial agreement is enforceable and, further, that it precludes the award of the pendente lite alimony and litigation expenses at issue, he may be unable to obtain restitution for the pendente lite alimony and litigation expenses he was required to pay the plaintiff throughout the course of the litigation. The defendant argues that the trial court's decision is "particularly harmful where, as here, the plaintiff . . . is without the means necessary to repay the defendant if the agreement is ultimately enforced."

We are not unsympathetic to the defendant's argument and recognize the possibility that he may not be made entirely whole in the event that the trial court determines that the parties' postnuptial agreement is enforceable under the criteria set forth in *Bedrick* for determining that question and that its provisions, in fact, preclude the award of the pendente lite alimony or litigation expenses at issue. Even if this scenario occurs, however, the defendant may not be without any remedy. For example, the trial court could ultimately adjust any financial orders to compensate the defendant for pendente lite payments that were made in contravention of the terms of the agreement, should it be

found to be enforceable and should the court, in the exercise of its discretion, determine that such a remedy is warranted. See *Volid* v. *Volid*, 6 Ill. App. 3d 386, 393, 286 N.E.2d 42 (1972) ("[t]he [trial] court in the exercise of its discretion awarded temporary alimony . . . [but] [t]he order should have contained a provision that any temporary sums for [the wife's] support [that] are paid will ultimately be deducted from the lump sum settlement agreed to by the parties [in their prenuptial agreement]").

Moreover, by our decision today, we do not foreclose the ability of the trial court to decide the enforceability of a marital agreement in connection with a request for pendente lite alimony or litigation expenses if the court determines, in its considered judgment, that a decision can be made at that time without doing an injustice to either party. See *Clarke* v. *Clarke*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA17-6031321-S (October 10, 2017) (65 Conn. L. Rptr. 327, 328) (applying prenuptial agreement in connection with request for pendente lite alimony because "enforcement of the premarital agreement . . . is not an issue in dispute; both parties are seeking its enforcement"). In considering such a request, the court is also free to fashion a pendente lite order of alimony or litigation expenses that takes into account the existence of a marital agreement that purports to preclude such support. See *Belcher* v. *Belcher*, 271 So. 2d 7, 9 (Fla. 1972) (provision in prenuptial agreement that purports to contract away spouse's future obligation to pay alimony, litigation expenses, and attorney's fees during separation prior to dissolution of the marriage "is a factor to be considered but not the sole factor, nor conclusive, in a determination of [an award for] support pendente lite" (emphasis omitted)). For the reasons previously set forth, however, we conclude that a trial court is also free to decide to delay a decision on the enforceability

of a postnuptial agreement until the conclusion of trial if circumstances and equity so require.

The trial court's orders are affirmed.

In this opinion the other justices concurred.

CATHERINE CRANDLE ET AL. *v.* CONNECTICUT STATE EMPLOYEES RETIREMENT COMMISSION
(SC 20532)

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

Syllabus

The plaintiffs, C and R, former state employees who are members of Tier II and Tier IIA, respectively, of the State Employees Retirement System (SERS), appealed to the trial court from the ruling of the defendant, the State Employees Retirement Commission. C's last day of paid state employment was in October, 2012, and R's last day of paid state employment was in October, 2015. Thereafter, C and R each submitted an application for disability retirement benefits to the Retirement Services Division, which received R's application in March, 2016, and C's application in April, 2016. The Medical Examining Board for Disability Retirement granted the plaintiffs' applications, and payment of their benefits commenced on the first day of the month following the Retirement Services Division's receipt of their respective applications. Accordingly, R's benefits became payable on April 1, 2016, and C's benefits became payable on May 1, 2016. The plaintiffs subsequently filed with the commission a petition for a declaratory ruling, claiming that, under the State Employees Retirement Act (§ 5-152 et seq.), payment of disability retirement benefits commences on the day after an employee's last day of paid state employment. The commission rejected the plaintiffs' claim, concluding instead that disability retirement benefits are payable on the first day of the month after the Retirement Services Division receives the employee's application. The commission noted that, although the act is silent as to when disability retirement benefits become payable, the attorney general had issued an opinion in 1981, in which he concluded that, under Tier I of SERS, such benefits are not payable from the date of the employee's termination of employment. Moreover, the commission observed that it had implemented that interpretation of the act on a number of occasions since 1981 and that the legislature had not overruled that interpretation. In the plaintiffs' administrative appeal before the

trial court, that court upheld the commission's ruling on the ground that the commission's interpretation of the act was entitled to substantial deference because it was time-tested and reasonable. The trial court rendered judgment dismissing the plaintiffs' administrative appeal, from which the plaintiffs appealed. *Held*:

1. The plaintiffs could not prevail on their claims that the trial court improperly deferred to the commission's interpretation of the act on the basis that that interpretation was neither time-tested, insofar as it was not formally articulated or adopted pursuant to formal rule-making or adjudicatory procedures, nor reasonable, insofar as the provisions of the act clearly and unambiguously provide that disability retirement benefits become payable on the day after the employee's last day of paid employment:

a. The commission's interpretation of the act was time-tested: even if an agency's interpretation of a statute is entitled to no deference unless it had been adopted pursuant to formal rule-making or adjudicatory procedures, the commission attached to its ruling an exhibit showing that, since 1986, it has issued decisions in a number of cases applying the rule that disability retirement benefits commence on the first day of the month after the application is received, this court repeatedly has afforded deference to an agency's interpretation of a statute, as reflected in the agency's rulings in specific cases, and the plaintiffs did not explain why these cases were not issued pursuant to adjudicatory procedures; moreover, unlike agency interpretations that are set forth only in private correspondence and internal documents, which are not entitled to judicial deference, the commission's interpretation of the act in the present case had been formally articulated pursuant to adjudicatory procedures, namely, in the specific cases it cited in its exhibit; in addition, the attorney general's 1981 opinion had been distributed to the heads of all state agencies shortly after it was issued, presumably so that agencies could make the substance of the opinion known to any SERS member who inquired about the date on which disability retirement benefits become payable.

b. There was no merit to the plaintiffs' claim that the commission's interpretation of the act, which was based on the attorney general's 1981 opinion, was unreasonable because it conflicted with the legislature's 1983 amendments to the act adopting tier II of SERS: the provisions (§§ 5-169 (j) and 5-192*l* (c)) of the act on which the plaintiffs relied did not specify the date that payment of retirement disability benefits commences but, rather, distinguished between the member's date of disability and date of retirement, nothing in the act indicated that the date a member becomes eligible for retirement disability benefits and the date that benefits become payable are identical, and, accordingly, the 1983 amendments did not clearly indicate that the attorney general's interpretation of the act was incorrect; moreover, although the act is silent regarding when disability retirement benefits commence and its

express provisions do no compel the interpretation that the commission adopted, that interpretation was nonetheless reasonable, especially in view of the fact that the provisions of the act were negotiated by the state and representatives of the state employee unions pursuant to collective bargaining, and approved and codified by the legislature, and neither those parties nor the legislature, which were all presumed to have been aware of the attorney general's 1981 opinion and the commission's decisions applying its interpretation of the act, has sought to renegotiate the agreement or to amend the provisions of the act to reflect a different understanding, even though the legislature has amended the act several times since 1981; furthermore, because the express terms of the act provide that, for normal retirement, early retirement and hazardous duty retirement, retirement occurs after the date that an application is filed, and payment of retirement benefits commences on the day of retirement, it was reasonable for the commission to treat disability retirement consistently with these other forms of retirement; in addition, having disability retirement benefits become payable on the first day of the month after an application for such benefits is received allows the state to predict at any given time its potential liability for the payment of such benefits, changing the rule could subject the state to claims for retroactive payments from members who are already retired, and it was appropriate for this court to defer to the commission's reasonable interpretation of the act in light of the gap that the legislature left in the act by failing to specify the date on which an employee's disability retirement benefits begin.

2. There was no merit to the plaintiffs' claim that the commission, as a fiduciary of the plaintiffs, had the burden of proving, by clear and convincing evidence, fair dealing with respect to its use of an unwritten practice to set a start date for disability benefits: when a breach of fiduciary duty is alleged, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence only when the dominant party is the beneficiary of the transaction or obtains a possible benefit, and, in the present case, the plaintiffs did not allege that the commission took advantage of its fiduciary relationship with SERS members to benefit itself; moreover, even if it were unfair for the commission to apply its unwritten interpretation of the act, the plaintiffs failed to raise a colorable claim because it would be anomalous to conclude that the commission must apply the plaintiffs' preferred interpretation, which also is not expressly set forth in the act or related regulations.

Argued January 12, 2021—officially released February 1, 2022*

Procedural History

Administrative appeal from the decision of the defendant determining the commencement date of the plain-

* February 1, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tiffs' disability retirement benefits, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston*, *J.*, granted in part the defendant's motion to dismiss; thereafter, the court, *Cordani*, *J.*, rendered judgment dismissing the appeal, from which the named plaintiff et al. appealed. *Affirmed.*

Russell D. Zimberlin, for the appellants (named plaintiff et al.).

Cindy M. Cieslak, with whom, on the brief, was *Michael J. Rose*, for the appellee (defendant).

Opinion

ROBINSON, C. J. The principal issue in this appeal is whether the State Employees Retirement Act (act), General Statutes § 5-152 et seq., requires the state to commence payment of state employee disability retirement benefits on the day after the employee's last day of paid employment or, instead, the act permits the payment of such benefits to start on the first day of the month after receipt of the employee disability retirement application. The plaintiffs, Catherine Crandle and Ronald Robinson,[1] who are former state employees, appeal[2] from the judgment of the trial court dismissing

[1] In addition to Crandle and Robinson, the plaintiffs in the underlying administrative appeal were Stephanie Hawthorne, Pedro Rodriguez, Michael Gardner, Leslie Cavanagh, Leah Margentino, Tammy Fettig, Ebone Kearse, Dana Goldberg, Gerard Bernier, Darcie Dockum, Stanley Jarosz, Derek Williams, Linda Walsh, Maria Sous and Karla Carey. The trial court, *Huddleston*, *J.*, dismissed the claims of Margentino, Fettig, Kearse, Goldberg, Bernier, Dockum, Jarosz, Williams, Walsh, Sous and Carey for their failure to exhaust their administrative remedies. The trial court, *Cordani*, *J.*, dismissed the claims of Hawthorne, Cavanagh, Gardner and Rodriguez for lack of aggrievement.

Because only Crandle and Robinson are participating in this appeal, all references herein to the plaintiffs are to them collectively, and we refer to them individually by name when appropriate. Moreover, all references in this opinion to the trial court are to Judge Cordani.

[2] 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 § 65-1.

their administrative appeal from the declaratory ruling of the defendant, the Connecticut State Employees Retirement Commission (commission). On appeal, the plaintiffs claim that the trial court improperly upheld the commission's declaratory ruling that, under various provisions of the act, disability retirement benefit payments commence on the first day of the month following receipt by the Retirement Services Division (division) of the employee's approved application for such benefits. The plaintiffs contend that the trial court improperly (1) deferred to the commission's interpretation of the act because that interpretation is neither reasonable nor time-tested, and (2) failed to consider that the commission, as a fiduciary of members of the State Employees Retirement System (SERS), had the burden of proving fair dealing by clear and convincing evidence. We disagree with these claims. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts, which the commission found or which are undisputed, and procedural history. Crandle is a member of Tier II of SERS.[3] On April 13, 2016, the division received Crandle's application for disability retirement benefits. Because Crandle's last date of state employment was October 16, 2012, the application was untimely under § 5-155a-2 (d) of the Regulations of Connecticut State Agencies, which requires such applications to be filed within twenty-four months of the applicant's last day of paid employment. Crandle requested that the commission toll the limitation period for submitting the application, and the com-

[3] Tier II of SERS is governed by part V of the act, General Statutes § 5-192e et seq., which applies to all members who joined SERS after July 1, 1984, and to some members who joined SERS after January 1, 1984. See General Statutes § 5-192e (a). Tier II does not apply to members who joined SERS after June 30, 1997. See Office of the State Comptroller, Retirement Services Division, Tier II/ IIA–Retirement Basics, available at https://www.osc.ct.gov/empret/tier2summ/workshop/tierprint22a.htm (last visited January 31, 2022).

mission granted her request. Thereafter, the State of Connecticut Medical Examining Board for Disability Retirement (board) conducted a hearing on Crandle's application for disability retirement benefits and granted it. Payment of the benefits commenced on May 1, 2016, the first day of the month following the division's receipt of the application.

Robinson is a member of Tier IIA of SERS.[4] His last date of state employment was October 31, 2015. On March 30, 2016, Robinson applied for disability retirement benefits. The board approved his application, and payment of the benefits commenced on April 1, 2016, the first day of the month following the division's receipt of his application.

On March 1, 2018, the plaintiffs filed a petition for a declaratory ruling with the commission, contending that, under the act, payment of disability retirement benefits commences the day after the employee's last day of paid employment.[5] In its decision and declaratory ruling, the commission noted that the act is silent with respect to when disability retirement benefits become payable. The commission disagreed with the plaintiffs' reliance on § 5-155a-2 (d) of the regulations of Connecticut State Agencies to support their position. The commission concluded that the language of the regulation, providing that "[t]he time period for filing an application for disability retirement benefits . . . shall begin on the day after the applicant's last day of paid employment," simply provides a time frame in which the appli-

[4] Tier IIA of SERS applies to members who joined SERS from July 1, 1997, through June 30, 2011. See Office of the State Comptroller, Retirement Services Division, Tier II/IIA Retirement Basics, available at https://www.osc.ct.gov/empret/tier2summ/workshop/tierprint22a.htm (last visited January 31, 2022).

[5] The petition was brought by the plaintiffs, Jeremy Wiganowske, Stephanie Hawthorne, Paula Mitchell, Leslie Cavanagh, Pedro Rodriguez and Michael Gardner. Only the plaintiffs remain as parties to this case. See footnote 1 of this opinion.

cant must apply and does not prescribe the day that payment begins. The commission also observed that normal retirement benefits for Tier II members become payable on the first day of any future month named in the application.[6] See, e.g., General Statutes § 5-192*l* (a) ("[e]ach member of tier II who has attained age sixty-five and has completed ten or more years of vesting service may retire on his own application on the first day of any future month named in the application").

In addition, the commission pointed out that, in 1981, it had sought an opinion from the attorney general on the issue of whether disability retirement benefits are payable retroactive to the date of the employee's termination of employment under Tier I of SERS.[7] In that opinion, the attorney general concluded that the legislature intended that Tier I "retirement benefits are to flow prospectively from the time of making application." Opinions, Conn. Atty. Gen. No. 1981-50 (July 30, 1981) p. 1 (1981 attorney general opinion). This is because "[a]xiomatic to the granting of such benefits is the requirement that a member of [SERS] apply for retirement, be it regular, disability or service-connected disability." Id., pp. 1–2. Emphasizing that it "is the filing of the application for retirement, and its subsequent approval by the [c]ommission [that] triggers a member's entitlement to benefits"; id., p. 2; the 1981 attorney general opinion concluded that "service-connected disability retirement benefits are not to be given retroactive effect when the application [therefor] is submitted subsequent to the date of termination." Id., p. 3.

[6] None of the parties contends that, for purposes of the issue before us in this appeal, Tier IIA disability retirement benefits differ in any material way from Tier II benefits.

[7] General Statutes §§ 5-157 through 5-192d govern Tier I of SERS. See General Statutes § 5-192f (e). Tier I applies to most employees who joined SERS on or before July 1, 1984. See Connecticut State Employees Retirement System, Tier I: Summary Plan Description, available at https://www.osc.ct.gov/empret/tier1summ/tier1summ.htm (last visited January 31, 2022)

The commission further reasoned in its declaratory ruling that "the [plaintiffs'] request to use the day after their last day of paid employment as the date on which benefits become payable is less of a bright-line rule [than the practice of commencing payment of benefits on the first day of the month after the application is received] since, often, in cases of disability retirement, members . . . take some form of a leave of absence while they evaluate whether they will recover from their injury or in fact are permanently disabled from the job so as to qualify for a disability retirement. Sometimes such leave is paid, and sometimes it is unpaid, depending on the types of leave accrued pursuant to sick time, vacation, family and medical leave, and workers' compensation laws and policies." Moreover, the commission noted that "some of the petitioners"; see footnote 5 of this opinion; "claimed service credit for certain types of leave, and the statutes do not permit an employee to receive service credit and a retirement benefit for the same period of employment."

Finally, the commission observed that it had implemented the foregoing interpretation of the act in a number of cases since 1981 and that the legislature had not overruled that interpretation, despite making multiple changes to SERS.[8] The commission further pointed out that the act is a creature of collective bargaining and was approved and codified by the legislature pursuant to General Statutes (Rev. to 2017) § 5-278 (b),[9] and that

[8] The commission attached to its ruling an exhibit that is identified in the index to the return of record that was filed in the trial court as a "selection of the commission's past decisions relating to the effective date of payment of disability retirement benefits." Three of the decisions appear to involve applications for disability retirement benefits.

[9] General Statutes (Rev. to 2017) § 5-278 (b) provides in relevant part: "Any agreement reached by the negotiators shall be reduced to writing. The agreement, together with a request for funds necessary to fully implement such agreement and for approval of any provisions of the agreement which are in conflict with any statute or any regulation of any state agency . . . shall be filed by the bargaining representative of the employer with the clerks of the House of Representatives and the Senate within ten days after

the parties charged with negotiating the terms of SERS had not made any attempt to amend the act in light of the commission's interpretation. Accordingly, the commission concluded in its declaratory ruling that disability retirement benefits are payable on the first day of the month following the division's receipt of an approved application for benefits.

Thereafter, the plaintiffs[10] filed an administrative appeal from the commission's declaratory ruling with the trial court. The trial court concluded that the commission's ruling was time-tested and reasonable and, therefore, was entitled to substantial deference. In addition, the trial court observed that neither the legislature nor the parties that had negotiated the terms of SERS had taken steps to change those terms as a result of the commission's interpretation. Moreover, the court reasoned that the commission's interpretation provides an incentive for members to apply promptly for disability retirement benefits, thereby minimizing the need for retroactive payments and maximizing the predictability of the state's financial liability. The court rejected the plaintiffs' reliance on General Statutes § 5-169 (j),[11] which provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable," concluding that that provision merely defines the member's

the date on which such agreement is reached . . . . The General Assembly may approve any such agreement as a whole by a majority vote of each house or may reject such agreement as a whole by a majority vote of either house. . . ."

[10] See footnote 1 of this opinion.

[11] General Statutes § 5-169 (j) provides: "A member whose date of disability occurs prior to January 1, 1984, shall have his benefits calculated in accordance with the provisions of law in effect at the time of such occurrence. A member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, whichever is earlier. A leave of absence for medical reasons shall not be deemed to be active employment."

date of disability for purposes of calculating benefits and does not specify the date that benefits first become payable. The court also rejected the plaintiffs' contention that the act should be liberally construed because it is remedial in nature, concluding that it merely sets forth contractual obligations negotiated by the unions and the state. Accordingly, the trial court rendered judgment dismissing the administrative appeal. This appeal followed.

On appeal, the plaintiffs claim that the trial court incorrectly concluded that the commission's interpretation of the act was entitled to deference because that interpretation is neither time-tested nor reasonable. They further claim that, as a fiduciary of SERS and its members, the commission had the burden of proving fair dealing with the plaintiffs by clear and convincing evidence. We address each claim in turn.

I

We begin our analysis with the plaintiffs' claims that the trial court improperly deferred to the commission's interpretation of the act because that interpretation was neither time-tested nor reasonable in that the applicable statutes clearly and unambiguously provide that benefits become payable on the day after the employee's last day of paid employment. We disagree.

Before turning to the plaintiffs' specific claims, we note the following general principles that govern judicial review of an agency's interpretation of the statutory scheme that it administers. "This court reviews the trial court's judgment pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency]

has acted unreasonably, arbitrarily, illegally, or in abuse if its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts." (Internal quotation marks omitted.) *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 525–26, 93 A.3d 1142 (2014).

This court previously has recognized that "the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . . Conversely, an agency's interpretation of a statute is accorded deference when the agency's interpretation has been formally articulated and applied for an extended period of time, and that interpretation is reasonable. . . . Deference is warranted in such circumstances because a time-tested interpretation, like judicial review, provides an opportunity for aggrieved parties to contest that interpretation. Moreover, in certain circumstances, the legislature's failure to make changes to a long-standing agency interpretation implies its acquiescence to the agency's construction of the statute. . . . For these reasons, this court long has adhered to the principle that when a governmental agency's time-tested interpretation [of a statute] is reasonable it should be accorded great weight by the courts."[12] (Citations omitted; inter-

[12] The plaintiffs point out that, in *Bouchard* v. *State Employees Retirement Commission*, 328 Conn. 345, 178 A.3d 1023 (2018), this court stated, with respect to a number of issues involving the interpretation of the act, that, "[a]lthough substantial deference is given to factual and discretionary determinations of administrative agencies, each of these questions is a purely legal matter over which we exercise plenary review." Id., 358. There was no claim in *Bouchard*, however, that the commission's interpretation was entitled to deference because it was time-tested and reasonable. Accordingly, we cannot conclude that that case overruled the long-standing principle that deference is given to a time-tested and reasonable agency interpretation.

nal quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, 309 Conn. 412, 422–23, 72 A.3d 13 (2013).

This court also has recognized that, in cases involving the interpretation of federal statutes, "[i]f the agency's reading fills a gap [in the statute] . . . we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." (Internal quotation marks omitted.) *Ahern* v. *Thomas*, 248 Conn. 708, 718, 733 A.2d 756 (1999). Other courts have applied the same principle to the interpretation of state statutes. For example, in *Hama Hama Co.* v. *Shorelines Hearings Board*, 85 Wn. 2d 441, 536 P.2d 157 (1975), the Washington Supreme Court reasoned that, "when a statute is ambiguous . . . there is the well known rule of statutory interpretation that the construction placed [on] a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling [on] the courts, should be given great weight in determining legislative intent. . . . The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment.

"At times, administrative interpretation of a statute may approach lawmaking, but we have heretofore recognized that *it is an appropriate function for administrative agencies to fill in the gaps where necessary to the effectuation of a general statutory scheme. . . . It is likewise valid for an administrative agency to fill*

See, e.g., *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 319, 258 A.3d 1 (2021) (court gives deference to agency's interpretation of statute if it is time-tested and reasonable).

in the gaps via statutory construction—as long as the agency does not purport to amend the statute." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 448.

Similarly, in *Silver Lining Group EIC Morrow County.* v. *Ohio Dept. of Education Autism Scholarship Program*, 85 N.E.3d 789 (Ohio App. 2017), appeal denied, 152 Ohio St. 3d 1424, 93 N.E.3d 1005 (2018), the Ohio Court of Appeals held that, "[i]f a statute provides an administrative agency authority to perform a specified act but does not provide the details by which the act should be performed, the agency is to perform the act in a reasonable manner based [on] a reasonable construction of the statutory scheme. . . . An agency's reading that fills a gap or defines a term in a reasonable way in light of the [l]egislature's design controls, even if it is not the answer the court would have reached in the first instance. . . .

"Thus, a legislative gap is not equivalent to a lack of authority for the agency to act. . . . Rather, the power of an administrative agency to administer a . . . program *necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly*, by the legislature." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 801; see also *Division of Justice & Community Services* v. *Fairmont State University*, 242 W. Va. 489, 496, 836 S.E.2d 456 (2019) ("a court is obligated to defer to an agency's view only when there is a statutory gap or ambiguity" (internal quotation marks omitted)).

A

We begin with the plaintiffs' claim that the commission's interpretation of the act is not time-tested because it "was neither formally articulated nor adopted pursuant to formal rule-making or adjudicatory procedures and because the agency . . . relied [only] on private corre-

spondence and internal documents . . . .”[13] In support of this claim, the plaintiffs rely on two of this court’s decisions. See *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, 317 Conn. 628, 651, 119 A.3d 1158 (2015) (agency’s interpretation of statute is not time-tested if it has “been neither formally articulated nor adopted pursuant to formal rule-making or adjudicatory procedures”); *Hasselt* v. *Lufthansa German Airlines*, 262 Conn. 416, 432, 815 A.2d 94 (2003) (noting that, under United States Supreme Court’s decision in *Christensen* v. *Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000), “opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant . . . deference” (internal quotation marks omitted)); see also *Christensen* v. *Harris County*, supra, 587 (United States Department of Labor’s interpretation contained in opinion letter was not entitled to deference because it was “not one arrived at after, for example, a formal adjudication or [notice and comment rule making],” and “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant . . . deference” under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).[14]

[13] The plaintiffs also contend that the commission’s interpretation is not time-tested because the 1981 attorney general opinion, on which the commission heavily relies, conflicts with later amendments to the act that, according to the plaintiffs, clearly show that the payment of disability retirement benefits commences on the day after the member’s last day of paid employment. Because that claim goes more properly to the plaintiffs’ claim that the commission’s interpretation is unreasonable, we address it in part I B of this opinion.

[14] Under *Chevron*, “[s]tatutory ambiguities will be resolved . . . not by the courts but by the administering agency.” *Arlington* v. *Federal Communications Commission*, 569 U.S. 290, 296, 133 S. Ct. 1863, 185 L. Ed. 2d 941 (2013); see id. (“if the statute is silent or ambiguous with respect to the

We conclude that neither *Hasselt* nor *Tilcon Connecticut, Inc.*, supports the plaintiffs' position. In *Hasselt*, the defendant, the Second Injury Fund, contended that this court should give deference to a memorandum written by Jesse M. Frankl, the chairman of the Workers' Compensation Commission, in which Frankl gave his interpretation of General Statutes § 31-307a (c). See *Hasselt* v. *Lufthansa German Airlines*, supra, 262 Conn. 421. This court noted that it "previously [had] not determined whether a commissioner's policy directive, which contains an interpretation [of a state statute] not adopted pursuant to formal rule-making or adjudicatory procedures, is entitled to deference," or, instead, this court should adopt the *Christenson* rule applicable to policy directives interpreting federal statutes. Id., 432. This court did not resolve that issue, however, because it concluded that, even if such policy directives may be entitled to deference in appropriate circumstances, Frankl's memorandum was not because it was neither time-tested nor reasonable.[15] Id.

specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute" (internal quotation marks omitted)).

[15] We recognize that, in *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 89 A.3d 841 (2014), this court cited *Hasselt* for the proposition that an agency's interpretation of a statute is not entitled to deference when it "was not promulgated pursuant to any formal rule-making procedures or articulated pursuant to any adjudicatory procedures . . . ." Id., 611; see *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 421, 94 A.3d 588 (2014) (citing *Sarrazin* for proposition that "an agency interpretation, whether of its own regulations or of a statute that the agency is charged with enforcing, is not accorded deference by the court when it has not been promulgated pursuant to any formal rule-making procedures or articulated pursuant to any adjudicatory procedures" (internal quotation marks omitted)); *State* v. *Drupals*, 306 Conn. 149, 169, 49 A.3d 962 (2012) (citing *Hasselt* for proposition that "[a]n agency form, to the extent it contains an interpretation not adopted pursuant to formal rule-making or adjudicatory procedures," is not entitled to deference (internal quotation marks omitted)). As we have explained, however, this court did not hold in *Hasselt* that an agency's interpretation of the statute that was not adopted pursuant to formal rule-making or adjudicatory procedures is not entitled to deference, and in none of these cases did the court independently analyze the issue.

We further note that, in *Christensen* v. *Harris County*, supra, 529 U.S. 576, on which this court relied in *Hasselt*, the United States Supreme Court recognized that, although interpretations contained in opinion letters "do not warrant *Chevron*-style deference," they are "entitled to respect under [its] decision in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 [65 S. Ct. 161, 89 L. Ed. 124] (1944) . . . to the extent that those interpretations have the power to persuade . . . ." (Internal quotation marks omitted.) *Christensen* v. *Harris County*, supra, 587; see *Skidmore* v. *Swift & Co.*, supra, 140 ("We consider that the rulings, interpretations and opinions of the [a]dministrator under [the Fair Labor Standards] Act, while not controlling [on] the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend [on] the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). This formulation seems consistent with our jurisprudence holding that, although an agency's interpretation of a statute is not binding, it is entitled to deference when it is time-tested and reasonable.[16] The same is true of an opinion of the attorney general. See *Connecticut Hospital Assn., Inc.* v. *Commission on Hospitals & Health Care*, 200 Conn. 133, 143, 509 A.2d 1050 (1986) ("[a]lthough an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive").

In any event, even if the plaintiffs were correct that an agency's interpretation of a state statute is entitled

[16] We acknowledge that it is arguable that the "respect" given to informal but persuasive policy directives interpreting federal statutes under *Christensen* may be somewhat weaker than the deference that we afford to time-tested and reasonable agency interpretations.

to *no* deference if it was not adopted pursuant to formal rule-making or adjudicatory procedures, the commission attached to its ruling an exhibit showing that, on a number of occasions since 1986, the commission has issued decisions in specific cases applying the rule that disability retirement benefits commence on the first day of the month after the application is received.[17] See footnote 8 of this opinion. The plaintiffs have not explained why these specific cases were not issued pursuant to adjudicatory procedures. Cf. *United States* v. *Independent Bulk Transport, Inc.*, 480 F. Supp. 474, 478 (S.D.N.Y. 1979) (under federal administrative law, "[a]djudicatory proceedings, unlike [rule-making] proceedings, involve determinations of contested facts in applying rules to specific circumstances"). This court has repeatedly afforded deference to an agency's interpretation of a statute, as reflected in the agency's rulings in specific cases. See, e.g., *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 309 Conn. 430–31 (giving deference to interpretation of statute by Board of Review of Employment Security Appeals Division, as reflected in that board's decisions); *Stec* v. *Raymark Industries, Inc.*, 299 Conn. 346, 357, 10 A.3d 1 (2010) ("[i]n light of the [Compensation Review] [B]oard's numerous decisions from 1980 to 2010, a period of thirty years, we conclude that the board's construction of [General Statutes] § 31-301 (a) constitutes a time-tested interpretation" entitled to deference); *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 268, 788 A.2d 60 (2002) (giving deference to agency's interpretation when agency "con-

[17] The commission also recognized exceptions to the rule that payment of retirement benefits commences on the first day of the month after receipt of the application when receipt of the application by the division was delayed through no fault of the applicant, when an agency, through its error, continued a member on sick leave when he should have been retired, and when the applicant failed to apply for retirement in a timely manner because the state misinformed her regarding her retirement rights.

sistently [had] interpreted the statute for more than twenty-five years" in its rulings); *Savings Bank of Rockville* v. *Wilcox*, 117 Conn. 188, 194, 167 A. 709 (1933) ("The interpretation [that] we have given this statute conforms to the practice of the tax commissioner's office and the bank in computing the deductions previously accorded as shown by the stipulation and exhibits. It is a familiar rule of statutory and constitutional construction that such usage, while not absolutely binding [on] the courts, is entitled to great weight." (Internal quotation marks omitted.)).

The plaintiffs contend that the commission's decisions are not entitled to deference because they merely indicate that the commission applied the rule that payment of disability retirement benefits commences on the first day of the month after receipt of the application, not that it "evaluated" that rule. In one of the cases, however, the applicant claimed that, as the result of a settlement with a workers' compensation carrier, the applicant was eligible for disability retirement benefits on a date considerably earlier than the settlement date and the date on which the applicant applied for benefits. The exhibit states that "[t]he [c]ommission *decided* that the retirement benefits could not commence until the first of the month after the [m]ember applied for retirement benefits . . . ." (Emphasis added.) Although the exhibit does not expressly indicate that the commission engaged in a thorough reexamination of its interpretation of the act, the commission presumably considered arguments why that interpretation was incorrect. In any event, the plaintiffs have cited no authority for the proposition that, for an agency's interpretation to be considered time-tested, every application of the interpretation in an adjudicatory proceeding must be subject to a challenge. An agency's interpretation of a statute is time-tested if it "has been formally articulated and applied for an extended period of time . . . ." (Internal

quotation marks omitted.) *Tuxis Ohr's Fuel, Inc.* v. *Administrator, Unemployment Compensation Act*, supra, 309 Conn. 422.

For similar reasons, we also conclude that *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, supra, 317 Conn. 628, does not support the plaintiff's claim that the commission's interpretation is not entitled to deference because it is not time-tested. In that case, the defendant, the Commissioner of Environmental Protection, claimed that the interpretation of the Department of Environmental Protection (department) of the Connecticut Water Diversion Policy Act, General Statutes § 22a-365 et seq., was entitled to deference because it had "(1) consistently required information from other applicants for water diversion permits that was similar to the category and extent of information [requested of the plaintiff]; and (2) consistently evaluated the direct *and indirect* effects of proposed diversions in acting on diversion permit applications. In support of this claim, the department submitted excerpts from various permit review processes, including correspondence and other internal memoranda, for a variety of applicants seeking diversion permits from the department." (Emphasis in original.) Id., 650. This court concluded that the department's interpretation was not entitled to deference because an interpretation that is set forth only in "private correspondence and internal documents" has not been formally articulated.[18] Id., 651. We conclude that the present case is distinguishable because the commission has formally articu-

[18] We note that, in *Tilcon Connecticut, Inc.*, this court stated that the interpretations of the Department of Environmental Protection were not entitled to deference "because they have been neither formally articulated *nor adopted pursuant to formal rule-making or adjudicatory procedures* . . . ." (Emphasis added.) *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, supra, 317 Conn. 651. As we explained, however, this court had not previously held that no deference is given to an agency's interpretation unless it was adopted pursuant to formal rule-making or adjudicatory procedures.

lated its interpretation of the act in adjudicatory procedures. Moreover, after the commission obtained the formal opinion from the attorney general on the question of when payments of disability retirement benefits become payable under the act, the Office of the State Comptroller distributed the opinion to the heads of all state agencies.[19] It is reasonable to conclude that one reason that the Office of the State Comptroller disseminated the memorandum was so that agencies could make the substance of the opinion known to any SERS member who inquired about the date on which disability retirement benefits become payable. Thus, the 1981 attorney general opinion is distinguishable from the "private correspondence and internal documents" to which deference was not afforded in *Tilcon Connecticut, Inc.* Id. We conclude, therefore, that the commission's interpretation of the act is time-tested.

B

We next address the plaintiffs' claim that the trial court incorrectly determined that the commission's interpretation of the act is reasonable. In support of this claim, the plaintiffs contend that the 1981 attorney general opinion, on which the commission's interpretation is premised, conflicts with certain provisions of the 1983 amendments to the act adopting Tier II of SERS, specifically, General Statutes §§ 5-169 (j), 5-192*l* (c) and 5-192p. See Public Acts 1983, No. 83-533, §§ 16, 28 and 32. For the following reasons, we disagree.

In reaching the conclusion that retirement disability benefits are not retroactive to the day following the last date of paid employment, the attorney general relied on the provisions of General Statutes (Rev. to 1981)

[19] We note that the commission is "within the Retirement Division of the office of the Comptroller for administrative purposes . . . ." General Statutes § 5-155a (a). Under General Statutes § 4-38f (b), "[t]he department to which an agency is assigned for administrative purposes only shall . . . (2) disseminate for the agency any required notices, rules or orders adopted . . . by the agency . . . ."

§ 5-162 (c), (d) and (e),[20] General Statutes (Rev. to 1981) § 5-163a (a), (b) and (c),[21] and General Statutes (Rev. to 1981) § 5-169 (c).[22] See Opinions, Conn. Atty. Gen. No. 1981-50, supra, pp. 1–3. On the basis of the provisions of General Statutes (Rev. to 1981) §§ 5-162 (c) and (d), and 5-163a (a), (b) and (c), the attorney general determined that, because a member seeking normal retirement is retired following the member's application, the application is a prerequisite for retirement. In addition,

[20] General Statutes (Rev. to 1981) § 5-162 provides in relevant part: "(c) . . . (1) Except as provided in section 5-163a, each member who has completed twenty-five or more years of state service shall be retired on his own application on the first day of the month named in the application, and on or after the member's fifty-fifth birthday.

* * *

"(d) . . . (1) Except as provided in section 5-163a, each member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if the member has completed ten years of state service and reached his sixtieth birthday.

* * *

"(e) Each retirement application shall be made to the retirement commission and, upon its approval, shall be forwarded to the comptroller, who shall draw his orders upon the treasurer for any amounts the applicant is entitled to receive."

[21] General Statutes (Rev. to 1981) § 5-163a provides in relevant part: "(a) Any member who has completed twenty-five years of state service and has reached the age of fifty prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subdivision (3) of subsection (c) of section 5-162, provided such member so elects prior to June 30, 1980.

"(b) Any member who has completed at least ten but less than twenty-five years of state service and reached the age of fifty-five prior to June 30, 1980, may elect to be retired on the first day of the month following his application and receive retirement benefits in accordance with subsection (d) of this section, provided such member so elects prior to June 30, 1980.

"(c) Any member who has completed at least five but less than ten years of state service and has reached the age of sixty-five prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subsection (d) of this section, provided such member so elects prior to June 30, 1980. . . ."

[22] General Statutes (Rev. to 1981) § 5-169 (c) provides in relevant part: "The governor shall appoint a board of seven physicians, each of whom is a state employee and two of whom shall be experienced in psychiatry, to

under General Statutes (Rev. to 1981) § 5-162 (e), which authorizes the comptroller to "draw his orders upon the treasurer for any amounts the *applicant* is entitled to receive"; (emphasis added); it is the retirement application that triggers retirement payments. With respect to retirement disability benefits, the attorney general determined that the provision of General Statutes (Rev. to 1981) § 5-169 (c) authorizing the board "to determine whether each *applicant* for disability retirement is entitled thereto"; (emphasis added); indicated that an application for retirement is a precondition for retirement.[23] See Opinions, Conn. Atty. Gen. No. 1981-50, supra, p. 2. The attorney general concluded that, because "the disability retirement income is an incident of retirement, it does not begin to accrue prior to retirement." Id., p. 3.

The plaintiffs first contend that the legislature's enactment of §§ 5-169 (j) and 5-192*l* (c) makes it clear that the attorney general's interpretation of the act was incorrect. Specifically, the plaintiffs point out that § 5-169 (j) provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, whichever is earlier. . . ." Section 5-192*l* (c) provides in relevant part: "Notwithstanding any other provision of sections 5-192e to 5-192x, inclusive, to the contrary, if a member's date of retirement, disability, death or termination occurs in the first six months of any calendar year, his monthly retirement income shall in no event be less than that which would have been payable had his date of retirement, disability, death or termination occurred as of December thirty-first of the prior year, and had his final average earnings, credited service, and breakpoint been determined as of that date.

serve at his pleasure as a medical examining board to determine whether each applicant for disability retirement is entitled thereto. . . ."

[23] On October 5, 1981, the Office of the Comptroller distributed the 1981 attorney general opinion to the heads of all state agencies.

No retroactive payments shall be paid because of such minimum, and *his actual date of retirement, disability, death or termination shall be utilized for all other purposes of the tier II plan.*" (Emphasis added.) The plaintiffs contend that these provisions clearly establish that, for purposes of determining when payment of disability retirement benefits commences, a member's date of disability retirement is the day after the member's "last date of active employment by the state prior to such disability," at the latest.[24] General Statutes § 5-169 (j).

We are not persuaded. As the trial court observed, § 5-169 (j) specifies the provisions of the act that govern the calculation of the *amount* of retirement disability benefits that the member will receive, based on the date of disability.[25] See General Statutes § 5-169 (j) ("[a] member whose date of disability occurs prior to January 1, 1984, shall have his benefits calculated in accordance with the provisions of law in effect at the time of such occurrence"). Section 5-169 (j) does not specify the date that payment of such benefits will commence. Section 5-192*l* (c) provides that, if a member's date of disability occurs in the first six months of the year and the calcula-

[24] The commission contends that, because the plaintiffs did not rely on these specific statutory provisions before the trial court, this claim is not preserved for review. We have some doubt as to whether a party's failure to cite a specific statute in support of its interpretation of a related statute before the trial court precludes the party from arguing that the previously uncited statute supports its interpretation on appeal. We conclude that we need not determine whether this claim was preserved, however, because the plaintiffs cannot prevail on it. See, e.g., *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 157–58, 84 A.3d 840 (2014) ("[r]eview of an unpreserved claim may be appropriate . . . when the minimal requirements for review are met and . . . the party who raised the unpreserved claim cannot prevail" (citation omitted; emphasis omitted; footnote omitted)).

[25] In their reply brief, the plaintiffs contend that, in § 5-169 (j), "date of disability" is used to calculate the amount of the retirement disability benefit only with respect to Tier I, not Tier II. Section 5-169 (j) specifies, however, whether the provisions of Tier I or Tier II apply for purposes of calculating the amount of the benefit.

tion of the amount of the member's disability retirement benefit on the date of disability is less than it would have been if the date of disability had occurred before December 31 of the prior year, the amount will be calculated as of the latter date. Nothing about § 5-192*l* (c) suggests that the date of disability *is* the date of disability retirement or that the "other purposes" of the act to which the statute refers include the date that payment of disability retirement benefits commences. Indeed, both §§ 5-169 (j) and 5-192*l* (c) *distinguish* the date of retirement from the date of disability. See General Statutes § 5-169 (j) (referring separately to "date of disability" and "date as of which [disability retirement] benefits . . . are payable," thereby implying that dates are different); General Statutes § 5-192*l* (c) (referring separately to "date of retirement" and "date of . . . disability," thereby implying that dates are different). Moreover, if the legislature had intended to mandate the payment of disability retirement benefits commencing on the day after the last day of paid employment, we cannot conceive why it would have done so in this roundabout way instead of expressly stating the date that payment commences.

The plaintiffs further contend that § 5-192p (a) implies that disability retirement benefits become payable on the day after the member's last day of paid employment. Section 5-192p (a) provides in relevant part that, "[i]f a member of tier II, while in state service, becomes disabled as defined in subsection (b) of this section, prior to age sixty-five, he is eligible for disability retirement if the member has completed at least ten years of vested service. . . ." We conclude that this statute merely sets forth the conditions for eligibility for disability retirement benefits; it does not provide that the date of eligibility and the date that benefits become payable are identical.

Finally, if the legislature had intended to overrule the 1981 attorney general opinion when it enacted the 1983

amendments adopting Tier II of SERS, it presumably would have amended the act to ensure that the same rule would apply to members subject to § 5-169, governing Tier I disability retirement benefits. The plaintiffs have made no claim that that is the case. We conclude, therefore, that the 1983 amendments do not clearly indicate that the attorney general's interpretation of the act was incorrect. Rather, the act is silent on the question of when disability retirement benefits commence.[26]

In light of this silence, we acknowledge that the express provisions of the act do not *compel* the interpretation set forth in the attorney general's opinion and adopted by the commission. We agree with the plaintiffs, for example, that the fact that an application is a prerequisite for payment of disability retirement benefits—which the plaintiffs have never denied—does not, ipso facto, compel the conclusion that retroactive payment of the benefits is prohibited. Nevertheless, we conclude, for the following reasons, that the commission's position that disability retirement benefits are payable on the first day of the month following application is reasonable.

First, the express terms of the act provide that, for normal retirement,[27] early retire-

[26] In reaching this conclusion, we acknowledge that the act is complex and hardly a model of clarity. For example, § 5-169 (j) provides in relevant part that "[a] member's date of disability shall be his last date of active employment by the state prior to such disability or the date as of which his benefits under this section are payable, *whichever is earlier*. . . ." (Emphasis added.) It is unclear to us how a member's disability retirement benefits could be payable earlier than his last date of active employment (which, according to the plaintiffs, means last date of *paid* employment) when the parties in the present case agree that a member cannot receive employment compensation and retirement benefits at the same time. See footnote 32 of this opinion. We note that the plaintiffs contend that, for purposes of § 5-169 (j), the phrase "date as of which [a member's] benefits . . . are payable" means the date that the member filed his application for benefits. They cite no authority in support of this claim, which would be inconsistent with their claim that disability retirement benefits are payable the day after the last day of paid employment. They also do not explain how a member could file an application for disability retirement benefits earlier than his last day of paid employment.

[27] General Statutes § 5-162 (c), governing Tier I normal retirement for members with twenty-five or more years of service, provides in relevant

ment[28] and hazardous duty retirement,[29] retirement

part: "(1) Except as provided in section 5-163a, each member who has completed twenty-five or more years of state service shall be retired on his own application on the first day of the month named in the application, and on or after the member's fifty-fifth birthday.

"(2) Each member who has completed twenty-five or more years of state service and has reached his seventieth birthday and who is in an appointive position shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the Retirement Commission to the member, to the executive head of his agency and the Comptroller.

"(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date . . . ."

Although § 5-162 (c) does not specify that the "day of the month named in the application" must be *after* the date of the application, the 1981 attorney general opinion presumes that that is the case, and neither the plaintiffs nor the commission has suggested otherwise.

General Statutes § 5-162 (d), governing Tier I normal retirement for members with fewer than twenty-five years of service, provides in relevant part: "(1) Except as provided in section 5-163a, each member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if the member has completed ten years of state service and reached his fifty-fifth birthday.

"(2) Each such member in an appointive position who has reached his seventieth birthday shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the Retirement Commission to the member, the executive head of his agency and the Comptroller.

"(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date . . . ."

General Statutes § 5-192*l*, governing Tier II normal retirement, provides in relevant part: "(a) Each member of tier II who has attained age sixty-five and has completed ten or more years of vesting service may retire on his own application on the first day of any future month named in the application. Benefits shall be payable from that date provided the member is no longer in state employment.

"(b) Each member of tier II who has attained age seventy and has completed five or more years of vesting service shall be retired on the first day of the month coincident with or, otherwise, immediately following his seventieth birthday, except as provided in subsection (e) of this section.

"(c) Each member of tier II referred to in subsections (a) and (b) of this section shall receive a monthly retirement income beginning on his retirement date . . . ."

[28] General Statutes § 5-192m (a), governing Tier II early retirement, provides: "Each member of tier II who has attained age fifty-five and has completed ten or more years of vesting service, shall be retired on his own application on the first day of any future month named in the application. Benefits shall be payable from that date provided the member is no longer in state employment."

[29] General Statutes § 5-192n provides in relevant part: "(a) Each 'hazardous duty member' who has completed twenty-five years of credited service while a hazardous duty member may be retired on his own application on the first day of any future month named in the application. . . .

occurs after the date that an application is filed, and payment of retirement benefits commences on the day of retirement. Although the act does not expressly state when disability retirement occurs or when payment of disability retirement benefits commences, it is reasonable for the commission to treat disability retirement consistently with these other forms of retirement.[30]

Second, the provisions of the act were negotiated by the state and representatives of the state employee unions pursuant to collective bargaining and were submitted to the legislature for approval and codification pursuant to § 5-278 (b). State employers and the unions have presumably been aware of the 1981 attorney general opinion, which was distributed to the heads of all state agencies, as well as the commission's decisions applying its interpretation of the act with respect to the date that normal and disability retirement benefits become payable, and neither party has sought to renegotiate the agreement or to amend the provisions of the act to reflect a different understanding. In addition, the legislature is presumed to be aware of the interpretation given to statutes by the attorney general and administrative agencies, and it has not given any indication that it had a different understanding of the agreement

"(b) Each member referred to in subsection (a) of this section shall receive a monthly retirement income beginning on his retirement date . . . ."

[30] The plaintiffs suggest that the fact that the provisions governing disability retirement, unlike the provisions governing normal retirement, early retirement and hazardous duty retirement, do not expressly specify the date of retirement and the date that payment of retirement benefits commences shows that the intent of the act was to treat disability retirement differently. If that were the case, however, we cannot conceive why the parties who negotiated the provisions of the act and the 1983 amendments adopting Tier II would have chosen to remain *silent* on the question of when disability retirement occurs and when benefits become payable instead of specifying when those events occur. It is more reasonable to conclude that this silence was a legislative oversight than to conclude that the legislature differentiated disability retirement from the other forms of retirement by intentionally remaining silent on this issue, thereby giving rise to the present uncertainty and confusion.

that the parties submitted to it for approval, even though the legislature has amended the act several times since 1981. See *Berkley* v. *Gavin*, 253 Conn. 761, 776 n.11, 756 A.2d 248 (2000) ("we have applied [the] doctrine of legislative acquiescence to administrative interpretations of statutes"); *Housing Authority* v. *Dorsey*, 164 Conn. 247, 253, 320 A.2d 820 ("[w]e . . . construe the legislature's failure to amend [General Statutes (Rev. to 1973)] § 8-42 after the attorney general's opinion that the statute barred tenants from being commissioners as an indication of legislative intent that tenants should not be placed in a position [in which] they could control housing authorities in whose properties they were tenants"), cert. denied, 414 U.S. 1043, 94 S. Ct. 548, 38 L. Ed. 2d 335 (1973); see also *State* v. *Salamon*, 287 Conn. 509, 525, 949 A.2d 1092 (2008) ("[l]egislative concurrence is particularly strong [when] the legislature makes unrelated amendments in the same statute" (internal quotation marks omitted)).

Third, we are not persuaded by the plaintiffs' argument that the commission's interpretation of the act "punishes injured members who attempt to recover." The plaintiffs posit "two employees, one [A] who [after his last day of paid employment] attempts rehabilitation through physical therapy or other treatment before sending in the application for disability retirement. Another employee [B] leaves work and immediately files for benefits, making no attempt to regain the ability to work. The second employee will receive more in state retirement benefits because there will be no gap between initial injury or sickness and application for pension benefits." The reason that employees A and B are treated differently in this scenario, however, is that A believed that he could not establish that he was entitled to disability retirement benefits immediately after his last date of paid employment, whereas B was in

fact able to do so.[31] If B *could* continue the service for which he was employed, he would not qualify for disability retirement benefits at any time, notwithstanding the fact that he filed an application for disability retirement benefits immediately after his last day of paid employment. If A believed as of his last day of paid employment that it was unlikely that he would be able to return to work but was uncertain whether he had sufficient information to establish that fact, that uncertainty would not prevent him from submitting an application the next day, if he so chose.[32] See Regs.,

[31] Under § 5-192p (b), which governs Tier II disability retirement, "[a] member is disabled for the first twenty-four months [after retirement] if he is permanently unable to continue to render the service in which he has been employed. Disability retirement continues thereafter only if such member is totally disabled for any suitable and comparable job."

[32] The commission points out that SERS members are entitled to state service credit for certain forms of unpaid leave. It contends that, if the period during which a member was entitled to receive payment of disability retirement benefits overlapped with the period for which the member was entitled to receive state service credit, as a general rule, the member could not both receive payment of the benefits and credit for state service during the period of overlap, a practice known as "double dipping." Cf. General Statutes § 5-192*l* (a) ("[b]enefits [for normal retirement] shall be payable from [the first day of any future month named in the application] provided the member is no longer in state employment"); General Statutes § 5-192v (b) ("[n]o [retired] member reemployed [by the state on a permanent basis] . . . shall receive a retirement income during such member's reemployment or other state service," with certain exceptions); see also General Statutes § 5-192i (f) ("[i]f an employee is absent from the service of the state due to a work-related injury or disease for which periodic workers' compensation cash benefits are payable, the period of such absence shall not count as a break in service and shall be considered vesting service"). According to the commission, § 5-192p (h) provides an exception to this rule. See General Statutes § 5-192p (h) ("if the member recovers from such disability prior to reaching what would have been his normal retirement date . . . such member shall receive credit for both vesting and credited service purposes for the years he was disabled").

The commission claims that the plaintiffs' position that disability retirement benefits are payable commencing on the day after the last day of paid employment would be unworkable because it would result in double dipping whenever a member took an unpaid leave for which he received state service credit after his last day of paid employment and later filed an application for retirement disability benefits that was granted. It is unclear to us, how-

Conn. State Agencies § 5-155a-2 (d).[33] If the board ever, that starting payment of retirement disability benefits on the first day of the month after receipt of the application would be the only way to avoid double dipping under these circumstances. If the plaintiffs were correct that payment of disability retirement benefits commences on the day after the last day of paid employment, the commission might adopt a rule that would give the member a choice between (1) receiving state service credit for the leave period and payment of retirement benefits starting the day after the last day of leave, or (2) receiving payment of retirement benefits starting the day after his last day of paid employment, but no state service credit. Alternatively, the commission might adopt a blanket rule barring either receipt of state service credit or payment of retirement benefits during the period of overlap.

Indeed, under the rule that payment of disability retirement benefits commences on the first day of the month after receipt of the application, the commission's suggestion that a member cannot file an application for retirement benefits and simultaneously take an unpaid leave that entitles the member to service credit creates a dilemma for a SERS member who, as of his last day of paid employment, is uncertain whether he qualifies for disability retirement benefits. Although the commission's position that retirement disability benefits are payable commencing on the first day of the month after receipt of the application creates an incentive for the member to file an application for disability retirement benefits as soon as possible after the last day of paid employment to maximize benefits if the application is ultimately granted, applying early in lieu of taking an unpaid leave would potentially deprive the member of state service credit to which he would otherwise have been entitled if the application is ultimately denied.

We note that the plaintiff's claim that the statutes cited by the commission prohibit only the simultaneous receipt of *employment compensation* and retirement benefits, not the simultaneous receipt of state service credit and retirement benefits. In support of this claim, they rely only on § 5-192p (h), which, according to the commission, provides an *exception* to the general rule that a member cannot receive state service credit and retirement benefits for the same period. Because we would conclude that the commission's position that disability retirement benefits become payable on the first day of the month after receipt of the application is reasonable regardless of which of these positions on the double dipping question is correct, and because the parties have not comprehensively briefed these issues, we decline to resolve them here.

[33] Section 5-155a-2 (d) of the Regulations of Connecticut State Agencies provides in relevant part: "The time period for filing an application for disability retirement benefits or petition for service connected disability retirement shall begin on the day after the applicant's last day of paid employment by the State of Connecticut and shall end at close of business on the date that is twenty-four months after the applicant's last day of paid employment."

denied the application, the member would have one year in which to file a motion for reconsideration. See id., § 5-155a-2 (f).[34] The member would then have one year from the date that he sought reconsideration to submit additional information to the board about his medical condition on the last day of employment and an explanation as to why the information was not available at the time of the original application. See id., § 5-155a-2 (g).[35] Thus, a member who filed an application the day after his last day of paid employment, even though he was not certain at that time that he could establish that he was qualified to receive disability retirement benefits, would have up to two years after his application was denied to obtain additional information to support the application. Although the member would admittedly have less time to obtain information supporting his application than a member who waited for two years after his last date of paid employment to file an application would have, we are not persuaded that that fact renders the commission's interpretation unreasonable.[36] We further note that an employee who

[34] Section 5-155a-2 (f) of the Regulations of Connecticut State Agencies provides: "The member shall have one (1) calendar year from the date of the Board's decision of denial to seek reconsideration of said decision. If the member does not seek reconsideration of the Board's decision of denial within said one (1) calendar year, the Board's initial decision of denial shall stand. The decision of denial shall be brought before the Commission for its approval as administratively denied."

[35] Section 5-155a-2 (g) of the Regulations of Connecticut State Agencies provides: "The member shall have one year from the date he or she sought reconsideration to: (1) submit the requested records (if any); and (2) submit additional material facts concerning his or her medical condition at the date of termination of employment; and (3) explain in writing why such material facts were not available to the member at the time of his or her original application to the Board. If the member does not provide the above information within one (1) calendar year of the date of seeking reconsideration, the Board's initial decision of denial shall stand. The decision of denial shall be brought before the Commission for its approval as administratively denied."

[36] We acknowledge that a member who sits on his rights and, without good reason, fails to file an application for disability retirement benefits, even though he clearly qualifies for them, would lose benefits for the period

takes an unpaid leave before filing an application because he is uncertain whether he will be able to return to work and who ultimately receives disability retirement benefits is in no worse a position than an employee who takes an unpaid leave and ultimately returns to work. Both will be unpaid during the period they are on leave. Finally, we note that an uncodified addendum to the SERS agreement governing disability retirement benefits provides that, if the board ultimately denies the member's application, the agency in which the member was last actively employed is required to return the applicant to employment. Thus, the member is not punished for filing an application that is denied.

Fourth, making disability retirement benefits payable on the first day of the month after an application is received allows the state to predict at any given time its potential liability for payment of such benefits. If a member could be paid benefits retroactively to a date up to two years before receipt of the application, the state could be subject to sudden, unforeseen increases in liability.[37] Moreover, if the rule were now changed,

of delay. We cannot conclude, however, that that fact renders the commission's interpretation unreasonable. We also note that the commission has recognized certain exceptions to the rule that benefits are payable on the first day of the month after receipt of the application when the application is delayed through no fault of the member. See footnote 17 of this opinion.

[37] The commission further contends that, under the plaintiff's interpretation, "there would be no incentive for the employing agency to work with the member to determine if [he] could return to work [because] the member will claim disability retirement benefits from the last day [he was] physically on the job." The commission points out that, during many types of leave, "the member's job is protected as [he attempts] to recover from a temporary disability and return to work." See, e.g., 29 U.S.C. § 2614 (2018) (providing certain protections to employees who takes leave because of health condition); General States § 31-51nn (a) (providing certain protections to employees who takes medical leave). According to the commission, if the member were entitled to disability benefits from the day after the last day of paid employment, the employing agency would receive no benefit from waiting to see if the employee would return to work and, therefore, would simply "separate" the member immediately, thereby depriving the member of his protected status. We are not persuaded. First, the commission has not

the state could be subject to claims for retroactive payments from members who are already retired.

Finally, and perhaps most significant, it is appropriate for this court to give great deference to the commission's reasonable interpretation in light of the gap that the legislature left in the act on this issue: the statute does not specify the date on which an employee's disability retirement benefits will begin. See *Silver Lining Group EIC Morrow County* v. *Ohio Dept. of Education Autism Scholarship Program*, supra, 85 N.E.3d 801 ("[a]n agency's reading that fills a gap . . . in a reasonable way in light of the [l]egislature's design controls" (internal quotation marks omitted)). Even if the commission reasonably *could have* adopted the plaintiffs' position, nothing in the act required it to do so, and we ought not substitute our judgment as to which of two reasonable positions is preferable for the judgment of the commission. Accordingly, we conclude that the trial court properly gave substantial deference to the commission's position that disability retirement benefits become payable on the first day of the month after the application is received.

II

We next address the plaintiffs' claim that, as a fiduciary of the plaintiffs, the commission has the burden

explained how the employing agency would know whether a member who takes a leave of absence for health reasons would later file an application for disability retirement benefits. Second, the commission has not explained how an employing agency could prevent an employee from taking a medical leave to which he is entitled by law or why it could simply ignore the laws that are intended to protect such employees. Third, the benefit from not terminating the member immediately would be that the state might not have to pay any disability retirement benefits if the member were able to return to work. Finally, this argument assumes that this issue could not arise under the commission's interpretation of the act because a member cannot file an application for retirement disability benefits on the day after the member's last day of paid employment if the member also takes an unpaid leave of absence. As we already indicated, it is unclear to us whether that is the case. See footnote 32 of this opinion.

of proving fair dealing by clear and convincing evidence and that it has failed to do so.[38] The commission contends that, because this is an administrative appeal, not a civil action for breach of fiduciary duty, the burden is on the plaintiffs to demonstrate that the commission's interpretation of the act is incorrect. We conclude that the commission did not have the burden of proving fair dealing by clear and convincing evidence.

We begin with a review of the governing law. General Statutes § 5-155a (c) provides in relevant part that the commission "shall have general supervision of the operation of the retirement system, shall conduct the business and activities of the system, in accordance with this chapter and applicable law and each trustee shall be a fiduciary with respect to the retirement system and its members. . . ." "This court has instructed that . . . [a] fiduciary or confidential relationship is characterized by a unique degree of trust and confidence between the parties, one of whom has superior knowledge, skill or expertise and is under a duty to represent the interests of the other. . . . The superior position of the fiduciary or dominant party affords him great opportunity for abuse of the confidence reposed in him." (Internal quotation marks omitted.) *Iacurci* v. *Sax*, 313 Conn. 786, 800, 99 A.3d 1145 (2014). "Once a [fiduciary] relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence."

[38] We note that, although the plaintiffs raised this claim in their briefs to the trial court, the trial court did not address it. The commission contends that the claim is not reviewable because the plaintiffs did not allege a breach of fiduciary duty in their initial appeal to the trial court. We conclude that we need not determine whether the plaintiffs' claim is reviewable because they cannot prevail. See footnote 24 of this opinion.

(Internal quotation marks omitted.) *Murphy* v. *Wakelee*, 247 Conn. 396, 400, 721 A.2d 1181 (1998).

"[I]t is only when the confidential relationship is shown together with suspicious circumstances, or [when] there is a transaction, contract, or transfer betweenpersons in a confidential or fiduciary relationship, *and* [*when*] *the dominant party is the beneficiary of the transaction*, *contract*, *or transfer*, that the burden shifts to the fiduciary to prove fair dealing." (Emphasis added; internal quotation marks omitted.) *Cadle Co.* v. *D'Addario*, 268 Conn. 441, 456, 844 A.2d 836 (2004); see id. ("*if the superior party obtains a possible benefit*, equity raises a presumption against the validity of the transaction or contract, and casts upon such party the burden of proving fairness, honesty, and integrity in the transaction or contract" (emphasis in original; internal quotation marks omitted)); id., 457 ("when a breach of fiduciary duty is alleged, and the allegations concern fraud, self-dealing or a conflict of interest, the burden of proof shifts to the fiduciary to prove fair dealing by clear and convincing evidence").

The plaintiffs in the present case appear to claim that the commission was required to prove by clear and convincing evidence that its use of "an unwritten practice . . . to set a start date for disability benefits" was fair to the plaintiffs. The plaintiffs contend that "[a]n unwritten policy could lead to inconsistent and arbitrary decisions" and "does not give fair notice to employees who are contemplating disability retirement." The plaintiffs also claim that the substance of the commission's rule is unfair insofar as it punishes SERS members who do not file an application for disability retirement benefits immediately after their last day of paid employment because they are uncertain whether they can establish that they qualify. Even if we were to assume, however, that the plaintiffs established a prima facie

case with respect to these issues,[39] the plaintiffs have not claimed that the commission took advantage of its fiduciary relationship with SERS members to benefit itself. We conclude, therefore, that the burden did not shift to the commission to prove fair dealing by clear and convincing evidence.[40] See, e.g., *Cadle Co.* v. *D'Addario*, supra, 268 Conn. 456–57 (fiduciary is required to prove fair dealing by clear and convincing evidence only if plaintiff alleges that fiduciary obtained benefit from alleged wrongdoing). We further note that, even if we were to conclude that it was unfair of the commission to apply its interpretation of the act to the plaintiffs because it was not expressly set forth in the act or any regulation, it is unclear to us what the remedy would be. It would be anomalous to conclude that the commission must apply the plaintiffs' interpretation, which also is not expressly set forth in the act or regulations. Accordingly, even if we were to assume, without deciding, that the commission's application of a time-tested and reasonable rule that fills a gap in the act could conceivably constitute an abuse of its fiduciary relationship

[39] As we explained, the Office of the Comptroller distributed the 1981 attorney general opinion, which provides the basis of the commission's interpretation, to the heads of all state agencies, presumably so that the agencies can provide this information to any SERS member who inquires about the issue. Moreover, there is no evidence that the commission has applied this interpretation inconsistently. Indeed, the only evidence is to the contrary. We also concluded that the plaintiffs have failed to establish that the commission's rule is punitive to SERS members who do not file an application for disability retirement benefits immediately after their last day of paid employment.

[40] We are aware of no authority for the proposition that a different rule applies when a fiduciary is administering a pension or healthcare plan and the benefit to the fiduciary may be somewhat attenuated. See, e.g., *Roth* v. *Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 917 (8th Cir. 1994) (under Employee Retirement Income Security Act of 1974, "plaintiffs bear the burden of proving a breach of fiduciary duty and a prima facie case of loss to the plan"); *Rodrigues* v. *United Public Workers, AFSCME Local 646, AFL-CIO*, 135 Haw. 316, 319, 349 P.3d 1171 (2015) (plaintiffs demonstrated by preponderance of evidence that administrator of union's healthcare benefit plan breached his fiduciary duty to participants).

with SERS members, and that a claim of breach of fiduciary duty may be raised in an administrative appeal, we conclude that the plaintiffs have not made a colorable claim that that is the case here.

The judgment is affirmed.

In this opinion the other justices concurred.

DELORES PEEK *v.* MANCHESTER MEMORIAL HOSPITAL ET AL.
(SC 20414)

Robinson, C. J., and McDonald, Mullins, Kahn and Ecker, Js.*

Syllabus

Pursuant to the statute ((Rev. to 2015) § 52-584) setting forth the limitation period for actions brought against hospitals for negligence or medical malpractice, among other actions, such actions may not be "brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ."

The plaintiff sought to recover damages from the defendant hospital and its holding company for negligence for injuries she sustained while admitted to the hospital. On February 10, 2015, the plaintiff, while on fall prevention protocol, fell while using the restroom and sustained injuries to her shoulder and neck. She was discharged from the hospital two days later. On April 6, 2015, while receiving follow-up care at her physician's office, a staff member in that office informed the plaintiff that a nurse or nurse's aide should have been responsible for her safety while she was an inpatient at the hospital. On May 22, 2017, the plaintiff delivered the present action to the state marshal for service of process. Subsequently, the defendants filed a motion for summary judgment, claiming that the plaintiff's action was barred by the two year statute of limitations set forth in § 52-584. The trial court granted the defendants' motion, reasoning that the plaintiff suffered actionable harm from the fall and injuries on February 10, 2015, and, having received a statutory ((Rev. to 2015) § 52-190a (b)) ninety day extension of the two year limitation period set forth in § 52-584, should have commenced her action on or before May 10, 2017. The trial court thus determined that

* This case was argued before a panel of this court consisting of Chief Justice Robinson and Justices McDonald, D'Auria, Mullins, Kahn and Ecker. Justice D'Auria has since been removed from the panel.

the plaintiff's action was time barred insofar as she commenced her action on May 22, 2017. The plaintiff appealed from the trial court's judgment in favor of the defendants, and the Appellate Court reversed the trial court's judgment. The Appellate Court, relying on this court's decision in *Lagassey* v. *State* (268 Conn. 723), construed the term "injury," for purposes of § 52-584, as synonymous with "actionable harm," which occurs when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant. The Appellate Court concluded that the trial court should not have granted the defendants' motion for summary judgment because the evidence demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584. On the granting of certification, the defendants appealed to this court. *Held* that the Appellate Court correctly concluded that, viewing the facts in the light most favorable to the plaintiff, there was a genuine issue of material fact regarding whether the plaintiff commenced her action within two years from the date of her "injury," as that term is understood in the context of § 52-584, and, accordingly, the Appellate Court properly reversed the trial court's judgment: Connecticut case law was clear that the term "injury," as used in § 52-584, means "actionable harm," which occurs when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant, and the fact that the plaintiff averred that she did not know the cause of her fall or that the defendants were responsible for her safety while she was an inpatient at the hospital until April 6, 2015, was sufficient to create a genuine issue of material fact regarding when her actionable harm occurred; moreover, there was no merit to the defendants' claim that, because the plaintiff's physical injuries from her fall were obvious, the Appellate Court improperly applied failure to diagnose or latent injury cases to the facts of this case, as the definition of "actionable harm" established in *Lagassey* and its progeny was applicable to all actions subject to § 52-584, regardless of whether the physical harm was obvious or latent; furthermore, the defendants could not prevail on their claim that the Appellate Court should have relied on this court's decision in *Burns* v. *Hartford Hospital* (192 Conn. 451), in which the plaintiff sustained obvious injuries, like the plaintiff in the present case, and in which the court determined that the limitation period set forth in § 52-584 began to run when the plaintiff sustained his injuries, as the plaintiff in *Burns*, unlike the plaintiff in the present case, became aware of the connection between his injuries and the defendants' negligence at the time that the injuries were sustained; in addition, contrary to the defendants' claim that, because *Lagassey* was decided after the statute (§ 1-2z) embodying the plain meaning rule became effective, the court in *Lagassey* improperly neglected to apply that rule and, pursuant to that rule, should have interpreted the term "injury" in § 52-584 to mean "hurt, damage, or loss sustained," the court in *Lagassey* simply restated

and followed this court's long-standing interpretation of "injury" for purposes of § 52-584 as actionable harm, this court saw no reason to abandon that long-standing interpretation in the present case, as the legislature, in enacting § 1-2z, did not intend for this court to overrule its prior interpretations of statutory language in cases decided prior to the enactment of § 1-2z, and the doctrine of stare decisis and the tenet of statutory interpretation that cautions against overruling case law involving this court's construction of a statute, if the legislature reasonably may be deemed to have acquiesced in that construction, as in the present case, counseled against accepting the defendants' invitation to revisit *Lagassey*'s interpretation of § 52-584.

Argued November 17, 2020—officially released February 2, 2022**

Procedural History

Action to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Cobb*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed; thereafter, the Appellate Court, *Alvord*, *Moll* and *Bear*, *Js.*, reversed the trial court's judgment and remanded the case for further proceedings, and the defendants, on the granting of certification, appealed to this court. *Affirmed.*

Sean R. Caruthers, with whom, on the brief, was *Michael D. Neubert*, for the appellants (defendants).

Neil Johnson, for the appellee (plaintiff).

Opinion

MULLINS, J. The defendants, Manchester Memorial Hospital and Prospect Medical Holdings, Inc., appeal from the judgment of the Appellate Court, which reversed the judgment of the trial court and concluded that a genuine issue of material fact exists as to whether the action of the plaintiff, Delores Peek, was barred by the two year statute of limitations set forth in General

** February 2, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Statutes (Rev. to 2015) § 52-584.[1] We conclude that a genuine issue of material fact exists regarding whether the plaintiff initiated her action within two years from the date of her injury, as that term is understood in the context of § 52-584. Therefore, we affirm the judgment of the Appellate Court.

The Appellate Court opinion sets forth the following relevant facts from the record, viewed in the light most favorable to the plaintiff as the nonmoving party. "On January 30, 2015, the plaintiff was admitted to Manchester Memorial Hospital with a medical diagnosis of [C. diff] diarrhea. On or about that date, she was assessed at the hospital and found to be at risk for falling. She was placed on 'fall prevention protocol' and required assistance to leave her hospital bed. On February 10, 2015, the plaintiff fell while using the restroom and sustained injuries to her shoulder and neck, for which she received medication and treatment. She 'was unaware,' on the date of her fall, 'what was the cause of [her] fall.' The plaintiff left the hospital on February 12, 2015, and received follow-up care through December 10, 2015, on which date she underwent neck surgery. On or about April 6, 2015, staff at the office of the plaintiff's doctor informed the plaintiff that 'a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the hospital].'

"On November 22, 2016, the plaintiff received an automatic ninety day extension of the statute of limitations pursuant to General Statutes [Rev. to 2015] § 52-190a

[1] General Statutes (Rev. to 2015) § 52-584 provides in relevant part that "[n]o action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ."

Hereinafter, unless otherwise indicated, all references to § 52-584 in this opinion are to the 2015 revision of the statute.

(b).[2] The plaintiff delivered the action to the state marshal for service of process on May 22, 2017. In her one count complaint, the plaintiff alleges that her fall resulted from the defendants' negligence in 'fail[ing] to exercise the degree of care, skill, and diligence ordinarily exercised by hospitals engaged in the treat[ment] of patients . . . on . . . fall prevention protocol . . . .' On July 26, 2017, the defendants filed an answer and a special defense alleging that the plaintiff's claim was barred by the statute of limitations in § 52-584. On July 31, 2017, the plaintiff filed her reply to the special defense, stating therein: 'The plaintiff . . . denies any and all allegations of the defendants' special defense in its entirety . . . .'

"On September 13, 2017, the defendants filed a motion for summary judgment, maintaining that the plaintiff's action was barred by the statute of limitations in § 52-584. The documents submitted with the defendants' motion and memorandum of law in support of their motion were the plaintiff's certificate of good faith pursuant to § 52-190a and attached written opinion letter, the plaintiff's request for an extension of the statute of limitations, the state marshal's return of service, the defendants' answer and special defense, and the plaintiff's reply thereto.

"On December 29, 2017, the plaintiff objected to the motion for summary judgment, arguing . . . [inter alia, that] the statute of limitations did not begin [to run] until April 6, 2015, on which date she claimed that she 'learned that she was on fall risk protocol and that while

[2] General Statutes (Rev. to 2015) § 52-190a (b) provides in relevant part: "Upon petition to the clerk of the court where the civil action will be filed to recover damages resulting from personal injury or wrongful death, an automatic ninety-day extension of the statute of limitations shall be granted . . . ."

Hereinafter, all references to § 52-190a in this opinion are to the 2015 revision of the statute.

on fall risk protocol that the hospital was required to provide her assistance whenever she left her bed.' She argued that she 'was not aware that the defendants' conduct or lack thereof was the cause of her injury until she was informed by the defendant provider on or about April 6, 2015.' The plaintiff attached to her opposition memorandum her affidavit averring that she 'was unaware,' on the date of her fall, 'what was the cause of [her] fall.' She further averred that staff at her doctor's office informed her on April 6, 2015, that 'a nurse or nurse's aide should have been responsible for [her] safety while inpatient at [the hospital].' The defendants did not file a reply memorandum.

"On January 2, 2018, the court granted the defendants' motion for summary judgment [and rendered judgment for the defendants], stating that 'the plaintiff did not place the action in the hands of the marshal until May 22, 2017. Because the plaintiff suffered actionable harm—the fall and injuries—on February 10, 2015, she should have brought the action on or before February 10, 2017. Having received a ninety day extension . . . the suit should have been initiated on or before May 10, 2017. Having failed to initiate this action within the applicable statute of limitations, the action is time barred.' " (Footnote added; footnotes omitted.) *Peek* v. *Manchester Memorial Hospital*, 193 Conn. App. 337, 339–41, 219 A.3d 421 (2019).

The plaintiff appealed from the judgment of the trial court. On appeal to the Appellate Court, the plaintiff asserted "that she submitted evidence in opposition to the defendants' motion for summary judgment that show[ed] that she did not discover her 'injury' for purposes of § 52-584 until April 6, 2015. She argue[d] that actionable harm occurred on April 6 when she learned that the defendants' negligence had caused her injury." Id., 345.

The Appellate Court reversed the judgment of the trial court. Id., 348. In doing so, the Appellate Court construed the term "injury" for purposes of § 52-584 consistent with this court's decision in *Lagassey* v. *State*, 268 Conn. 723, 747–49, 846 A.2d 831 (2004). The Appellate Court noted that, in *Lagassey*, this court explained that, as used in § 52-584, "the term 'injury' is synonymous with 'legal injury' or 'actionable harm.' 'Actionable harm' occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action." Id., 748; see *Peek* v. *Manchester Memorial Hospital*, supra, 193 Conn. App. 345 (quoting *Lagassey*). This court also explained that "actionable harm does not occur until the plaintiff discovers or should have discovered that the harm complained of *was caused by the negligence of the defendant*." (Emphasis in original.) *Lagassey* v. *State*, supra, 747; accord *Peek* v. *Manchester Memorial Hospital*, supra, 346 (quoting *Lagassey*).

Applying this court's interpretation of § 52-584 from *Lagassey*, the Appellate Court concluded that "the evidence before the trial court demonstrated a genuine issue of material fact as to when the plaintiff discovered her injury as contemplated by § 52-584 . . . ." *Peek* v. *Manchester Memorial Hospital*, supra, 193 Conn. App. 339. Accordingly, the Appellate Court concluded that the trial court should not have granted the defendants' motion for summary judgment, and it reversed the judgment of the trial court. Id., 348.

Thereafter, the defendants sought certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court correctly conclude that there existed a genuine issue of material fact as to whether the plaintiff's action was barred by the two year statute of limitations set forth in . . . § 52-584?" *Peek* v. *Manchester Memorial Hospital*, 334 Conn. 906, 220 A.3d 801 (2019).

On appeal to this court, the defendants assert that the Appellate Court misapplied this court's precedent under § 52-584 to the facts of the present case and relied on the immaterial fact of when the plaintiff became aware that the defendants were responsible for her safety. They further argue that this court should construe § 52-584 consistent with the plain meaning rule of General Statutes § 1-2z, and that such a construction would require reversal of the judgment of the Appellate Court. We disagree and, accordingly, affirm the judgment of the Appellate Court.

"The scope of our appellate review depends [on] the proper characterization of the rulings made by the trial court. . . . When . . . 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.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 389, 54 A.3d 532 (2012). In the present case, the trial court granted the defendants' motion for summary judgment on the ground that the plaintiff failed to demonstrate a genuine issue of material fact regarding whether she initiated this action within two years of suffering an "injury," as required by § 52-584. To the extent that determining whether summary judgment was appropriate in this case is based on interpreting § 52-584, our review is plenary. See, e.g., *Shoreline Shellfish, LLC* v. *Branford*, 336 Conn. 403, 410, 246 A.3d 470 (2020).

Before addressing the defendants' specific arguments, we lay out this court's long-standing interpretation of the term "injury" for purposes of § 52-584. We begin with the statutory language. General Statutes (Rev. to 2015) § 52-584 provides in relevant part: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice

of a . . . hospital . . . shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . .''

In considering the meaning of the term ''injury'' for purposes of § 52-584, however, we do not write on a clean slate. In 2004, in *Lagassey*, this court took the ''opportunity to *restate* the correct legal standard by which to evaluate the timeliness of causes of action in negligence.'' (Emphasis added.) *Lagassey* v. *State*, supra, 268 Conn. 748. Relying on a case that dated back to 1986, this court explained that ''[t]he limitation period for actions in negligence begins to run on the date when the injury is first discovered or in the exercise of reasonable care should have been discovered. See General Statutes §§ 4-148 (a)[3] and 52-584. In this regard, the term 'injury' is synonymous with 'legal injury' or 'actionable harm.' 'Actionable harm' occurs when the plaintiff discovers, or in the exercise of reasonable care, should have discovered the essential elements of a cause of action. . . . A breach of duty by the defendant and a causal connection between the defendant's breach of duty and the resulting harm to the plaintiff are essential elements of a cause of action in negligence; they are therefore necessary ingredients for ' ''actionable harm.'' ' . . . Furthermore, 'actionable harm' may occur when the plaintiff has knowledge of facts that would put a reasonable person on notice of the nature and extent of an injury, and that the injury was caused by the negligent conduct of another.'' (Citations omitted; footnote added.) *Lagassey* v. *State*, supra, 748–49, quoting *Catz* v. *Rubenstein*, 201 Conn. 39, 44, 47, 513 A.2d 98 (1986). In discussing the term ''injury,'' this

[3] Although § 4-148 (a) was the subject of a technical amendment in 2016; see Public Acts 2016, No. 16-127, § 7; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

court further explained that it has "repeatedly stated that 'an injury occurs when a party suffers some form of actionable harm.' . . . This court first used the term 'actionable harm' in 1984, in *Burns* v. *Hartford Hospital*, [192 Conn. 451, 460, 472 A.2d 1257 (1984)]." (Citations omitted.) *Lagassey* v. *State*, supra, 739.

After *Lagassey*, this court has uniformly reaffirmed the definition of "actionable harm." See, e.g., *Kelly* v. *University of Connecticut Health Center*, 290 Conn. 245, 255, 963 A.2d 1 (2009) ("The discovery of the presence of a foreign object in the body of a person who recently has undergone a medical procedure presupposes discovery of the 'essential elements of a cause of action in negligence,' as required by the standard this court articulated in *Lagassey* v. *State*, supra, 268 Conn. 748. Thus, when the plaintiff discovered the presence of the laser fibers sometime in 2000, he became aware of actionable harm within the meaning of § 4-148 and the one year limitation period began to run."); *Tarnowsky* v. *Socci*, 271 Conn. 284, 297, 856 A.2d 408 (2004) (relying on definition of "actionable harm" from *Lagassey* and concluding that "the two year statute of limitations set forth in § 52-584 does not begin to run until a plaintiff knows, or reasonably should have known, the identity of the tortfeasor"). Our case law is thus quite clear that "injury," as used in § 52-584, means actionable harm, i.e., when the plaintiff discovers or should have discovered that the harm complained of was caused by the negligence of the defendant.

Understanding that this court has consistently construed the term "injury" to mean "actionable harm," we turn to the facts of the present case. Here, it is undisputed that the plaintiff fell on February 10, 2015, while a patient at Manchester Memorial Hospital. It is also undisputed that she knew that she fell and that she knew she suffered some physical harm as a result of that fall. On the basis of those facts, the defendants

filed a motion for summary judgment, claiming that the plaintiff's claims were barred by the statute of limitations set forth in § 52-584. Specifically, the defendants asserted that "the plaintiff claims that she suffered injuries as a result of a fall that occurred on February 10, 2015, when she was a patient at [Manchester Memorial Hospital]. Because there is no issue of material fact that the plaintiff delivered the writ, summons and complaint to the state marshal for service on May 22, 2017, beyond the applicable statute of limitations set forth in . . . § 52-584, the plaintiff is barred from bringing these claims as a matter of law."

In response, the plaintiff submitted an opposition to the defendants' motion for summary judgment, asserting that she "was not aware that the defendants' conduct or lack thereof was the cause of her injury until . . . April 6, 2015." In support of her opposition, the plaintiff submitted an affidavit. In that affidavit, the plaintiff averred that "I was unaware [on February 10, 2015], what was the cause of my fall." The plaintiff further averred that, "[o]n or about April 6, 2015, staff at the . . . doctor's office informed me [that] a nurse or nurse's aide should have been responsible for my safety while inpatient at [Manchester Memorial Hospital]."

In considering the plaintiff's claim, it is important to note that "the determination of when a plaintiff in the exercise of reasonable care should have discovered 'actionable harm' is ordinarily a question reserved for the trier of fact." *Lagassey* v. *State*, supra, 268 Conn. 749; see, e.g., *Taylor* v. *Winsted Memorial Hospital*, 262 Conn. 797, 810, 817 A.2d 619 (2003) ("because the determination of reasonable care is a question of fact, it was up to the jury to determine whether the plaintiff exercised reasonable care in the discovery of his injury").

Furthermore, as we explained previously in this opinion, "actionable harm does not occur until the plaintiff

discovers or should have discovered that the harm complained of *was caused by the negligence of the defendant*." (Emphasis in original.) *Lagassey* v. *State*, supra, 268 Conn. 747. Bearing in mind that a court, in deciding a motion for summary judgment, must view the facts in the light most favorable to the nonmoving party, the fact that the plaintiff averred that she did not know the cause of her fall or that the defendants were responsible for her safety while she was inpatient at Manchester Memorial Hospital until April 6, 2015, is sufficient to create a genuine issue of material fact regarding when her actionable harm occurred.

The defendants did not submit any evidence in support of their motion for summary judgment establishing that the plaintiff's representation in this regard could not have been credited by a reasonable fact finder. Indeed, the defendants submitted no evidence to contradict her representation on this point. Because the determination of when a plaintiff in the exercise of reasonable care should have discovered actionable harm is ordinarily a question reserved for the trier of fact, we cannot conclude that the Appellate Court incorrectly determined that there was a genuine issue of material fact. In other words, at this early stage of the proceedings, and without other evidence from the defendants, we cannot conclude that the plaintiff's statement that she did not know the causal connection between her physical harm and the negligence of the defendants until April 6, 2015, was unreasonable as a matter of law.

With this background in mind, we now turn to the defendants' specific claims in the present case. The defendants first assert that the Appellate Court "relied on an immaterial fact," namely, the fact that "the plaintiff was told on April 6, 2015, that [the defendants] were responsible for her safety." The defendants assert that

this is not a material fact, but a specific legal theory. We disagree.

As we explained in this opinion, this court has consistently concluded that the plaintiff's knowledge of the causal connection between the defendants' alleged negligence and her physical harm is a material fact because it begins the accrual of the statute of limitations under § 52-584. Therefore, without knowledge of the causal connection to the defendants' negligence, the plaintiff did not experience any actionable harm. Accordingly, we conclude that the Appellate Court properly relied on the fact that there was a genuine issue of material fact regarding when the plaintiff knew that her physical harm was a result of the defendants' negligence.

The defendants next claim that the Appellate Court misapplied this court's precedent to the facts of this case. Specifically, the defendants claim that the Appellate Court improperly applied what the defendants call failure to diagnose or latent injury cases to the facts of this case because the plaintiff's physical injuries were obvious. We disagree.

Nothing in *Lagassey* or its progeny indicates that *Lagassey*'s definition of "actionable harm" is only applicable to some actions for negligence. To the contrary, that definition is applicable to all actions subject to § 52-584, regardless of whether the physical harm is obvious or latent. As we have explained, the statute of limitations begins to run, not when the plaintiff knows that she has suffered a physical harm, but when she knows that the physical harm suffered "was caused by the negligent conduct of another." *Lagassey* v. *State*, supra, 268 Conn. 749. There may be many instances in which a plaintiff's actual or constructive knowledge of causation and negligence will arise at the same time as her knowledge that she has sustained physical harm. In those cases, the statute of limitations begins to run

immediately, not because the injury is obvious but, rather, because the plaintiff is aware of both the injury and the defendant's negligence.

Nevertheless, there are also times when a plaintiff may know that she has suffered physical harm, but she may not know that the harm was caused by the negligent conduct of another. In those cases, the statute of limitations does not begin to run until the plaintiff discovers or reasonably should have discovered that the defendant's negligence was the cause of her harm. The definition of "actionable harm" is applicable to both scenarios.

A review of *Catz* v. *Rubenstein*, supra, 201 Conn. 39, exemplifies this principle. *Catz* involved a medical malpractice action in which the coexecutors of the estate of the decedent, Elaine S. Foster, claimed that the defendant physician, Stephen R. Rubenstein, failed to properly diagnose Foster's breast cancer. See id., 40, 41. The trial court granted Rubenstein's motion for summary judgment on the ground that the action was time barred under the applicable statute of limitations because Foster did not initiate it within two years of her cancer diagnosis. See id., 40–41.

In that case, Foster "consulted . . . Rubenstein, a physician who practiced general internal medicine," in July, 1979. Id., 40. During a physical exam, Rubenstein noted a lump in Foster's breast and ordered a mammogram. Id. Thereafter, "[i]n early August, 1979, [Rubenstein] informed Foster that the mammogram was negative for cancer . . . ." Id.

In January, 1980, Foster discovered another lump and spoke to Rubenstein on the telephone, and Rubenstein told her "she had a propensity to fatty tissue, that he did not think it was anything serious, and that there was no cause for concern." Id., 40–41. In April, 1980, Foster again contacted Rubenstein because one of the

lumps had become larger. Id., 41. On April 21, 1980, Rubenstein examined Foster for the second time and ordered another mammogram, which indicated a malignancy. Id. By May, 1980, Foster was diagnosed with cancer. See id.

In April, 1982, Foster sought treatment from Horace Stansel of the Yale Medical School. See id., 42. At that point, Stansel informed Foster that, at the time she was examined by Rubenstein in August, 1979, she had cancer in her left breast. See id.

Thereafter, Foster commenced an action for medical malpractice on June 11, 1982. Id., 41. Specifically, she claimed that Rubenstein "negligently failed to prescribe or recommend further diagnostic tests or treatment for Foster and negligently failed to obtain the opinion of or refer her to a physician who specialized in the recognition and treatment of potential malignancies." Id. Rubenstein filed a motion for summary judgment, asserting that the claims were barred under § 52-584 because they were not brought within two years from the date Foster was diagnosed with cancer. See id., 40– 41. The trial court granted Rubenstein's motion for summary judgment, and the coexecutors, who were substituted as plaintiffs after Foster died, appealed. See id.

The coexecutors conceded that Foster became aware of her cancer diagnosis in May, 1980. See id., 41–42. Nevertheless, they asserted "that there was no evidence submitted with [Rubenstein's] motion for summary judgment and no facts established that showed when Foster discovered or in the exercise of reasonable care should have discovered that she had cancer in her left breast when she was initially examined and diagnosed by Rubenstein or that her condition at that time was related to the cancer discovered on May 1, 1980. The [coexecutors] claim[ed], on appeal, that Foster first

became aware of that possibility when she was advised to that effect by . . . Stansel . . . in April, 1982, and that she did not therefore discover her 'injury' until that date." Id., 42.

This court agreed with the coexecutors, explaining that "[Rubenstein's] affidavit and the other documents submitted in support of his motion for summary judgment pinpoint when [Rubenstein] examined Foster and initially diagnosed her condition and when she became aware that she had cancer. They do not, however, disclose when Foster discovered or in the exercise of reasonable care should have discovered that [Rubenstein] was negligent in his examination, diagnosis, and treatment and the causal nexus, if any, between his alleged negligence and the metastasis of her cancer. [Thus, there remained] a genuine issue of material fact [that] was not resolved and the trial court erred in granting [Rubenstein's] motion for summary judgment." Id., 44.

Similar to *Catz*, in the present case, although the plaintiff knew that she suffered physical harm when she fell on February 10, 2015, it was not until April 6, 2015, that she discovered the causal nexus between the defendants' alleged negligence and her injuries from the fall. At this preliminary, summary judgment stage, we do not know whether this delay in discovering actionable harm was reasonable, but, considering the facts in the light most favorable to the nonmoving party, we conclude that the Appellate Court properly applied this court's precedent and the "actionable harm" standard to the facts of this case.

The defendants assert that the present case is more similar to *Burns* v. *Hartford Hospital*, supra, 192 Conn. 451, and that the Appellate Court should have applied *Burns* to the facts of the present case. We disagree. *Burns* is distinguishable based on the pivotal fact that,

in that case, the minor plaintiff, Bryan Burns, and his mother, Barbara Burns, who brought the action on Bryan's behalf, were made aware of the connection between the physical harm and the defendants' negligence approximately three years before the action was commenced. See id., 456–57.

Bryan had been admitted to the defendant hospital on October 23, 1975, for treatment of injuries to his upper body and torso that he had suffered in an automobile accident. Id., 452. While in the hospital, he required intravenous fluids, which were administered through intravenous tubes that were inserted in his lower legs. Id.

During his hospital stay, Bryan began to experience pain, redness and swelling in one of his legs, near the area where the intravenous tubes were inserted. See id. On or about November 10, 1975, Ronald W. Cooke, Bryan's physician, diagnosed Bryan with a streptococcus infection and told his mother, Barbara Burns, that the infection was caused by the use of contaminated intravenous tubes. Id., 452–53. Cooke informed Barbara that Bryan's infection "had probably reached the muscle and had possibly reached the bone as well." Id., 453. Cooke also told Barbara that the infection could be treated with antibiotics and would heal fully in time. See id., 453, 459.

After Bryan was released from the hospital and began walking again, his gait progressively worsened, and his left foot and calf were not growing properly. See id., 453. Eventually, in August, 1977, Barbara took Bryan to another physician, who diagnosed him as having a buildup of scar tissue caused by the streptococcus infection, which was impeding muscle development. Id.

Thereafter, in November, 1978, Barbara, on behalf of Bryan, brought an action against Hartford Hospital and Cooke, alleging that they acted negligently in failing to

diagnose accurately and treat properly the infection in his leg. See id., 452–53. The defendants moved for summary judgment, claiming that the action was barred by the statute of limitations set forth in § 52-584 because it was brought more than two years after Barbara became aware that Bryan suffered an infection from the contaminated intravenous tubes and that the buildup of scar tissue was just a manifestation of that infection. See id., 453–54.

The trial court rendered summary judgment in favor of both Hartford Hospital and Cooke on the ground that the action was barred by the statute of limitations. See id., 454. The only issue on appeal to this court was whether the claim against Hartford Hospital—for its negligence in causing the infection—was barred by the statute of limitations. Id.

On appeal, this court considered Barbara's assertion, in her affidavit in opposition to Hartford Hospital's motion for summary judgment, that she did not discover Bryan's injury until August, 1977, because it was not until then that she was informed that there was muscle damage in his leg. Id., 456. It also considered Barbara's assertion, during her deposition, that "she delayed bringing suit against Hartford Hospital because she relied on [Cooke's] prognosis of complete recovery from the infection." Id., 458.

This court rejected Barbara's claims, explaining that "Cooke's alleged misdiagnosis . . . did not toll the statute of limitations as it applied to Hartford Hospital. The injury that [Barbara] attributes to the hospital's negligence, i.e., the streptococcus infection, was inflicted and discovered in November, 1975. At that point the hospital's alleged breach of duty was complete. [Barbara] has not alleged that the hospital staff in any way concealed the extent of the injury or misled her about its cause. The act of an independent interven-

ing third party, who may have misled [Barbara] about the injury's seriousness or even compounded the harm by failing to render effective treatment, cannot extend the hospital's liability beyond the statutory limitation period." (Footnote omitted.) Id., 459.

This court further explained that § 52-584 "requires that the injured party bring suit within two years of discovering the injury. . . . In this context an injury occurs when a party suffers some form of actionable harm. The harm need not have reached its fullest manifestation before the statute begins to run. Because [Barbara] did not bring suit within two years of discovering the injury, the trial court correctly ruled that the action was barred by the statute of limitations." (Citation omitted.) *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460.

The defendants in the present case attempt to liken the facts of the present case to the facts of *Burns*, claiming that, in both cases, there were "obvious injuries," and, therefore, that the statute of limitations begins to run at the time the physical harm is sustained. We disagree. *Burns* is distinguishable from the present case because, in *Burns*, Barbara knew of both the physical harm and the causal connection to the defendants' negligence more than two years prior to initiating the action. As this court explained, "[b]y about November 10, 1975, [Barbara] became fully aware not only of Bryan's injury but also of its cause. She testified in her deposition that on or about November 10 [1975], [Cooke] told her that [one of Bryan's legs] was infected and that the infection was caused by contaminated intravenous tubes that hospital staff had placed in the leg . . . ." *Burns* v. *Hartford Hospital*, supra, 192 Conn. 456. Therefore, Barbara was informed that the physical harm to Bryan—the streptococcus infection—was caused by the defendants' negligence—use of contaminated intravenous tubes—on November 10, 1975, but the action

in *Burns* was not brought until November, 1978. See id., 452, 456.

In *Burns*, Barbara admitted that she was informed of the hospital's negligence on November 10, 1975, which was more than two years before the action was commenced. Unlike in *Burns*, the plaintiff in the present case alleged in her affidavit that she did not become aware of the defendants' alleged negligence until April 6, 2015, which—after factoring in the ninety day extension—was less than two years before she brought her medical malpractice action.

We reject the defendants' contention that there are two separate standards for negligence claims, depending on whether the harm is latent or obvious. Instead, we agree with the Appellate Court that this court has consistently defined "injury" as actionable harm for purposes of § 52-584, and that actionable harm requires both knowledge of the physical harm and knowledge of its connection to the defendants' negligence. Accordingly, we conclude that the Appellate Court properly applied this court's precedent to the facts of the present case.

Finally, the defendants assert that the plain meaning of § 52-584 supports the judgment of the trial court in the present case. The defendants claim that, when this court decided *Lagassey*, it failed to follow the plain meaning rule codified in § 1-2z. Specifically, the defendants claimed that, because § 1-2z became effective on October, 1, 2003, and *Lagassey* was decided thereafter, on May 4, 2004, the court was required to, but improperly neglected to, apply the plain meaning rule of § 1-2z when it interpreted the language in § 52-584. Accordingly, the defendants assert that this court should abandon the interpretation of "injury" adopted in *Lagassey* in favor of a new interpretation of the term "injury," in which this court would follow the plain meaning rule

of § 1-2z. They contend that the plain meaning rule would dictate that we interpret the term "injury" in § 52-584 to mean " 'hurt, damage, or loss sustained,' " as it is defined in the dictionary. We disagree.

In *Lagassey*, this court was interpreting the statute of limitations set forth in § 4-148 (a), and it recognized that our interpretation of "injury" for purposes of § 52-584 was relevant to that interpretation.[4] At the time this court decided *Lagassey*, this court already had a rich history of interpreting "injury" for purposes of both §§ 4-148 (a) and 52-584. Indeed, this court had repeatedly addressed the commencement of the statutes of limitations contained in §§ 4-148 (a) and 52-584 well before § 1-2z came to be. Thus, in point of fact, the court in *Lagassey* was not interpreting the term "injury" anew in 2004.

In fact, *Lagassey* transparently explained that "we have repeatedly stated that an injury occurs when a party suffers some form of actionable harm"; (internal quotation marks omitted) *Lagassey* v. *State*, supra, 268 Conn. 739; see id. (citing cases); meaning "the plaintiff discovers an injury *and* causation." (Emphasis in original.) Id., 743; see, e.g., *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460 ("[i]n [the context of § 52-584] an injury occurs when a party suffers some form of actionable harm"); see also, e.g., *Catz* v. *Rubenstein*, supra, 201 Conn. 44 (limitation period accrues on date plaintiff discovered or should have discovered "causal nexus" between alleged negligence and subsequent

[4] "A plain reading of §§ 4-148 (a) and 52-584 reveals that the statutes are alike in most material respects. Both statutes provide that the limitation period begins to run when a plaintiff either sustains or discovers the injury or, in the exercise of reasonable care, should have discovered the injury, and both statutes contain a three year period of repose. The only material differences in the two statutes are that § 4-148 (a) allows for a one year limitation period [whereas] § 52-584 allows for a two year limitation period, and § 4-148 (a) relates only to actions against the state brought under chapter 53 of the General Statutes." *Lagassey* v. *State*, supra, 268 Conn. 738–39.

injury). Indeed, *Lagassey* merely reaffirmed this court's interpretation of "injury" for purposes of §§ 4-148 (a) and 52-584 as "actionable harm" by reviewing this court's prior cases in which the term "injury" had been interpreted.

We see no reason to abandon this court's long held interpretation of the term "injury," which dates back to 1984, simply because the legislature later enacted § 1-2z. We previously have addressed the issue of whether the passage of § 1-2z required us to abandon prior interpretations of statutes in order to comply with § 1-2z. In addressing that question, we have determined that we do not abandon prior interpretations of statutory language. Rather, even after the passage of § 1-2z, it is customary for us to begin with this court's prior interpretations of statutes in previous cases. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 501, 923 A.2d 657 (2007). To be sure, in *Hummel*, we explained: "There is nothing in the legislative history [of § 1-2z] to suggest that the legislature also intended to overrule every other case in which our courts, prior to the passage of § 1-2z, had interpreted a statute in a manner inconsistent with the plain meaning rule, as that rule is articulated in § 1-2z. We are unwilling to impute to the legislature such a sweeping purpose in the absence of convincing evidence of that purpose. Because neither the language nor the legislative history of § 1-2z provides any such evidence, we conclude that § 1-2z does not overrule our prior case law . . . ." Id.

In other words, after the passage of § 1-2z in 2003, our courts were directed to interpret statutes in accordance with the plain meaning rule embodied in § 1-2z, unless the statute being interpreted had been interpreted previously by this court prior to the passage of § 1-2z.[5] The

[5] Of course, if the statutory language has been amended since this court's prior interpretation, or if the portion of the statute that is at issue has not already been subject to this court's interpretation prior to the passage of § 1-2z, then § 1-2z must be applied.

term "injury" in § 52-584 had already been interpreted well before the passage of § 1-2z.

As the court noted in *Lagassey*, prior to that case, this court had "repeatedly stated that 'an injury occurs when a party suffers some form of actionable harm.' . . . This court first used the term 'actionable harm' in 1984, in *Burns* v. *Hartford Hospital*, supra, [192 Conn.] 460." (Citations omitted.) *Lagassey* v. *State*, supra, 268 Conn. 739. We elaborated further on the meaning of actionable harm two years later, in 1986, when we decided *Catz*. See *Catz* v. *Rubenstein*, supra, 201 Conn. 45–47.

Accordingly, in *Lagassey*, this court did not reach a new interpretation of the meaning of "injury" for purposes of §§ 4-148 (a) and 52-584. This court already had construed § 52-584 in its previous cases, and, in *Lagassey*, it simply restated and followed that long held construction. In fact, any doubt on this point is extinguished by this court's decision in *Lagassey* itself, in which this court explicitly stated that "we take this opportunity to *restate the correct legal standard* by which to evaluate the timeliness of causes of action in negligence." (Emphasis added.) *Lagassey* v. *State*, supra, 268 Conn. 748. That standard is actionable harm.

It has been more than thirty-five years since the term "injury" was first defined as actionable harm by this court in *Burns* v. *Hartford Hospital*, supra, 192 Conn. 460, and approximately eighteen years since this court reaffirmed the construction in *Lagassey* v. *State*, supra, 268 Conn. 739. During that time, our courts, including this court, have repeatedly relied on the interpretation of the term "injury" as actionable harm, and the legislature has not sought to correct that construction of §§ 4-148 (a) and 52-584. Thus, the doctrine of stare decisis and the tenet of statutory interpretation that cautions against overruling case law involving our construction

of a statute, if the legislature reasonably may be deemed to have acquiesced in that construction, counsel against accepting the defendants' invitation to revisit *Lagassey*'s interpretation of §§ 4-148 (a) and 52-584. See, e.g., *Hummel* v. *Marten Transport, Ltd.*, supra, 282 Conn. 494–95 ("[o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision" (internal quotation marks omitted)). Accordingly, we reject the defendants' invitation to implicitly overrule *Lagassey* in order to apply the plain meaning rule.

Even if we agreed with the defendants that we should not rely on *Lagassey* but should instead interpret § 52-584 consistent with § 1-2z, we would reach the same result. The term "injury" in § 52-584 is used within the phrase "when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered . . . ." General Statutes (Rev. to 2015) § 52-584. Thus, we would conclude that, as used within that statutory phrase, the term "injury" is not clear and unambiguous. There are two plausible interpretations. On one hand, the term could mean "actionable harm," as this court has previously interpreted the term for purposes of § 52-584. On the other hand, injury could mean "hurt, damage, or loss," as the defendants assert. (Internal quotation marks omitted.) Accordingly, we would need to turn to the legislative history of the statute and to engage in much of the same analysis that this court did in *Catz*. See *Catz* v. *Rubenstein*, supra, 201 Conn. 45–47. After reviewing the legislative history, the court in *Catz* concluded that the term "injury," in this context, means "actionable harm . . . ." (Internal quotation marks omitted.) Id., 49. We agree with that conclusion.

Prior to 1957, the statutory predecessor to § 52-584 provided: "No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, chiropodist, chiropractor, hospital or sanatorium, shall be brought but within one year from the date of the act or omission complained of, except that a counter-claim may be interposed in an action which has been brought within the year at any time before the pleadings in such action are finally closed." General Statutes (1949 Rev.) § 8324.

In 1957, the legislature enacted No. 467 of the 1957 Public Acts, which replaced the language "of the act or omission complained of" with "when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of . . . ." In *Catz*, this court explained: "The testimony in 1957 before the General Law Committee of the legislature, which considered the predecessor to § 52-584, indicates that the use of the term 'injury' was a conscious reaction to, and an attempt to alleviate the draconian effect of, two cases, *Dincher* v. *Marlin Firearms Co.*, 198 F.2d 821 (2d Cir. 1952), and *Vilcinskas* v. *Sears, Roebuck & Co.*, 144 Conn. 170, 174, 127 A.2d 814 (1956). In those cases, the United States [Court of Appeals for the Second Circuit] and this court concluded that the language 'act or omission complained of' in [the statutory predecessor to § 52-584] required a holding that the statute of limitations began running on the date of the defendant's negligence and that a plaintiff's cause of action could be barred before the plaintiff suffered any harm and therefore before a cause of action had accrued." (Footnote omitted.) *Catz* v. *Rubenstein*, supra, 201 Conn. 46.

The legislative history of § 52-584 also reveals that, when testifying in favor of the passage of No. 467 of the 1957 Public Acts before the General Law Committee, Attorney Charles Hunt testified that the act, "[i]t seems to me in keeping with the traditional thinking of [s]tatutes of [l]imitation[s], the time ought to begin to run at the time that the injured person acquires his right of action . . . ." Conn. Joint Standing Committee Hearings, General Law, Pt. 1, 1957 Sess., p. 145. Therefore, the legislative history of § 52-584 supports this court's prior conclusion that "injury," as used in § 52-584, was intended to mean a legally recognized injury, not just physical hurt or loss, as the defendants assert.

Moreover, the fact that the legislature removed the "act or omission complained of" language from the statute of limitations, but not from the three year statute of repose portion of the statute, is further evidence that the legislature intended for the starting point of the statute of limitations to be something other than the "hurt, damage, or loss." (Internal quotation marks omitted.) Accordingly, even if we ignore *Lagassey* and, instead, apply § 1-2z to § 52-584, we would reach the same interpretation of § 52-584 as this court reached in *Lagassey*.

On the basis of the foregoing, we conclude that the Appellate Court correctly concluded that, viewing the facts in the light most favorable to the plaintiff, there is a genuine issue of material fact. Therefore, the Appellate Court properly reversed the judgment of the trial court.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.